**IN THE COURT OF APPEAL**

**AT KISUMU**

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

**CRIMINAL APPEAL NO. 74 OF 2017**

**BETWEEN**

**LUCAS MASA HURA.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

***(An Appeal from the Conviction and Sentence of the High Court of Kenya at Migori, A. C. Mirima, J.) dated 14th March, 2017***

**in**

**H.C.CR.A. NO. 6 OF 2016)**

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**JUDGMENT OF THE COURT**

[**1**] The appellant appeals from the judgment of the High Court (**Mirima, J**) dismissing the appellant's appeal against conviction and sentence on one count of defilement and one count of escape from lawful custody.

[**2**] The appellant who was an elected member of **Migori County Assembly,** was charged before the Senior Resident Magistrate's court at Kehancha with the offence of defilement contrary to **section 8(1) as read with section 8(3) of the Sexual Offences Act,** with an alternative count of **committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act** and a second count of **escape from lawful custody contrary to section 123 as read with section 36 of the Penal Code**. He denied the offence. On his application, the High Court transferred the case to Rongo Principal Magistrate's court for trial.

[**3**] The particulars of the main offence in the first court alleged that on 11th May 2014, at [particulars withheld], shopping center, the appellant defiled the named complainant (name withheld), a child aged 13 years. However, the trial magistrate made a finding that the complainant was aged sixteen (16) years and convicted the appellant for defilement contrary to **section "8(1) (4)"** of the Sexual Offences Act and sentenced him to 15 years imprisonment. The appellant was also convicted for the offence of escape from lawful custody and sentenced to a fine of Kshs. 10,000/-, in default three (3) months imprisonment, the sentences to run concurrently.

[**4.1**] The prosecution case was briefly as follows.

On 11th May 2014 at about 7.00 p.m. the complainant who was a standard six pupil at [particulars withheld] Primary School was going home carrying charcoal and vegetables which she had been given by her mother. While on the way, a man came from behind whom she identified as the appellant. The appellant held her hand and took her to a nearby bar and lodging at Ntimaru town. There was a watchman and a lady at the lodging. The appellant gave a one thousand shillings note to the lady. The appellant and the complainant entered into a room. The lady brought two beers and opened the bottles. The appellant gave the complainant one beer and she drunk part of it after which the appellant defiled her.

[**4.2**] Meanwhile, **MBC** the complainant's mother reported at the nearby Ntimaru Police station that the complainant had not arrived home and that she had been spotted around [particulars withheld] House. At about 8.00 p.m**. PC Jacton Ojera (PC Ojera), Senior Sergeant Justus Kasisia (S/Sgt Kasisia**) and another police officer went to the guest house which was about sixty meters from the police station. They were accompanied by the mother of the complainant. They entered the guest house through the rear door and checked the rooms. They found one room christened 'Machakos' occupied but locked from inside. PC Ojera peeped through the window and saw that the appellant was naked. The police knocked at the door and commanded the occupants to open and the door was opened. The police entered into the room.

The complainant was seated on one of the two beds in the room dressed up. There were two bottles of beer, one full and one empty. There was also a bottle of soda. The appellant and the complainant were arrested and taken out of the room.

[**4.3**] The appellant asked for re-conciliation and gave Shs. 3,000/- to the police which the police rejected. The appellant also talked to the mother of the complainant in the local language. The mother of the complainant told the police that the appellant had offered her shs. 4,000/- but she refused. As the appellant and the complainant were being led outside the guest house through the rear door, a lady – a bar attendant asked the appellant to pay Shs. 50/- which he paid. When the police moved out of the guest house, they found a crowd of about 15-20 people who started shouting at the police and throwing stones. The appellant removed his shoes, mingled with the crowd and ran away. The police fired in the air and chased the appellant but he disappeared in the maize plantation.

[**4.4**] The complainant was taken to hospital for medical examination and age assessment. Medical examination by **Edwin Omare**, a clinical officer, revealed that her hymen was broken. The age assessment was done by one **Moses** – a clinical officer at Kuria District hospital and the approximate age of the complainant established at 13 years. The clothes that the complainant was wearing and her blood sample and the appellant's blood sample were taken to the Government Chemist for DNA analysis. The Government Chemist – **Wangechi Nderitu** found that the complainant's pant, biker and skirt were not stained with blood, semen or spermatozoa; the complainant's blouse was slightly stained with blood; several attempts to generate DNA profile from the blood stains on the blouse did not generate DNA profile for the appellant and the complainant because of natural causes such as rotting of the blood. In the final analysis, the Government Chemist did not find any link between the blood samples of the appellant and the complainant.

[**5**] A warrant of arrest was issued by the trial court and the appellant was arrested on 20th May, 2014.

[**6**] The appellant testified in his defence that the evidence relating to what happened at Sadaam Guest House on 11 th May 2014 was false. He testified that on the material day he had guests at his home and that he remained at home throughout and did not have time to go to Ntimaru Town. The appellant called one witness **James Machira Rioba,** who testified that on the material day he was with the appellant at his home with guests from 2.00 p.m. to 9.00 p.m.

[**7**] The trial magistrate considered the issue of age of the complainant and relied on the entry of a copy of the school's admission register which showed that the complainant was born in 1998 to find that she was 16 years of age and not 13 years of age at the time of the commission of the alleged offence. Accordingly, the trial magistrate convicted him of defilement under **section 8(1)(4)** of the **Sexual Offences Act**.

On the question whether or not the appellant defiled the complainant, the trial magistrate relied on the evidence of the complainant, PC Ojera, S/Sgt Kasisia and Edwin Omare and made a finding that the complainant was defiled by the appellant. As regards the offence of escape from lawful custody, the trial magistrate relied on the evidence of the complainant, PC Ojera, S/Sgt Kasisia and the police occurrence book entry to find that the appellant escaped from lawful custody.

[**8**] The High Court differed with the finding of the trial magistrate regarding the age of the complainant. The High Court made a finding that from the evidence of the complainant, the evidence of her mother and the age assessment report, the correct age of the complainant was 13 years at the time of the alleged incident. However, the High Court did not interfere with the sentence for the reasons that there was no cross-appeal and the issue of the age was not raised in the High Court. The High Court after analysing the evidence came to the same conclusion as the trial magistrate that the appellant defiled the complainant and that he escaped from lawful custody.

[**9**] The main grounds of appeal relate to failure by the High Court to correctly re-evaluate the evidence and misdirections in respect to age of the complainant; defilement, identification and defence of alibi. The learned Judge is also faulted for displaying prejudice and bias against the appellant by dealing at length with irrelevant matters and in selective re-evaluation of the evidence of the complainant.

The appeal is opposed by the respondent. Both the appellant and the respondent have filed respective written submissions which were orally highlighted at the hearing of the appeal

[**10**] **Mr. Amuga**, learned counsel for the appellant has extensively submitted on the question of the age of the complainant. He submitted, amongst other things, that the two courts below did not agree on the age of the complainant, the age was not proved; that there is no explanation why the two courts below ignored the complainant's own evidence that she was born in 1995; and that the complainant's conduct when she was found in the room shows that she was a willing participant and was not an underage girl. In essence, the appellant's contention is that the prosecution failed to prove that the complainant was under the age of 18 years.

[**11**] By section 8(1) of the Sexual Offences Act, the offence of defilement comprises of committing an act which causes penetration with a child. The Act imports the definition of a "**child**" in the Children's Act which means any human being under the age of eighteen years. The Children Act also defines age thus;

> **"…where actual age is not known means apparent age."**

In this case, the actual age of the complainant was not known as no certificate of birth was produced. The complainant's mother testified that she could not recall the complainant's date of birth. However, she testified that the complainant was 12 years old and was a primary school pupil in standard six. The complainant herself testified that she was 13 years old and was a standard six pupil. She was subjected to *voire dire* examination. In her evidence in cross-examination she stated:

> **"I am 13 years. I was born in 1995".**

The copy of the school's admission register on which the trial magistrate relied indicated that she was born in 1998. Incidentally, the record

does not show that the school's admission register was formally produced as exhibit. It was only marked for identification during the cross-examination of some witnesses. The age of the complainant was clinically determined as 13 years and the age assessment form produced as an exhibit. The appellant's counsel at the trial expressly stated that he had no objection to the production of the report. The age assessment report showed that the complainant had not started menstruating, had a fair pubic hair, had 28 teeth and her breasts had started growing.

The High Court evaluated all the evidence at length and concluded that the complainant was thirteen years of age at the time of the alleged incident. The age assessment was the best evidence as to the approximate age of the complainant. Her mere mention that she was born in 1995 while still saying that she was 13 years old was not supported by any tangible evidence. The evidence established that she was a primary school pupil in standard six. The evidence that she was found seated on the bed smiling and was normal does not itself discredit the age assessment report. In the end, we find that the concurrent findings of fact that the complainant was a child was supported by credible evidence.

[**12**] The appellant's counsel strenuously submitted that the two courts below reached the erroneous conclusion that the complainant had penetrative sex. He referred to the evidence of the complainant and the medical evidence and submitted that the only evidence that there was penetrative sex was from the complainant, such evidence was not supported by medical evidence and such evidence required corroborative evidence, which was lacking. Counsel relied on the case of **Benjamin Mugo Mwangi & Another v Republic [1984] eKLR** and submitted that proof of broken hymen is not conclusive proof that sexual intercourse or penetration had taken place. On the other hand, **Ketoo** for the respondent submitted that Edwin Omare confirmed that the hymen was broken and in addition, the complainant testified that she was defiled, which evidence the High Court believed.

[**13**] "**Penetration"** is defined in section 2(1) of the Sexual Offences Act as meaning ***"the partial or complete insertion of the genital organs of a person into the genital organs of another person***".

The complainant stated in her evidence in-chief that the man carried her and placed her on the bed; that the man joined her in bed and laid on top of her, that the man removed his thing, parted her legs and had sex with her. She repeated the same evidence in her evidence on cross-examination. According to the evidence of Edwin Omare, the complainant reported that she was defiled. On examination of the complainant, he found the hymen broken but the external genitalia was normal. Edwin Omare stated in his evidence in cross-examination that the hymen is a thin membrane between the inner and outer genitalia, and that the victim had no previous sexual experience. He further stated:

> **"Assuming that bleeding was to be there, then the hymen may have been broken earlier. We are not in agreement that the hymen was broken earlier it is not mandatory that one bleeds when hymen is broken…. My only conclusion is that the hymen was broken".**

It is clear from the evidence of Edwin Omare that he did not say as a fact that the hymen was broken earlier. His evidence was that the complainant did not have previous sexual experience. Furthermore, since partial insertion is considered as penetration, the fact that hymen is not broken does not in itself disprove penetration of genital organs. The DNA examination by Ann Wangechi Nderitu, the Government Chemist, was of no evidential value. No DNA profiles could be generated from the blood stain on the complainant's blouse to link the blood samples of the complainant and the appellant.

[**14**] Section 124 of the Evidence Act provides that the accused shall not be liable to be convicted in criminal cases on the evidence of a child unless such evidence is corroborated by other evidence implicating him. However, the proviso to section 124 provides:

> **"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 victim is telling the truth"**

[**15**] The trial magistrate made a finding that the evidence of Edwin Omare corroborated the evidence of the complainant of sexual intercourse and penetration. The High Court considered the law and re-valuated the evidence particularly the evidence of the complainant, and Edwin Omare and concluded:

> ***"from the above analysis and by taking the entire body of the evidence on the issue of penetration into account and by further guidance of the binding judicial precedents referred to hereinabove, this court is satisfied that there was indeed penile penetration into the complainant's vagina. Penetration was hence proved".***

The two courts below believed the evidence of the complainant that there was penetration. That evidence could be relied upon without corroboration. Further, the two courts below believed the evidence of Edwin Omare that the complainant's hymen was broken, which is evidence of corroboration. We are satisfied that penetration was proved by credible and cogent evidence.

[**16**] The appellant's counsel submitted that the evidence of the complainant on identification of the appellant was worthless as it was dock identification and that an identification parade should have been conducted. As regards the evidence of recognition tendered by PC Ojera and S/Sgt Kasisia, counsel submitted that the circumstances were not favourable for identification. It was further submitted that the finding by the High Court that the guest house was sufficiently and well lit was not supported by evidence.

[**17**] The complainant described the circumstances in which she met the appellant, how he led her to the guest house, the payment of Shs. 1,000 by the appellant, the supply of beer and what transpired in the room before the police arrived. The appellant was represented by a counsel at the trial. At the trial, the lighting at the guest house was not questioned, it was never put to the complainant, PC Ojera or to S/Sgt Kasisia, that the guest house was not lit. The appellant's counsel merely submitted at the trial that an identification parade should have been conducted in respect of the complainant and that her identification of the appellant was dock identification. The question of lighting in the guest house was first raised in the High Court.

The trial magistrate considered the evidence of identification and made a finding that the evidence of the complainant on the identification of the appellant was corroborated by the evidence of PC Ojera and S/Sgt Kasisia. Both PC Ojera and S/Sgt Kasisia stated at the trial that they knew the appellant previously as a Councillor and later as a Member of County Assembly. The name of the appellant was inserted in the police occurrence book in the report recorded on the same night. The evidence of both PC Ojera and S.Sgt. Kasisia, that they knew the appellant before was not questioned at the trial.

[**18**] The High Court considered the evidence of identification alongside the defence of alibi and referred to the relevant case law and alternatively made a finding that the circumstances of identification were favourable and that the evidence of the complainant and the two police officers was credible.

Further, the High Court considered the fact that the guest house was a running business; that the guest house had a bar and guests were taking drinks and food and the detailed description of the incident by the complainant and the two police officers, and made inference that the guest house was sufficiently well lit.

The High Court was entitled under section 119 of the Evidence Act to presume that in the circumstances the guest house was well lit.

[**19**] The appellant has accused the High Court of bias in the manner in which the evidence was analysed and re-appraised particularly the evidence of the complainant and also by unnecessary recital of what transpired before Kehancha court. The appellant's counsel referred to the judgment of the High Court where the complainant is quoted to have stated that nobody coached her on what to say in court and accused the High Court of ignoring other evidence of the complainant where she stated that the police told her what to write in her statement. However, it is clear from the judgment of the High Court that the High Court considered the entire evidence of the complainant including the inconsistencies in her evidence. For instance, at paragraph 42 of the impugned judgment the High Court said in part:

> **"the complainant was very clear on what she told the court. Although she indicated that some part of the statement recorded at the police station were untrue she sternly stated that what she was stating in court was what exactly happened on the material day. She repeatedly stated that neither the police nor her advocate had told her to say what she stated in court but she said what she personally witnessed happening on that day."**

It is true that the High Court at the outset referred to the record of the proceeding of the Kehancha court as the High court expressly stated, the purpose of that, was to clarify how the trial was conducted before the Kehancha and Rongo Courts. There is no apparent prejudice arising from the descriptive part of the judgment as it is clear from the judgment that the High Court was solely guided by the evidence of witnesses in reaching its decision.

From the foregoing, it is clear that the High Court re-evaluated and reconsidered the evidence. There is no misdirection in the findings of the High Court that the appellant was positively identified as the person who took the complainant to the guest house and defiled her.

[**20**] As regards the charge of escape from lawful custody, there was ample evidence from the complainant, PC Ojera and S/Sgt Kasisia that the appellant was in lawful custody being led from the guest house to the police station when, with the assistance of members of the public, escaped. The fact of his escape was recorded in the police occurrence book a few moments later. The charge was undoubtedly proved.

[**21**] Lastly, the appellant counsel submitted that the appellant was convicted of the offence of defilement under section "8(1)(4)", with which he was not charged and that section "8(1) (4)" does not exist, thus rendering the conviction illegal.

It is section 8(1) of the Sexual Offences Act which creates the offence of defilement. That offence was proved.

Section 8(4) only provides for sentence for defilement of a child between the age of 16 and 18 years. It was a technical error that the charge did not clearly state that the offence was contrary to section 8(1) as read with section 8(4).

Furthermore, the trial court had power under section 186 of the Criminal Procedure Code to convict and sentence the appellant as it did although he was not charged with the specific offence. The appellant was represented by counsel at the trial. The sentencing was in favour of the appellant and the error did not occasion a failure of justice.

[**22**] For the foregoing reasons, the appeal has no merit and is dismissed in its entirety. We so order.

***Dated and delivered at Kisumu this 27th day of June, 2019.***

***E. M. GITHINJI***

**.....**

***JUDGE OF APPEAL***

***HANNAH OKWENGU***

**.....**

***JUDGE OF APPEAL***

***J. MOHAMMED***

**.....**

***JUDGE OF APPEAL***

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

**DEPUTY REGISTRAR**