IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, NAMBUYE & MUSINGA, JJ.A)

CRIMINAL APPEAL NO. 21 OF 2017

BETWEEN

CLAMUEL MWENESI NGAIYA.....APPELLANT

AND

REPUBLIC OF KENYA .....RESPONDENT

(An appeal from a Judgment of the High Court of Kenya at Nairobi (L. Kimaru, J.) dated 29th October, 2015

in

H. C. Cr. A. No. 137 of 2013)

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JUDGMENT OF THE COURT

Upon concurrent findings of fact being made by Kibera Resident Magistrate **(Hon. Olando)** on 7th August, 2013, and the High Court **(Kimaru, J.)** on 29th October, 2015, the appellant remained convicted for the offence of defilement of a twelve-year old girl contrary to ***section 8 (1)*** as read with ***section 8 (3)*** of the **Sexual Offences Act (SOA)**. He was sentenced to serve 20 years in prison for the offence. Aggrieved by the decision of the High Court, the appellant filed a notice of appeal and a memorandum of appeal on 21st January, 2016.

The hearing of the appeal was not reached until 12th April, 2017 when it was placed before the Deputy Registrar for case management in readiness for hearing.

However, the appellant, who has always appeared in person, took issue with the record of appeal, asserting that there were missing documents. The matter was adjourned at the appellant's request to provide particulars of the missing documents. It was then given other dates but adjourned on four occasions on similar grounds until it was placed before us for hearing on13th February, 2019. But the appellant still raised complaints about the impropriety of the record once again, whereupon we gave him time to compare the hand-written record with the typed record and identify the errors he had alluded to.

It was a futile exercise as recorded in our ruling made on the same day as follows:

"RULING OF THE COURT

This appeal was first called out for hearing at 9.30 am but the appellant, who appears in person, stated that the file served on him had problems which he wanted to sort out. We examined the record of his appearances before the Deputy Registrar for case management and found that the same issue has been raised by the appellant on five occasions; that is 12th April, 2017, 2nd October, 2017, 6th November, 2017, 11th June, 2018 and lastly on 29th October, 2018 when the appellant is recorded to have stated that he was ready to take a hearing date. That date was fixed for today but surprisingly the appellant says he thought he was appearing before the Deputy Registrar to have his file sorted out.

In those circumstances, we gave time to the appellant to go through the file served on him and point out the problems he was alluding to. He did so, and after two hours or so the appeal was called out again and the appellant raised two areas of the record that he contented were either improperly added in the record by the trial Magistrate or were never stated at all by the witnesses. We have examined the record before us as well as the original record of the trial Magistrate and we are satisfied that the portions complained about appear in

the original record as typed out in the other records before us. The appellant's submission appears to be that the original record was falsified but we have no basis for making such finding. It is our decision therefore that the record of appeal before us and the record served on the appellant form a proper basis for the appeal. We so find. The appellant further says he has not filed the memorandum of appeal and written submissions and therefore needs time to do so. We have examined the record and found that indeed the appellant filed his memorandum of appeal on 21st January, 2016. There is no requirement in law that written submissions be filed. This appeal has been pending since 2016. It is a straightforward appeal and we need not adjourn it further.

We order that it proceeds for hearing orally as scheduled today.

Made at Nairobi this 13th day of February, 2019.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

D. K. MUSINGA

.....

JUDGE OF APPEAL".

Despite opportunity being given to the appellant to proceed with his appeal, he declined to do so, with the clear intent to delay it further. In those circumstances, we called upon the Respondent, represented by **Ms. Maina**, Senior Principal Prosecution Counsel **(SPPC),** to respond to the issues raised in the memorandum of appeal.

The facts as established by the two courts below were straight forward. The appellant and HS **(the minor)** who stayed with her parents, were neighbours at Kangemi, in Westlands, Nairobi. At about 7pm, on 11th June, 2011, the minor was playing with other children when the appellant called her to go to his 1st floor house on the pretext that he wanted to send her for a matchbox. On arrival in the house, the minor was locked in and ordered to remove her trouser and lie down on the sofa. When she refused to do so, the appellant threatened to kill her and he removed her pants by force. He then removed his trousers, lay on top of her and inserted his penis in her vagina. She felt pain and screamed whereupon the neighbours, including PW5, went to her rescue. They found the appellant in the act of defiling the minor and rescued her. They proceeded immediately to have the appellant arrested by Administration Police officers based in Kangemi and handed over to Spring Valley police station.

The minor was taken to Nairobi Women's Hospital where she was examined and treated. The medical report produced by PW3 confirmed that the minor's genitalia had whitish discharge and multiple tears on the hymen. A diagnosis of sexual assault was made. Three days later the minor was taken before a police surgeon (PW6) for completion of a P3 form and the surgeon confirmed *'old hymen tags and torn hymen*' consistent with sexual assault. The appellant was then charged with the offence of defilement as earlier stated.

On the basis of evidence from seven prosecution witnesses, including the father of the minor (PW4), who provided proof of the age of the minor, and the investigating officer (PW7) who submitted samples of various items to, and obtained a report from the Government Chemist, the case was proved. In his unsworn statement in defence, the appellant denied the offence and stated that the witness who was at the scene did not give a true picture of what happened. In what he called his "submissions" at the trial, he admitted that the minor was in his house but claimed that she was being used as a trap by PW5 and other fifty women who wanted him killed.

In his memorandum of appeal, the appellant listed the following grounds:

> ***"1. THAT, the learned judges of the 1st appellate court erred in law in failing to consider that the Hon. trial Magistrate had overlooked the evidence adduced in court in regard to proof of penetration by the medical expert.***
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> ***2. THAT, the learned judges of the 1st appellate court erred in law in failing to find that the prosecution did not prove to the required standards and or failed to adduce sustainable assessment of the age of the victim.***
>
> ***3. THAT, the sentence imposed to me the appellant was rather too harsh and excessive.***

4. THAT, the learned judges of the 1st appellate court erred in law in failing to consider the appellants defence and failed to advance any cogent reasons for not believing the same in breach of provisions of Sec. 169 of the C. P. C.".

Learned SPPC, Ms. Maina, urged us to dismiss the appeal on all the grounds for the reason that the offence was proved beyond reasonable doubt. On penetration, which is a necessary legal ingredient of the offence, counsel referred to the evidence of the minor which was forthright that the appellant inserted his private part in her vagina and she felt pain. Counsel further referred to the two medical reports which confirmed multiple tears on the minor's hymen. According to counsel, there was no reason for doubting such evidence on penetration.

As regards the issue of the age of the minor, counsel submitted that although there was a variation on the evidence relating to age: 10 years as stated by the minor, or 11 years according to the medical report, there was irrefutable proof from the father of the minor (PW4) that she was aged 12 years and eight months. Under ***section 8 (3)*** of the SOA, a person who defiles a child aged between the age of twelve and fifteen, is liable, upon conviction, to imprisonment for a term of not less than 20 years. That is the provision under which the offence was charged and proved and, therefore, there was no basis for interfering with the decision. In her view, even if the evidence of PW2 and PW5 was ignored, the offence would still have been proved. Counsel made no submissions on the last ground of appeal relating to non-consideration of the defence.

As stated earlier, the appellant declined to make any submissions despite being given the opportunity to do so.

We have considered the grounds of appeal as laid out by the appellant. By dint of ***section 361*** of the Criminal Procedure Code, only issues of law may be raised for consideration on a second appeal. ***Section 361 (1) (a)*** declares a challenge on severity of sentence as a matter of fact, and for that reason, ground 3 in the memorandum of appeal falls by the wayside.

The 1st issue also arose before the two courts below. After considering the evidence on record, the trial court made a finding thereon as follows:

"The other issue is whether the accused actually defiled the complainant. From the evidence of Pw1 complainant, she stated that the accused pulled her into his house and he pushed her on the sofa and then accused removed her clothes by force and inserted his penis into her vagina. Pw2 and Pw3 stated that they checked the complainant and found that she had been defiled.

The report from Nairobi women's hospital indicate multiple tears on the hymen at 6 o'clock, 9 o'clock and 3 o'clock and the report by the Police doctor Dr. Kamau who testified as Pw6 confirmed that the hymen had been broken. It is therefore evidence that the complainant had been defiled".

The High Court in its duty to re-evaluate the evidence on a first appeal also made a finding as follows:

"In the present appeal, proof of penetration was established by medical evidence. The complainant was examined by Dr. Thuo at Nairobi Women's Hospital on 12th June, 2011. He confirmed that the complainant had indeed been defiled. He noted that the Appellant had sustained multiple tears on the hymen an indication that the complainant had been sexually assaulted. Section 2 (1) of the Sexual Offences Act defines penetration as:

'the partial or complete insertion of the genital organ of a person into the genital organs of another person."

We agree with the assessment of the issue as made by the two courts below. The trial court made a note on the credibility of the minor as she testified under oath, stating that *"the witness is very forward (sic) honest"*. As always, it is the trial court which has the advantage of seeing and hearing a witness, and is the best judge on credibility. The minor was forthright that the appellant *'inserted his private part into the vagina and I felt a lot of pain.*' The appellant's quarrel appears to be specifically with the medical evidence which was corroborative of the minor's testimony. The doctor who examined the minor was not the one who produced the medical report but there was nothing objectionable in law to that procedure. ***Section 77*** of the **Evidence Act** allows it. The vaginal examination made soon after the incident clearly showed:

"Normal external genitalia, whitish penovaginal discharge, multiple tears on hymen: 6 o'clock, 9 o'clock and 3 o'clock."

Further medical examination carried out two days later confirmed the same diagnosis of sexual assault. We have no reason to doubt the medical evidence as supportive of the minor's evidence, and we reject the 1st ground of appeal.

The 2nd ground of appeal similarly arose before the two lower courts and findings were made thereon by the trial court as follows:

"Pw2; testified and produced the child dedication card which proved that the complainant was born on 18-10 -1998, which shows that the complainant was aged 12 1/2 years at the time of the offence.

The issue of age of the complainant was not disputed and the validity of the dedication card was not challenged by the accused even in cross examination of the witness.

I therefore find that the complainant was aged 12 1/2 years old at the time of the charged incident.

In fact the issue of the age was not in dispute but the court has to make a finding on the same".

The High Court after re-evaluating the evidence found:

> ***"The second issue that the prosecution was supposed to establish is the age of the victim. According to PW4, the complainant was born on 18th October 1998. He produced the complainant's dedication card as proof of her age. The complainant was about 12 years and 8 months old at the time of the incident. The court therefore holds that the prosecution did establish that the complainant was a child within the meaning of Section 2 (1) of the Children Act".***

Section 2 (1) of the **Children Act** is a general definition section which defines "Child" as *"any human being under the age of 18 years"***.** The offence facing the appellant was not charged under the Children Act and the prosecution need not have proved it under that statute. To that extent, the High Court erred in invoking the Act. The elements of the offence which ought to have been proved are in SOA. The offence charged in this matter was under ***Section 8 (1)*** as read with ***8 (3)*** of SOA which provide as follows:

> ***"8. Defilement***
>
> ***(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement .....***
>
> ***(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years".***

The onus was therefore on the prosecution to prove that the minor was aged between the age of 12 and 15 years. The importance of proving age has been underscored by this Court in several decisions and we take it from the case of ***Eliud Waweru Wambui vs Republic [2019] eKLR*** where the Court stated:

> "***There is no doubt that in an offence such as faced the appellant, indeed in most of the offences under the Act where the age of the victim determines the nature of the offence and the consequences that flow from it, it is a matter of the greatest importance that such age be proved to the required standard, which is beyond reasonable doubt. That has been the consistent holding of this Court and we are content to adopt what the Court sitting at Mombasa stated in Hadson Ali Mwachongo vs Republic [2016] eKLR;***
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> *"The importance of proving the age of a victim of defilement under the Sexual Offences Act by cogent evidence cannot be gainsaid. It is not in doubt that the age of the victim is an essential ingredient of the offence of defilement and forms an important part of the charge because the prescribed sentence is dependent on the age of victim. In Alfayo Gombe Okello vs Republic Cr. App. No. 203 of 2009 (Kisumu), this Court stated as follows;*
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> *"In its wisdom Parliament chose to categorize the gravity of that offence on the basis of the age of the victim, and consequently the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under section 8(1)."*

In this case, the minor simply stated that she was aged 10 while the police surgeon opined that she was 11. Those statements are obviously no proof of age beyond reasonable doubt. But there was documentary evidence from the father of the minor to confirm the age as 12 years and 8 months. It has been held before that such evidence would pass muster in sexual offences. The Court of Appeal in Uganda, in the case of ***Francis Omuroni vs Uganda, Criminal Appeal No. 2 of 2000,*** which has been followed severally in this country, held that:

> ***"In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense..."***

We find no error made by the two courts below in accepting the evidence tendered by the father of the minor in proof of age. We reject that ground of appeal also.

Finally, on ground 4 asserting that the defence of the appellant was not considered, the trial court had this to say:

> ***"The defence by the accused only amounts to admission since he admits that the complainant was found in his house, but states that it was a trap by Pw2 and Pw3. The accused did not explain what the complainant was doing in his house. Further the accused did not give any reason why the witness could be framing him.***
>
> ***I find the Defence lacking in merit and I dismerit*** *(sic)* ***the same".***

The issue was not specifically urged as a ground of appeal before the High Court, but the court still made reference to the defence stating;

> ***"When the appellant was put on his defence, he denied committing the offence. He claimed that he had been framed with the offence"***

The appellant's defence did not go beyond denial and he had no onus of proving his innocence. The 'submissions' he made in his unsworn statement before the trial court did not amount to evidence, but it was still considered and evaluated as evidence. It amounted to an admission that the minor was indeed in his house but he attributed her presence there to other motives by one prosecution witness, PW5. Unfortunately, the appellant did not put that evidence to the prosecution witness as she testified and, therefore, his 'evidence' remains untested. It did not

dislodge the prosecution evidence on record and the two courts below made no error in principle in the manner they considered it . We reject the ground of appeal.

The upshot is that the appeal has no merit in its totality and we order that it be and is hereby dismissed.

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

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR