IN THE COURT OF APPEAL

AT ELDORET

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

CRIMINAL APPEAL NO. 186 OF 2018

BETWEEN

RS.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Kitale (Chemitei, J.)

dated 15th June, 2017 in ***H.C.CR.A. No. 23 of 2016)***

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JUDGMENT OF THE COURT

1. The appellant, **RS** was convicted by the R./lesident Magistrates court at Kitale for the offence of defilement contrary to **section 8 (1)** as read with section **8(2)** of the **Sexual Offences Act** No. 3 of 2006, and sentenced to life imprisonment. Aggrieved by the judgment of the trial court, the appellant filed a first appeal in the High Court which appeal was dismissed by the High Court (Chemitei, J.) for lack of merit.

2. Undeterred, the appellant filed the appeal now before us. In his appeal the appellant impugns the judgment of the High Court on six grounds contending that the Judge erred in law: in failing to find that the medical evidence did not prove penetration, a key element of the charge of defilement; in failing to re-analyze the whole evidence as required of it as the first appellate court; and in disregarding the appellant's defence without giving any cogent reasons. The two courts below were also faulted for superintending an unfair trial which went against the proviso of **Article 50 (2)** of the Constitution.

3. When the appeal came up for hearing on 5th March 2019, the appellant was in person while Ms. Karanja, Prosecution Counsel was present for the respondent.

4. The appellant relied on his written submissions filed on 16th January 2019. He contended that there was no medical proof that there was penetration; that the charge against him was a frame up; that the complainant's evidence was unreliable; and that he was denied the right to address the court at the close of both the prosecution case and his case. In his oral remarks before us, the appellant informed us that he has since reformed and trained in discipleship and intends to become a preacher.

5. In opposing the appeal, Ms. Karanja relied on the respondent's submissions filed on 27th February 2019. Ms. Karanja submitted that the complainant's age was assessed and a dental assessment form produced in court, as proof of the complainant's age of eight years (8 years); that penetration was proved beyond doubt; that identification was by recognition; that the appellant failed to raise the issue of unfair trial in the two lower courts hence the same is an afterthought; and that the charge against the appellant was not a frame up.

6. This being a second appeal, **section 361(1)** of the **Criminal Procedure Code** enjoins us to consider only questions of law. We are alive to our duty as a second appellate court as stated in ***Karani vs. R [2010] 1 KLR 73***:

> **"This is a second appeal. By dint of the provisions of section 361 of the Criminal Procedure Code, we are enjoined to consider only matters of law. We cannot interfere with the decision of the superior court on facts unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law."**

7. The particulars of the offence against the appellant as stated in the charge sheet were that on 8th April, 2015 at [particulars withheld] area in Trans Nzoia County intentionally caused his penis to penetrate the vagina of FN (name withheld) a child aged 8 years. During the trial evidence was adduced that the complainant was an 8 year old nursery school pupil at [particulars withheld] School. She was living with her sister CN (C). The appellant was husband to C. On the material day, the complainant was washing utensils when the appellant called her into the house. She obliged and when she went inside the appellant placed her on a mattress on the floor and defiled her. The appellant promised to buy her mandazi if she did not tell anyone. She later told her sister, C what had happened and C reported the matter to the village elder. The matter was reported at Kitale police station and the appellant was arrested.

8. On 9th April, 2015, the complainant was taken to Kitale District Hospital where she was examined by Kirwa Labatt (Kirwa), a Clinical Officer, who noted that she had no bruises on the labia, that her hymen was torn and old looking, and that she had a foul smelling vaginal discharge. Specimen taken revealed that epithelial and pus cells were present in her vagina. Kirwa testified that the complainant informed him that it was not the first time that she had been defiled. The complainant was also examined by Phalis Silali an officer at the hospital's Dental Department who using her dental formation formed the opinion that she was 8 years old.

9. APC Lotiong arrested the appellant on 9th April, 2015. The appellant in his sworn statement of defence denied the charges against him. He stated that he was employed by [particulars withheld] and had not been paid after 3 months of work, and that he was performing his normal duties when he was arrested.

10. In its judgment the trial court held that that the evidence of the complainant and that of the clinical officer was sufficient proof of penetration; that there was evidence that the complainant was 8 years old at the time of defilement; that the identification of the appellant as the perpetrator was free from mistake or error; and that the defence tendered by the appellant was inconceivable as the prosecution evidence was overwhelming.

11. On appeal, the learned Judge of the High Court found that the defence of the appellant was an afterthought; that the evidence of the complainant was believable and fell within the proviso to **section 124** of the Evidence Act; and that there was sufficient evidence in support of the charge. The appeal was therefore dismissed as unmeritorious.

12. We have carefully considered the record of appeal, the written submissions of the appellant, and of the respondent, authorities and the law. The Sexual Offences Act sets out the main elements of the offence of defilement as follows:

i. The victim must be a minor.

ii. There must be penetration of the genital organ and such penetration need not be complete or absolute. Partial penetration will suffice.

iii. The identity of the perpetrator must be established

13. For the offence of defilement to be established, the prosecution must prove each of the above ingredients. It is contended that the prosecution did not discharge its mandate to the required standard of proof especially on the element of penetration. The trial magistrate found the production of the dental assessment report sufficient to establish the complainant's age, and the presence of epithelial and pus cells indicative of friction on the vaginal wall thereby confirming penetration; and that the issue of identity did not arise as both the complainant and the appellant were people who knew each other very well. The trial court therefore concluded that there was sufficient evidence to prove the charge against the appellant to the required standard.

14. The first appellate court upon reviewing the evidence of the trial court came to the same conclusion. On our part we find no reason to depart from the concurrent findings of the two courts below. The appellant was well known to the complainant as the appellant was married to the complainant's sister, (C). The complainant narrated how the appellant called her and defiled her. The two lower courts made concurrent findings that her evidence was truthful and reliable. The complainant reported her ordeal to her sister immediately after it happened. The evidence of the complainant was consistent with the evidence of the Clinical Officer. The age of the complainant was also established to be 8 years old. In the circumstances there was overwhelming evidence in proof of the charge of defilement against the appellant and his defence was rightly rejected. We are therefore satisfied that the appellant's conviction was safe.

15. As regards sentence, the complainant having been established to be under the age of 11 years, the sentence imposed of life imprisonment was as provided under **section 8(2)** of the **Sexual Offences Act**, and therefore lawful. We are mindful of the fact that the sentence imposed was the minimum mandatory sentence. However, the trial magistrate clearly exercised his discretion having taken into account the appellant's mitigation, and the circumstances of the offence, and being of the view that the appellant's action was beastly and deserved a deterrent sentence.

16. The upshot is that we find no merit in this appeal. It is hereby dismissed in its entirety.

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