IN THE COURT OF APPEAL

AT ELDORET

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

CRIMINAL APPEAL NO. 83 OF 2017

BETWEEN

STEPHEN KIPROP KIPSANG.....APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Kenya

at Eldoret, (Kimondo, J.) dated 22nd October, 2015

in

HCCR. NO. 55 OF 3013)

****

JUDGMENT OF THE COURT

Background

[1] **Stephen Kiprop Kipsang**, (the appellant) is before us in this second appeal in which he challenges the dismissal of his first appeal by the High Court (Kimondo, J.). The appellant was tried and convicted in the Principal Magistrate's Court at Kapsabet for the offence of defilement contrary to **section 8(1)** as read with **section 8(2)** of the Sexual Offences Act.

[2] The particulars of the offence were that on 1st July, 2012 in Nandi County, he intentionally and unlawfully did cause his penis to come into contact with the vagina of BC (name withheld) a girl aged 5 years in violation of the said Act.

[3] During the trial, the prosecution called five (5) witnesses including the minor complainant (the complainant), her mother **WT** (W), **Moses Rotich** (Moses) the clinical officer at Meteitei – Sub District Hospital, the arresting officer **APC Patrick Okumu** (Patrick), and **Corporal Mike Wachira** (Wachira) who was the Investigating Officer.

[4] The evidence was that the complainant informed her mother, WT that she had a headache and later informed her that her leg and genitalia were paining; that upon checking the complainant's private parts, WT found that the complainant's vagina vulva had a discharge and the vagina opening was white; that the complainant informed her that the appellant took her to his house and defiled her; that WT took the complainant to the hospital at Meteitei and reported the matter to the Assistant Chief who referred them to the D.O's office in Maraba and the matter was referred to the police.

[5] The complainant was examined and a P3 form filled at Meteitei Sub District Hospital. **Moses** testified that he examined the complainant and his findings were that her labia was inflamed, there was pus discharge from vaginal surface, dry stained semen from the thighs, the hymen was freshly broken (about 4 days old) and in his opinion the complainant was defiled. The appellant was later arrested by **APC Patrick**.

[6] In his defence, the appellant gave an unsworn statement and did not call any witnesses. He denied the offence and stated that on 1st July, 2012 he went to Church and was thereafter arrested on his way home and taken to the Police Station.

[7] In his judgment, the Resident Magistrate (Hon. B. Limo) found that the prosecution had proved the charge against the appellant beyond reasonable doubt. He therefore rejected the appellant's defence, convicted him of the offence of defilement and sentenced him to life imprisonment in compliance with section 8(2) of the Sexual Offences Act.

[8] Dissatisfied with the judgment of the trial court, the appellant filed a first appeal to the High Court. The appellant raised five main grounds of appeal which were that the charge was not proved beyond reasonable doubt; that the investigations into the matter were shambolic; that the evidence was dubious and contradictory; that his mitigation was not taken into consideration; and that the trial court disregarded his defence.

[9] The State opposed the appeal on the grounds that the prosecution proved the charge beyond any reasonable doubt; that the appellant was positively identified; that penetration was proved; that there was clear evidence linking the appellant to the offence; that the age of the minor was never in doubt; and that the sentence was a lawful sentence.

[10] The learned judge reconsidered and re-evaluated the evidence and found that the appellant and complainant were not complete strangers; that the complainant identified him by his names; that the complainant testified that the appellant defiled her; that she did not waver upon cross examination and that she was consistent in her evidence. The learned judge found that the complainant positively identified the appellant as the person who tricked her into getting into his house and who defiled her in broad daylight.

[11] The learned judge further found that from the evidence on record, the appellant is the person who penetrated her; that the alibi in this case was a red herring; that the evidence of the complainant was consistent and believable.

[12] Regarding the age of the complainant, the learned judge found that the evidence of the complainant, WT, and the Child Health Card for the complainant, all proved that the complainant was aged five years and that there was never any doubt that she was below eleven (11) years. The learned judge found the evidence of the five (5) prosecution witnesses to be consistent and sufficient to establish the offence and dismissed the appeal.

[13] Dissatisfied with that decision, the appellant filed this second appeal to this Court. The appellant filed grounds of appeal and written submissions.

Submissions

[14] At the hearing of the appeal, the appellant who was acting in person relied on his written submissions to the effect that penetration was not medically proved as the semen allegedly found on the complainant's thighs was not forensically tested; that the P3 form was not complete; that the clinical notes were not certified; that the age of the complainant was not proved; that the appellant was not given an opportunity to cross examine the Clinical Officer and that *voire dire* was not properly conducted.

[15] Learned Prosecuting Counsel. **Ms. R. N. Karanja**, appeared for the State and relied on her written submissions which she orally highlighted. She opposed the appeal and submitted that all the ingredients of the offence of defilement were present; that the age of the complainant was 5 years, that penetration was proved and that the appellant was identified by recognition as he was well known to the complainant.

[16] The learned Prosecuting Counsel further submitted that the prosecution called five (5) witnesses whose evidence was consistent with the evidence of the Clinical Officer who examined the complainant and confirmed that she had bruises and injuries on her private parts and that she had been defiled; that the complainant gave very concise testimony that she was 5 years old; that her mother WT, testified that the complainant was born on 2nd November, 2006 and was about 5 and a half years old at the time that the offence was committed; that no better evidence an age could be adduced than that of the parent of the child who stated the exact date of birth; that the clinical officer who examined the complainant and who produced the P3 form indicated the approximate age of the child as 5 years.

Determination

[17] We have considered the appeal, the submissions, the authorities cited and the law. This being a second appeal, the jurisdiction of this Court is limited to consideration of matters of law only.

Section 361 of the Criminal Procedure Code states:-

> **"361. (1) A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section –**
>
> ***(a)*** **on a matter of fact, and severity of sentence is a matter of fact; or**
>
> ***(b)*** **against sentence, except where a sentence has been enhanced by the High Court, unless the subordinate court had no power under section 7 to pass that sentence."**

[18] The issues for determination are whether the charge against the appellant was proved to the required standard; whether the appellant was given an opportunity to cross-examine the clinical officer; and whether *voire dire* examination was properly carried out.

[19] Although the appellant complained that his right to a fair trial was infringed by the failure to give him an opportunity to cross-examine the clinical officer, the record of the trial court reveals that the appellant cross-examined the clinical officer on 25th February, 2013. Nothing

therefore turns on that ground.

[20] On the issue whether *voire dire* examination was properly carried out, we note from the record that the trial court carried out *voire dire* examination and concluded that "**the minor understands the purpose of the oath."** This was sufficient to facilitate the admission of the complainant's evidence on oath. This ground also fails.

[21] The appellant was charged with defilement contrary to **section 8(1)** as read with **section 8(2)** of the Sexual Offences Act. The onus was on the prosecution to prove the particulars of the charge.

Sections 8(1) and **8(2)** of the Sexual Offences Act provide as follows:-

> **"A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.**
>
> **8(2). A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life."**

[22] The prosecution had to establish the following ingredients to prove the charge; that there was penetration committed and that the female person was under the age of 18 years. In the instant appeal there was sufficient evidence adduced by the complainant, her mother WT and the clinical officer, (Moses) which indicated that the complainant was defiled and that she suffered injuries on her private parts which confirmed that there was penetration.

[23] Regarding the age of the complainant, the trial magistrate observed during *voire dire* that the complainant was a minor and that she understood the purpose of the oath; the clinical officer, Moses, who filled the, P3 form indicated the complainant's age as 5½ years. WT, the complainant's mother testified that the complainant was born on 2nd November, 2006 and was aged about 5½ years at the time she was defiled. While there was no documentary evidence to prove the complainant's age, there was sufficient evidence to prove that she was about 5 years old. The trial court noted that the child was of tender years. It was therefore clear that the complainant was under 11 years of age.

[24] Regarding the identity of the person who defiled the complainant, it was the complainant's testimony that the appellant defiled her, that she knew the appellant and gave his full names to her mother. It was WT's testimony that the complainant informed her that the appellant had defiled her; and that the appellant was her relative and neighbour and therefore well known to her. The identity of the defiler was therefore clearly established. We are satisfied that all the ingredients of the offence of defilement were established to the required standard and that the concurrent findings of the two courts below were based on credible evidence.

As regards sentence, the complainant having been established to be under the age of 11 years the sentence imposed of life imprisonment was lawful.

Accordingly, we find no merit in this appeal and do therefore dismiss it in its entirety.

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

E. M. GITHINJI

.....

JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR