IN THE COURT OF APPEAL

AT KISUMU

(CORAM: GITHINJI, MAKHANDIA, & J. MOHAMMED, JJ.A.)

CRIMINAL APPEAL NO. 184 OF 2014

BETWEEN

LEONARD OTIENO NDOGA .....APPELLANT

AND

REPUBLIC .....RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Kisumu

(Chemitei, J.) dated 14th July, 2014

in

H.C.CR.A. No. 62 of 2013)

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JUDGMENT OF THE COURT

1. The appellant, **Leonard Otieno Ndoga** was charged with the offence of defilement contrary to **section 8 (1)** as read with **section 8 (3)** of the Sexual Offences Act. The particulars of the offence were that on 20th May, 2012 in Siaya district of the then Nyanza province, he intentionally caused his penis to penetrate the vagina of LAO (name withheld) a child aged 17 years. He was convicted and sentenced to 15 years imprisonment.

2. Aggrieved by the judgment, the appellant filed a first appeal in the High Court where Chemitei, J dismissed it, upheld the conviction and confirmed the sentence by the trial court. Undeterred, the appellant filed this appeal. In his memorandum of appeal the appellant listed 9 "grounds" of appeal but in our view only 3 thereof merit our attention. He faulted the 1st appellate Court for failing to find that the charge against him was not proved beyond reasonable doubt; failing to find that he was now a reformed person; and that the age of the complainant was not proved.

Submissions

3. On 27th March 2019 the appeal came before us for plenary hearing. The appellant who appeared in person relied on his supplementary petition and his written submissions filed on 21st May 2019. It was his submissions that he did not commit the offence. He then proceeded to allude to what may be considered as mitigation. He indicated that he had done tests in prison and studied religious studies and obtained a Diploma in Biblical Studies; that he was a parent to young children; that he was reformed and would like to serve Kenya; that he had been in prison for 8 years and has been commended for good behavior.

4. In conceding to the appeal, **Mr. Kakoi** the Principal Prosecution Counsel relied on his submissions filed on 12th November 2018. He conceded that there was no evidence establishing the age of the complainant other than the P3 form which indicated that she was 17 years; that the P3 form was not conclusive evidence of the complainant's age; that it was not clear whether the complainant was 17 or 18 years, and hence the benefit of doubt should go to the appellant.

5. In his brief reply, the appellant submitted that the complainant had three children and that she was pregnant at the time of the alleged commission of the offence. He complained that he was not given the opportunity to relay that information to the lower courts.

Determination

6. We have carefully considered the record of appeal, the submissions by the appellant and counsel for the respondent, authorities cited and the law. This being a second appeal, **section 361(1)** of the **Criminal Procedure Code** enjoins us to consider only questions of law. We are in this regard guided by the decision in **M'Riungu v. Republic (1983) KLR 455** where this Court stated;

> ***"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."***

7. The evidence as adduced in the trial court was that the complainant was a house help to the appellant's mother. On the material day the appellant arrived from Nairobi at around 11pm and was served food by the complainant. That while the complainant was preparing a place for the appellant to sleep the appellant locked the door and defiled her and threatened to stab her with a knife should she raise alarm. The appellant then gave the complainant Kshs. 50/-. The complainant immediately reported the incident to the appellant's mother who then asked her not to report the matter to the police. The complainant also informed the appellant's sister and the shopkeeper, **Richard Onyango Ogola (Richard)** who then accompanied her to the police station. The complainant had not met the appellant before although she knew that he was her employer's son.

8. The matter was reported at Siaya police station and the appellant was arrested by **P.C. Peter Kosen (P.C. Kosen)**. In the meantime the complainant was treated at Siaya District Hospital. On examination, **Nyambwembe**, the then Clinical Officer at Siaya District Hospital found that there were lacerations on the inside of the vaginal wall with a whitish discharge. It was also found that the complainant was pregnant at the time of defilement.

9. In his unsworn statement of defence the appellant denied committing the offence and stated that on the material day he went home to repair his door; that after eating he went to look for a 'fundi' (repairman) and when he came back he went to sleep; that the following morning the complainant was sent to the shop by the appellant's mother but she did not return and he was arrested at around 3pm. That he had disagreed with **Richard** in 2010 and that is why he was being framed.

10. The trial court and the 1st appellate court had no hesitation in finding that the complainant was defiled as per the medical report. That there was no doubt that the appellant was in the same home with the complainant on the material evening; there was no doubt as to the identity of the assailant as the complainant knew the appellant was the son of her employer who arrived home late on that night and was served with food by the complainant. There was no reason established to warrant the complainant to frame up the appellant in place of another person.

11. Be that as it may, the record shows that the trial Court did not address its mind as to the age of the complainant. It was completely silent on this aspect. As regards the 1st appellate Court, the learned Judge stated as follows as regards the complainant's age:

> ***"Equally, the fact that PW1 was pregnant at the time of the incident was not disputed. This therefore concludes the argument in regard to the age of the complainant. Although there was no evidence to show her exact age from the available dates on record, it's (sic) highly doubtful if she was over 18 years.***

Consequently, the fact that the age assessment of the complainant was not undertaken does not in any way help the appellants defence."

12. In this Court's decision of **Hadson Ali Mwachongo v Republic [2016]eKLR** it was held that:

> ***"Before we conclude this judgment, it is necessary to say a word on computation of the age of the victim. The Sexual Offences Act provides for punishment for defilement in a graduated scale. The younger the victim, the severe the punishment. Where the victim is aged 11 years or less, the prescribed punishment is imprisonment for life. Defilement of a child of 12 years to 15 years attracts 20 years imprisonment while defilement of a child aged 16 years to 18 years is punishable by 15 years imprisonment. Rarely will the age of the victim be exact, say exactly 8 years, 10 years, 13 years, etc., as at the date defilement. It will be a few days or months above or below the prescribed age. The question then arises, is a victim who is, for example, 11 years and six months old at the time of defilement to be treated as 11 years old, or as more than 11 years old? If the victim is treated as more than 11 years old, to what term is the offender to be sentenced since the victim has not attained 12 years for which a sentence is prescribed. In the same vein, in the present appeal where the victim was aged 15 years old, is the appellant to be sentenced as if the victim was exactly 15 years or as if she was 16 years old?...a victim who is days or months above 11 years will be treated as 11years old so long as he or she has not attained 12 years of age. On the same reasoning, the victim in this case who was 15 years, 6 months and 13 days old must be treated to be 15 rather than 16 years old."***

13. It is not disputed that the age of the complainant was not assessed by **Nyambwembe**, the Clinical Officer. Indeed, the P3 form produced by **Nyambwembe** did not provide the "estimated age of person examined." The complainant indicated that she was 17 years old. She however did not indicate her date of birth nor did she produce any documentary proof to this effect. Furthermore, in her evidence she stated: ***"I am 9 months pregnant now and I have a child born in January 2011. The child is one year 10 months old now. The pregnancy I have is not for accused."*** Given the fact that the complainant was already a mother with one child and was expecting another child, it is our view that it was crucial to establish her age. This omission is glaring and thus conceded to by the State and rightly so, in our view. It is in view of this that we find the appellant's appeal is meritorious.

14. Accordingly, we allow the appeal, quash the conviction and set aside the sentence. We order that the appellant be set at liberty forthwith unless he is otherwise lawfully held.

Dated and delivered at Kisumu this 31st day of July, 2019.

E. M. GITHINJI

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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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