IN THE COURT OF APPEAL

AT ELDORET

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

CRIMINAL APPEAL NO. 92 OF 2015

BETWEEN

JOSEPHAT WANJALA OLBAI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the Judgment of the High Court of Kenya

at Kitale, ***(N. R. O. Ombija, J)*** *dated 3rd June, 2011*

in

HCCRA NO. 30 OF 2009)

****

JUDGMENT OF THE COURT

Background

[1] This is a second appeal by **Josephat Wanjala Olbai** (the appellant) following the dismissal of his first appeal by the High Court against his conviction and sentence by the Principal Magistrate's Court at Kitale, for the offence of defilement contrary to **section 8(1) as read with section 8(2)** of the Sexual Offences Act.

[2] The particulars of the charge against the appellant were that on the 25th day of September, 2007 in Uasin Gishu District within Rift Valley Province he caused penetration with his genital organ namely, penis into the genital organ namely, vagina of the complainant, **CNW** (name withheld) a girl aged four (4) years.

[3] The prosecution called a total of six (6) witnesses to establish its case. The complainant's mother, **MNW** testified that she went to her house at about 1 pm to give her children lunch; that she found the appellant carrying water in a basin; that **CNW** was standing next to the appellant as he washed his legs; that **MNW** sent the appellant to buy diesel for the posho mill; that as she tried to remove **CNW's** petticoat and dress, **CNW** who looked gloomy started crying; that upon interrogation regarding what had happened to her, **CNW** informed her mother, **MNW** that "**Jose"** had knocked her down on her grandmother's kitchen and injured her in her private parts; that the appellant herein was referred to as **"Jose"** by children in their neighbourhood; that she immediately took **CNW** to **FN's** house (**CNW's** grandmother) whereupon they both examined **CNW** and found that her thighs and private parts were swollen; that her pants were wet and soiled with male fluids; that she requested her husband, **MN** to apprehend the appellant whereupon he was taken to the police station; and that **MNW** and **FN** rushed **CNW** to hospital. It was **MNW's** testimony that the appellant had been employed by **FN** for a period of less than one month and that she did not know the appellant before he was employed by **FN.**

[4] The evidence of **CNW** (the complainant) was that she was a pupil at [particulars withheld] Nursery School; that one day **MNW**, her mother left her at home to take care of her younger sisters; that the appellant was also in the compound; that the appellant did "*tabia mbaya*" to her (bad manners); that he took her to her grandmother's house, placed her on the bed; removed her pant and did bad manners to her and she felt pain; that the appellant left her on the bed and she left the appellant's house and went to her home; that when her mother, **MNW** returned, she informed her what had happened and **MNW** bathed her and took her to hospital. **CNW** pointed out **Jose** (the appellant) in court.

In cross examination, **CNW** confirmed that she knew the appellant and upon being asked **her** who "wronged" her she answered that it was **Jose**, the appellant and that **Jose** referred to the appellant.

[5] MN who is **CNW's** father testified that on the material day at about 2 pm, his wife, **MNW**, called him, to urgently rush home; that upon reaching his home he was informed that **CNW** had been defiled by their employee, the appellant; who had been sent to buy diesel; that he rushed to apprehend the appellant and thereafter escorted him to the police station while **CNW** was taken to hospital for treatment; and that **CNW** continued to attend hospital for two (2) months for review.

[6] Francis Banchibo (Francis) was the clinical officer at Kitale District hospital who examined and treated **CNW** and observed that **CNW** was a small child who was deeply traumatised and was in pain; and that he assessed her age as between 3½ to 4 years. **Francis** observed that both of **CNW's** labia were swollen and tender and inflamed; that she had discharge from her genitalia; and that the hymen was broken. He concluded that **CNW** had been defiled and filled the P3 form.

[7] The evidence of **FN, CNW's** grandmother was that she lived in the same compound as her son, **Francis** and his family; that her daughter in-law, **MNW's** house and found **CNW** naked and shivering; that upon examination, she found that **CNW** had male discharge in her vagina which was swollen; that upon inquiry regarding who had assaulted her, **CNW** informed her that it was **Jose**; **MNW** testified that she knew who **Jose** was; that **Jose** referred to the appellant who had been her employee for about two (2) weeks; that when the appellant was apprehended and brought to their compound she questioned him and he prayed for forgiveness.

[8] The evidence of **CPL Lena Kangogo (CPL Kangogo)**, the investigating officer was that she got a report that a child aged four (4) years had been defiled; that the child victim was swollen on her private parts and had a white discharge; that she was in pain when **CPL Kangogo** tried to examine her; that upon inquiry from **CNW** who had assaulted her, **CNW** informed her that Jose was the short name for **Josephat**; that she ascertained that **Jose** was employed by **CNW's** grandmother; that she questioned the appellant and placed him in the cells and issued **CNW** with a P3 form; that **CNW** was examined at Kitale District Hospital and the doctor confirmed that **CNW** had been defiled; that after investigations, **Cpl Kangogo** was satisfied that the appellant had committed the offence.

The appellant was deemed to have a case to answer as per section 211 of the Criminal Procedure Code (CPC) and was put on his defence. The appellant opted to give an unsworn statement claiming that his employer owed him money and was looking for ways to avoid paying the same and therefore framed him with the offence of defilement.

[9] The trial court dismissed the appellant's defence as a sham and confirmed that the P3 form together with evidence led by the prosecution corroborated the charge against the appellant. The appellant was found guilty of the charge of defilement, convicted and sentenced to life imprisonment.

[10] Aggrieved by that decision, the appellant appealed to the High Court on the grounds that hearsay evidence was used to convict him; that the sentence meted out on him was harsh considering that he had stayed eleven days in police custody before being presented to court; that the investigation carried out was not sufficient to convict; that there was no eye witness in the case, and that the prosecution placed the burden of proof on him. The learned Judge re-evaluated the evidence before him and found that evidence of **CNW** was corroborated by the medical evidence adduced by Francis; that the minor complainant was of tender years; and that the conviction and sentence meted out by the trial court were lawful. The learned Judge found that the appeal lacked merit and dismissed the same both on conviction and sentence.

[11] Aggrieved by that decision, the appellant filed this second appeal challenging the High Court judgment on the grounds that the prosecution case was not proved to the required standard; that the charge sheet was defective as it had the words "intentionally" and "unlawfully" missing in the particulars of the charge; that the names of the alleged victim in the charge sheet are at variance with those given by the complainant and the same was not amended as per the provisions of section 214 of the CPC; that the age of the minor victim was not proved; that the 1st appellate court failed to comply with section 36 of the Sexual Offences Act by accepting the evidence of the clinical officer without forensic testing to link the appellant to the offence; that as a result, the P3 form presented was unreliable and inconclusive; that there were no independent witnesses called to testify and that the appellant's defence was disregarded.

Submissions

[12] At the hearing of the appeal, the appellant was unrepresented while **Ms R. N. Karanja**, the learned Prosecuting Counsel represented the State.

[13] The appellant relied on his grounds of appeal and written submissions. It was the appellant's submission that the charge sheet was defective as the words "intentionally" and "unlawfully" are missing in the particulars of the charge which defect is incurable under Section 382 of the Penal Code; that the names of the complainant differed in her evidence and in the charge sheet; that there were no exhibits produced in evidence; that the trial court erred by failing to observe that the appellant was prejudiced by failure to arraign him in court within 24 hours contrary to Article 49 of the Constitution; that the age of the minor complainant was not proved by any credible means, thereby occasioning a miscarriage of justice; that there were no independent witnesses called to testify in support of the prosecution's case; that his defence was not considered; and that the sentence meted out by the trial court was manifestly harsh and excessive.

[14] Ms Karanja opposed the appeal and submitted that the complainant was aged between three and a half (3½) years and four (4) years; that this was the evidence of the clinical officer, **Francis Banchibo (Francis)** who produced the P3 Form; that it is undisputed that the complainant was a child of tender years; that this Court has held that age is a question of fact and the complainant's age was therefore proved by the evidence adduced by the prosecution witnesses.

[15] On penetration, it was counsel's submission that the clinical officer, **Francis** testified that on examining the complainant he found injuries on her genitalia, her hymen was broken and spermatozoa was found in her private parts.

[16] Counsel submitted that from the entirety of evidence, the offence committed was a crime of opportunity as the appellant was an employee of the complainant's grandmother; that the incident took place in the early afternoon; that the complainant was consistent in naming the appellant as her assailant to her mother, **MNW** and to her father, **MN**; that the appellant was arrested shortly after the incident; and that the prosecution proved its case beyond all reasonable doubt.

[17] On the appellant's submission that the charge sheet was defective as the words "intentionally" and "unlawfully" were not indicated in the particulars of the charge, counsel submitted that the said words are not required to be indicated in the charge sheet; and that all that is required is proof of penetration.

Regarding the anomalies between the name of the complainant in the charge sheet and in her evidence, counsel submitted that the difference was between the names N and W; and that the anomaly was not material as the appellant knew who the complainant was.

[18] Counsel submitted that the prosecution proved its case beyond all reasonable doubt and the sentence of life imprisonment meted out was lawful.

Determination

[19] We have carefully considered the appeal, the submissions, the authorities cited and the law. Section 361 of the Criminal Procedure Code states as follows:-

> **"361. (1) A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section –**
>
> a. **on a matter of fact, and severity of sentence is a matter of fact; or**
>
> b. **against sentence, except where a sentence has been enhanced by the High Court, unless the subordinate court had no power under section 7 to pass that sentence."**

[20] 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.

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

> **"8(1). 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."**

[21 The prosecution had to establish the following ingredients to prove the charge; that there was penetration committed; that the female person was under the age of eighteen (18) years and the identity of the perpetrator. In the instant appeal there was sufficient evidence adduced by the complainant, her mother **MNW** and the clinical officer, **Francis** which indicated that the complainant was defiled and that she suffered injuries on her private parts which confirmed that there was penetration.

[22] Regarding the age of the complainant, the trial magistrate observed during *voire dire* that the complainant was very young (about 4 years); that she understood the virtue of telling the truth; that the clinical officer, **Francis** who filled the P3 form indicated the complainant's age as 3½ to 4 years. While there was no documentary evidence to prove the complainant's age, there was sufficient evidence to prove that she was about 4 years old. It was therefore clear that the complainant was under 11 years of age.

[23] Regarding the identity of the person who defiled the complainant, it was the complainant's testimony that the appellant defiled her, that she knew the appellant and gave his nick name **Jose** to her mother. It was **MNW's** testimony that the complainant informed her that the appellant had defiled her and that the appellant was an employee of the complainant's grandmother, **FN**. It was **FN**'s testimony that the appellant was known in the neighbourhood as **Jose**. The identity of the appellant as the person who defiled **CNW** was therefore proved.

[24] It was the appellant's claim that he was convicted of a defective charge as the words "intentionally" and "unlawfully" were not indicated in the particulars of the charge and that this irregularity was incurable under **section 382** of the **Criminal Procedure Code.**

[25] The offence of defilement is unlawful and the absence of the words "intentional" and "unlawful" in the particulars of the charge do not render the charge defective. The words *'intentional'* and *'unlawful'* are not ingredients of the offence of defilement under section 8(1) of the Sexual Offences Act. Defilement itself is unlawful. Those words are only elements of a charge of rape and attempted rape under section 3(1) and section 4 of the Sexual Offences Act respectively.

[26] The appellant further claimed that the charge was defective as there was an anomaly in the complainant's names in the charge sheet and in her evidence. The name **W** is indicated in the charge sheet while the complainant in her evidence introduced herself as N. From the record, the complainant's father is WN which would explain the anomaly.

[27] The appellant complained that his constitutional rights were violated as he was not produced in court within the time provided under **Article 49 & 50** of the **Constitution**. We note that this ground was not taken up either in the trial court or in the first appellate court. In any

case, the remedy if any, for such constitutional violations, lies in a separate claim for damages, and does not provide a ground for acquittal for the criminal charge for which the arrest was carried out. On the appellant's claim that his defence was not considered, it is apparent from the record that the trial court considered the appellant's defence and dismissed it as untrue. The High Court on the other hand, considered and rejected the defence on the basis that the evidence adduced against the appellant was overwhelming.

[28] We are satisfied that the High Court properly re-evaluated and considered the evidence that was adduced before the trial court and came to its own conclusion. There was clear evidence from CNW whose evidence both the lower courts believed to be truthful that the appellant penetrated her genital organs. CNW's evidence was also consistent with the evidence of MNW and that of the clinical officer who examined CNW. All the ingredients of the offence of defilement having been established against the appellant to the required standard, the appellant's conviction was proper.

[29] On the ground that the sentence that was imposed upon the appellant was unlawful, CNW's age was established to be under the age of 11 years. **Section 8(2)** of the **Sexual Offences Act** (reproduced at paragraph 20) provides for a minimum sentence of life imprisonment. To that extent the sentence imposed by the trial magistrate was lawful. However, we are alive to this Court's recent decisions arising from the application of the Supreme Court's decision in **Francis Karioko Muruatetu & others vs Republic [2017] eKLR**, in regard to mandatory sentences under the Sexual Offences Act (See **Dismus Wafula Kilwake vs Republic, Criminal Appeal No. 129** of **2014** and **Criminal Appeal No. 312** of **2018, Evans Wanjala Wayonyi vs Republic).** We have considered whether this is an appropriate case where this Court should intervene. CNW's age was about 4 years at the time of the unfortunate incident. The appellant preyed on an innocent child who was left hurt and traumatized. The burden of the psychological trauma will be with CNW for the rest of her life. We find that the sentence imposed on the appellant though severe, was commensurate with the circumstances of the offence.

[30] Accordingly, we find no merit in this appeal, and dismiss the appeal against both conviction and sentence.

Dated and delivered at Eldoret this 25th day of July 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.