IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: VISRAM, KOOME & MURGOR JJ.A)

CRIMINAL APPEAL NO. 18 OF 2017

BETWEEN

KASUNGU KALAMA JEFWA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from judgment of the High Court of Kenya at Mombasa (Ongeri, J)

dated 2nd August 2016 in

HCCRA No. 152 of 2015)

****

JUDGMENT OF THE COURT

Kasungu Kalama Jefwa, ***the appellant***, was charged with the offence of defilement contrary to ***section 8 (1)*** and ***(3)*** of the ***Sexual Offences Act, 2006***. The particulars of the offence are that on diverse dates between 1st November, 2014 and 15th January, 2015 in Kilifi County within the Coast Region, he unlawfully and intentionally committed an act which caused penetration of a male genital organ namely a penis into the female genital organ namely vagina of ***the complainant, AKN***, (name withheld) a girl aged 15 years.

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,*** in that on diverse dates intentionally and unlawfully touching her vagina with his penis.

In brief, the facts of the case are that, between November, 2014 and 15th January, 2015, the appellant would have sexual intercourse with AKN at her home during the day, and on other days, they would have intercourse in a nearby thicket. The appellant would trick her to go and collect firewood, and then force her to undress, after which he would defile her. He would then threaten her that he would kill her if she told anyone. In January 2015, ***JF (PW2***), a standard 6 pupil caught them in the act, and on seeing him, the pair ran off, in different directions. He later informed AKN's uncle of what he had seen.

In the same month AKN's father, PW3 learnt that his daughter was pregnant, and that his cousin the appellant was responsible. He reported the matter to the village elder, who in turn reported it to the head teacher. They were referred to Kaloleni police station and St. Luke's Mission Hospital by Sgt. ***Jacob Okongo (PW4)*** who received the report. ***Patrick Bashishi,*** (indicated as PW 4 instead of PW5) a clinical officer, examined AKN, and completed the P3 form. He found that she was visibly pregnant, her hymen was absent, the AIDS tested - negative and the pregnancy test -positive.

In his defence the appellant gave an unsworn statement and did not call any witnesses. He stated that he was 20 years old, and that on the material

days he was in Mombasa and not at Mbiri Mbiri village; that in December, 2014 he returned to the village, and thereafter went back to Mombasa. He did not meet AKN on the dates in question.

Upon considering the evidence, the learned trial magistrate found that the offence had been proved to the required standard and, upon

conviction sentenced the appellant to 20 years imprisonment. The appellant appealed to the High court, which upheld the conviction and sentence imposed by the trial court.

The appellant now prefers an appeal to this Court on the grounds that his conviction was based on a violation of his rights as a child under ***section 190 (1)*** of the ***Children's Act*** and ***Article 53 (1)*** of the ***Constitution***; that the conviction did not take into account that a DNA test was not conducted on him to ascertain the paternity of the complainant's child; that the prosecution witnesses gave unsworn evidence contrary to ***section 151*** of the ***Criminal Procedure Cod***e; that the exhibits were not produced contrary to ***section 63*** of the ***Criminal Procedure Code***, and finally that the sentence was harsh and excessive.

In the written submissions that were presented in Court, the appellant contended that he was below the age of 18 years at the time of his conviction, and that his age was not ascertained prior to the trial. As a consequence, his fundamental rights were violated by the unlawful detention that followed his conviction. It was further submitted that a DNA test was not carried out to ascertain whether he was responsible for impregnating the complainant, which was contrary to the requirements of ***Section 36*** of the ***Sexual Offences Ac***t.

Next the appellant submitted that the witnesses who testified did so without taking an oath; that PW2, William Karisa and Patrick Bashishi all testified without having taken an oath. Regarding the exhibits, it was submitted that they were not produced in court during the trial, and as a consequence, the prosecution was not entitled to rely on the exhibits; that despite there being a list indicating 13 witnesses and exhibits, none of the exhibits were produced. As a consequence, the Court was urged to reevaluate the evidence and to arrive at its own independent conclusion as to whether the prosecution had proved its case.

Lastly, the appellant submitted that the sentence imposed on him was harsh and excessive, particularly having regard to the Supreme Court's decision in ***Francis Karioko Muruatetu & Another vs Republic*** ***SC Pet. No. 16 of 2015*** where the court found that imposition of the mandatory death sentence was unconstitutional.

Opposing the appeal, Senior Prosecution Counsel ***Mr. Isaboke*** submitted that, the offence was proved to the required standard. The complainant was a minor, an age assessment was undertaken which showed that her age at the time was 15 years; that further, the treatment notes and the P3 form proved that the complainant was defiled. It was submitted that the complainant testified without wavering, and her evidence was supported by PW2 who caught them flagellate de lento; that the appellant had threatened the complainant with death if she disclosed what he had done to her. In addition, counsel asserted, she had testified that the appellant had defiled her six other times and that it was when she was found to be pregnant that she informed her step- mother. On the conduct of a DNA test so as to connect the appellant to the offence, counsel expounded that the trial court believed the complainant and PW2, and found that their evidence was sufficient to convict the appellant.

On the appellant's age, counsel asserted that the evidence showed that the appellant was 20 years of age and that therefore he was not a minor within the meaning of the Children's Act.

In this second appeal, the jurisdiction of this Court is confined to questions of law only. See ***Joseph Njoroge vs Republic*** ***[1982] KLR 388.*** In considering the appellant's grounds of appeal and the parties' submissions, it is apparent that the issues for determination are;

i) whether the appellant was a minor;

ii) whether the evidence of prosecution witnesses who testified without taking an oath was admissible;

iii) whether the exhibits were produced in court;

iv) whether a DNA test on the complainant's child was necessary to connect the appellant with the offence; and

v) whether the sentence was harsh and excessive.

On the issue of the appellant's age, the appellant contends that he was a minor at the time of conviction and that his rights as a child were violated which was contrary to under ***Article 53 (1)*** of the ***Constitution*** and ***section 190 (1)*** of the ***Children's Act***, it is instructive that this issue was not at any time raised in the lower court. It has only now been raised in this Court. But that said, since this appellant's age is a matter of law, we consider it to be an essential matter for our determination.

With reference to his age, in his defence, the appellant testified that he was 20 years of age, and during mitigation he informed the trial court that;

"I am aged 20 years and I am the first born in the family. My father died long ago and I fend for my family. I also educate my siblings".

In addition, the Prosecutor stated, *"The accused had national identification card."* Besides this evidence, there was nothing on the record

that showed that he contested his age or informed the trial court that he was a minor. By his own admission, and given that he possessed a national identity card, a fact which he did not deny, the evidence remains uncontroverted that he was aged 20 years, and therefore was an adult. Consequently, the allegation that his rights were violated on account of being a child does not arise, we consider it to be an afterthought, and therefore this ground fails.

Turning to whether PW2, William Karisa and Patrick Bashishi testified without taking an oath, when PW2 testified, the trial court appreciated that he was a minor of 17 years of age. To establish whether he understood the meaning of taking an oath, after conducting a *voire dire* examination of PW2, the trial magistrate was satisfied that he was intelligent and understood the meaning of an oath and the duty to tell the truth. Thereafter, PW2 was affirmed before testifying.

In ***Macharia vs Republic [1976] KLR 209***, Kneller & Platt, JJ (as they were then) explained;

> ***"It [voir dire] must be a preliminary examination of a witness by the magistrate in which the witness is required "to speak the truth" with respect to questions put to him, or her, so that the magistrate can discover if he, or she, is competent (e.g. she is not too young, or she is not insane) to give evidence and should be sworn or affirmed (according to whether or not she is a Christian, or of any other, or no, faith, and understands the nature and obligation of an oath to tell only the truth)."***

PW2 having been duly affirmed, meant that the appellant's assertion that he did not take an oath is therefore incorrect. This ground therefore fails.

Regarding William Karisa and Patrick Bashishi unsworn evidence, it is true that the record does not indicate that they testified under oath. Clearly, it was a mistake on the part of the trial magistrate not to specify whether their testimony was sworn or unsworn. Needless to say, we are satisfied that it was not fatal to the prosecution's case.

> ***Section 151*** of the ***Criminal Procedure Code***, stipulates that;
>
> ***"Every witness in a criminal cause or matter shall be examined upon oath, and the court before which any witness shall appear shall have full power and authority to administer the usual oath".***

In the case of ***Amber May vs Republic (1981) KLR*** (Law Miller & Potter, JJA.) as follows;

> ***"An unsworn statement is not, strictly speaking, evidence and the rules of evidence cannot be applied to an unsworn statement. It has no probative value, but it should be considered in relation to the whole of the evidence. Its potential value is persuasive rather than evidential. For it to have any value it must be supported by the evidence recorded in the case."***

In other words, for unsworn evidence to be admissible, there must be other evidence to corroborate the unsworn evidence. See ***Oloo vs R (2009) KLR 416.***

That said, though the evidence of William Karisa and Patrick Bashishi was unsworn, there is no question that there was sufficient evidence from PW2 and AKN to corroborate it, and consequently, the two courts below cannot be faulted for having relied upon it when convicting the appellant. This ground therefore lacks merit.

In considering the appellant's complaint that copies of exhibits were not included in this Court's record, we find on reviewing this record it is true that the exhibits were not included. However, once again we do not consider that the omission is fatal to the prosecution's case. This is because the proceedings show that during the trial, the complainant's father PW3, Sgt. Jacob Okongo, and Patrick Bashishi all referred to Exhibit 1- the P3 Form, Exhibit 2 - the Treatment Notes and Exhibit 3 - the Age Assessment report.

With reference to the offence, in its judgment the trial court stated that;

> ***"The complainant was examined and established that the hymen was absent and the uterus was bulky signifying that the complainant was pregnant. To this end there (sic) is clear that the complainant was defiled."***

The court went on to state with respect to Exhibit 3 which was the age assessment report that;

> ***"The clinician (PW3) who examined the complainant produced an age assessment report and put the age of the complainant at fifteen years."***

It is apparent from the above that the afore stated exhibits were produced before the trial court, and based on this evidence the trial court was satisfied that it conclusively demonstrated that the complainant, a girl aged 15 years was defiled. But quite apart from the conclusion reached by the lower courts based on the exhibits, the evidence of both AKN and PW2 was sufficient to convict the appellant. In his uncontroverted testimony, PW 2 stated that he had caught the appellant and AKN in the act, while AKN testified that the appellant had defied her on six occasions. Her testimony was credible and believable, and the trial court was satisfied that AKN's evidence pointed to the appellant's guilt. Moreover, as per the provisions of the Sexual Offences Act and the provisio to Section 124 of the Evidence Act, the trial court can convict on

the basis of the complainant's evidence, if satisfied that the complainant is a truthful witness.

In addition, on the question of her age for the purposes of sentencing, in ***Criminal Appeal No. 504 of 2010 Kaingu Elias Kasomo vs R*** this Court stated

thus,

> ***"Age of the victim of sexual assault under the Sexual Offences Act is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim."***

AKN stated that she was 15 years old and in standard five, and though her father stated that she was 14 years, this evidence was not challenged. In any event following the decisions in the case of ***Francis vs Uganda CA App No. 2 of 2000***, later cited by the High Court decisions of ***Faustine Mghanga vs Republic [2012]*** Nzioka, J, and ***Mangunyu vs Republic***, Ouko J, (as he then was), where it was held that, *"Apart from medical evidence age may also be proved by birth certificate, the victim's parent or guardian and by observation an common sense…",* we are satisfied that AKN was 15 years old. As such, the appellant's complaint that the absence of the exhibits rendered his conviction unsafe, is unfounded, and we accordingly dismiss it.

With regard to the issue that no DNA evidence was taken to connect the complainant's child to the deceased, we will begin by observing that to prove that there was a nexus between him and the alleged defilement, ***section 36*** of the ***Sexual Offences*** Act provides**,**

> ***"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."***

In ***Geoffrey Kionji vs Republic Cr. Appeal No 270 of 2010***, this Court stated that the medical examination of the accused is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement; that the court could convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by the accused person.

In this case, the evidence of AKN, PW2 who caught them in the act, and the clinical officer, showed that she had been defiled. Furthermore, the courts below found her evidence to be cogent and reliable and they did not doubt the truth of her testimony. On this basis we find that there was no reason for DNA tests to be undertaken and as a consequence, this ground fails.

Finally, in reevaluating the evidence, the High Court stated;

> ***"(i)There is evidence that the Appellant who is a relative of the complainant took advantage of the complainant a minor aged 15 years and had sexual intercourse with her on several occasions.***
>
> ***ii)The testimony of the complainant is that it was the appellant who was responsible for the pregnancy. Under section 124 of the evidence act, the court can rely on the evidence of the complainant alone to convict in cases of sexual offences. The trial court gave reasons why it relied on the testimony of the Complainant….***
>
> ***iii) The evidence of PW2 corroborated the testimony of the complainant. It was PW2 who reported the matter to the Elders and the Appellant was told to leave the area."***

In effect, both the trial court and the High court considered the evidence and arrived at the conclusion that the prosecution had proved its case beyond reasonable doubt, that it was the appellant who was responsible for defiling

AKN. We too have subjected the evidence to a further evaluation as is required of us, and have similarly concluded that the appellant was guilty of the offence of defilement. Accordingly, we have no reason to interfere with the findings of the lower courts.

The appeal against the conviction lacks merit and is hereby dismissed. This leads us into the question of the sentence. Following conviction, the trial court sentenced the appellant to 20 years' imprisonment. In our view,

having regard to the circumstances of the case, and notwithstanding the Supreme Court's decision in ***Muruatetu (supra)*** we consider the sentence to befitting of the offence herein and we see no reason to interfere with it.

As such, the appeal is unmerited, and is hereby dismissed.

It is so ordered.

Dated and delivered at Malindi this 11th day of July, 2019.

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

M. K. KOOME

.....

JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR