IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: NAMBUYE, KARANJA & KANTAI, JJA]

CRIMINAL APPEAL NO. 121 OF 2015

BETWEEN

M M..APPELLANT

AND

REPUBLIC...........................RESPONDENT

(Being an appeal from the conviction and sentence of the High Court of Kenya at Garissa, (S. Mutuku, J) dated 26th June, 2014 **In**

GARISA HC.CRA NO. 64 OF 2013)

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JUDGMENT OF THE COURT

This is a second appeal and by virtue of the provisions of Section 361(1) (a) of the Criminal Procedure Code we are to consider issues of law only but not matters of fact which have been tried by the first court and retried by the High Court on a first appeal. We are to resist treating matters of fact as issues of law as has been held by this Court in many cases that have come forth from the court such as the case of **Stephen M'Irungi v.Republic [1982-88]1KAR, 360** where the following passage appears:

> ***" Where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law, and, it should not interfere with the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision is bad in law."***

Our examination of the facts as were placed before the Senior Resident Magistrate, Mwingi in Criminal Case No. 391 of 2011 is to enable us carry out the mandate we have recognized in this appeal.

The appellant M M, was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act No. 3 of 2006. Particulars of the offence being that, on the 13th day of June, 2011, at a place named in the charge sheet, he intentionally did an act which caused penetration with his male genital organ namely penis into the female genital organ namely vagina of **KP,** a child aged 8 years.

Seven (7) witnesses were called in support of the prosection case and the evidence was that on 13th June, 2011, **Josephat Musyimi Mbuko** (P.W.1) (**Musyimi**), who was the Assistant Chief of the area was called by the councillor by the name **Kilonzi Maundu** who reported to him that a girl had been defiled by a boy. He was not given the name of the offender but was given that of the victim. He passed through the hospital where the child had been taken and found the child who was being examined. On his way out, he passed by the suspect's house and according to him, when the suspect saw him, he ran away. The suspect was brought to him by the suspect's father the following day.

TK who testified as PW 2 was an aunt to the victim. On the said day **13th June, 2011**, she was at her hotel when she was visited by **LK** (who was not called as a witness) who informed her that while going to fetch water from a river, she heard a child crying from a bush and when she stopped to investigate, she saw the victim coming towards her whereas a person referred to as a young man was running away. **TK** spoke to the girl victim and was told that the victim was playing with other children when the appellant asked her to accompany him to a place where he would give her some fruits. That the appellant took her to a bush where he removed her pant and defiled her. When **TK.** examined the child, she noticed a bruise and some blood oozing from her genitalia. She took the child to **Nguni Police Post** and thereafter to **Mwingi Hospital.** The following day, the victim's mother came from Garisa and **TK**, after narrating the ordeal to the victim's mother, handed over the pant that had been given to her by **LK.**

The evidence of the victim, **KP** was to the effect that the appellant went to her and the other children where they were playing and offered them fruits. He then asked them to go to a farm but along the way, the appellant carried her and on seeing this, the other children ran back home. He took her to a river, placed her down, removed her pant and defiled her while strangling her. According to her:

> ***"I felt so painful. Before he could finish, a woman came namely (name withheld). When he saw her, he ran away. I wore my pant"***".

Further that she was taken to her aunt where she narrated what had happened to her and was then taken to hospital.

The victim's mother **KN** (PW5) stated that her daughter was eight (8) years old and that she was away when the incident took place. She was telephoned by PW2 who reported the incident to her. She travelled home the following day and found her daughter in hospital. On examining her daughter who was in hospital, her vagina was torn. On speaking to her, the daughter narrated how the appellant had taken her to the river where he had raped her.

No. 2008115451 APC. Evans Safari received the appellant from another police officer and delivered him to **Nguni Police Post.**

No. 91106 P.C Enosi Malaka Ekidor, P.W.7 was at the material time attached to Nguni Police Post. He received the victim who was brought by her aunt **TK** It was reported to him that the victim had been defiled. He spoke to the victim who explained how she had been lured to the river and defiled. He escorted them to **Mwingi District Hospital** where the girl was examined and it was found that she had been defiled. In cross-examination, he admitted that he had not visited the scene of crime and had not gotten the names of the person who rescued the girl.

The other evidence was by Dr.**Indunwa Edmond** of **Mwingi District Hospital.** He examined K. P on **15th June, 2011** and found that she was a girl aged 8 years. On examination of the genitalia, there were lacerations present on both right and left majora, lacerations were present on the pelinium and the hymen was broken. He formed the opinion that there was forced penetration and produced the P.3 form as part of the evidence. On the same day he examined the appellant and did not find any injuries on his penis or anus. He testified that usually lacerations are not found on male genitalia. That formed the prosecution's case which the trial magistrate considered and found that the appellant had a case to answer.

The appellant in a sworn statement stated that he was 17 years old and a standard seven(7) pupil. On **15th June 2011** he was at school after which on reaching home in the evening, he was arrested. He was not told why he was being arrested. He was taken to **Nguni Police Post** then to **Mwingi Police Station** and to court. He was surprised when the charge was read to him because he had not committed any offence. He stated that he did not know the complainant but knew her parents.

The trial magistrate considered the prosecution’s case and the defence offered by the appellant and in a Judgment delivered on **11th April, 2013,** the appellant was convicted as charged. There was an order for assessment of the appellant's age but it was discovered that the appellant held a National Identification Card which showed his age to be twenty three (23) years. This enabled the trial magistrate to impose the sentence of life imprisonment as provided for by law because the appellant was over eighteen (18) years old.

The appellant filed an appeal at the High Court of Kenya at Garissa. In the Petition of Appeal in that Court he stated amongst other things that the victim was a young girl who had been coached on what to say in Court; that the magistrate had erred on convicting him when the eye witness who was said to have found them in the action was not called as a witness; that it was wrong to rely on the evidence of PW 2, who had not witnessed the incident; that penetration had not been proved; that his alibi defence was not considered amongst other complaints.

The first appeal was heard by **S.N Mutuku, J**, who in a judgment delivered on **26th June, 2014** found no merit in the same and the same was dismissed. The appellant was not satisfied with those findings and filed this appeal. In a document titled **"SUPPLEMENTARY GROUNDS OF APPEAL"** the appellant faults the High Court for failing to consider that the age of the victim was not supported by documentary evidence; that the High Court erred in failing to analyze afresh the entire prosecution evidence and find that it was marred by contradictions and inconsistencies; that the High Court erred in law in failing to consider that essential witnesses were not availed in court to testify; that the prosecution's case was not proved beyond reasonable doubt and finally that the High Court erred in law by dismissing his alibi defence which was strong enough to displace the prosecution's case.

When the appeal came up for hearing before us the appellant appeared in person as he had done all along in the courts below. He had filed writtten submissions which he relied on and the only issue he raised in highlight was the age asssessment of the complainant which according to him was not ascertained and he also raised as an issue failure by the prosecution to call some witnesses.

Miss Maina, Senior Principal Prosecution Counsel (SPPC), in opposssing the appeal submitted that the complainant was defiled in broad day light by a person known to her. According to counsel, the complainant's age was confirmed by both herself, her mother and the doctor. According to counsel, the evidence of the complainant's aunt (PW 2) was corroborated by the evidence of the complainant herself. Counsel finalized her submissions by supporting the findings of the High Court which according to her had properly re-evaluated the evidence to reach its findings.

We have considered the entire record and we only consider issues of law, if we find that there are any raised by the appellant.

The appellant raises as an issue that the age of the victim was not proved. Age of a victim under the Sexual Offences Act is an important aspect as sentence of an offender who is convicted under the said Act flows in a segmented manner depending on the age of the victim. Sentence is determined by the age of the victim where for instance, if the victim is twelve (12) years old or below, the sentence provided is one of life imprisonment. According to the appellant, the age of the victim was not ascetained or proved.

The record shows that the victim herself stated that she was eight (8) years old and this was confirmed by her mother P.W. 5. The doctor

gave testimony to the same effect.

Although no documentary evidence was produced to prove the age of the victim, the law allows the trial court to go by the apparentage of a victim not actual age.

In **Paul Odhiambo Mbola vs. Republic (Kisumu) Criminal Appeal No. 16 of 2014 (ur)** this Court found that the Sexual Offences Act adopts a definition of a child in the Children's Act and by Section 2 thereof ***"age"*** is defined as:

> ***"… where actual age is not known means apparent age…"***

That is to say that actual age need not be proved and the trial court is entitled to go by apparent age of the child victim in a sexual offence. In the case before the trial court the child herself, her mother and the Doctor gave the child's age as 8 years and there is no merit in the complaint on the aspect of the age of the complainant.

The appellant also complains that some witnesses were not called.

PW 2, who was an aunt to the victim gave evidence on matters relayed to her by one LK who was not called as a witness. That would amount to hearsay evidence and it was necessary for the prosecution to call LK as a witness to testify on what she had observed when she stumbled on the defilement that was taking place in a bush. In ordinary criminal cases, failure to call such a witness would affect the prosecution's case as hearsay evidence would not ordinarily be good evidence.

However, the proviso to Section 124 of the Evidence Act Cap 80 Laws of Kenya allows a court trying a criminal case involving a victim of a sexual offence to receive such evidence of the victim and to convict an accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.

The trial magistrate relied on the testimony of the child victim stating that:

> ***''the complainant though eight (8) years, she gave sworn evidence by affirmation. Her evidence was tangible, consistent and precise''.***

The magistrate went on to state that she believed the child victim's evidence because she had reported the matter to the person who was not called, who had reported the same to PW2 and further that the girl victim was examined and penetration was proved.

The High Court on that issue of relying on the evidence of a single witness stated:

> ***"I have considered that this is evidence of a single witness and that I have to treat it with caution.The trial magistrate had conducted a voire dire examination on the complainant and had formed an opinion that the girl was intelligent. She was affirmed to testify. I have noted that the trial magistrate, though believing the evidence of the complainant failed to caution himself on relying on her evidence on the issue of identity. The trial magistrate took the evidence in totality to find the charge proved''.***

The High Court further stated on the same issue in its judgement:

> ***''The record as I have stated showed that the trial magistrate although having recorded the reasons for believing the evidence of the complainant, believed her evidence, failed to warn himself of the dangers involved in relying on the evidence of a single witness. In my view, even though the trial magistrate failed to caution himself, this did not, in my view, occassion any miscarriage of justice, expecially when there is other evidence to show that the appellant committed this offence''.***

As we have shown, a crucial witness who had stumbled on the defilement was not called as a witness and the evidence of PW 2 amounted to hearsay evidence. As we have also shown, Section 124 of the Evidence Act allows a trial magistrate to convict an accused person on the evidence of the victim in a sexual offence if the court believes that the victim is telling the truth. That section requires that the magistrate records the reasons why the court believes that the victim is telling the truth.

In the case before the trial magistrate, the victim of the sexual offence was eight (8) yrs old. The victim was a child of tender years as defined in law. The trial magistrate did not record any reason why the evidence of the child victim was believed. The High Court acknowledges in its Judgment that the trial magistrate made an error in law in not recording reasons for believing the testimony of the child of tender years but the High Court did not correct that error. The High Court was legally and duty bound to re-evaluate the evidence and come to its own conclusion. The High Court here re-evaluated the evidence, found an error of law in the way the trial magistrate had dealt with an important issue where there was reliance on the evidence of a single witness but did not correct it. It would be remiss of us and against our mandate to let such an error stand. It was an error of law and the conviction entered was unlawful in that the law required the trial magistrate to record in the proceedings, reasons why he had believed the testimony of the single witness who was the victim of a sexual offence. The High Court re-evaluated the evidence and made a direct finding that the trial magistrate had erred in law in failing to abide by the requirements of Section 124 of the Evidence Act. The High Court was duty bound to correct the error by the trial magistrate but did not do so. That was an error of law and should not be allowed to stand. The conviction of the appellant for the offence of defilement is hereby quashed and the sentence imposed is set aside. The appellant shall be set at liberty forthwith unless otherwise lawfully held.

Dated & delivered at Nairobi this 8th day of March, 2019.

R. N. NAMBUYE

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR