IN THE COURT OF APPEAL

AT ELDORET

(CORAM: E. M. GITHINJI, HANNAH OKWENGU AND J. MOHAMMED, JJ.A)

CRIMINAL APPEAL NO. 88 OF 2016

BETWEEN

JACKSON KALENGA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

*(Appeal from the Judgment of the High Court of Kenya at Eldoret (**Kariuki, J**) dated 24th July, 2015*

in

H. C. CR. A NO. 53 of 2015)

****

JUDGMENT OF THE COURT

Background

[**1**] **Jackson Kalenga** (the Appellant) was charged before the Chief Magistrate's Court at Eldoret with defilement contrary to **Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act No. 3 of 2006, Laws of Kenya**.

[**2**] The particulars of the offence were that on the 4th day of October, 2012 at Tapsagoi location in Eldoret West District of Rift Valley Province intentionally and unlawfully caused his genital organ (penis) to penetrate the genital organ of the complainant (vagina), (**IN)** (name withheld) a child aged 8 years old. The appellant was also charged with an alternative count of committing an indecent act with a child contrary to **section 11(1) of the Sexual Offences Act No. 3 of 2006, Laws of Kenya**, the particulars of which were that on the 4th day of October, 2012 at Tapsagoi location in Eldoret West District of the Rift Valley Province intentionally touched the vagina of **IN**, a child aged 8 years with his penis.

[**3**] The Appellant pleaded not guilty to both charges and the matter proceeded to full trial with the prosecution calling four (4) witnesses, including the complainant in support of its case. In a nutshell, the evidence led by the prosecution before the trial court was that at about 7.00 pm on 4th October, 2012, the complainant was sent by her father to buy airtime credit from a shop near their home; that while on her way to the shop, the appellant, who was their neighbour, got hold of her and took her to his house; that he removed her pants and his trouser and underwear, and defiled her on the floor of his house; that she felt a lot of pain and tried to scream for help but the appellant covered her mouth with a piece of cloth; that thereafter, the appellant took her out of his house and she went to a nearby church where she stayed until the following morning when she informed the appellant's mother that the appellant had defiled her.

[**4**] It was the testimony of **DN** (D) the complainant's mother that the complainant was 8 years old; that on the material night, the complainant did not return home after her father had sent her to the nearby shops; that **D** and the complainant's father, unsuccessfully looked for the complainant in the neighborhood and reported the matter to Turbo Police Post; that the following morning, **D** continued the search for the complainant and in the course of the day she got a call from the appellant's mother, one Catherine who informed her that the complainant was at the appellant's house and that she had spent the night at a nearby church; that upon arrival at the appellant's house, **D** enquired from the complainant why she did not go back home the previous night; that the complainant informed **D** that the appellant had defiled her; that **D** took the complainant home and later to the police station where she was advised to take her to the hospital for treatment; that at the hospital, **Dr Chynthia Kimutai Kibet** (Dr Kibet) confirmed that the complainant had been defiled and filled the P3 form. **D** confirmed that the appellant was their neighbour at home and that that she had no grudge against him. On cross-examination, **D** confirmed that she and her husband had bought land from the appellant but that the defilement charge was not connected to the purchase of land.

[**5**] **PC Caroline Muhonja (PC Muhonja)**, the Investigating Officer testified that she had been at the police post on the night of 4th October, 2018 when **D** came to report that the complainant had gone missing after being sent to buy airtime credit and that the report was recorded by her colleague; that she then advised Damaris to continue looking for the complainant; that the following morning, **D** brought the complainant who informed her that she was dragged by the appellant to his house where he defiled her and that she decided to spend the night in a nearby church; that **PC Muhonja** advised the complainant's parents to take her to Turbo Health Center for treatment; that she issued a P3 form and requested for an age assessment of the complainant. On cross-examination, **PC Muhonja** testified that she arrested the appellant two weeks after the incident as he had gone into hiding.

[**6**] **Dr. Cynthia Chemutai Kibet (Dr. Kibet)**, testified that she carried out a medical examination on the complainant four days after the incident; that on 10th October, 2012 she filed a medical examination report in respect of the complainant aged 8 years; that on examination, the complainant had no injuries on any other part of her body except her genitalia which had a tear on the hymen; that she concluded that based on the injuries, there was evidence of penetration in the vagina by blunt object; that she signed the P3 form and produced it in court; that she also produced the age assessment report prepared by her colleague, **Dr. Kiyeng;** and that according to the age assessment report, the complainant's date of birth was 2004.

[**7**] In his defence, the appellant gave an unsworn statement and did not call any witnesses. He denied the offence and stated that on 4th October, 2012 he was at his place of work and could not therefore have defiled the complainant. He further stated that he was arrested after two (2) weeks and taken to the Police Station.

[**8**] The trial court found that the prosecution had proved the charge against the appellant beyond reasonable doubt, convicted the appellant and sentenced him to life imprisonment in compliance with **Section 8(2)** of the Sexual Offences Act.

[**9**] Dissatisfied with the decision of the trial court, the appellant filed a first appeal to the High Court on grounds: that the prosecution did not prove its case beyond reasonable doubt; and that the sentence imposed was not in accordance with the law.

[**10**] The State opposed the appeal on the ground that the prosecution proved the charge beyond any reasonable doubt; that there was overwhelming evidence to support both the conviction and sentence.

[**11**] The learned judge re-considered and re-evaluated the evidence and was satisfied that the prosecution proved the offence of defilement as the ingredients of the offence of defilement were proved beyond doubt and that the appellant was established to be the person who penetrated the complainant. Regarding sentence, the learned Judge found that the complainant having been established to be below 11 years of age, Section 8(2) of the Sexual Offences Act was applicable and the sentence of life imprisonment was lawful. The learned judge therefore dismissed the appeal.

[**12**] Undeterred, the appellant filed this second appeal to this Court. The appellant filed grounds of appeal, supplementary grounds of appeal and written submissions.

Submissions

[**13**] At the hearing of the appeal, the appellant acted in person while the respondent was represented by **Mr Job Mulati,** the Senior Public Prosecuting Counsel (SPPCC.) The appellant relied on his written submissions in which he contended that the prosecution did not prove its case beyond reasonable doubt; that the prosecution case was contradictory; that his defence was not considered; that the appellant and the complainant were not subjected to DNA testing and that his rights under **Article 50 (2)(g)** and **(h)** of the Constitution were infringed as he was not accorded the right to legal representation at the trial as he was not assigned an advocate by the State and at the State's expense despite the seriousness of the offence and the sentence.

[**14**] The learned Senior Assistant Director of Public Prosecutions (SADPP), **Mr. Mulati** opposed the appeal and submitted that there were concurrent findings of fact of the two lower courts; that the evidence regarding when the offence occurred was not contradictory as the charge sheet indicates that the complainant was defiled on 4th October, 2012; that the complainant, her mother, **D** and the Investigating Officer, **PC Muhonja** all testified that the appellant was defiled on 4th October, 2012; that all the ingredients of the offence of defilement were present; that the age of the complainant was 8 years, that penetration was proved and that the appellant was identified by recognition as he was well known to the complainant and **D** as they were neighbours.

[**15**] On the ground that the appellant and the complainant were not subjected to DNA testing, counsel submitted that the provision under ***Section 126 of the Evidence Act***, is not couched in mandatory terms. On the ground that the appellant's right to a fair trial under **Article 50 (2) (g) and (h) of the Constitution** was infringed as he was not accorded the right to legal representation, counsel submitted that the authorities are clear that the right to legal representation is given gradually over time.

Determination

[**16**] We have considered the appeal, the submissions, the authorities cited and the law. This being a second appeal, this Court's jurisdiction is limited to matters of law pursuant to ***Section 361(1) (a) of the Criminal Procedure Code***. We reiterate what this Court stated in **Dzombo Mataza v R [2014] eKLR:**

> ***"As already stated, this is but a second appeal. Under the law we are only concerned with matters of law and not fact. Put differently, in a second appeal such as this one, matters of fact are for the trial court and the first appellate court – see Okeno v Republic (1972) E.A. 32.***

By dint of the provisions of section 361(1)(a) of the Criminal Procedure Code our jurisdiction does not allow us to consider matters of fact unless it be shown that the two courts below considered matters of fact that should not have been considered or failed to consider matters that they should have considered or that looking at the evidence they were plainly wrong."

[**17**] The appellant was charged with defilement contrary to **section 8(1)** as read with **section 8(2)** of the Sexual Offences Act. The onus was on the prosecution to prove the particulars of the charge.

Sections 8(1) and **8(2)** of the Sexual Offences Act provide as follows: -

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

8(2). A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life."

[**18**] The onus was on the prosecution to establish the following ingredients in order to prove the charge; that there was an act that caused penetration with a child aged 11 years or less and that the identity of the perpetrator was proved to be the appellant. In the instant appeal there was sufficient evidence adduced by the complainant, D, and Dr. Kibet, who examined the complainant and confirmed that she suffered injuries on her private parts which proved that there was penetration.

[**19**] Regarding the age of the complainant, the Medical Doctor (Dr Kibet) who examined the complainant, and produced the signed P3 form which indicated the complainant's age as 8 years. Dr Kibet also produced the complainant's age assessment report which indicated that the complainant was born in 2004. The complainant and her mother, D both testified that the complainant was 8 years old. There was therefore sufficient evidence to prove that the complainant was 8 years old, and therefore was under 11 years of age.

[**20**] Regarding the identity of the person who defiled the complainant, it was the complainant's testimony that the appellant defiled her; and that she knew the appellant as they were neighbours and gave his name to her mother, D when she reported that she had been defiled. It was D' testimony that the complainant informed her that the appellant had defiled her; that the appellant's mother called her to inform her of the complainant's whereabouts and that the complainant had spent the night in a church; and that the complainant was at the appellant's home. The identity of the offender was therefore clearly established. We are satisfied that all the ingredients of the offence of defilement were established to the required standard and that the concurrent findings of the two courts below were based on credible evidence.

[**21**] Regarding the appellant's contention that his defence was not considered, the trial court stated as follows:

"The complainant succinctly narrated to the court the events leading to defilement. In my view, she does not appear to be a person who was couched on what to say in court…It is not lost on me that the accused did not put forward his defence of alibi at any (sic) early stage in this case, at the stage of plea taking so that it could be tested by PC Caroline *[Muhonja]***. *In my view the alibi defence of the accused is an afterthought and I believe the complainant's evidence that the accused was at the scene of crime on the day and time he is alleged to have defiled her. I found the complainant a candid and honest witness whose evidence is credible as opposed to the accused who in my view is a liar."***

We find that the trial court considered the appellant's defence and rejected it on the ground that from the facts and the evidence adduced, it was not truthful.

[**22**] On the ground that the appellant and the complainant were not subjected to undergo DNA testing to prove the prosecution case, there is settled law that defilement is proven by way of evidence and not by DNA. See **AML v Republic [2012] eKLR (Mombasa)**

[23] Section 36 (1) of the Sexual Offences Act provides as follows:

"Notwithstanding the provisions of section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence." **[Emphasis added]**

[**24**] In ***Evans Wamalwa Simiyu v Republic [2016]*** this Court observed that: -

"the power to order an Accused person to undergo DNA testing is discretionary and there is no mandatory obligation on the court to order DNA testing in each case. In our view, in the case of the appellant DNA testing was not necessary. This is because the minor complainant identified the appellant who was known to her as the person who sexually violated her. The trial magistrate who saw and assessed the demeanor of the witnesses believed the complainant that it was the appellant who violated her."

[**25**] Similarly, in the instant case, the complainant identified the appellant who was known to her as her neighbour as the person who defiled her. The trial court was satisfied that the complainant was telling the truth as per ***section 150 of the Evidence Act*** and observed that the complainant while giving *viva voce* evidence, was a **'candid and honest witness'** and that there was no proof of bad blood between her family and that of the appellant. On re-evaluation of the evidence, the High Court also found that the prosecution had proven its case beyond reasonable doubt.

Accordingly, we find that there was no requirement for the appellant and the complainant to undergo DNA testing to prove that the appellant committed the offence. From the evidence, the prosecution had proved its case to the required standard.

[**26**] On the question whether the State was obliged to have an advocate assigned to the appellant at its cost at the time when he was arraigned in Court. ***Article 50 (2) (g) and (h) of the Constitution*** provides as follows: -

> ***"Article 50 (2) Every accused person has the right to a fair trial, which includes the right***
>
> ***(g) to choose, and be represented by an advocate and to be informed of this right promptly.***
>
> ***(h) to have an advocate assigned to the accused person by the State and at the States' expense if substantial injustice would otherwise result, and to be informed of this right."***

From the above, it is clear that the Constitution guarantees an accused person the right to legal representation as well as the right to have an advocate assigned by the State and at the State's expense if substantial injustice would otherwise result. This was confirmed by this Court in the case of **David Macharia Njoroge v Republic [2011] eKLR**, which found that provision of free legal representation to an accused person was necessary especially in instances where an accused person faces a capital offence that carries with it a penalty that entails loss of life.

[**27**] This Court also observed that the said provision would remain aspirational until **the enactment of legislation to give effect to the provision. See Douglas Kinyua Njeru v R. [2015] eKLR. Subsequently, in 2016, the *Legal Aid Act, Number 6 of 2016* was passed and commenced on 20th May, 2016. See Thomas Alugha Ndegwa v R [2016] eKLR**.

In **Joseph Kakei Kaswili v R [2017] eKLR** this Court, faced with the same issue and relying on the foregoing cases concluded that: -

> ***"…although the appellant was arraigned in Court in October, 2010, and therefore after the promulgation of the Kenya Constitution 2010, that apparently guaranteed him free legal aid. But as at that point in time, the said right was merely aspirational. It is only recently that Parliament has put in place legislation to actualize the right guaranteed under Article 50(1) (2) (h), in the form of the Legal Aid Act No. 6 of 2016, effective 20th May, 2016. It is therefore our finding that the State had no obligation to grant free legal aid to the appellant as of right as at the time he was arraigned in court."***

[**28**] In the instant appeal, the Appellant was arraigned in Court in October, 2012 after the promulgation of the ***Constitution of Kenya, 2010*** but before the enactment and commencement of the ***Legal Aid Act No. 6 of 2016***. Accordingly, we find that the State had no obligation to grant the accused free legal representation at the time he was arraigned in court as at that time the right was only aspirational.

[**29**] As regards sentence, the complainant having been established to be under the age of 11 years the sentence imposed of life imprisonment was lawful.

The upshot is that we find no merit in this appeal and do therefore dismiss it in its entirety.

Dated and delivered at Eldoret this 6th 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.

DEPUTY REGISTRAR.