



IN THE COURT OF APPEAL

AT ELDORET

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

CRIMINAL APPEAL NO. 109 OF 2017

BETWEEN

DAVID MUTAI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Eldoret, (G.K. Kimondo, J.) dated 29th October, 2015

in

High Court Criminal Appeal No. 136 of 2013)

JUDGMENT OF THE COURT

[1] David Mutai the appellant herein was convicted by the Principle Magistrates Court at Eldoret on three counts of the offence of defilement contrary to section 8(1) as read with section 8(4) of the Sexual Offences Act. He was sentenced to serve 15 years imprisonment on each count and the sentences ordered to run concurrently.

[2] Being aggrieved by the Judgment of the trial court, the appellant appealed to the High Court, raising ten grounds. The grounds of appeal included: that the charge sheet was defective; that the charges against him were not proven beyond reasonable doubt; that the DNA test was dubious and failed to establish that the appellant had impregnated PN; that the evidence of the clinical officer was not clear; that the age of the minor was not sufficiently established; that the trial court was not impartial; that the defence of the appellant of an *alibi* was improperly disregarded and finally that the burden of proof was unfairly shifted to the appellant.

[3] Upon hearing the appeal, the High Court found that there was overwhelming evidence against the appellant and that all the elements of offences were proved beyond doubt. He therefore dismissed the appeal against both conviction and sentence. The appellant who was dissatisfied with the judgment of the High Court, filed this second appeal challenging the judgment of the High Court on nine grounds.

[4] In his appeal, the appellant faulted the High Court Judge for erring in law: by convicting the appellant of offences of defilement when the age of the PN was not proved beyond reasonable doubt; by convicting the appellant based on a defective charge sheet; by convicting the appellant when the prosecution failed to prove their case beyond reasonable doubt; by convicting the appellant without giving credence to all the issues raised in evidence.

[5] During the hearing of the appeal the appellant appeared in person while **Mr. Chacha**, prosecuting counsel from the office of the Director of Public Prosecution appeared for the respondent. Both the appellant and Mr. Chacha relied on and highlighted written submissions that had been duly filed and served.

[6] It was the appellant's contention that *voir-dire* examination was not administered on PN; that the state contravened section 383 of the Criminal Procedure Code by charging him with 3 counts over the same crime; that the prosecution relied on the immunization card of PN as proof of her age, yet the same card was disregarded by the High Court; that the High Court erred by relying on the oral evidence of the PN's mother concerning her daughter's age yet she was the one who produced the forged immunization card; and that PN's mother was not a reliable witness. In addition, the appellant faulted the first appellate court for relying on the evidence of the doctor who examined PN when it was clear that the doctor relied on information given by PN to ascertain her age.

[7] Mr. Chacha opposed the appeal submitting that *voir-dire* examination was not necessary at the time of the trial as PN was already 17 years of age; and that as per section 2 of the Children's Act, she was not a child of tender years to who ought to have been subjected to *voir dire* examination. On the issue of the charge sheet, counsel pointed out that there was no miscarriage of justice as the alleged defect is curable under section 382 of the Criminal Procedure Code. Counsel pointed out that the age of the PN was proved by her own evidence and that of her mother. Counsel relied on *Martin Nyongesa Wanyonyi vs. Republic [2016] eKLR*. In regard to penetration counsel relied on *Ambrose Mwawindo Ngwatu vs. Republic 2016 eKLR* for the proposition that proof of penetration and not the paternity of the child is what was required. He concluded that **section 36** of the **Sexual Offences Act** was complied with and urged the Court to dismiss the appeal.

[8] This being a second appeal, it is limited under **section 361(1)** of the Criminal Procedure Code to consideration of matters of law only. In addition, the duty of the Court has been well explained in *Boniface Kamande & 2 Others v Republic [2010] eKLR*;

“On a second appeal to the Court, which is what the appeals before us are, we are under legal duty to pay proper homage to the current findings of facts by the two courts below and we would only be entitled to interfere if and only if, we were satisfied that there was no evidence at all upon which such findings were based or if there was evidence, that it was of such a nature that no reasonable tribunal could be expected to base any decision upon it.”

[9] At this stage it is necessary to recapitulate the evidence as adduced in the trial court. The appellant was at the material time a pastor of a local AIC church which was situated near where PN lived with her parents. As a result of such proximity, PN often run into the appellant on her way to collect milk as she had to pass by the church in order to get there. Each time she ran into the appellant, he would encourage her to visit him at his house which was within the same church compound. On 5th of August 2010, the appellant met and took PN to his house where he had sexual intercourse with her. Similarly, on 15th August 2010, the appellant urged her to visit him in order to collect some medicine. PN went to the house and the appellant had sex with PN for a second time. On 28th of August 2010, the appellant again had sexual intercourse with PN and gave her Kshs. 300 urging PN not to disclose to anyone about their ‘relationship’.

[10] As a result of the sexual encounters PN became pregnant and upon being confronted revealed to her mother **NK (N)** and her aunt **ZKN (Z)** that it was the appellant who was responsible. The matter was reported to the police who arrested and charged the appellant. PN gave birth before the hearing of the case and a DNA examination was done which revealed a 99.9% result that the appellant was the father of the child.

[11] The appellant gave a sworn statement in his defence and said that on the aforementioned dates when the crime allegedly took place, there were various church activities that not only engaged him but also brought a lot of congregants to the church; that it was impossible for him to have met PN on those diverse dates; that he is innocent and the one who requested for the DNA tests to be done in order to clear his name; that while in the hospital for the DNA testing, a stranger accompanied them and had access to the lab, and therefore the authenticity of the report produced in court was questionable. The appellant called **Sarah Tikoko** who is the chairlady of the Women Congregants in his church as a witness. The evidence of this witness was however not of much help as she could not tell whether the appellant entertained any visitors on days other than Sundays.

[12] We have considered this appeal, the written submissions, oral submissions made before us and the authorities cited. It is clear to us that there are several issues of law that emerge for our consideration in this appeal. The issues include whether the age of PN was established, whether a *voir dire* examination should have been administered before her evidence was received and whether all the elements of the charge of defilement were established against the appellant.

[13] The first issue that we wish to address is whether the two lower courts erred in admitting the evidence of PN without a *voir-dire* examination. From the record, it is clear that the issue of *voir dire* was neither raised nor addressed by either the trial judge or the first appellate court.

[14] Section 19 of the Oaths and Statutory Declaration Act that provides for the admission of evidence of children states as follows:

(1)Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 233 of the Criminal Procedure Code (Cap. 75), shall be deemed to be a deposition within the meaning of that section.

[15] This calls for the trial court carrying out a *voire dire* examination to determine whether the child understands the nature of an oath, and if not whether he/she understands the importance of speaking the truth. However, the trial court is only required to carry out such an examination in cases where the witness is “a child of tender years,” and the Children Act section 2 defines a “child of tender years” as a “child under the age of ten years.”

[16] PN gave her date of birth as 2nd April 1994. Her mother N gave the date of birth as 2nd October 1994, but her attempts to rely on the Child health clinic Card did not bear much fruit as it was evident that the card was interfered with. Despite the apparent contradiction regarding the exact date of birth of PN, it was evident that at the time of testifying her age was well over 10 years and she had already given birth to a child. Therefore, she was not a child of tender years to whom a *voire dire* examination ought to have been administered. This ground of appeal therefore fails.

[17] The second issue that we wish to address is whether the charge sheet was defective. The appellant was charged with three counts of the offence of defilement alleged to have taken place on three specific dates that is 5th of August 2010, 15th of August 2010 and 28th August 2010. On each of these dates he was alleged to have **“intentionally and unlawfully caused his genital organ (penis) into the genital organ**

(vagina) of PN (name withheld) a child aged 16 years.” Each of the three counts constituted a complete offence and the issue of duplicity did not therefore arise. However, as conceded by the respondent the particulars were defective to the extent that the word “penetrate” was left out. The question is whether this defect prejudiced the appellant. We answer this question in the negative as the record of the proceedings reveal that the appellant was clear as to what charges he was facing. We are therefore satisfied that the defect is curable under section 382 of the Criminal Procedure Code. We add that the words “intentionally and unlawfully” are not ingredients of the charge of defilement but the use of that phrase in the charge did not make the charge fatally defective nor cause any prejudice to the appellant consequently this ground must therefore also fail.

[18] In order to establish each of the counts against the appellant the prosecution had to prove that PN was 16 years old, and that on each occasion the appellant caused complete or partial insertion of his genital organs into the genital organs of PN. As already stated, the evidence regarding PN’s age was rather contradictory. The learned Judge rightly disregarded the immunization card as the same had alterations and was therefore suspicious. The Judge held that the age of the minor was established in three ways:

“First, by the evidence of the complainant who testified she was seventeen at the time she gave evidence. That means she was sixteen at the time of the offence; secondly, by her mother PW2 who was emphatic that the complainant was born on 2nd October 1994; and, thirdly by the medical examination and P3 form (exhibit 1).”

[19] The appellant submitted that since N is the witness who produced the forged clinic card her evidence ought to have been disregarded. We concur that the altered document cast aspersions on the evidence of N. However, both N and PN were agreed on the year of birth as 1994. The inconsistency was only on the month. Secondly there was evidence that PN was at the particular time a Form Two student and this was consistent with the age of 16 years. Moreover **section 8(4)** of the Sexual Offences Act relates to a person who commits a sexual offence with a child aged between 16 and 18 years old, and PN’s age was clearly within this bracket. Consequently, we find that PN’s age was sufficiently established.

[20] As regards penetration, PN gave evidence that the appellant had sexual intercourse with her on the three occasions. PN’s pregnancy and the report from the government analyst which confirmed that the DNA profiles showed that the child born by PN was “99.9 % the biological” child of the appellant, provided consistency to her evidence.

[21] In ***P M v Republic [2014] eKLR***; this Court stated as follows:

“It is important to bear in mind that in sexual offences the evidence from one witness, even from a minor, would be sufficient to sustain a conviction as long as the court is satisfied with the veracity of the testimony of the complainant. Section 124 of the Evidence Act Cap 80 Laws of Kenya, on the evidence of children, provides:

“Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth .” (emphasis added).”

[22] In this case both lower courts made concurrent findings that PN’s testimony was unwavering and consistent, and believed that she spoke the truth. We have no reason to depart from this finding. PN’s evidence could therefore be safely relied upon to sustain the appellant’s conviction.

[23] We are satisfied that the learned judge came to the correct conclusion that the elements of the offence of defilement was established and that the charges against the appellant were proved to the required standard. We come to the conclusion that the appellant’s conviction was safe.

[24] As regards the sentence under section 361 of the Criminal Procedure Code, the issue of severity of sentence is an issue of fact that is not open for consideration by this court on a second appeal. We therefore dismiss this appeal against both conviction and sentence.

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

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DEPUTY REGISTRAR