IN THE COURT OF APPEAL

AT MALINDI

(CORAM: OKWENGU, GATEMBU & KANTAI, JJ.A)

CRIMINAL APPEAL NO. 22 OF 2018

BETWEEN

MBOGO RAPHAEL CHENGO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal against the judgment of the High Court of Kenya at Malindi

(W. Korir, J.) delivered on 5th December 2017

in

HC Cr. Appeal No. 12 of 2016)

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JUDGMENT OF THE COURT

[1] The appellant was charged with 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 particulars of the offence were that on the 3rd of February, 2013 at [Particulars Withheld] Sub Location within Kilifi County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of PS, (name withheld) a child aged 15 years.

[2] The prosecution called four witnesses during the trial. These were: PS who gave evidence on oath following a *voire dire* examination; Mary stepmother to PS with whom PS was at the material time living; Dr Busra Ahmed (Dr. Bursa) a doctor at Kilifi County Hospital who produced the P3 form and post rape form in regard to PS; and Corporal Clara Bingo an officer attached to Kilifi Police Station.

[3] The prosecution evidence was that PS who was 13 years old was living with her stepmother Mary. At the material time the appellant worked as a herds-boy in their home. Sometimes in September 2012, the appellant lured PS into having sexual intercourse with him following promises that he would buy her a mobile phone. After this first encounter, the appellant and PS had sexual intercourse on five other occasions. In February, 2013, PS discovered that she was pregnant. She informed the appellant, who told her not to worry, but he later disappeared. PS confided in her sister in law, one Margaret. Mary learnt of the pregnancy from Margaret on 6th May, 2013, and on probing PS, she identified the appellant as the one responsible for the pregnancy. Since PS was a student, Mary reported the matter to the school. The matter was reported to the area chief, who referred PS to [Particulars Withheld] Health Centre where a pregnancy test confirmed her pregnancy. PS was later examined at Kilifi District Hospital, a Post rape care form and P3 form were filled, and the appellant arrested. PS explained that the appellant had worked as a herds-boy at her home for about a year prior to the defilement.

[4] The appellant gave unsworn evidence in his defence in which he explained that he was arrested at Gede while waiting for a vehicle to go to Kakuyuni. He denied having committed the offence or even knowing PS.

[5] The trial Magistrate after considering the evidence found that PS was 13 years old; that that there was sufficient proof that the appellant was defiled as evident from the pregnancy and the evidence of the Doctor. As regards the identity of the defiler, the trial magistrate believed and accepted the evidence of PS that it was the appellant who defiled her. The trial magistrate therefore convicted the appellant of defilement and sentenced him to 20 years imprisonment.

[6] The appellant was aggrieved and appealed to the High Court contending that the medical evidence adduced by the prosecution was not sufficient to sustain the charge of defilement; that the age of PS was not proved; that section 36 of the Sexual Offences Act was not complied with; and that his defence was not considered.

[7] In dismissing the appeal, the learned Judge of the first appellate court stated *inter alia*:

> ***"The prosecution's evidence is that PW1 was 13 years old. The appellant lured her into sexual intercourse.***
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> ***The evidence shows that the appellant used to work as a herdsboy at PW2's home. PW2 testified that she employed the appellant. Although the appellant alleged that he was a shop attendant and does not know PWI, I do find that the evidence is misplaced. It is proved that the appellant worked as a herdsboy for PW2. PW1 had sex with him and knew him.***
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> ***PWI testified that she was 13 years old and attending school at* [Particulars Withheld] *primary school in class seven (7). The appellant was living in the same homestead. He knew that PWI was a primary school student. His contention that PW1 appeared to be over 18 years old is an afterthought, he categorically denied knowing PW1 in his defence. According to PW2, the appellant was employed in 2010 as a herdsboy. He must have seen PW1 from childhood. The appellant knew very well that PW1 was a minor. ….the appellant took advantage of PW1 naivety and had sex with her. The prosecution did prove that it is the appellant who defiled PW1. The appeal lacks merit (sic) is hereby disallowed."***

[8] During the hearing of the appeal before us, the appellant appeared in person while the respondent was represented by Ms Jackline Isaboke, Senior Prosecution Counsel. The appellant had filed written submissions which he relied on in arguing his appeal.

[9] In his written submissions, the appellant submitted that the offence of defilement was not proved beyond reasonable doubt. This was because penetration was not proved as no samples were taken from the appellant or subjected to DNA testing as provided for under the provisions of **Section 36(1)** of the **Sexual Offences Act No.3 of 2006.** There was thus no corroborating evidence proving that the appellant was the person who had defiled PS. The appellant asserted that he did not know PS, nor was he connected with the alleged penetration against PS. He urged that there was no independent corroboration of the evidence of PS. In addition, the appellant submitted that there was no evidence adduced regarding how and why he was arrested, and the absence of this evidence was detrimental to the prosecution's case.

[10] The senior prosecuting counsel on her part supported the appellant's conviction and sentence, urging that the main issue in the appeal was identification. In this regard she pointed out that the appellant was identified by PS and Mary; that Mary had employed the appellant as a herds-boy; and that the appellant had been working and living with the family for over one year. Thus, there was no possibility of mistaken identification. In addition, counsel submitted that PS explained in detail how the appellant lured her into performing sexual intercourse with him more than five times. On the issue of lack of DNA evidence, prosecuting counsel submitted that a DNA test was not necessary as PS clearly identified the appellant as her defiler, and her evidence was believable. The senior prosecuting counsel concluded that the appellant's conviction was proper, and urged the Court to dismiss the appeal.

[11] Having considered the appellant's grounds of appeal, the record of appeal, submissions by both parties, and the authorities cited, we take cognizance of the fact that this is a second appeal against the appellant's conviction and sentence, and that by dint of **Section 361** of the **Criminal Procedure Code**, a second appeal is confined to matters of law only. This Court restated as much in **Karingo -vs- R (1982) KLR 213** at p. 219;

> ***"A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did (Reuben Karari C/O Karanja -vs- R (1956) 17 EACA 146)"***

[12] The issue of law that we must determine is whether the prosecution established that PS was a minor and that she was defiled, and whether the appellant was properly identified as the perpetrator of the crime. In this regard the first appellate court made similar findings as the trial court stating as follows:

> ***"From the evidence on record, I find that PW1 is a minor. When PW1 testified on 17/9/2013, she stated that she was 13 years old. I have perused P. Exhibit 3(her clinic card) and I observe that she was born on 4/12/1999. This implies that PW1 was 13 years old as of 3/2/2013 when the offence is alleged to have been committed…***
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> ***The second issue for determination is whether PW's vagina was penetrated… It was PW1's evidence that the accused had sex with her a total of 5 times. The evidence of PW3(Dr. Busra) was that PW1's hymen was broken and that she was pregnant. I have perused P. Exhibit 1 and P. Exhibit 2 (P3 form and post rape care form) and note that PW1's pregnancy test was positive and her hymen is indicated as missing. It is a well known fact that sexual penetration inside the vagina is among the causes of a broken hymen. I am therefore convinced that her vagina was penetrated…***

The next issue is whether PW1 was defiled by the accused. PW1 stated that the accused was their herdsboy who lived at their home. That he lured her and they ended up having sex 5 times. PW2 also confirmed that she had employed the accused as their herdsboy. I note that the evidence of PW1 was consistent and not shaken during cross examination. I have no reason to believe otherwise. The accused was a person well known to PW1 having lived at PW1's home hence the issue of mistaken identity does not arise. It is my finding that the accused defiled PW1 and was positively identified as the defiler."

[13] Thus the two courts below arrived at concurrent findings of fact that PS was defiled and that the appellant was the person who committed the offence. In **Adan Muraguri Mungara v Republic, [2010] eKLR,** this Court stated the circumstances in which this Court may interfere with the concurrent findings of fact by the trial court and the first appellate court, 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."

[14] Applying this yardstick to the circumstances before us, it behooves us to consider whether there is justification to interfere with the concurrent findings of fact that were made by the two lower courts, and whether the decision of the first appellate court should stand. In his appeal, the appellant sought to demonstrate to this Court that the prosecution was unable to prove that he penetrated PS. The question is whether the ingredients of the charge of defilement were established. That is whether PS was a minor; whether there was penetration of her genital organs; and if so whether the appellant was established to be the person who penetrated the genital organs of PS.

[15] PS testified that the appellant who was employed by her step mother as a herdsboy, lured her into having sexual intercourse with him, by promising that he would buy her a mobile phone. PS further testified that the appellant had sex with her five times after the first act of sexual intercourse, after which she became pregnant. The record reveals that the appellant was a person known to PS. Although there was no corroboration of PS's evidence, her evidence was consistent with the medical evidence produced by Dr Busra, to the extent that the medical evidence confirmed that there was penetration of the genital organs of PS. Moreover, the fact that PS was pregnant, confirmed her evidence that sexual intercourse had taken place.

[16] As regards the identification of her assailant, PS identified the appellant as the perpetrator of the offence. There was no possibility of PS being mistaken in her identification of the appellant as this was a person well known to her, and apparently the violation was repeated severally. The trial magistrate believed and accepted the evidence of PS as truthful. This was consistent with **Section 124** of the **Evidence Act** which though requiring corroboration of the evidence of victims of a criminal offence, has a proviso in regard to victims under the Sexual Offences Act as follows:

"Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

[17] We reiterate what this Court (differently constituted) stated in **Williamson Sowa Mbwanga v Republic [2016] eKLR, that:**

"The import of the proviso to section 124 of the Evidence Act is that the trial court can convict an accused facing a charge of defilement solely on the evidence of the victim, if for reasons to be recorded, the court is satisfied that the victim is telling the truth. Medical evidence is not mandatory under that proviso, a position which was reiterated thus by this Court in GEORGE KIOJI V. REPUBLIC, CR. APP. NO. 270 of 2012 (Nyeri):

> *"Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to section 124 of the Evidence Act, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief."*

[18] In light of the evidence of PS and Mary, the appellant's defence that he did not know PS was properly rejected. In regard to the appellant's contention that no DNA evidence was conducted to prove that he was responsible for the pregnancy of PS. **Section 2(1)** of the **Sexual Offences Act** defines "penetration" as 'the partial or complete insertion of the genital organs of a person into the genital organs of another person." As stated by this Court in the case of **Evans Wanjala Wanyonyi –vs- Republic [2019]eKLR:**

"An essential ingredient in the offence of defilement is penetration and not impregnation."

[19] Further, in **Williamson Sowa Mbwanga –vs- Republic** (supra), this Court stated as follows on defilement and paternity

> ***"...it is patently clear to us that whilst paternity of PM's child may prove that the father of the child had defiled PM, that is not the only evidence by which defilement of PM can be proved. The fact, as happens in many cases, that a pregnancy does not result from conduct that would otherwise constitute a sexual offence does not mean that the sexual offence has not been committed. In this case, there does not have to be a pregnancy to prove defilement. A DNA test of the appellant would at most determine whether he was the father of PM's child, which is a different question from whether the appellant had defiled PM. As the Court of Appeal of Uganda rightly stated, in the sexual offence of defilement, the slightest penetration of the female sex organ by the male sex organ is sufficient to constitute the offence and that it is not necessary that the hymen be ruptured. (See TWEHANGANE ALFRED V. UGANDA, CR. APP. NO. 139 OF 2001)."***
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> **It is partly for this reason that section 36(1) of the Sexual Offences Act is couched in permissive rather than mandatory terms, allowing the court, if it deems it necessary for purposes of gathering evidence to determine whether or not the accused person committed the offence, to order that samples be taken from him for forensic, scientific, or DNA testing."**

[20] Applying the above judicial decisions, the ground that no DNA was conducted on the complainant has no substance. The appellant was identified by way of recognition as the person who committed the offence as alleged. On the issue of age, although the particulars of the offence stated that PS was "**a child aged 15 years,**" the evidence of PS, Mary, the P3 form and the clinic card produced all reflected PS's age as 13 years as at the time of the commission of the offence. This means that the particulars of the charge in regard to the age was not consistent with the evidence.

[21] Section 382 of the Criminal Procedure Code provides that:

> **Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:**
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> **Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.**

[22] The appellant herein was charged with the offence of defilement which is defined under section 8(1) of the Sexual Offences Act as:

> ***"8(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement."***

[23] Under **section 2** of the **Sexual Offences Act** a "child" has the meaning assigned under the Children's Act and the Children's Act defines a child as any person under the age of 18 years. Therefore, in so far as the offence of defilement was concerned, proof that PS was 13 years old and therefore a child, was sufficient to prove the element of age in establishing the offence. The actual age of PS was only relevant in so far as the sentence was concerned.

[24] Section 8(3) of the Sexual Offences Act which was the Penal section in regard to the charge against the appellant, provides that:

> ***"A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years."***

[25] Since PS fell within the age bracket of 12 to 15 years the appellant has not suffered any prejudice by the apparent error in the particulars of the charge sheet, and therefore the error is curable under section 382 of the Criminal Procedure Code.

[26] We come to the conclusion that there was sufficient evidence in support of the concurrent findings of the two lower courts, and that the learned Judge of the first appellate court did not err in upholding the conviction and sentence of the appellant for the offence of defilement. Accordingly, we find no merit in this appeal. It is dismissed in its entirety.

Orders accordingly.

Dated and delivered at Mombasa this 26th day of September, 2019.

HANNAH OKWENGU

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR