IN THE COURT OF APPEAL

AT ELDORET

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

J. MOHAMMED, JJ.A.)

CRIMINAL APPEAL NO. 96 OF 2015

BETWEEN

DAVID ESOKON SAMUEL……..APPELLANT

AND

REPULIC……..……..……RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Kitale, ***(J. R. Karanja, J.)*** *dated 13th November, 2013* **in HCCRA NO. 5 OF 2011)**

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JUDGMENT OF THE COURT

[1] David Esokon Samuel (hereinafter referred to as the appellant), was tried and convicted by the Senior Resident Magistrate's Court at Kitale, for the offence of defilement of the complainant (name withheld), a girl aged eight years old contrary to **section 8(2)** of the **Sexual Offences Act.** He was sentenced to life imprisonment. He appealed to the High Court against his conviction and sentence. The High Court (J. R. Karanja J), dismissed his appeal. The appellant is now before us in this second appeal.

[2] In the original ground of appeal, the appellant faulted the learned judge of the first appellate court for failing to warn himself that no exhibits were produced in evidence; in failing to note that the appellant was not taken for any medical examination in order to connect him with the alleged offence; in failing to note that crucial key witnesses were not called to testify; in dismissing the appeal without considering that the age of the complainant was not established; and in failing to consider **section 214(1)** of the **Criminal Procedure Code.**

[3] In his supplementary grounds filed on 29th January, 2018, the appellant faulted the learned judge of the High Court in failing to find that the evidence adduced was insufficient to prove the charge against him, and in dismissing his defence which was plausible. The appellant also filed written submissions which he fully depended on during the hearing of the appeal. In his written submissions, the appellant argued that the evidence adduced against him was insufficient to establish the charge as the evidence adduced was inconsistent and contradictory; that penetration of the complainant was not proved, nor was her age established; that the investigations carried out were shoddy, and exhibits not produced; and that his defence which amounted to an alibi defence was not considered nor was his contention that he was either framed or a victim of mistaken identity.

[4] Ms R. N. Karanja, prosecuting counsel, from the ODPP appeared for the respondent. She opposed the appeal and urged the Court to dismiss the appeal against both conviction and sentence. She submitted that the age of the complainant was established as eight years at the time of the commission of the offence; that the appellant was known to the complainant; that the incident happened at 4.00 p.m. and that the complainant was able to describe the clothes that the appellant was wearing, and how the offence was committed.

[5] Ms Karanja further pointed out that Faith Jepchichir (Faith) a witness who testified, found the appellant in the act and raised an alarm and that the appellant tried to run away but was arrested. Ms Karanja also drew the Court's attention to the evidence of the Clinical Officer who examined the complainant and found that her hymen was broken. She therefore urged that the evidence against the appellant was overwhelming.

[6] This being a second appeal, the jurisdiction of this Court is as per section 361 of the Criminal Procedure Code limited to considering matters of law only. Severity of sentence is a matter of fact not law, and an appeal against sentence can only be entertained where the sentence was enhanced by the High Court or where the trial magistrate had no jurisdiction to impose the sentence. Secondly, in a second

appeal the Court will not interfere with the concurrent findings of fact made by the two lower courts, unless it is established that the findings were not based on any evidence or that the findings were based on a misapprehension or perversion of the evidence. (see ***M'Riungu v R (1983) KLR 455**.)*

[7] In the present case, there were concurrent findings made by the two lower courts that the appellant put his penis into the vagina of the complainant, and that this was witnessed by Faith who raised an alarm leading to the apprehension of the appellant. According to the P3 Form produced in evidence, which form was filled a few days after the offence was committed, the age of the complainant was estimated at eight years. The complainant's immunization card that was also produced in evidence, showed her date of birth as 20th November, 2001, which was consistent with the estimated age in the P3 Form. In the circumstances, there was sufficient evidence confirming that the complainant was a minor whose age was less than eleven years old.

[8] Defilement is defined under section 8(1) of the Sexual Offences Act as committing an act which causes penetration with a child. Therefore, it is important in a charge of defilement that penetration is established. Penetration is defined under section 2 of the Sexual Offences Act as the partial or complete insertion of the sexual organs of a person into the genital organs of another person. Thus, proof of partial insertion of the sexual organs would be sufficient to prove the charge.

[9] In this case, the Clinical Officer who examined the complainant found that her hymen was broken but not fresh looking. That would imply that the breaking of the hymen was not a result of the alleged defilement. That does not necessarily confirm that the complainant was not defiled. All it confirms is that the complainant may have had her hymen broken either in a prior sexual encounter or through some other way. What is material, is that both the complainant and Faith testified that the appellant did "tabia Mbaya" to the complainant. The context in which these words were used and the explanation given meant that the appellant did bad manners on the complainant by inserting his sexual organ into the complainant's sexual organ.

[10] Both the trial court and the first appellate court believed the evidence of Faith and the complainant, and we have no reason to doubt their evidence. Indeed, the appellant was apprehended immediately after Faith raised an alarm. His defence that he was framed or a victim of a mistaken identification was rightly rejected as both the complainant and Faith knew him well. In the circumstances, there was overwhelming evidence in support of the charge.

[11] As regards the sentence, the appellant was sentenced to serve life imprisonment which is a lawful sentence under section 8(2) of the Sexual Offences Act. In sentencing the appellant the trial magistrate took into account his mitigation and gave reasons why she felt the sentence she imposed was appropriate. Consequently, there is no justification for this Court to interfere with the exercise of discretion by the trial magistrate. We find no merit in this appeal and do therefore dismiss it in its entirety.

Those shall be the orders of this Court.

DATED and delivered at Eldoret this 6th day of March, 2019.

E. M. GITHINJI

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