IN THE COURT OF APPEAL

AT ELDORET

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

CRIMINAL APPEAL NO. 87 OF 2017

BETWEEN

ALEX KIPRONO WANJALA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the Conviction/Judgment/Decree/Order of the High Court of Kenya

at Eldoret (**Mativo, J**.) dlivered on 21st July 2015

in

H.C. Cr. A. NO. 63 OF 2014)

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JUDGMENT OF THE COURT

[**1**] The appellant was convicted by the **Senior Resident Magistrate** at Iten for the offence of **defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act** and sentenced to life imprisonment. He appealed to the High Court at Eldoret but his appeal against conviction and sentence was dismissed. He has filed the instant second appeal against the judgment of the High Court.

[**2**] The particulars of the amended charge alleged that on 16th June 2009, the appellant defiled the named complainant, a girl aged 8 years. The prosecution called five witnesses namely; the complainant; ***EO,*** **(*PW2*)** the complainant's mother, ***Dr. Jospeh Imbesi, Grace Atieno Thirikwa*** and ***PC Bernard Gakuri***. The High Court excluded the evidence of the complainant from consideration for the reason that *voire dire* examination was not conducted by the trial magistrate before reception of her evidence. Nevertheless, the High Court found the evidence of ***EO, Dr. Joseph Imbesi*** and ***Grace Atieno Thirikiwa*** sufficient to sustain a conviction.

[**3**] The summary of the remaining prosecution evidence was as follows:

On the material day ***EO*** left the complainant a class 1 pupil at [particulars withheld] Primary School playing with her friends outside the house and went to buy milk. On her return, she saw the complainant leave the appellant's house, a neighbour and suspecting something was amiss she interrogated the child who started crying and told her that ***Alex*** had grabbed her and taken her to his house. She noticed that the child's panty was wet. She went to look for the appellant in his house on three occasions but did not find him. She reported to G***race Atieno Thirikwa,*** her neighbour, who examined the child. The latter found that the complainant's panty was dirty and her private parts were swollen and inflamed. The complainant's mother reported to Kapsoya police post on the following day and took her to a clinic. ***Dr. Joseph Imbesi*** examined the complainant and filled the police medical examination report (P3). He found that the complainant's private parts were extremely red; her vagina had bruises and was tender, and there was friction on the vagina. The doctor did not find spermatozoa but he formed the opinion that there was actual penetration on the complainant's vaginal parts. The appellant disappeared from home and when the complainant's mother saw him two weeks later, she alerted the police and he was arrested.

[**4**] The appellant gave sworn testimony and stated that he was 22 years old and that he was innocent and that the charges were framed against him. The appellant called two witnesses ***Samuel Wawiya Shueka*** who testified that he attended a funeral in the company of the appellant on 17th June, 2009 until 8.30 p.m. ***Agnes Atieno*** testified that she was the wife of the appellant and that the appellant was at work on 16th June, 2009 and also attended a funeral on 17th June, 2009.

[**5**] The trial magistrate made a finding that the complainant was defiled and that the evidence proved that the appellant committed the offence of defilement.

[**6**] The High Court considered the evidence of ***EO, Grace Atieno Thirikwa*** and ***Dr. Joseph Imbesi*** and concluded;

> **"…this evidence is cogent and was not rebutted and is sufficient to show that there was penetration, an essential element of the offence of this nature."**

The High Court next considered the issue of identification. In this regard, the court considered the evidence of ***EO***, the evidence of the appellant and his two witnesses and concluded;

> **"a close examination of the defence offered clearly shows that it does not create doubts on the strength of the prosecution case."**

[**7**] We have read the appellant's grounds of appeal in the memorandum of appeal and the supplementary grounds of appeal. We have also read the lengthy handwritten submissions filed by the appellant. The appellant raises several grounds of appeal including non-compliance with the law. In particular, he states that he was not asked to plead to the amended charge; that the trial magistrate did not specify the sections of the law under which he convicted the appellant; that he was not accorded a fair hearing as the High Court based the conviction on the evidence of ***EO*** and not on the evidence of the complainant. On the merits of the appeal, he impugns the judgment of the High Court on the grounds that the age of the complainant was not proved; that penetration was not proved and that the witnesses did not identity him as the person who defiled the complainant. The State opposes the appeal for reasons, among others, that the appeal is not based on matters of law; that the medical evidence proved penetration and that there was strong circumstantial evidence pointing at the appellant as the person who defiled the complainant.

[**8**] The original charge indicated that the offence of defilement was contrary to **section 8(1) as read with section 8(3) of the Sexual Offences Act**. The particulars of the offence indicated that the complainant was aged 7 years. At the trial, section 8(3) was amended to read section 8(2) and the age of the complainant amended to read 8 years. The record of the proceedings shows that the appellant was not called upon to plead to the charge after the amendment. The appellant raised the same ground of appeal in the High Court and the High Court made a finding that the nature of the amendment did not alter the evidence or the facts and that the age bracket for the minor remained within the provisions of section 8(2). We respectively agree with the finding of the High Court. The amendment did not in fact occasion a failure of justice. The High Court also considered the appellant's complaint that the trial magistrate did not specify the section of the law under which he convicted the appellant. The High Court made a finding that the omission was not fatal. The trial court stated in the judgment that the appellant was guilty of the "**main count**". The main count as amended charged the appellant with defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act. The trial magistrate in sentencing the appellant referred to section 8(2) of the Sexual Offences Act. The provisions of the law creating the offence for which the appellant was convicted were disclosed in the charge sheet and we do not find any merit in this ground of appeal.

[**9**] As regards the age of the complainant, ***EO*** stated that the complainant was aged 7 years and was born on 16th July 2001. She produced the Immunization Card which indicates the same date. The appellant states that the name of the child in the card is ***SA***. However, the immunization card bears the name of ***SA*** –the correct name of the complainant.

The P3 form showed the age of the complainant as 7 years. The complainant was a class one pupil. The High Court made a finding that she was 8 years old at the time of the offence. That is the correct computation of her age. She was below 18 years old and below the 11 years stipulated in section 8(2) of the Sexual Offences Act. We find that the age of the complainant was proved by the acceptable evidence.

[**10**] In spite of the absence of bleeding and spermatozoa, ***Dr. Joseph Imbesi*** testified that there was penetration of the complainant's private parts. The Doctor found bruises, tenderness and friction. ***Grace Atieno Thirikwa*** noticed that the complainant's private parts had a swelling and inflammation. The High Court referred to the definition of "**penetration"** in section 2 of the Sexual Offences Act which includes partial insertion of a genital organ into another's genital organ. We are satisfied that penetration as defined by law was proved by the evidence of ***Dr. Joseph Imbesi.***

[**11**] The High Court excluded the evidence of the complainant based on several authorities on the effect of failure to hold a *voire dire* examination of a child. As the authorities cited by the High Court show, failure to hold a *voire dire* examination of a child leads to the exclusion of such evidence and is fatal to the prosecution case where there is no other sufficient evidence to sustain a conviction. The High Court made a finding that the evidence of ***EO, Dr. Joseph Imbesi*** and ***Grace Atieno Thirikwa*** was sufficient. Whereas the evidence of ***Dr. Joseph Imbesi*** and ***Grace Atieno Thirikwa*** supported the fact of defilement, it is only the evidence of ***EO*** which referred to the identity of the person who defiled the complainant.

[**12**] It is clear that the identification of the appellant as the person who defiled the complainant was solely based on the evidence of ***E.*** Hers was circumstantial evidence because she did not say that she found the appellant in bed with the complainant. The appellant has referred to the contradictions in the evidence of ***E*** and the complainant. He states that while the complainant mentioned "*Boyi"* as the person who defiled her, E said that the complainant stated it was "*Alex*". Further, neither the charge sheet nor ***E*** mentioned the time when defilement took place. However, the complainant stated that it was 6.30 p.m. when "*Boyi"* held her and took her to his house. ***E*** returned home later. While ***E*** stated in her evidence in chief that when she returned she met the complainant with the appellant, she stated in her evidence in cross-examination that she saw the appellant leave his house with the complainant. But according to the complainant, she ran home after the incident and found her mother and reported to her what had happened. It is then that her mother went to look for "*Boyi"*.

On 26th June 2009 when the plea was taken, the prosecutor stated the facts partly as follows:

E said that when she went to look for "*Alex*" in his house, she did not find him. The evidence of ***E*** clearly contradicted the evidence of the complainant on how the identity of the person who defiled the complainant was ascertained. What was the truth? Is it that ***E*** actually saw complainant leaving the house of the appellant or is it that the complainant ran home and reported what "*Boyi*" had done to her, leading to ***E*** going to the appellant's house? Further, this was a case dependent on the identification by a single witness at night. The record shows that the two courts below did not evaluate the evidence of E regarding the circumstances of identification of the appellant. In addition, the two courts below did not consider whether or not circumstantial evidence met the requisite test. In view of the contradiction in evidence, and the fact that it was at night, there was reasonable doubt on the identification of the appellant. The High Court failed to appreciate, after correctly excluding the evidence of the complainant, that the conviction was solely dependent on the evidence of a single identifying witness at night and circumstantial, and also failed to re-evaluate and reconsider such evidence. In the circumstances, we are not satisfied that the conviction of the appellant was based on positive and credible evidence of identification. It seems to us that the appellant was convicted merely on suspicion.

[**13**] For the foregoing reasons, the appeal is allowed, the conviction quashed and the sentence set aside. The appellant shall be set at liberty unless otherwise lawfully held.

We so order.

Dated and delivered at Eldoret this 28th day of June, 2019.

E. M. GITHINJI

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JUDGE OF APPEAL

H. M. 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