**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: VISRAM, W. KARANJA & KOOME, JJ.A.)**

**CRIMINAL APPEAL NO. 12 OF 2014**

**BETWEEN**

**TEDDY KAWIRE ODERO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(An appeal from the Judgment of the High Court of Kenya at Nairobi (Mbogholi Msagha J.) dated 19th September 2013 in H.C.CR.A. No. 80 of 2012.)**

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**JUDGMENT OF THE COURT**

1. The appellant, **Teddy Kawire Odero,** was charged before the Senior Principal Magistrate's Court, Makadara, with the offence of defilement contrary to **Section 8(1) (3)** of the Sexual Offences Act, No. 3 of 2006. The particulars of the offence were that on the 2nd day of August 2007 at [particulars withheld] Estate Phase Four, Nairobi within Nairobi area committed an act which caused penetration with his genital organ into the female genital organ of **MNW**, a child aged 13 years.

2. He was also charged with an alternative count of committing an indecent act with a child contrary to **Section 11(1)** of the same Act the particulars being that on the 2nd day of August 2007 at [particulars withheld] Estate Phase Four, Nairobi within Nairobi area, he intentionally and unlawfully committed an indecent act with **MNW**, a child aged 13 years, by touching her private parts (vagina).

3. In brief, the case against the appellant as established by the evidence led before the trial court was that on 2nd August, 2007 at about 9.30 am the child, **PW1**, was cooking outside her mother's house when the appellant went and summoned her inside the house. She said that she obliged and went to the house under the mistaken belief that the appellant needed to borrow something from the house. To her surprise, the appellant just got hold of her, removed her underpants, forced her to lie on the bed and then defiled her. She later narrated her ordeal to her mother, **RS** (**PW2)**, who immediately examined her private parts and noticed traces of semen. She started screaming as she run to seek help from **PW3** and **PW5** who were community service volunteers working in the neighborhood. The two went to PW2's home and after confirming that the child had been defiled advised PW2 to take her to hospital and report the matter to the police. She thereafter took the child to Nairobi Women's Hospital for examination and treatment and proceeded to report the matter to Dandora Police Post.

**4. Dr. Adan Riwal, PW7** testified on behalf of **Dr. Muhombe** who examined **PW1** on the material day. Upon vaginal examination, the medical report revealed that she had multiple fresh tears on her genitalia, with no infection. There were no sperms seen or sexual transmitted diseases**.**

**5. PW6, Dr. Zephania Kamau** who also examined and treated **PW1** on 16th August 2007, testified that **PW1's** hymen was absent and that she had a copius whitish vaginal discharge. He also examined the appellant seven days after the alleged offence and found no physical injuries or abnormalities in his sexual organs.

6. When put on his defence, the appellant gave a sworn statement and called one witness, **DW2**. His defence was that on the material day at around 8.00 a.m. he had gone to his pastor's house to collect his money. At around 1.00 p.m. he boarded a vehicle to town to meet his band members for practice until 5.00 p.m. He got home at about 6.45 p.m. when he found his son ill and took him to a herbalist. On arrival he found a drunkard, Ndu'nge who intimated to him that some village elder was spreading rumors that he had defiled a child.

7. He immediately went and reported the matter at Kinyago Police Station and filed a defamation complaint but he claimed to have

misplaced the OB number under which his complaint was registered. On 21st August, 2007, he was summoned to the station and escorted to Milimani where his blood sample was taken. According to him the complainant's medical report confirmed that she was not defiled since her vaginal status was normal. He asserted that **PW1's** mother had asked him for Kshs 30,000 to treat her daughter but he was unable to give her that money and that's where the grudge started.

**8. DW2**, the appellant's wife testified that the appellant did not commit the crime. That **PW2** had vowed to teach the appellant a lesson since he had disrespected her. Further that the police officer wanted Kshs 30,000 and since she wasn't able to raise the amount at that particular point, the officer decided to take the appellant to court. She also stated that there was bad blood between **PW2** and herself for the reason that she had once told PW2 to dress decently.

9. Having considered all the evidence before it, in a judgment rendered on the 29th February, 2012, the trial court found the appellant guilty of defilement contrary to **Section 8(1) (2)** of the **Sexual Offences Act, 2006**, convicted him and sentenced him to 20 years imprisonment.

10. Being aggrieved by the judgment of the trial court, the appellant lodged an appeal in the High Court. On 19th September 2013, (**Mbogholi Msagha, J.**) dismissed the appeal, sustained the conviction of the appellant and upheld the sentence, thus precipitating the present appeal.

11. The appellant's memorandum of appeal, dated the 29th October, 2012, sets out Fourteen (14) grounds of appeal which can be summarized as follows:

> Credibility of PW1's evidence; burden of proof did not meet the threshold, proof of age of the complainant; Lack of D.N.A testing; circumstantial evidence not proved beyond reasonable doubt; defective charge sheet; contradictory medical evidence; essential witnesses not availed before court; failure to properly re-evaluate the evidence on record.

12. The appellant conducted his appeal in person by way of oral arguments and written submissions. He first argued that the complainant had been sexually active as she was three months pregnant as at the time she was examined. Her sister, **PW4,** was also inconsistent on her age when she claimed she was 9 years in 2009 only to state later that she was 14 years in 2011, he added.

13. On ground two he submitted that the prosecution did not meet the threshold for proving the offense. No age verification was done, neither was any birth certificate produced which rendered the case null and void. He contended that no DNA was conducted on the complainant's underpants and the blood sample that was tested did not match his.

14. The appellant further contended that the witnesses claimed there were spermatozoa on her private parts yet the medical report stated that none was traced. According to him, this was a case of circumstantial evidence. That the inference of guilt should have been cogently established.15. Furthermore, the Nairobi women's hospital report had no connection with the case at hand and if it did then it rendered the charge sheet defective. The appellant concluded his submissions by urging the court to allow his appeal.

16. Opposing the appeal **Mr. Omirera**, learned counsel for the respondent, submitted that the complainant's evidence was corroborated by her sister **PW4**. That their evidence was that of recognition and not visual identification and further that penetration was proved. As to whether age was proved, counsel contended that as much as there was no documentary evidence of the same, the complainant clearly stated that she was 15 years old. In his view, there was evidence of penetration and the circumstantial evidence demonstrated that he went to the complainant's house and came out belting his trousers. This was corroborated by PW4 who testified that he saw the appellant going into the house but she thought he was going to borrow a broom.

17. Learned counsel also submitted that there is a rebuttable presumption under **Section 109 and 111** of the Evidence Act that the appellant committed the offence. He further argued that there were concurrent findings by both courts below that the evidence of the witnesses was credible and believed that the appellant was the complainant's neighbor. No DNA testing was required as the appellant was linked to the defilement through the evidence presented to the court.

18. On the issue of the report indicating 3rd July, 2007 learned counsel submitted that it was a typographical error because the record clearly showed that it was 2nd August, 2007. In conclusion counsel stated that the appellant was not prejudiced as he was sentenced to 20 years imprisonment which was within the same age bracket.

19. We have duly perused the record of proceedings both before the trial court and the first appellate court. We have also considered the submissions of the appellant and learned counsel as well as the authorities they sought to rely on.

**20. Section 361** of the **Criminal Procedure Code** enjoins this Court to consider matters of law only when hearing and determining a second appeal. In ***Karingo v Republic*** ***[1982] KLR 219,*** this Court stated the principle underpinning **section 361** of the **Criminal Procedure Code** as follows:

> **"A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was corroborated by other material evidence in support thereof implicating him:**
>
> **Provided that where in a criminal case involving a sexual offence, the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be** ***any evidence on which the trial court could find as it did."***

21. The first issue in this appeal is whether the trial court and the first appellate court erred in relying on the evidence of **PW1** and her sister **PW4,** who were both minors, as the basis of the appellant's conviction. **Section 124** of the **Evidence Act** as amended by **Act No. 5 of 2003** and **Act No. 3 of 2006** provides as follows:

> **"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."** *(Emphasis added)*

22. The effect of the proviso to **section 124** was aptly captured by this Court in ***Mohamed v Republic* [2006] 2 KLR 138,** when it stated that:-

> **"It is now settled that the Courts shall no longer be hamstrung by requirements of corroboration where the victim of a sexual offence is a child of tender years if it is satisfied that the child is truthful."**

23. In the present appeal, the two courts below believed the testimony of **PW1**. The learned Judge observed thus;

> "**He subjected the two young children, that is PW1 and PW2 to cross-examination and they remained firm. The complainant was emphatic that he was the one who defiled her. The complainant was pregnant by another boy and specifically said the appellant was not responsible. I consider this a reflection of her honesty in the circumstances of her case**."

25. Further the trial magistrate conducted a *voire dire* examination to **PW4** and was satisfied that the witness was intelligent enough to understand the meaning of an oath and directed that her evidence be taken under oath. In our opinion, this evidence was cogent and credible in placing the appellant at the scene as the person who had committed the crime. From the trial record, evidence from both witnesses was clear and concise. We have no basis for interfering with this concurrent finding of fact by the two courts below.

25. The appellant's other ground was that there was no tangible medical evidence adduced to link him with the defilement of **PW1** and the blood test conducted did not match **PW1's**. He also argued that a DNA examination was not conducted to link him to the defilement. In our view, such evidence was not necessary and in any event, the trial court found that there was sufficient medical evidence in support of **PW1's** testimony and **Dr. Muhombe's** report which indicated that the hymen of the complainant had fresh tears.

26. In ***Aml v Republic* [2012] eKLR (Mombasa)**, this Court upheld the view that:

> **"The fact of rape or defilement is not proved by way of a DNA test but by way of evidence."**

This was further affirmed in the case of **Kassim Ali v Republic** ***Cr. App. No. 84 of 2005 (Mombasa)*** where the Court stated:

> **"… [examination to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence."]**

The evidence of the minor witnesses squarely placed the appellant as the one who defiled PW1. It cannot therefore be said that there was no evidence that would link him to the crime. This ground of appeal is therefore fails.

27. Turning to the appellant's contention that the age of the complainant was not proved, we opine that the same is without basis. It is indeed true that the complainant gave evidence that she was 15 years old but this was as at the time the matter was first heard in court on 25th March, 2009. However, the medical examination report from Nairobi Women's Hospital and the P3 form revealed that she was 13 years old as at the time the alleged offence was committed. There were concurrent findings of fact by the two courts below that the complainant was under 15 years of age.

**28. Section 8 (1)** provides that "*A person who commits an act which causes penetration with a child is guilty of an offence termed defilement*." ***Section 8 (3)*** provides that " A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years."

29. For the purposes of this appeal, there are two essential ingredients of the offence of defilement: first, there must be proof of penetration and second, there must be proof that the complainant was a child between the ages of twelve and fifteen years.

30. The critical issue for determination by the two courts below was whether the appellant committed the offence of defilement as charged. In accordance with the definition of penetration in ***Section 2 (1)*** of the **Sexual Offences Act**, was there a partial or complete insertion of the appellant's genital organs into the genital organs of the complainant? Was the complainant a child between the ages of 12 and 15 years? According to **PW7's** evidence, indeed there was proof of penetration from the fresh tears that was found in her genitalia.

**31. PW1** testified that on the appellant had on several occasions had sexual intercourse with her. She stated "…*They advised me to report to my mother since the accused was fond of doing that*." Nowhere in the record does it show that this statement of evidence was challenged by the appellant. We are satisfied that penetration as an essential ingredient of the charge under ***Section 8 (1)*** of the **Sexual Offences Act** was proved beyond reasonable doubt. As this Court has stated time and again, by *dint* of the proviso to ***Section 124*** of the **Evidence Act**, a court can convict on evidence of a victim of a sexual offence if it is satisfied that the victim is telling the truth and needs the reasons for being so

satisfied.

32. In ***Adan Muraguri Mungara v Republic, Cr. No. 347 of 2007 (Nyeri),*** this Court set out the circumstances under which it will disturb the concurrent findings of fact by the trial court and the first appellate court, in the following terms:

> **"As this court has stated many times before, it has a duty to pay homage to concurrent findings of fact made by the two courts below unless such findings are based on no evidence at all or on a perversion of the evidence, or unless on the totality of the evidence, no reasonable tribunal properly directing itself would arrive at such findings. That would mean that the decision is bad in law, thus entitling this Court to interfere."**

33. The surrounding circumstances that would pre-empt us to interfere with the concurrent findings of the lower courts do not obtain before us in this case. We are satisfied that the appellant was properly convicted of the offence of defilement contrary to **section 8(2)** of the **Sexual Offences Act, 2006.** This appeal is bereft of merit and the same is accordingly dismissed as we so order.

**Dated and delivered at NAIROBI this 8th day of February, 2019**

**ALNASHIR VISRAM**

**……..**

**JUDGE OF APPEAL**

**W. KARANJA**

**……..**

**JUDGE OF APPEAL**

**M. K. KOOME**

**…….**

**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR**