



THE COURT OF APPEAL

AT MALINDI

(CORAM: VISRAM, KARANJA & KIAGE, JJA)

CRIMINAL APPEAL NO. 28 OF 2018

BETWEEN

NATHANIEL CHARA CHANZERA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against the Judgment of the High court of Kenya at Malindi (Chitembwe, J) dated 6th June, 2017

in

H.C.CRA NO. 44 OF 2016)

JUDGMENT OF THE COURT

1. This is a second appeal by **Nathaniel Chara Chanzera (the appellant)** against the decision of the Resident Magistrate's Court at Malindi in which he was convicted for the offence of defilement under **Section 8(1)** as read with **Section 8(4) of the Sexual Offences Act** and sentenced to serve twenty (20) years imprisonment. That sentence was nonetheless subsequently reduced to fifteen (15) years imprisonment by the High Court on first appeal.

2. The particulars of the charges before the trial court were that on 12th October, 2012 at [particulars withheld] Village in Malindi District intentionally and unlawfully caused penetration of his male genital organ into the female genital organ of **MK**, a child aged 16 years. In the alternative he was charged with committing an indecent act on the same child contrary to **Section 11(1) of the Sexual Offences Act**.

3. He pleaded not guilty to both the main and the alternative charges. When the matter came up for hearing on 7th March, 2014 the appellant informed the court that he was ready to proceed. The child **MJK** testified and narrated how the appellant, who was her neighbour went to her home, knocked at the door and called her outside. After she complied he is said to have told her that he wanted to give her something which was in his house. She said that he pulled her to his house where he defiled her and detained her until the following morning. According to **MJK**, the same thing was repeated the following day but when she went home she found her mother and one Tina already in the house.

4. She narrated to them what had happened to her. Her mother went to the child's school and reported the matter to the headteacher . She was given a letter to take to the Chief who in turn gave her a letter to take to the police station as well as the hospital. Ultimately, the child was taken to hospital for observation and treatment. The appellant was thereafter arrested and taken to Watamu Police Station where he was charged as earlier stated.

5. Upon examination, the doctor confirmed that the child had been defiled.

He also carried out age assessment and issued an "*Age Assessment Certificate*" which certified that the child was sixteen (16) years of age.

6. In his defence which was unsworn, the appellant told the court that he was summoned to the Chief's Office where he found the child and her parents. He was then taken to Watamu Police Station where an attempt to settle the matter was made with the appellant being asked to part with Ksh. 25,000/=. According to the appellant, he refused to pay the money and he was therefore taken to court and charged with the offences outlined earlier. He denied having defiled the child but at the conclusion of the trial, he was found guilty, convicted and sentenced to twenty (20) years imprisonment.

7. On first appeal in which he was represented by the firm of **J. K. Mwarandu & Co. Advocates**, he raised three grounds of appeal. He stated that the ingredients of the charge were not proved beyond reasonable doubt; that the court erred in admitting the age assessment report in contravention of **Section 33(b) of the Evidence Act**; and that the sentence was manifestly excessive.

8. The learned Judge (Chitembwe, J.) found the charge proved beyond reasonable doubt as the appellant was well known to the child and there could not be any possibility of mistaken identity. The issue of defilement was also proved; and there was an age assessment report confirming that the MJK was 16 years old. Consequently, the learned Judge found the appeal on conviction unmerited and dismissed it. He nonetheless allowed ground 3 of appeal and reduced the sentence from 20 years to 15 years imprisonment.

9. Still aggrieved, the appellant moved to this Court, this time appearing in person relying on four grounds of appeal. He faults the learned Judge of the High Court for failing to consider that in absence of the child's birth certificate, her "exact age" had not been proved; failing to find the charge sheet was defective; and failing to consider the appellant's defence.

10. Prosecuting his appeal before us, the appellant tendered written submissions. His submissions reiterate and amplify his claim that the exact age of the child was not proved. He also seems to have introduced another ground of appeal through the submissions to the effect that the first appellate court failed to re-analyse and re-evaluate the evidence on record and lastly, that this defence was not considered.

11. Opposing the appeal, learned Senior Prosecution Counsel Mr. Isaboke told the Court that they were not contesting the sentence. He stated that the appellant had not even cross-examined the victim at the trial court or challenged her evidence in any way. He posited that the appellant in his defence had only dwelt on the discussion with the victim's family at the police station but never claimed that there was any bad blood between the families. He urged us to dismiss the appeal.

12. Responding to the prosecution counsel's submissions in reply, the appellant stated that he failed to cross-examine the child and her mother because he was not ready to proceed and further that the court did not inform him that he was required to cross examine the witnesses. We note however that nowhere in his grounds of appeal and submissions either here or before the High Court did the appellant claim that he was not informed by the trial court that he was supposed to cross-examine the child or that he was forced to proceed with the hearing when he was not prepared. Indeed the record is clear that on the date the hearing started, the appellant informed the court that he was ready to proceed and that fact was recorded. We also note that he cross-examined the other witnesses and he cannot therefore be heard to say he did not know that he was supposed to cross-examine witnesses. His claim that he was not informed that he could cross-examine the child was in our view a belated afterthought and a misplaced one at that.

13. We have considered the grounds of appeal, the written submissions by the appellant, and his brief address in court and learned counsel's response. We have also considered the relevant law. This being a second appeal, we are confined to determining issues of law as opposed to revisiting any matters of fact by dint of **Section 361 of the Criminal Procedure Code**. In the case of ***Dzombo Mataza vs. R* [2014] eKLR** this Court succinctly observed;

"As already stated, this is but a second appeal.

Under the law we are only concerned with matters of law and not fact. Put differently, in a second appeal such as this one, matters of fact are for the trial court and the first appellate court

*— see *Okeno v Republic* (1972) E.A. 32. By dint of the provisions of section 361(1)(a) of the Criminal Procedure Code our jurisdiction does not allow us to consider matters of fact unless it be shown that the two courts below considered matters of fact that should not have been considered or failed to consider matters that they should have considered or that looking at the evidence they were plainly wrong."*

14. We are also obliged to pay homage to concurrent findings of fact by the two courts below, provided they are based on acceptable and clear evidence which was adduced at the trial. (See, ***M'Riungu v. Republic* [1983] KLR 455**) This Court in the case of ***Thiaka v Republic* [2006] 2 EA 326** reiterated this principle and expressed itself in the following terms:-

"... [this Court] will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings.

15. With the above in mind, we have identified three issues for our determination:-

- (i) Was the case proved beyond reasonable doubt?
- (ii) The issue of the complainant's age and its impact on the conviction;
- (iii) Whether appellant's defence was considered;

On the first issue, it is now settled that for the charge of defilement to be established three ingredients have to be proved; penetration, victim's age and identity of the perpetrator.

16. In the case, the two courts below made concurrent findings of fact on the issue of penetration. They both found the victim had told the truth about how she was defiled, a fact which was corroborated by the P3 form. We cannot therefore revisit that issue as we are satisfied that they did not consider any extraneous issues or exclude any relevant matters when they determined that issue. Penetration was therefore

proved.

17. The identity of the assailant in this case was not seriously contested. Both courts below found the appellant was the victim's neighbour and was well known by the victim and her parents. The issue of his identity was therefore settled by the two courts below. We have no reason to interfere with the said finding.

18. On the age of the victim, there was no doubt she was below 18 years. She was therefore a child and any sexual activity with her whether consensual or not amounted to defilement. The three ingredients of the offence of defilement were therefore proved. As this issue has been specifically raised as a ground of appeal, we shall address it further. We note that the appellant's complaint seems to be with the victim's "exact age". This Court has settled the issue of how a victim's age may be established. To start with, it bears repeating that for purposes of the Sexual Offences Act the relevant age is the "apparent age" and not the "exact age". This Court has stated time without number that the best person to ascertain a child's age is the mother. In this case the victim said she was 16 years at the time the incident took place. Her parents testified and corroborated that evidence. The P3 form which the appellant does not seem to have any issue with gave the victim's age as 16 years. Even the age assessment, which though challenged by the appellant, was admitted by the two courts below set the victim's age as 16 years. There is therefore no doubt that the victim was a child.

19. On the issue of the appellant's defence not being considered, we find that the two courts below considered the same. The substance of appellant's defence was on how he was arrested and how he had refused to settle the matter with the victim's parents. He said he did not commit the offence but both court's below found his defence did not displace or cast any doubt on the prosecution's evidence. Considering an accused persons defense does not necessarily mean agreeing with it or believing it. The fact that the two courts below did not believe the appellant's defence does not mean they did not consider it. We find that the two courts below considered the appellant's defence and ruled on the same. That ground of appeal also fails like all the others.

20. From the foregoing, it is clear that the charge against the appellant was proved beyond reasonable doubt as required by law. The concurrent findings by the two courts below cannot be faulted. We find this appeal devoid of merit and dismiss it accordingly.

Dated and delivered at Mombasa this 7th day of March, 2019

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR