IN THE COURT OF APPEAL

AT ELDORET

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

CRIMINAL APPEAL NO. 55 OF 2017

BETWEEN

WILFRED KANGWONY..................................APPELLANT

VERSUS

REPUBLIC..RESPONDENT

(Appeal from the Judgment of the High Court of Kenya

at Eldoret, (Githua, J.) dated 16th November, 2015

in

HCCR.A. NO. 66 OF 2014)

****

JUDGMENT OF THE COURT

Background

[1] Wilfred Kangwony, the appellant is before us in this second appeal in which he is challenging the dismissal of his first appeal by the High Court, (Githua, J.). The appellant was tried and convicted in the Principal Magistrate's Court at Kabarnet for the offence of defilement contrary to **section 8 (1)** as read with **section 8(4)** of the Sexual Offences Act. He was sentenced to 15 years imprisonment.

[2] The particulars of the offence were that on diverse dates between 7th and 8th June, 2013 within Baringo County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of DC (name withheld) a girl aged 16 years.

[3] During the trial, the prosecution called a total of five (5) witnesses. These included the minor complainant **(complainant)** David Amdany**, (David)** who was a member of the community forum; Thomas Chesang, **(Thomas)** who was the area Assistant Chief, Benjamin Kandagor, **(Benjamin)** the Clinical Officer at Kabarnet District Hospital who filled the P3 form in respect of the complainant, and Corporal Elizabeth Lopeten, **(Elizabeth**) the investigating officer.

[4] The brief facts are that on 7th June, 2013 at around 6 p.m. the complainant was walking home from school when she noticed the appellant following her, that the appellant was a person well known to her as they hailed from the same area; that he caught up with the complainant and requested her to accompany him to his house; that she refused and he grabbed her by the hand, threatened to kill her if she screamed, dragged her to his house and locked her inside the house for two (2) days; that during the two days he defiled her severally; and that in the morning of the second day he left her in the house and locked the door from the outside with a padlock.

[5] David testified that on 9th June, 2013 he received a report from members of the public that the appellant had been spotted dragging the complainant to his house; that together with other elders David proceeded to the appellant's house; that they knew the appellant's house as he was from their neighbourhood; that they found the house locked from the outside with a padlock whereupon they forced it open and found the complainant lying on the bed; that the appellant was not in the house and upon looking for him they found him hiding in a nearby bush whereupon they arrested him and took him and the complainant to the trading centre where they found **Thomas**, the area Assistant Chief. **Thomas** testified that he was the complainant's uncle and guardian and that she did not go back home from school on 7th June, 2013.

[6] The matter was reported to the police and the complainant was examined by **Benjamin**, the clinical officer who noted that the complainant's genitalia had excessive redness, her hymen was broken, both labia were swollen and there was a whitish discharge on her labia and vulva. He concluded that there was an element of sexual assault. In his assessment the complainant was 16 years old.

[7] In his defence, the appellant elected to give an unsworn statement and did not call any witnesses. He denied the offence and claimed that on 7th and 8th June, 2013, he was away at Kipsaraman with his mother where he had gone to visit his sick grandmother; that upon his return home on 9th June, 2013 while shepherding goats, he was arrested by members of the community policing group who included David; that the charges were a fabrication by David with whom he had a prior grudge.

[8] In his judgment, the trial magistrate (Hon. E. Bett) found the evidence for the prosecution to be consistent that the complainant was defiled by the appellant. He therefore rejected the appellant's defence, convicted him and sentenced him to fifteen years imprisonment.

[9] In his first appeal, the appellant faulted the trial magistrate for convicting him on the basis of contradictory evidence which was not sufficient to prove the charges preferred against him beyond reasonable doubt; that the complainant's age was not proved; that the judgment contravened the provisions of the law as it was not signed and that the trial court erred by disregarding his defence.

[10] In her judgment he learned judge of the first appellate court came to the conclusion that there was sufficient evidence that the complainant was defiled and that the appellant was sufficiently identified as the defiler based on the evidence of the complainant, David, Thomas, Benjamin and Elizabeth. The learned judge rejected the appellant's defence as an afterthought and found no substance in the appellant's complaint that the judgment of the trial court did not comply with the provisions of section 169 of the Criminal Procedure Code as the original hand written judgment of the trial court was duly signed by the trial magistrate as required by the law.

<u>Submissions</u>

[11] In this second appeal the appellant who was acting in person filed grounds of appeal and written submissions raising grounds that the prosecution did not prove its case beyond reasonable doubt; that the facts of the case were not established to the appropriate standard; that the evidence of the complainant was not scrutinized; that his defence was not considered; that the complainant's evidence was not consistent; that the ingredients of the charge of defilement were not established; that the age of the complainant was not proved as an age assessment was not done.

[12] Ms R. N. Karanja, a prosecuting counsel who appeared for the State opposed the appeal and submitted that this Court has ruled severally, age is a question of fact; that at the trial the complainant was categorical that she was 16 years old; that the Doctor who examined her also confirmed that she was 16 years old; that there were difficulties in obtaining documents regarding the complainant's age as the complainant was living with the Chief as her guardian; that the learned judge found that the age of the complainant was properly proved; that the appellant's claim that the charge sheet was defective was unsupported by evidence as he was properly charged under **section 8 (1**) of the Sexual Offences Act and that his defence was considered and found to be wanting; that all the ingredients of the offence of defilement were present. The learned Prosecuting Counsel urged us to dismiss the appeal.

<u>Determination</u>

[13] We have considered this 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** Criminal Procedure Code provides as follows;-

> **"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."**

See also **<u>(Karani V Republic 2010 1KLR 73).</u>**

[14] The issues of law that require our determination are whether the ingredients of the charge of defilement which the appellant was charged with were established and whether the sentence imposed upon the appellant was proper. To prove the charge, the prosecution had to establish the following elements; that there was an act which caused penetration and that the act involved a child bearing in mind that a child is defined as a person below the age of eighteen years.

[15] On the issue of the complainant's age, Benjamin, the clinical officer estimated her age on the P3 Form as sixteen (16) years. While no documentary evidence was adduced to prove the complainant's age, her age was conclusively determined as under eighteen (18) years. This was sufficient to establish the charge of defilement as defined under section 9(1) of the Sexual Offences Act. However, the appellant was also charged under section 8(4) of the Sexual Offences Act that states as follows:

> ***"A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years."***

This means that for the purposes of sentencing, it had to be established that the complainant was aged between sixteen (16) and eighteen (18)

years.

[16] In this case there was evidence adduced by the complainant, **David, Thomas** and **Benjamin** which indicated that the complainant was violated and that she suffered injuries in her private parts which confirm that there was penetration.

In the case of **Evans Wamalwa Simiyu V. Republic [2016] eKLR** this Court stated as follows;-

> ***"As to whether the appellant's age fell within 12 and 15 years of age, the evidence was rather obscure. Although the complainant testified that her age was twelve years, she did not explain the source of this information. The Complainant's mother did not offer any useful evidence in this regard as she did not say anything about the complainant's age. This leaves only the evidence of Dr. Mayende who indicated at Part C of the P3 form that the estimated age of the complainant was 12 years. We have anxiously considered the purport of this evidence since the Doctor does not appear to have carried out a specific scientific age assessment. Nevertheless we do note that under part C of the P3 form the age required is estimated age and under the Children's Act "age" where actual age is not known means apparent age. This means that in the Doctors opinion the apparent age of the complainant from his observation was 12 years. Thus although the actual age of the minor complainant was not established, the apparent age was established as 12 years."***

We therefore find that the age of the complainant was established as 16 years. It was not disputed that the complainant was less than 18 years of age.

[17] Regarding the identity of the person who defiled the complainant, the complainant stated that it was the appellant who defiled her. The evidence of David, corroborated the evidence of the complainant as he found the complainant inside the house of the appellant.

The two lower courts found that there was sufficient evidence to convict the appellant with the offence of defilement of the complainant. We have no reason to depart from their concurrent findings in this regard. The identity of the person who defiled the complainant was clearly established as the appellant was well known to the complainant, David and Thomas. Accordingly, we are satisfied that all the elements of the offence of defilement were established.

[18] Regarding the severity of sentence, section 8(4) of the Sexual Offences Act provides as follows;-

> ***"A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years."***

[19] The trial magistrate complied with section 8(4) in sentencing the appellant to fifteen (15) years imprisonment. The sentence was therefore in accordance with the law.

[20] The upshot is that this appeal has no merit and we dismiss it in its entirety.

DATED and delivered at Eldoret this 6th 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 certify that this is a true copy of the original.

DEPUTY REGISTRAR