IN THE COURT OF APPEAL

AT ELDORET

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

J. MOHAMMED, JJ.A.)

CRIMINAL APPEAL NO. 16 OF 2017

BETWEEN

MESHACK WANGILA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Kitale (J.R Karanja, J.) dated 4th June, 2015

in

H.C.CR.A. No. 71 of 2013)

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JUDGMENT OF THE COURT

[1] This is an appeal arising from the judgment of the High court, (J.R Karanja, J) dismissing the appellant's first appeal, against his conviction and sentence, for the offence of defilement contrary to **section 8(1)** as read with **section 8(2)** of the **Sexual Offences Act No. 3 of 2006**. The appellant had appealed to the High Court against the judgment of the Senior Principal Magistrate's Court at Kitale.

[2] Being aggrieved by the dismissal of his appeal, the appellant has now brought this second appeal before us. The appellant has raised five grounds contending that the learned Judge of the High Court erred in law in not finding that the charge sheet was defective and tampered with by the prosecution, in not finding that the medical evidence was below the standard required to prove penetration as an element of defilement; in not finding that the alleged exhibits were obtained through fraud and their authenticity was questionable; in failing to note that the age of the complainant as an ingredient of defilement was not conclusively proved; and in not analyzing the whole evidence as required of him by law before arriving at his decision.

[3] The particulars of the charge against the appellant were that on 25th March, 2010 in Trans Nzoia West district within Rift Valley province, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of FB (name withheld) a child aged 5½.

[4] FB's mother (L) produced an immunization card indicating that FB was born on 25th May, 2004 and was 5½ years old. On the material day, L was seated outside her house at around 10:00am while the appellant played with her daughter FB and some other children. L then dozed off. In the meantime, the appellant took FB to his sister's house where he was staying. He made her sit on the chair and then penetrated her vagina. He then gave FB sugarcane and two bananas.

[5] As FB left the house, her mother saw her and told her to take the two pieces of banana to the kitchen. The child then went to where her mother was seating. It was at that stage that her mother became suspicious when she noted that the child's trousers were wet. She asked her what had happened and FB narrated to her what had happened. L then dashed to the house of the appellant's sister where she found the appellant sitting on a chair looking at his trousers which were apparently also wet. L raised an alarm and the appellant noting that members of the public had responded to the alarm jumped onto a motorbike but was arrested and taken to Lessos Chief's Camp.

[6] FB was escorted to Kitale District Hospital where she was examined and treated. Subsequently she was issued with a P3 form which was duly filled by a doctor. The clinical officer Chrisandus Masinde (Masinde) who examined FB and filled the P3 form noted that her hymen

was broken and had a discharge resembling semen and she also had bruises on her labia minora. PC Wanjiru Kiruri of Kitale Police Station investigated the case and subsequently caused the appellant to be charged.

[7] In his defence, the appellant gave a sworn statement in which he denied having committed the offence. He contended that the allegation was made out of malice because L owed him Kshs.1,500/= and accused him falsely when he declined to advance her more money. The appellant's brother David Isabwa Shamama also testified in support of the appellant's defence and stated that L was fond of borrowing money from the appellant.

[8] In its judgment, the trial court found that the medical evidence indicated that FB's hymen was broken; that there was clear evidence of penetration; that the appellant was known to FB as a neighbour; that notwithstanding the absence of medical evidence to link the appellant to the penetration, the evidence of FB that the appellant was her defiler was truthful; that the appellant's defence that the allegations against him were malicious was an afterthought and incredible as they were not raised in cross examination; that no credible evidence was adduced to prove that the charge was actuated by malice; that the complainant spoke the truth and her evidence was admissible under section 124 of the Evidence Act; that FB's age was just under 6 years at the time she was defiled; the learned magistrate therefore concluded that the charge against the appellant was proved beyond doubt.

[9] On appeal to the High Court, the learned judge of the High Court, dismissed the appeal, holding that the evidence of FB proved that her genital organs were penetrated by a male genital organs; that her evidence was corroborated by the evidence of the clinical officer; that the presence or absence of spermatozoa was irrelevant to establishing penetration; that the use of the word "tabia mbaya" by children, in court was common enough for the court to take judicial notice that the words meant "penetration"; that the age of the broken hymen was irrelevant in disproving the act of defilement as penetration could be complete even without breaking the hymen; that the appellant was a neighbor and the circumstances in which FB's mother found his trousers wet and the trouser of the child wet, led to the conclusion that he had sexually assaulted the child; and that there was no doubt that the child was under the age of 11 years, which brought the penal section, that is, section 8(2) of the **Sexual Offences Act** into play against the appellant. The learned judge also rejected the appellant's contention regarding the failure by the trial court to comply with **section 200** of the **Criminal Procedure Code.** The learned judge therefore concluded that the appellant's conviction was safe; and that the sentence was lawful.

[10] During the hearing of the appeal before us, the appellant was present in person whereas **Mr. Oyiembo**, Senior Assistant Director of Public Prosecution appeared for the respondent.

[11] The appellant who relied on his written submissions submitted that the charge sheet was defective since there was no alternative count and the charge sheet was also tampered with as the age of the minor was overwritten in ink; that for defilement to be established, medical evidence was necessary to conclusively prove the charge; that proof of age was not conclusive as the exhibits were manipulated; that the age of FB was not proved; that it was the doctor's opinion that the appellant should be tested but the prosecution failed to have him tested; and that the first appellate court failed to properly evaluate the evidence.

[12] Mr. Oyiembo who supported the conviction and sentence, opposed the appeal, submitting that the appellant's cross examination of the witnesses during the trial, revealed that the appellant was aware of the charges he was facing; that in addition to the broken hymen, FB's private parts had bruises, an indication that penetration had taken place; that an immunization card was produced in proof of FB's age; and that the learned Judge was aware of his duty to re-evaluate evidence, made his own observations, and concluded that the evidence was proper.

[13] We have carefully perused the record of appeal, and considered the submissions made by the appellant and Mr Oyiembo; the authorities cited and the law. This being a second appeal, **section 361(1)** of the **Criminal Procedure Code** obliges us to consider only questions of law. The duty is well articulated by this Court in **M'Riungu v. Republic (1983) KLR 455** where the Court stated as follows;

> ***"Where the right of appeal is confined to the question of law, an appellate court has loyalty to accept the findings of fact of the lower courts and resist the temptation to treat findings of fact as holdings of fact and law and it should not interfere with the decision of the trial court or the 1st appellate court unless it is apparent that on evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision was bad in law."***

[14] The appellant took issue with the charge sheet on two grounds. First, that it had no alternative charge. Although it is common for charges under the Sexual Offences Act to have a main count and alternative count, there is no requirement that says that every charge must have an alternative charge or that a charge under the Sexual Offences Act must be accompanied with an alternative charge. Therefore, this ground has no substance.

[15] The other issue taken up was the apparent alteration of the age of FB which in the charge sheet dated 30th March, 2010, was indicated as 10 years to an alteration from 10 to 5½ years in the charge sheet dated 13th September, 2010. It is not clear who or when the alteration was made. However, the record of the trial court indicates that on 10th June, 2010, the prosecutor made an application in the presence of the appellant applying for an adjournment to enable him amend the charge sheet as FB's mother had informed him that the age of FB was 6 years and not 10 years as indicated on the charge sheet. The adjournment was granted and the record indicates that on 13th September, 2010, an amended charge sheet was substituted. This is the charge sheet that had an alteration. The charge having been read and explained to the appellant, he entered a plea of not guilty. We also note that during the trial, the prosecution evidence was that FB was 5½ years at the time of the commission of the offence.

[16] There are two aspects to a defective charge sheet; one is where the charge sheet is fatally defective; and the second is where the charge sheet though defective the defect is curable. Under section 134 of the Criminal Procedure Code, it is a requirement that the charge sheet should contain all the ingredients of the charge.

[17] The following statement from **Isaac Omambia v Republic, [1995] eKLR** is instructive:

"In this regard, it is pertinent to draw attention to the following provisions of S. 134 of the Criminal Procedure Code which makes particulars of a charge an integral part of the charge: Every charge or information shall contain, and shall be sufficient if it contains a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence."

[18] A charge can also be defective if it is at variance with the evidence adduced in its support. In **Peter Sabem Leitu v Republic, CR.A NO. 482 OF 2007 (UR)** this Court held:

"The question therefore is, did this defect prejudice the appellant as to occasion any miscarriage of justice or a violation of his fundamental right to a fair trial? We think not. The charge sheet was clearly read out to the appellant and he responded. As such he was fully aware that he faced a charge of robbery with violence. The particulars in the charge sheet made clear reference to the offence of robbery with violence as well as the date the offence is alleged to have occurred. These particulars were also read out to the appellant on the date of taking plea. The fact that PW1 was not personally robbed and did not also witness the robbery did not in any way prejudice the appellant."

[19] On the second aspect, **section 382** of the **Criminal Procedure Code** states as follows:

"Subject to the provisions herein before contained no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error or omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or bother proceedings before or during the trial or in any enquiry or other proceedings under this code unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice, the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

[20] Further, in **Njuguna v Republic, [2002] LLR NO. 3735 (CAK);** this Court in considering whether a defect in a charge sheet was fatal stated:

"We think, like the Learned Judges of the High Court did, that stating in a Charge Sheet a lesser amount than the amount which was actually stolen was no more than an irregularity in the Charge Sheet and it did not render the Charge Defective. It was an irregularity curable under the above quoted section of the Criminal Procedure Code and the Appellant did not point out to us any sort of prejudice which the irregularity could or did occasion to him." [Emphasis added]

[21] In the case of the appellant, the irregular alteration of the age of FB, from 10 to 5 ½ years did not occasion any prejudice to the appellant as he was fully aware of the case before him. In the circumstances, we hold that the irregularity was not fatal but was curable under section 382 of the Criminal Procedure Code.

[22] Moreover, **section 8(1)** of the Sexual Offences Act No. 3 of 2006 states as follows:

" A person who causes penetration with a child is guilty of an offence termed defilement.

[23] Therefore, the main elements of the offence of defilement are:

(i) That the victim is a child.

(ii) That there has been penetration of the child's genital organs (such penetration need not be complete or absolute), by the genital organs of the perpetrator.

(iii) that the perpetrator of the offence is established to be the accused person.

[24] Under **section 2** of the **Sexual Offences Act**, a child has the meaning assigned under the Children's Act, and under the Children's Act a child is defined as a person who is under the age of eighteen years. The offence of defilement is therefore complete if it established that the child was under eighteen (18) years. However, the actual age of the victim is important for the purposes of sentencing as under section 8(2) of the Sexual Offences Act, the sentence is anchored on the age cluster of under eleven years old.

[25] We note that an immunization card was produced as evidence of the age of FB and the same indicates that she was 5½ years old at the time she was defiled. However, an issue arose regarding the difference in names, as the second name on the immunization card was different from the name of FB as given on the charge sheet and in the trial court. Although it is possible that both names belong to FB, L did not give any explanation for the disparity in the names. Be that as it may, the fact that FB was a child whose age was less than eleven years was apparent. The clinical officer who filled the P3 form gave her estimated age as five (5) years. The trial court also found it necessary to carry out a *voire dire* examination indicating that in the court's opinion she was a child of tender years. In the circumstances, there was sufficient evidence upon which the court found that FB was a minor whose age was under eleven years and this was sufficient to satisfy both **section 8(1)** and **8(2)** of the **Sexual Offences Act**.

[26] From the medical evidence, the clinical officer concluded that the broken hymen and bruises on the labia minora proved that there was penetration. This was consistent with the evidence of FB whom the court found to be truthful. With regard to the identity of the perpetrator, the appellant was well known to FB and FB maintained that he was the one who had defiled her. In addition, FB's evidence was consistent

with the evidence of L who saw the child come from the house where the appellant was staying and noted that both the trouser of the child and that of the appellant were wet. From the foregoing, we find that all the elements of the offence of defilement were established as there was sufficient evidence to prove penetration, the fact that FB was a child and the identity of the appellant as the person who had caused his genitals to penetrate the genitals of FB.

[27] We have carefully perused the judgment of the High Court and are satisfied that the learned Judge went into great detail in analyzing the evidence tendered before the trial court by each individual witness and also determined the issues as raised in the appellant's appeal. There is no basis to fault the first appellate court in this regard.

[28] The upshot of the above is that the appeal lacks merit and is accordingly dismissed.

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

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR