IN THE COURT OF APPEAL

AT ELDORET

(CORAM: E. M. GITHINJI, HANNAH OKWENGU &

J. MOHAMMED, JJ.A.)

CRIMINAL APPEAL NO. 103 OF 2015

BETWEEN

JIBRIL EKAL EKIDOR.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Kitale **(J. R. Karanja. J**.*)*

dated 14th May, 2013 **in HCCRA NO. 45 OF 2012)**

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JUDGMENT OF THE COURT

[1] On 17th November, 2010, **Jibril Ekal Ekidor** (now appellant) was charged before the Senior Resident Magistrate's Court at Lodwar, with the offence of defilement contrary to **section 8(1)** as read with **section 8(2)** of the **Sexual Offences Act.** He was also charged with an alternative charge of Indecent Act with a child contrary to **section 11(1)** of the **Sexual Offences Act.** Following the trial in which seven (7) witnesses testified for the prosecution and the appellant gave a sworn statement, the trial magistrate delivered a judgment in which he convicted the appellant of the alternative charge and sentenced him to serve 15 years imprisonment.

[2] Being aggrieved by his conviction and sentence, the appellant lodged an appeal in the High Court in which he challenged the judgment on several grounds. Upon hearing the appeal, the High Court dismissed the appeal but found that the trial magistrate erred in convicting the appellant on the alternative charge when there was sufficient evidence against the appellant on the main charge. The High Court therefore substituted the conviction on the alternative charge with a conviction on the main charge of Defilement and consequently set aside the sentence of 15 years with the mandatory sentence of life imprisonment as provided under section 8(2) of the Sexual Offences Act for defilement of a child under the age of 11 years.

[3] As would be expected the appellant is now before us with an appeal challenging the judgment of the High Court. In his original grounds of appeal, the appellant faulted his conviction contending that the evidence was insufficient to sustain the charge, as there was no evidence of age assessment, no medical document to support the P3 Form, and no identification parade that was done. In addition, that there were material contradictions, and that his defence was not properly considered.

[4] In his supplementary grounds of appeal, the appellant reiterated the issue of the complainant's age, the contradictions and inconsistencies, and the variance between the particulars of the offence in the charge sheet and the evidence tendered before the Court. He maintained that he was not properly identified as the complainant's assailant, and that his defence was not given due consideration.

[5] In support of his appeal, the appellant who was in person filed written submissions that he fully relied upon. He submitted that there was variance between the particulars of the offence as stated in the charge and the evidence adduced by the prosecution witnesses as regards the place where the offence was committed. As regards the age of the complainant, the appellant submitted that although the charge sheet, P3 Form and the evidence adduced in court indicate that the complainant was nine (9) years old at the time of the alleged offence, the evidence originated from the complainant and her mother and was therefore not sufficient to prove such a material factor; that evidence such as a birth certificate, age assessment, clinic card or any other medical record would have been more reliable.

[6] On the issue of identification, the appellant submitted that the evidence of the alleged eye witness was contradictory and inconsistent in several material aspects such as whether there was light, if so, the intensity of such light; and whether the witnesses saw or recognized the appellant. The appellant cited **Kiarie vs Republic [1984] KLR 739** in which the court stated that before a conviction can be entered against an accused on account of visual identification, the evidence must be water tight as it is possible for even an honest witness to make an honest mistake.

[7] Mr. Job Mulati, Senior Public Prosecuting Counsel, made oral submissions urging the Court to dismiss the appeal. Counsel argued that there was sufficient evidence in proof of the complainant's age. This included the Doctor's estimation of her age. As regards identification, counsel posited that both the complainant and her mother knew the appellant well and were able to identify him by name.

[8] Mr. Mulati argued that the witnesses were clear on how the offence was committed and that there was no contradiction in that regard. He therefore urged the Court to dismiss the appeal.

[9] In response, the appellant singled out the evidence of SA whose evidence he claimed was different from the statement she was alleged to have made to the police and who denied making any statement to the police. He pointed out the inconsistent evidence regarding the panty that the complainant was wearing on the night of the incident.

[10] We have considered this appeal, the evidence that was adduced in the trial court, the proceedings in the first appellate court, and the submissions before us. We are mindful of the fact that this is a second appeal, and that the jurisdiction of this Court is by virtue of **section 361** of the **Criminal Procedure Code,** only limited to considering matters of law. Secondly, this Court is bound to follow the concurrent findings of fact of the two lower courts, and can only depart from the same if it is established that there are compelling reasons to do so, **(Nyambane vs Republic [1986] KLR 248)**.

[11] During the hearing, the complainant (name withheld), identified the appellant as the person who held her nose and mouth suffocating her until she fell unconscious. Her 10 year old cousin SA, who was asleep with her in the manyatta testified that she also saw the appellant enter the manyatta, remove his shorts and force himself on the complainant holding her mouth and nose to stop her from making noise. In the meantime, the complainant's mother EA (E), who had left the manyatta to answer a call of nature, met one Eskol Nakapel (Nakapel) outside her home, and they stopped to chat, she then saw the appellant coming from her home. The appellant was breathing very heavily and E became alarmed. She rushed into the manyatta to find out if her children were okay. She found the complainant with her legs wide apart, and she appeared to be unconscious. She screamed for help but the appellant managed to run away. After a while, the complainant regained consciousness, and on checking her private parts, there was a sticky fluid that E concluded was semen. The matter was reported to the police and the complainant was subsequently examined by a clinical officer and a P3 form filled. The appellant was subsequently arrested and charged.

[12] In his defence, the appellant gave a sworn statement in which he denied having committed the offence, contending that he was away at a place called Lwarengak where he was doing some construction work. Under cross-examination, he stated that there was a grudge between him and the mother to the complainant and that he was released from prison on 3rd November, 2010, in a case initiated by the uncle of the complainant.

[13] The two lower courts made concurrent findings that the complainant was violated on the 13th November, 2010, when she was asleep in the Manyatta in Lokitung. Both courts were also satisfied that the appellant was properly identified as the person who had violated the complainant. On our part, we find that there was clear evidence from the complainant and SA, that the appellant entered the manyatta and that he was the one who violated the complainant. Their evidence was consistent with the evidence of E who saw the appellant leave her home shortly before she found that her daughter had been violated. Although the appellant denied being present at the home, his alibi defence was negated by the evidence of these three witnesses. His allegations of a grudge were an afterthought and was therefore properly rejected. Although Eskol denied seeing the appellant, it is evident that this witness may not have spoken the truth.

[14] There is an issue as to whether the offence of defilement was proved to the required standard or whether the alternative charge of Indecent Act with a child was the one proved. The appellant argued that the age of the complainant which in his view was a necessary ingredient in establishing section 8(2) of the Sexual Offences Act was not established.

[15] In **Joseph Kiura Njagi vs Republic [2016] eKLR,** this Court reiterated the position it had taken in **Kaingu alias Kasomo vs Republic, Criminal Appeal No. 504 of 2010 (UR)** that:

> ***"Sexual assault under the Sexual Offences Act is a critical component as it forms part of the charge which must be proved in the same way as penetration in both rape and defilement. In order for such proof to hold, there has to be demonstration that such proof is based on credible evidence as any sentence imposed is dependent on the age of the victim. Approved mode of proof is through medical evidence where this is professionally determined by a medical doctor. Further approved modes are through a birth certificate, clinic card as well as oral testimonies through parents and guardians. The Court of Appeal in Uganda in Francis Omoroni vs Uganda, criminal Appeal No. 2 of 2000 added by observations and common sense."***

[16] The record shows that before the minor complainant testified, the trial magistrate carried out a *voire dire* examination and ruled as follows:

> ***"the child PW 1 who is 9 years old is intelligent and eloquent in Kiswahili she understands the nature of oath and the reason why she is now before the Court. She is competent to give her evidence on oath."***

[17] In her evidence, the complainant repeated that she was 9 years old and a class 3 pupil at [Particulars Withheld] Primary School. This evidence taken together with the evidence of Kipkurui Ng'eno (Ng'eno), a registered Clinical Officer who examined the complainant and filled the P3 form showing her estimated age as 9 years, demonstrates that there was proper evidence before the court upon which the court

could arrive at the conclusion that the age of the complainant was 9 years.

[18] In any case, it was obvious that the complainant was a minor under the age of 18 years and that was sufficient for the purpose of the offence of defilement under section 8(1) of the Sexual Offences Act. The age of nine (9) years was only relevant in so far as the punishment of the offence was concerned. Under section 8(2) of the Sexual Offences Act, the punishment for a person who commits an offence of defilement with a child of eleven (11) years or less, is imprisonment for life. Even giving an allowance for a mistake in the estimation of the complainant's age, the evidence before the court was sufficient to establish that the complainant was under the age of 11 years.

[19] Under section 8(1), of the Sexual Offences Act, the offence of defilement occurs when there is an act that causes penetration with a child. In this regard, SA observed the appellant putting his penis into the complainant's genital organs. Ng'eno examined the complainant's genitals and found that her labia majora and labia minora had dry semen and that her hymen was perforated. These findings provided clear evidence that penetration had taken place. In the circumstances, we agree with the learned judge of the first appellate court, that the offence of defilement was proved beyond reasonable doubt and, there was no justification for the trial magistrate convicting the appellant on the alternative charge. Consequently, we find no substance in the appeal against conviction of the appellant for the offence of defilement. As regards the sentence, the sentence of life imprisonment imposed on the appellant was lawful, and we have no reason to interfere.

[20] The upshot of the above is that, we dismiss this appeal in its entirety.

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

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR.