IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MAKHANDIA, GATEMBU & MURGOR JJ.A)

CRIMINAL APPEAL NO. 9 OF 2017

BETWEEN

DANIEL NJENGA WAINAINA.......................................APPELLANT

AND

REPUBLIC..RESPONDENT

(Being an appeal from the Judgment of the High Court at Nairobi (Kimaru J.)

delivered on 8th March, 2016 ***in High Court Criminal Appeal No. 150 of 2014)***

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JUDGMENT OF THE COURT

1. Daniel Njenga Wainaina, the appellant, was charged with three counts of the offence of defilement contrary to Section 8(1) (2) of the Sexual Offences Act.

The particulars of the offence under Count I and Count II were that on 30th October 2012 and on 4th November 2012, respectively, at [particulars withheld] village in Kiambu County, he caused his genital organ (penis) to penetrate the vagina of RWN a girl aged 10 years. Under Count III, the particulars were that on 30th October 2012 he defiled MNK, a girl aged 8 years. To each of the three counts were three alternative charges of committing an indecent act with the said minors contrary to Section 11(1) of the Sexual Offences Act. He was tried before the Magistrates' Court at Limuru and convicted on the three main counts in a judgment delivered on 2nd October 2014 and sentenced to life imprisonment. His first appeal before the High Court was dismissed by **Kimaru, J.** in a judgment delivered on 8th March 2016.

2. In this second appeal he complains that the High Court did not consider the grounds of appeal that he urged before that court; that the prosecution did not prove its case to the required standard; and that the age of the complainants was not proved.

3. To place the appellant's present appeal in context, a brief factual background based on the evidence presented before the trial court will suffice. On 30th October, 2012 RW *(PW1)*, an 11 year old girl was sent home from school to collect her score card. Finding no one at home, she chose to go to a neighbour's. On the way, she passed through a forested area, where she decided to take a rest and sat under a tree and dozed off. She was woken by the appellant, who covered her mouth with a handkerchief, took off her clothes as well as his own and defiled her. He then threatened her with death should she

report to anyone what had transpired. PW1 returned home and kept the matter to herself.

4. A few days later, on 4th November, 2012, PW1 was directed by her elder sister, TW to go and fetch firewood. PW1 took her friend MN *(PW2)* along in search of the firewood. Together they collected the firewood but just as they were about to leave, the appellant appeared and got a hold of the two of them, tied them up to a tree and defiled them in turns. As happened on the previous occasion, he threatened to kill them should they reveal to anyone what had happened. The girls went back home and kept the matter to themselves.

5. When PW1 attended school the following Monday, her teacher (Mrs. Ngethe) enquired from her who she was with in the bush over the weekend. Apprehensive that the teacher might have seen them, PW1 narrated the entire horrific experience. PW1's mother (PW4) was then called in and informed of what had happened to her daughter and to PW2. She (PW4) in turn informed PW2's mother of the ordeal their daughters had gone through. According to PW4, the appellant had been their neighbor for three months prior to the incident.

6. PW2's father (PW3) who was also a grounds man at the school, his wife and PW4 took their daughters, the complainants, to hospital where they were examined. The medical examination was performed by Dr. Kanana. The examination revealed that the complainants had been sexually assaulted. The hymen in each case was broken. They had whitish discharge and foul smell. Urinalysis revealed pus cells. The P3 form completed by Dr. Kanana was tendered in evidence on his behalf by James Kafue (PW5), a clinical officer.

7. In his defence, the appellant denied the charges. In his unsworn statement he stated that he was being framed by PW4 who was out to settle scores on account of his having declined to split her firewood. In his words, "*she called me to go break firewood in her home and I was working at her neighbor*" and that "*the following day I saw her with people come to arrest me saying I had defiled her child*."

He stated that even at the time of his arrest, he had no idea of what he haddone wrong and that the defilement charges levelled against him were absolute lies propagated by PW4.

8. After reviewing the evidence, the trial court, as already stated, convicted the appellant on all three counts having been satisfied that the prosecution had established its case to the required standard, and as noted, the High Court upheld the convictions and sentence paving way for the present appeal.

9. Appearing in person before us, the appellant relied entirely on his written submissions in which he urged that the High Court failed to consider the grounds of his appeal exhaustively; that although he had complained about the trial court's failure to comply with the provisions of Section 200 (3) of the Criminal Procedure Code, the High Court did not address that complaint; that the first appellate court had therefore failed to discharge its duty, thus infringing on his Constitutional right to a fair and impartial trial. Relying on the decisions in ***Pascal Clement Braganza vs. R (1951) EA 152; Lolimo Ekimat vs. R. Criminal appeal No. 151 of 2004*** and ***Mwangi vs. R (1983) KLR 522*** the appellant submitted that in view of the unsatisfactory trial herein, the only remedy is for this court to order a retrial.

10. With regard to the complaint that the prosecution failed to prove its case beyond reasonable doubt, the appellant contended that no medical evidence was adduced to show a nexus between him and the complainants' injuries. Specifically, that though the medical examination of the complainants revealed they had a whitish discharge from their genitalia, no tests were conducted to prove that the appellant had caused the said discharge. The trial court should therefore have acquitted him, he argued.

11. Opposing the appeal, **Ms. Wang'ele** learned Senior Principal Prosecution Counsel submitted that the three ingredients of the offence of defilement under Section 8 (1) (2) of the Sexual Offences Act, namely penetration, age and identification were established beyond reasonable doubt; that the complainants were very clear on how the offence was executed and their accounts were supported by medical evidence; that the ages of the complainants as well as the identity of the perpetrator were sufficiently established; and that evidence in that regard was never challenged.

12. We have considered the appeal and the submissions. The mandate of this Court on a second appeal is limited. Under Section 361 (1) (a) of the Criminal Procedure Code, this court has no jurisdiction to entertain matters of fact. In ***Karani vs. R [2010] 1 KLR 73*** this Court stated:

> ***"This is a second appeal. By dint of the provisions of section 361 of the Criminal Procedure Code, we are enjoined to consider only matters of law. We cannot interfere with the decision of the superior court on facts unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law."***

13. Bearing that in mind, the issues for determination in this appeal are: whether the High Court failed to consider grounds of appeal presented by the appellant; and whether the prosecution established its case against the appellant beyond reasonable doubt.

14. On the first issue, the appellant contends that although he raised a complaint before the High Court about the trial court's failure to comply with the provisions of Section 200 (3) of the Criminal Procedure Code; that the High Court did not address it and as a result there was a miscarriage of justice and his conviction and sentence should therefore be set aside and a retrial ordered.

15. It is apparent from the record that the appellant had indeed raised that complaint. The Judge alluded to it in his judgment thus:

> *"**He faulted the trial magistrate for not complying with section 200 of the Criminal Procedure Code**..."*

16. Beyond that statement, the Judge made no further mention of the matter in the judgment. The appellant is therefore correct to the extent that no pronouncement was made by the High Court on the matter. Being a matter of law, we have ourselves considered whether the trial court complied with the provisions of Section 200 (3) which provides:

> ***"Conviction on evidence partly recorded by one magistrate and partly by another…(3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, <u>the accused person may demand</u> that any witness be resummoned and reheard <u>and the succeeding magistrate shall inform the accused person of that right</u>."***

17. The record in this case indicates that prior to the commencement of hearing of the witnesses, the matter was handled by various magistrates. Of interest among them are Hon. Ole Tanchu (SRM) and Hon. Makau (RM). The hearing of witnesses commenced on 13th November, 2013. The record on that date captures the Coram was as follows:

> ***"13/11/013;***
>
> ***Before: T. Ole Tanchu SRM***
>
> ***Cp: IP Ombito***
>
> ***Cc: Boniface***
>
> ***Accused: present***
>
> ***Madam Leah Owuor watching brief for complainant"***

18. However, at the end of the testimonies of PW1 and PW2 who testified on that day, the name of N. Makau (R.M) appears as the magistrate who presided over the hearing. In effect, while the record at the

beginning of the proceedings on 13th November, 2013 indicates the presiding magistrate as Ole Tanchu (SRM), the same record, at the conclusion of the testimonies on the same day is signed off by N. Makau (R.M). It is of course not possible that the two magistrates presided over the matter at the same time. The record is otherwise clear that the evidence of all witnesses was taken by N. Makau R.M who rendered the judgment.

19. In our view, the indication in the record at the commencement of the hearing on 13th November 2013 of Ole Tanchu (SRM) as the presiding officer can only be a typographical error. We say so for two reasons. First, this curious phenomenon also appears in the record of 11th November 2013 before the trial began where the Coram indicates Makau (RM) as the presiding magistrate but the day's proceedings were signed off by Ole Tanchu (SRM). Secondly, it is evident from the narration of the evidence by Makau RM in his judgment that he was present when PW1 and PW2 testified. Further, the original handwritten file record confirms that the trial was exclusively presided over by N. Makau (RM) who signed off on each of the days that the witnesses testified.

20. The rationale behind Section 200(3) was stated by this court in ***Abdi Adan Mohamed vs. Republic [2017] eKLR*** as follows:

> "***The re-summoning of a witness or witnesses and re -hearing of the case is intended to ensure that the succeeding magistrate is able to assess personally and independently the demeanour and credibility of the particular witness or witnesses and to weigh their evidence accordingly.***" (Emphasis added)

21. Consequently, all witnesses having been heard in this case by the magistrate who rendered the judgment, Section 200 (3) of the Criminal Procedure Code did not apply. The complaint that there was non-compliance with that provision has no merit. Given that position, the omission by the High Court to address the matter did not occasion a miscarriage of justice.

22. As to whether the prosecution established its case to the required standard the appellant has impugned the findings by the two courts below and contended that the case against him was never proven beyond reasonable doubt. He asserted that no evidence was adduced to prove that he was responsible for the whitish discharge found on the complainants' genitalia; that the complainants' age was never proven and on the whole, that the entire case was never proven beyond reasonable doubt.

23. To start with, the assertion that there was no medical evidence to link the appellant to the whitish discharge found on the complainants has been raised for the first time before this Court. It is a matter that should have been raised from the outset. In ***Alfayo Gombe Okello vs. Republic [2010] eKLR Criminal Appeal No. 203 of 2009*** where a similar situation arose, the Court stated:

> ***"….the issue was not raised since the trial began and was only raised for the first time in this second appeal. The appellant gave no reason for failure to do so earlier. We must therefore find, and we now do so, that it was not raised at the earliest opportunity although it could and should have."***

24. The courts below cannot therefore be blamed for failing to address matters that were not raised. Furthermore, the appellant having been positively identified as the perpetrator, and, penetration having been established, there was no need for the medical evidence to which the appellant referred.

25. As regards the ages of the complainants, the High Court Judge was right when he stated that:

> "***In determining the age of the complainants, it is imperative that the prosecution establishes the age of the complainants with the best possible evidence which is a birth certificate, birth notification, an immunization card or in some instances, a baptismal card issued shortly after the birth of the child. However, where this best evidence is not available, the prosecution can rely on other documentary evidence such as the medical report and the P3 form. The prosecution can also rely on the testimony of the parents of the complainant and also by the court visually***

> ***satisfying itself as to the apparent age of the complainant. This position was upheld by the Court of Appeal in Nyeri C.A Criminal Appeal No. 61 of 2014; Richard Wahome Chege v. Republic (unreported) and Nyeri C.A Criminal Appeal No. 100 of 2013 J.W.A v. Republic (unreported). In the present appeal, this court holds that the prosecution established the complainants' age through the evidence of PW 4 and the P3 forms produced as prosecution exhibits Nos. 2 and 3.***"

26. As the two courts below correctly found, all the ingredients of the offence of defilement were established to the required standard. We have no basis for interfering with the convictions or the sentence. The appeal fails and is accordingly dismissed.

Dated and delivered at Nairobi this 21st day of June, 2019.

ASIKE MAKHANDIA

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

JUDGE OF APPEAL

A.K. MURGOR

JUDGE OF APPEAL

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

DEPUTY REGISTRAR