IN THE COURT OF APPEAL

AT ELDORET

(CORAM: E. M. GITHINJI, HANNAH OKWENGU & J. MOHAMMED, JJ.A.)

CRIMINAL APPEAL NO. 11 OF 2017

BETWEEN

A R...APPELLANT

AND

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

(Appeal from the judgment of the high Court of Kenya at Kitale ***(J. R. Karanja, J.)*** *dated 28th July, 2015* **in HCCRA NO. 61 OF 2014)**

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JUDGMENT OF THE COURT

[1] The appellant, **AR,** was tried and convicted by the Resident Magistrate's Court at Kitale, for the offence of Defilement contrary to **section 8(1)** as read with **section 8(3)** of the Sexual Offences Act. He was sentenced to serve twenty (20) years imprisonment. His appeal to the High Court against his conviction and sentence was dismissed. He is now before us in this second appeal. In his original memorandum of appeal that was filed in person, he listed eleven grounds. He subsequently filed supplementary grounds of appeal, as well as written submissions.

[2] During the hearing of his appeal, the appellant basically relied on his written submissions, and added that the minor/complainant who was allegedly defiled, was a daughter to his uncle, and that his uncle had demanded land for him to withdraw the complaint. In his written submissions, the appellant maintained that the charge brought against him of defilement was not proved, because neither the complainant nor himself, were escorted to the hospital for examination; and that his age was not assessed nor was his age proved by the production of a birth certificate or clinic card.

[3] The appellant challenged the evidence regarding the assessment of the age of the complainant. He submitted that the admission of the report of the dental officer, who assessed the age of the complainant did not comply with **section 77(1)** of the **Evidence Act**. In addition, the appellant submitted that the clinical officer who examined the complainant did not find any signs of penetration, nor did he find evidence of fresh torn bruises or lacerations, spermatozoa or whitish discharge; that the examination of the clinical officer revealed that the hymen was broken and old looking; and that the complainant had had previous sexual encounter; that the evidence of the clinical officer was not sufficient to prove the charge; and that the alleged victim destroyed crucial evidence by taking a bath and changing her clothes.

[4] The appellant pointed out that the charge against him was defective, as some particulars such as the word "intentional" and "unlawful" were omitted; that the court erred in relying on the evidence of the complainant which was not reliable; that the evidence before the trial court was not sufficient to prove the case to the required standard; and that his defence was not considered nor did the trial magistrate state the reasons for the judgment.

[5] Mr. Mulati, Senior Public Prosecuting Counsel, who appeared for the State, opposed the appeal and urged the Court to uphold the conviction and sentence. He submitted that there were concurrent findings made by the two lower courts; that the evidence of the complainant was clear as she knew the appellant well, and gave a graphic account of what transpired; that the age of the complainant was confirmed by **Dr. Ken Ndege,** a dentist, who examined her and assessed her age as thirteen years and that **John Kipkorir Koima,** a clinical officer, who examined the complainant confirmed that her hymen was torn. He urged that the evidence was cogent enough to sustain the charge, and that the alleged family differences was not borne out by the record. He therefore urged the Court to dismiss the appeal.

[6] We have considered this appeal, and the contending submissions. This being a second appeal, our jurisdiction is limited by **section 361** of the **Criminal Procedure Code,** to considering matters of law only. We reiterate what this Court has stated before, that, the Court will only interfere with the concurrent findings of facts made by the two lower courts, if it is established that the findings were not based on evidence or were based on a misapprehension of the evidence or that it is apparent that no reasonable tribunal could have reached that

conclusion. **(M’Riungu vs Republic [1983] KLR 455)**.

[7] In this case, the two lower courts made concurrent findings that the complainant disappeared from home for three days, and that during that period, she was in the company of the appellant. This was confirmed by the complainant’s two brothers, as well as **T W W,** a neighbour. The complainant testified that during this period, she was with the appellant and that they engaged in sexual intercourse. Although the complainant claims that the appellant forced her into sexual intercourse, she appears to have been a willing participant because she ran away, and tried to hide when she saw her brother.

[8] Under **section 8(1)** of the **Sexual Offences Act,** any person who commits an act which causes penetration with a child, is guilty of an offence termed defilement. The appellant was facing a charge of defilement. Unlike the offence of rape, in a charge of defilement, the issue of the complainant’s consent is immaterial, nor is the fact that the offence was committed “intentionally and unlawfully” a necessary ingredient of the offence. What is material and crucial, is that the complainant is established to be a minor. The law presumes that as a minor, she is not capable of making a decision regarding her involvement in sex and therefore requires protection.

[9] Dr. Ken Ndege, a dentist who examined the complainant’s dental formula and assessed her age confirmed that she was thirteen years old. The clinical officer, confirmed that the complainant’s hymen was torn with remissions that was probably due to sexual activity. There was therefore, clear evidence that the appellant took advantage of the complainant, a minor, and had sexual intercourse with her. In his defence, the appellant denied the charge and explained how he was arrested. He did not say anything about a grudge between the complainant’s father and his father. The attempt to introduce this angle at this stage is nothing more than a belated afterthought. We agree with the two lower courts that there was overwhelming evidence in support of the charge and that the appellant’s conviction was proper.

[10] As regards the sentence, the appellant was sentenced to twenty years imprisonment in accordance with **section 8(3)** of the **Sexual Offences Act**. That sentence was upheld by the first appellate court. As a second appellate court, we find no justification to interfere.

[11] The upshot of the above is, that we find no substance in this appeal. Accordingly we uphold the judgment of the first appellate court and dismiss the appellant’s appeal in its entirety.

Those shall be the orders of the Court.

DATED and delivered at Eldoret this 7th day of March, 2019

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.