IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, OKWENGU & SICHALE, JJ.A.)

CRIMINAL APPEAL NO. 197 OF 2016

BETWEEN

MUSYOKI MWAKAVI .....APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Machakos, (Mutende, J.) dated 3rd April, 2014

in

H.C.CR.A. NO. 172 OF 2012)

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JUDGMENT OF THE COURT

[1] This is a second appeal by the appellant who is aggrieved by the judgment of the High Court (***Mutende, J.***) dismissing his first appeal against his conviction and sentence for the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act No. 3 of 2006. The appellant was tried and convicted of the offence by the Principal Magistrate's Court in Makindu. The particulars of the offence were that on the 19th of May, 2012 at Mungwani market, Kakutha location in Makueni County within Eastern Province, the appellant intentionally and unlawfully caused his male organ to penetrate the vagina of DKM (name withheld), a girl child aged 14 years. The appellant also faced an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act, No. 3 of 2006.

[2] At the trial the prosecution called six witnesses in proof of the charge. These were DMK the survivor of the offence; E mother to MK, Esther Amina Mbai (Assistant Chief), the Assistant Chief to whom the matter was reported; Patrick Musyoki Kibwana (Dr Kibwana) a medical officer attached to Makindu District Hospital; Joshua Nzuma Mbindyo who was at the material time the Head teacher at Mujani Primary School and Emily Ngulet a police constable then attached to Sultan Hamud Police Station. The appellant gave an unsworn statement in his defence.

[3] Briefly the prosecution evidence was that on 19th May, 2012, E sent DMK her 14-year-old daughter to the shop with a Kshs 500 note to buy sugar and oil. When DMK went to the shop, which was operated by the appellant, the appellant went out to look for change. On coming back the appellant gave DMK the change and some biscuits. He then held her and took her to a room behind the shop, removed her panties and defiled her. DMK went back home but did not report her violation as she feared that she would be beaten by her mother and laughed at by her siblings. About a week later her teachers at the school noted a significant drop in her performance and that she appeared disturbed. Upon being interrogated she explained to the teachers what happened. The teachers called E and the matter was reported to the Assistant Chief who referred her to Sultan Hamud police station. At the Police Station, Pc Ngullet recorded the report and accompanied DMK and her mother to Makindu District Hospital where DMK was examined and treated. Dr Kibwana later filled the P3 form in which he noted amongst other things that DMK's hymen was perforated, and that she had a whitish vaginal discharge which when subjected to laboratory testing revealed pus cells. Dr Kibwana concluded from his findings that DMK had been defiled. DMK maintained that the appellant was the one who had violated her and that it was the second time he had done so.

[4] In his defence the appellant gave an unsworn statement in which he denied having committed the offence. He explained how he was arrested on 2nd June 2012, and stated that he has a wife and seven children one of whom is mentally challenged.

[5] As already stated, the trial magistrate upon considering the evidence found the appellant guilty of the charge, convicted him and sentenced him to 14 years imprisonment.

[6] In his appeal to the High Court the appellant contended that the prosecution failed to prove DMK's age, and that the medical evidence presented before the trial court was not sufficient to sustain the defilement charge against him. The High Court dismissed the appeal holding *inter alia* as follows:

> ***"The trial court having heard the evidence of the complainant was satisfied that she was truthful. It went on to give reasons upon which it formed the opinion prior to convicting the appellants. Arguments raised on appeal did not raise anything whatsoever to make this court fault the trial court. In the premises, the offence as charged was proved to the required standard of proof namely proof beyond reasonable doubt."***

[7] In this second appeal, the appellant relied on his amended grounds of appeal which contained 5 grounds. In brief the appellant assails his conviction on the premises that key elements of the charge against him, such as penetration, age of the complainant and the identity of her assailant, were not proved, and that the learned judge of the first appellate court relied on inferences not supported by the evidence that was adduced. The appellant who appeared in person also relied on written submissions that he had filed.

[8] In his written submissions the appellant argued that Dr Kibwana who examined DKM 11 days after the alleged defilement did not find any evidence of sexual assault, but based his report on an earlier examination purportedly done at Makindu District Hospital, and that the Doctor who carried out the initial examination did not testify. Therefore the evidence that the hymen was perforated was hearsay evidence and not admissible in proof of the defilement charge. In addition, the period between the defilement and the medical examination left room for the hymen to have broken through some other intervening circumstances.

[9] In regard to the appellant's identification as the perpetrator of the offence, the appellant contended that the evidence implicating him was insufficient as E relied on information that was hearsay evidence. In addition, the evidence regarding the appellant's arrest was inconclusive as it was not clear how he was arrested. The appellant maintained that the age of DMK was not established as that could only be properly done through a professional age assessment which was not done. He argued that the oral evidence regarding DMK's age was not sufficient. In support the appellant cited **Philip Maingi Mueke v Republic [2015] eKLR** in which the High Court (Kimaru, J) stated:

> ***"This court agrees with the Appellant that it is imperative that the prosecution establishes the age of the complainant in defilement cases with the best possible evidence which is a birth certificate, birth notification, an immunization card or in some instances a baptismal card issued shortly after the birth of the child. However, where this best evidence is not available, the prosecution can rely on other documentary evidence such as the medical report and the P3 form. The prosecution can also rely on the testimony of the parents of the complainant and also by the court visually satisfying itself as to the apparent age of the complainant. This position was upheld by the Court of Appeal in Nyeri C.A. Criminal Appeal No.61 of 2014 Richard Wahome Chege –Vs-Republic (unreported) and Nyeri C.A. Criminal Appeal No.100 of 2013 J.W.A. –Vs-Republic (unreported). In the present appeal, this court holds that the prosecution established the complainant's age through the testimony of her parents and the P3 form and the medical report produced by the two doctors. Both parents testified that the complainant was a Standard 5 pupil aged nine (9) years old at the time. This court has no reason to doubt the assertion by the parents of the complainant."***

[10] Finally, the appellant submitted that DMK did not of her own volition make the allegations against the appellant but was coerced into making the allegations against the appellant in a bid to shift blame from herself to someone well known to her. In this regard the appellant relied on the Court of Appeal decision in **Paul Kanja Gitari v Republic [2016] eKLR**. The appellant urged the Court to find that the investigations were a sham and insufficient to justify the appellant's prosecution and conviction.

[11] Senior Public Prosecution Counsel Ms. Wangele appeared for the respondent and made oral submissions opposing the appeal. Counsel submitted that DMK positively identified the appellant as the person who defiled her; that the prosecution proved that DMK was a minor aged 14 years and that the evidence of Dr. Kibwana corroborated DMK's evidence that she was defiled. Counsel submitted that these facts were sufficient to establish the ingredients for the offence of defilement against the appellant. He therefore urged the Court to dismiss the appeal.

[12] As this is a second appeal, Section 361 of the Criminal Procedure Code limits this Court's jurisdiction to matters of law only. This was reiterated by this Court in the case of **Dzombo Mataza –vs-Republic** ***[2014] eKLR*** where the Court expressed itself as follows:

> **"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…. By dint of the provisions of section 361(1)***
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> ***(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*."**

[13] This Court in **John Mutua Munyoki –vs- Republic [2017] eKLR,** held that**;**

> **"Under the Sexual Offences Act the main elements of the offence of defilement are as follows:**
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> **(i) The victim must be a minor, and**
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> **(ii) There must be penetration of the genital organ and such penetration need not be complete or absolute. Partial penetration will suffice."**

[14] Both courts arrived at concurrent findings that the appellant committed the offence of defilement that he was charged with. In **Adan**

Muraguri Mungara –vs- Republic, Criminal Appeal No. 347 of 2007 (Nyeri), this Court stated as follows;

> ***"As this court has stated many times before, it has a duty to pay homage to concurrent findings of fact made by the two courts below unless such findings are based on no evidence at all or on a perversion of the evidence, or unless on the totality of the evidence, no reasonable tribunal properly directing itself would arrive at such findings. That would mean that the decision is bad in law, thus entitling this Court to interfere."***

[15] According to the charge sheet DMK was alleged to be 14 years at the time of the incident. In her evidence DMK testified that she was 14 years old. This was consistent with her evidence that she was a standard eight student. E who is mother to DMK testified that she was born in 1998 and therefore was 14 years old. Although she claimed that there was a birth certificate, for some unexplained reasons this was not produced in evidence. The birth certificate would no doubt have been useful in establishing the age of DMK. Nevertheless, the absence of the birth certificate was inconsequential as the evidence of DMK and her mother was consistent with the evidence of Dr Kibwana who estimated DMK's age as 14 years. Thus, although no birth certificate was produced the evidence adduced was sufficient to prove DMK's age as 14 years. The learned judge properly directed herself by referring to the persuasive decision of the Uganda Court of Appeal in ***Francis Omuroni versus Uganda Criminal Appeal No 2 of 2000*** where it was held that:

> ***"Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense."***

[16] In regard to the issue of penetration, we note that DMK testified that the appellant defiled her on the material day, and that this was the second occasion that he had defiled her. The learned Judge noted:

> ***"It was PW2's evidence that it was not the first time she engaged in the act of sexual intercourse. At the time of examination her hymen was perforated. The examination was done some eleven***
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> ***(11) days after the alleged act. She also had pus cells. This was evidence of the child having been penetrated. The probable weapon used was definitely a male genital organ following the infection she got. Being a minor, even if this was the second time she was engaging in sexual intercourse with no intention of telling her mother, she was by law incapable of consenting to the act. The act occasioned on her was therefore unlawful."***

[17] Both the trial magistrate and the learned Judge believed and accepted the evidence of DMK that she was defiled. Moreover, her evidence did not stand alone as the medical examination also revealed that her hymen was perforated and that she had pus cells in her vagina which was symptomatic of a vaginal infection, and consistent with penetration of the vagina having taken place. It is evident that DMK was examined and treated at Makindu District Hospital, before Dr Kibwana examined her and filled the P3 form. Although the treatment notes were produced in evidence it is not clear who first attended DMK. That notwithstanding, Dr. Kibwana examined DMK and filled the P3 form having the benefit of his own examination, the treatment notes and the laboratory reports which were hospital records. In the circumstances Dr. Kibwana's report was properly admitted in evidence, and the issue of hearsay evidence does not arise.

[18] DMK identified the appellant as the person who violated her. The appellant conceded that he was a person well known to DMK.

Moreover the incident occurred in broad daylight so the issue of mistaken identification does not arise. DMK was very categorical in her testimony that the appellant defiled her. She gave a plausible explanation as to why she did not report the assault. It is evident that she was disturbed and affected by the incident, hence her sudden drop in school. Her report about the incident was not made out of coercion, but a genuine opening up as a result of the concern and inquiry from the teacher. The explanation also given by DKM why she did not disclose to her mother the acts of sexual assault due to fear of shame is plausible.

[19] For the above reasons we find that the concurrent findings of fact made by the two lower court were based on the evidence that was adduced and that there was no misdirection on the law. Consequently, the appellant was properly convicted and his appeal rightly rejected by the first appellate court.

[20] As regards the sentence the appellant urged the Court to reduce his sentence. However, this being a second appeal under section 361(1) (a) severity of sentence is a matter of fact and therefore not open for consideration on a second appeal.

[21] We come to the conclusion that this appeal has no merit. It is therefore dismissed in its entirety.

Dated and delivered at Nairobi this 27th day of September, 2019.

M. K. KOOME

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR