IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, MUSINGA & OTIENO-ODEK JJA)

CRIMINAL APPEAL No. 31 Of 2016

BETWEEN

MUTIE MUSAULI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal against the judgment of the High Court of Kenya

at Machakos (Jaden, J.) dated 12th June 2014)

in

H.C.CR.A. NO. 338 OF 2013)

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JUDGMENT OF THE COURT

1. The appellant, ***Mutie Musauli***, was arraigned before the magistrate's court charged with defilement contrary to ***Section 8 (1) (3)*** of the **Sexual Offences Act No. 3 of 2006**. The particulars were that on 9th April 2012, at about 5.00 pm, at [Particulars Withheld] Location in Mutomo District within Kitui County, he defiled **KM** a child aged 13 years by penetrating his penis into her vagina.

2. Upon evaluating the evidence, the trial magistrate convicted the appellant and sentenced him to a term of 20 years' imprisonment. His first appeal to the High Court was dismissed. The learned judge upheld his conviction and sentence. Aggrieved, the appellant has lodged the instant second appeal to this Court.

3. In his amended memorandum of appeal, the appellant raises the following grounds:

> "*(i) The judge erred in concluding that the prosecution had proved its case beyond reasonable doubt.*
>
> *(ii) The judge erred in not considering the appellant had a grudge with the PW2, the mother of the complainant (PW1) who planned the case against him.*
>
> *(iii) The judge erred in not finding the charge sheet was defective.*
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> *(iv) The judge erred in not finding the appellant was not properly identified.*
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> *(v) The evidence on record did not prove penetration.*
>
> *(vi) The judge erred in making inferences based on own theories unsupported by evidence.*
>
> *(vii) The judge erred in failing to find the trial court erroneously rejected the appellant's defence and did not give cogent reasons*

for discarding the defence."

PROSECUTION CASE

4. The prosecution case is grounded on the testimony of the complainant, **(PW1)**; the complainant's mother, **(PW2)** and ***Ms Teresia Mbula (PW4)***, a clinical officer attached to Mutomo Hospital.

5. After *voire dire* examination**,** PW1testified as follows:

> ***"…. I recall on 9th April 2012 at 5.00 pm I had gone to be shaved at the home of Kimalu Mutua. I went there but I did not find him. I returned home and met the accused on the way. He got hold of my hand and pulled me to a bush. Accused removed by clothes and defiled me. I screamed and my mother came to my rescue. She found us and the accused ran away. I went home with my mum. My mum reported to the village elder who called the youth to arrest the accused. We went to Ikutha and then to Mutomo Police Station. We were referred to the hospital. These are my treatment card and P3 Form. Accused who is present in court was not my friend.***

6. PW2 testified as follows:

> ***"I recall on 9th April 2012 at 5.00 pm. I was at home when I sent my child Kaluku to go and shave at the home of Kimalu Mutua. My child left. After about 30 minutes I heard screams. I went there and found the accused defiling my child. He ran away when he saw me. I took my child and reported the matter to the village elder. The village elder told the youths to go and arrest the accused. The accused was arrested. On 10th April 2012 we met the assistant chief. We went to Ikutha and we were referred to Mutomo where we were referred to the hospital."***

7. The prosecution case is that after the alleged defilement, the complainant went to Mutomo Hospital where she was medically examined. PW4, a clinical officer at Mutomo Hospital testified as follows:

> ***"I am a clinical officer. I examined PW, KM She complained of having been defiled by a person known to her. On examination her hymen was missing, the vagina was loose and there was whitish smelly discharge. I concluded that penetration took place because of missing hymen and loose vagina. I produce the treatment card and P3 form as exhibit. I filled the P3 Form."***

8. The trial magistrate was satisfied that the appellant was positively identified as the person who defiled the complainant. The magistrate held that the evidence on record directly linked the appellant to the offence as charged. The court was satisfied that the prosecution had proved its case beyond reasonable doubt. After mitigation, the trial court sentenced the appellant to a term of 20-year imprisonment.

9. On appeal to the High Court, the learned judge upheld the appellant's conviction and sentence and expressed herself as follows:

> ***"The trial magistrate who had the advantage of seeing the witnesses testify and observed their demeanour believed the complainant, hence the conviction. I have no reason to differ with the trial magistrate....***
>
> ***The accused in his defence case stated he was framed up. There are however no reasons that emerge from the record why the complainant and her mother would frame up the appellant. The defilement was real as attested by the medical evidence…. There is sufficient evidence in support of the conviction… I find no merits in the appeal and dismiss the same."***

10. In this appeal, the appellant appeared in person while the State was represented by ***Ms. Maina***, Senior Principal Prosecution Counsel (SPPC).

APPELLANT'S SUBMISSION

11. The appellant filed written submissions and made oral highlight; he denied committing the offence as charged; that he was framed by PW2; penetration was not proved; the charge sheet was defective; that the two courts below did not take into account the entry in the P3 Form where it is indicated that the appellant had been having sex with the complainant many times and yet PW1 testified that the appellant never had sex with her before. From this evidence, the appellant submitted that the P3 Form contradicts PW1's testimony and the question is, who is this man who had been having sex with the complainant many times? Due to this apparent contradiction, the appellant faulted the learned judge for failing to reject in entirety the testimony of PW1 and that the prosecution case was thus unbelievable.

12. The appellant further submitted that the evidence does not prove penetration; he was not medically examined to determine if he was the source of the whitish smelly discharge; that the youth who arrested him should have been called to testify; and that the exhibits like the clothes that PW1 was wearing on the particular day ought to have been produced in court. Due to all these omissions, the appellant reiterated the prosecution case was not proved beyond reasonable doubt.

RESPONDENT'S SUBMISSION

13. The State in opposing the appeal submitted that the prosecution had proved its case beyond reasonable doubt; that the two court's below made concurrent finds of fact and properly convicted and sentenced the appellant. From the testimony of PW1 it was clear that the appellant was the one who removed the complainant's clothes. The testimony of PW1 as corroborated by the medical report tendered in evidence by PW4 proved penetration. The complainant's mother, PW2, found the appellant in action and he ran away. The offence was committed in broad daylight; the appellant is a person who was well known to the complainant and her mother and this is a case of recognition.

14. On the alleged defective charge sheet, counsel submitted that the evidence on record supports the charge as framed; and there is no variance between the charge and the particulars of the offence. In summary, counsel urged us to dismiss the appeal as the prosecution had proved its case beyond reasonable doubt.

ANALYSIS

15. We have considered the appellant's amended grounds of appeal, submissions by parties and the authorities cited. This is a second appeal against conviction and sentence. By dint of ***Section 361*** of the ***Criminal*** **Procedure Code**, a second appeal is confined to matters of law. This Court restated as much in **Karingo -vs- R (1982) KLR 213** at p. 219;

> **"A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did (Reuben Karari C/O Karanja -vs- R (1956) 17 EACA 146)"**

16. One of the issues raised in the appeal is the alleged defective charge sheet. In **Bisonga -vs- Republic [2014] eKLR** it was expressed as follows:

> **"In Alivi v Republic [1990] KLR 188 it was held that it is not every defect or omission that constitutes a charge defective and it has been held many a time that a mere technical defect in the charge sheet which is not fundamental and does not cause a failure of justice is curable. In Kilome v Republic [1990] KLR 194 it was held that the paramount consideration in determining whether or not a defect in the charge is incurable or not is whether**
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> **there is prejudice occasioned to the accused in putting up his defence because of the words used in the charge sheet."**

17. In this appeal, the learned judge in considering whether the charge sheet was defective stated the court had not seen any variance between the charge sheet and the evidence. Likewise, on our part, the appellant has not pointed out to our satisfaction the defects in the charge sheet that support the contention that the charge is defective. The appellant has not demonstrated what prejudice, if any, was occasioned to his defence by the charge as framed and upon which he took a plea of not guilty.

18. A further ground urged is on identification. The appellant contends that the evidence on record did not positively identify him as the person who committed the offence. We have examined the testimony of PW1 and PW2. Both witnesses knew the appellant before the offence was committed. The complainant PW1 testified that she knew the appellant well before the crime; PW2 testified that when she found the appellant in action, he ran away. She informed the village elder who directed the youth to arrest the appellant. The testimony of PW1 and PW2 is one of recognition of the appellant as the person who defiled the complainant. In **Anjononi & others v Republic**

[1980] KLR 57 it was held:

> **"…; recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends on the personal knowledge of the assailant in some form or the other."**

19. A ground urged by the appellant is that there is contradictory evidence in the testimony of PW1 and the medical report as stated in the P3 Form. The contention is that the P3 Form indicates that the appellant had sex several times with the complainant; and that in her evidence, the complainant stated she had never had sex with the appellant.

20. We have considered this ground of appeal. The number of times a person has sex with the victim or a child is not an ingredient in the offence of defilement. Defilement is not committed due to the number of times a person has sex with a child under the prescribed age, the offence is committed when the specific ingredients of a particular charge and age of the victim have been proved. In the instant case, PW1 testified the appellant defiled her; this evidence is corroborated by PW2 who found the appellant in the act; the medical P3 Form tendered in evidence by PW 4 also corroborate defilement. The issue of number of times a person had sex with the victim is per se immaterial to proving defilement. At best, it establishes a pattern of conduct and lends credence to recognition of the perpetrator of the crime. In any event, there was no evidence that the complainant and the appellant had had any other sexual contact there before.

21. On the alleged inconsistencies in PW1's evidence and the medical report, we find that the ground has no merit. The recognition of the appellant and the corroborative evidence overwhelmingly outweigh any inconsistency in the evidence on record. The inconsistencies neither dent nor dislodge the prosecution case. In arriving at our decision, we are persuaded by the decision of this Court in **John Nyaga Njuki & 4 others -v-R [2002] eKLR** where it was stated:

> **"But what is important is whether the discrepancies are of such a nature as would create a doubt as to the guilt of the**

accused. If so, then the prosecution would not have discharged the burden squarely on it to prove the case beyond any reasonable doubt. However, where discrepancies in the evidence do not affect an otherwise proved case against the accused, a court is entitled to overlook those discrepancies and proceed to convict the accused."

22. A ground urged in this appeal is that the judge erred in failing to find the youth who arrested the appellant ought to have been called to testify. This court is alive to the fact that there is no legal requirement in law on the number of witnesses to prove a fact. ***Section 143*** of **Evidence Act (Cap 80) Laws of Kenya** provides: -

"143. No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact*"*

23. In **Keter -v- Republic [2007] 1 EA 135** it was held *inter alia:*

"The prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt."

24. In the instant appeal, the record shows that the appellant was arrested after the offence was committed. The youth who arrested him were not material witnesses to prove any ingredient of the offence as charged; and they were not eye-witnesses to the offence. We see no probative value the testimony of the youth who arrested the appellant could add to or subtract from the prosecution case. There is no prejudice occasioned to the appellant in their failure to testify.

25. The appellant faults the two courts below for failing to find the prosecution did not prove there was penetration of the appellant's genitalia into the female genitalia of the complainant. In **John Mutua Munyoki -vs-Republic [2017] eKLR**, this Court stated under the **Sexual Offences Act** that the main elements of the offence of defilement are as follows:

(i) The victim must be a minor, and

(ii) There must be penetration of the genital organ and such penetration need not be complete or absolute. Partial penetration will suffice.

26. The pertinent legal issue is whether there was penetration by the appellant into the genital organ of PW1. Proof of penetration is established either by the victim's evidence, medical evidence or any other cogent evidence, (See **Remigious Kiwanuka -v - Uganda; S. C. Crim. Appeal No. 41 of 1995 (Unreported).** The slightest penetration is enough to prove the ingredient of the offence of defilement. In the persuasive case of **Michael Kihara Kariuki -v - Republic [2017] eKLR**, it was correctly stated that proof of defilement and the key ingredient of penetration is not dependant on the words used to describe the genital organs but is dependent on whether there was cogent, consistent and reliable evidence adduced by the prosecution witnesses to prove the offence.

27. In this appeal, the evidence tendered in proof of penetration is the testimony of PW1 who testified that the appellant removed her clothes and defiled her. PW2 testified that she found the appellant on top of PW1. The medical report shows that the complainant's hymen was missing and she had a loose vagina. PW1's testimony is corroborated by the medical report. From that evidence on record, we are satisfied that penetration was proved. Coupled with the evidence on recognition that it is the appellant who defiled the complainant, we find the prosecution proved its case beyond reasonable doubt.

28. On the contestation the appellant's defence was not considered, we have examined the record. The appellant's defence is that he was framed up. The trial magistrate stated that he found the appellant's *"defence wanting and unconvincing."* The learned judge in considering the defence held that there was no reason for the complainant and her mother to frame up the appellant and ignorance of law is no defence. Our examination of the record reveals that there is no evidence proving vendetta or framing of the appellant by the complainant and her mother. Further, the appellant's defence did not challenge the testimony of PW1 and PW2 as well as the medical evidence of PW4 as to what had happened. Accordingly, we are satisfied that the two courts below duly considered the defence put forth by the appellant.

29. For the foregoing reasons, we find that this appeal has no merit and it is hereby dismissed. We uphold and affirm conviction and sentence meted on the appellant.

Dated and delivered at Nairobi this 24th day of May, 2019

P. N. WAKI

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR