IN THE COURT OF APPEAL

AT ELDORET

(CORAM: NAMBUYE, ASIKE-MAKHANDIA & ODEK, JJ.A)

CRIMINAL APPEAL NO. 60 OF 2018

BETWEEN

EDWIN OKOTH ODHIAMBO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an Appeal against the Judgment of the High Court of Kenya at Eldoret

***(G. Kanyi Kimondo, J.) dated 24th September, 2015* in HCCRA No. 140 of 2012)**

****

JUDGMENT OF THE COURT

The appellant was charged with the offence of defilement contrary to **section 8(1)** as read together with **section 8(2)** of the **Sexual Offence Act**. The particulars of the offence were that between the 1st of October and 13th of November 2010 in Wareng District within Rift Valley Province, the appellant intentionally and unlawfully caused his genital organ (penis) to penetrate the genital organ (vagina) of MK, a girl aged 12 years. The appellant also faced an alternative count of an indecent act with a child contrary to **section 11 (1)** of the **Sexual Offences Act**, particulars being that within the same period and place, the appellant intentionally and unlawfully indecently touched the private parts (vagina) of **MK**, a girl aged 12 years. The appellant denied the charges.

The prosecution in a bid to prove its case against the appellant lined up a total of four witness. On 2nd May, 2010, MK had gone to collect a social studies book at a home nearby. Upon reaching the house, she found the appellant, who was her Sunday school teacher at the time, in the house. On entering the said house, the appellant locked the door and sat her on a chair. He proceeded to remove his pants, defiled her and thereafter told her to go home. When she got home she did not tell her mother **BMA, (PW3)** what had transpired. Again, on 8th August, 2010 at around 3.00pm, she proceeded to the appellant's house and was defiled once more. Just like before, she went back home and did not tell PW3 what transpired as she feared that she would have been punished. Lastly, on 5th October, 2010 the appellant called PW3 and asked her to send MK to his house to collect some items that were to be taken to the church. MK got to the appellant's house, found him alone and he defiled her again. As had become the habit, MK went back home and did not tell PW3 regarding the incident.

According to PW3, on 12th November, 2010 her niece **R** came to visit MK Later that evening, she found MK reading a letter which she tried to chew in order to prevent PW3 from seeing the contents. On sensing mischief, PW3 forced the letter out of MK's mouth only to discover that it was a love letter from the appellant. She was shocked as she knew the appellant to be a Sunday school teacher and her daughter and other children were the congregants. PW3 informed MK's father who interrogated her and she opened up and confirmed that the appellant had befriended her. The father reported the matter to Langas Police Station and thereafter took MK to Moi Teaching and Referral Hospital where she was examined by **Cynthia Kibet, (PW2)** a medical officer at the facility. During examination she noted that MK's hymen was torn but had partially healed. It was her conclusion that there was vaginal penetration.

The investigating officer, **P.C Lucy Okumu (PW4)** upon receiving the complaint from MK's father regarding the defilement of his daughter commenced investigations and when done preferred the charges against the appellant.

The appellant when put on his defence denied committing the offences or having a relationship of any kind with MK. He confirmed though that he was a Sunday school teacher and that MK was one of those he taught. He denied having sexual intercourse with MK or any other member of the Sunday school. He further denied authoring the love letter that was found in possession of MK by PW3.

Having carefully considered and evaluated the evidence adduced by the prosecution and the defence as well as submissions by both prosecution and the

defence, the trial court was persuaded that the prosecution had proved beyond reasonable doubt the offence of defilement against the appellant. Accordingly he convicted him of the offence but discharged him of the alternative count. Upon conviction, the appellant was sentenced to 30 years imprisonment.

The appellant was dissatisfied with the decision of the trial court and appealed to the High Court. The High Court **(Kanyi Kimondo, J)** upon hearing the appeal dismissed it on the grounds that the appellant was positively identified by MK by way of recognition; that MK's testimony appeared to be consistent and truthful and did not dither under cross examination by the appellant; that penetration was proved by the evidence tendered by PW2 which revealed that the minor's hymen was partially broken; that the minor's testimony was corroborated by that of PW2, the P3 form and the existence of the love letter, which MK was emphatic was written to her by the appellant and finally that the prosecution had proved its case beyond reasonable doubt against the appellant. However, he considered the sentence of 30 years imprisonment meted out as harsh and substituted it with 20 years' imprisonment.

Still aggrieved by the judgment of the High Court, the appellant filed this second and perhaps last appeal on the grounds that the learned judge erred by failing to find that: - Penetration was not proved; the circumstantial evidence was not sufficient to establish his culpability and that the prosecution failed to call crucial witnesses.

When the appeal came up for hearing, the appellant appeared in person whereas **Ms. Oduor,** Principal Prosecution Counsel appeared for the State. Both had filed written submissions but only Ms. Oduor opted to briefly highlight her written submissions.

The appellant submitted that the learned judge erred in holding that there was strong circumstantial evidence that justified his conviction. That the evidence was not sufficient to found a conviction, notwithstanding the presence of the love letter. He argued that the prosecution failed to call R, the cousin to MK who allegedly delivered the love letter from the appellant. According to the appellant, she was a crucial witness as she would have provided evidence on the alleged friendship between him and MK. He relied on the case of **Bukenya & Others v Uganda (1972) EA 549** for the proposition that the prosecution need to call all witnesses to prove its case. The appellant further submitted that the love letter was not subjected to a hand writing expert to ascertain whether the handwriting belonged to the appellant.

The appellant further contended that penetration was not proved since there were no injuries on MK's genitalia, nor were there signs of spermatozoa or any male emissions found in MK's genitalia. That since it was said that there was continuous defilement, a broken hymen alone was not sufficient proof of penetration. For this submission, the appellant relied on the following cases **P.K.W v Republic [2012] eKLR** and **David Mwingirwa v Republic [2017] eKLR** on that aspect. He therefore faulted the Judge for concluding that there was defilement from the mere fact that MK had a broken hymen.

On the issue of corroboration, the appellant argued that despite the provisions of **section 124** of the **Evidence Act**, the learned judge erred in finding that the evidence of MK was truthful when he had no opportunity of seeing her as she testified. That even though corroboration was not a mandatory legal requirement, it was a matter of practice so that the court could absolve itself of the dangers of convicting a person based on the evidence of a single witness.

In opposing the appeal, Ms. Oduor submitted that the ingredients of the offence were proved; that penetration was proved by virtue of the torn hymen, the age and the identity of the appellant were also proved. Cousel urged that the evidence of MK was corroborated by that of PW2, the medical officer. MK also placed the appellant at the scene of the crime and the appellant's defence did not shake prosecution's case at all. Furthermore, section **143** of the **Evidence Act** provides that no particular number of witnesses are required to establish a fact. Therefore the conviction of the appellant was safe. She therefore urged us to dismiss the appeal.

This being a second appeal, we are only allowed to consider matters of law. This is the essence of **section 361 (1) (a)** of the Criminal Procedure Code. Dealing with the same issue, this Court in the case of **David Njoroge Macharia v Republic [2011] eKLR** held as follows;

> ***"This is a second appeal. That being so only matters of law fall for consideration – see section 361 of the Criminal Procedure Code. As this Court has stated many times before, it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings – see Chemagong v. R [1984] KLR 611."***

We have carefully considered the record of appeal, submissions by counsel as well as the appellant and the law. The matters of law that fall for our determination in this appeal are whether penetration was proved, the need for corroboration, circumstantial evidence and failure to call material witnesses.

The appellant contended that there was no sufficient proof of penetration. He submitted that a torn hymen was not proof of penetration. More importantly that it was not proved that it was the appellant who penetrated the vagina of MK. The appellant also contended that the lack of spermatozoa or injuries in the vagina of MK also pointed towards the fact that no penetration took place. We are cognizant of the fact that section 2 of the **Sexual Offences Act** defines penetration as:

> ***"…….partial or complete insertion of the genital organs of a person into the genital organs of another person;"***

This Court pronounced itself on the same issue in the case of **Mark Oiruri Mose v Republic [2013] eKLR**; thus:-

> ***"In any event the offence is against penetration of a minor and penetration does not necessarily end in release of sperms into the victim. Many times the attacker does not fully complete sexual act during commission of the offence. That is the main reason***

why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ."

Therefore whether or not the victim has a torn hymen is not what the law envisions as penetration because the foregoing section and the holding of this Court above is clear that even partial insertion is sufficient penetration. The hymen need not be torn or broken to prove penetration therefor. In **Lucas Masa Hura v Republic [2019] eKLR;** this Court emphatically stated:-

"Furthermore, since partial insertion is considered as penetration, the fact that hymen is not broken does not in itself disprove penetration of genital organs."

From the evidence on record, MK had sexual intercourse with the appellant three times, that is, on 2nd May, 2010 at 4.00pm, 8th August, 2010 at 3.00pm and on 5th October, 2010. On all these occasions she never told PW3 as she feared the consequences. It would appear that this would have gone on but for the recovery of a love letter by PW3 from the mouth of MK. According to the learned Judge, MK came across as a consistent and a truthful witness. She did not dither at all under cross examination by the appellant. From the record, we have no reason to differ with the learned Judge's observations aforesaid. Indeed it does appear to us that the appellant and MK were friends and had canal knowledge. The appellant whether deliberately or out of ignorance did not consider and appreciate that he was dealing with a minor incapable of consenting to sexual intercourse. It is not contested that PW2's examination of MK revealed a partially torn hymen that had healed. She was emphatic in her conclusion that there was vaginal penetration. This evidence taken together with the direct evidence of MK leaves no doubt that there was penetration. In any case the two courts below came to the concurrent finding that there was sufficient evidence of penetration. We have no reason to depart from those concurrent findings.

Corroboration, we are aware that it is not a mandatory requirement in sexual offences contrary to the submissions of the appellant. However, in this case, the trial court went looking for corroboration. He found such corroboration in the medical evidence proffered by PW2. He is also reverted to the love letter in such of further corroboration. According to MK that letter was authored by the appellant. There was no reason to doubt this testimony. The first appellate court also took the same positon on the question of corroboration. We have no reason to depart from these concurrent findings on corroboration. Thus, the appellant's complain that there was no corroboration of MK's evidence is not merited at all.

Turning to circumstantial evidence, the two courts below came to the same concurrent finding, that, the evidence irresistibly pointed to the appellant and no one else as the perpetrator of the crime. The test regarding the probative value of circumstantial evidence was stated in the case of **R v Kipkering arap Koske & another 16 EACA 135** as:-

"… In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt…"

MK was categorical that she had sexual intercourse with the appellant at least three times. The appellant does not deny knowing MK. In fact he readily conceded in his defence that she was a member of his Sunday school. He also knew PW3. No basis was laid by the appellant in his cross-examination of the prosecution witnesses nor in his defence why MK and PW3 would gang up and falsely testify against him. In his own statement of defence, he conceded that he had no differences with MK's mother. It is also not lost on us that the appellant was throughout the proceedings represented by counsel. Then there is the issue of the love letter. According to MK, the letter she was found chewing by PW3 had been addressed to her by the appellant. Indeed this was not the first love letter that the appellant had written to her. Under cross-examination by counsel for the appellant, she stated:-

"… I did not want my mother to see if the accused had initially written to me a love letter. I read and returned to him…"

This testimony clearly shows that the appellant had written a love letter to MK before. MK was emphatic the letter she was found in possession of by PW3 was authored by the appellant. Given their relationship, it is foolhardy for the appellant to deny the authorship of the letter. All these evidence point irresistibly to the appellant as the only person who could have defiled MK.

It was urged by the appellant that the prosecution failed to call crucial witnesses to testify and as such his conviction was unsafe. Ms. Oduor rightly pointed out that **section 143** of the **Evidence Act** provides that no particular number of witnesses are necessary to establish a fact. See also **Joseph Njuguna Mwaura & another v Republic [2013] eKLR** and **Bukenya v Uganda [1972] EA 549.** In this case the appellant complained that the prosecution ought to have called Rael, the cousin to MK as well as MK's father to testify. There is nothing to suggest that it was Rael who delivered the love letter from the appellant to MK contrary to the submissions of the appellant. Further, MK's father could not have been considered a crucial witness. His role was limited to taking MK to Langas dispensary and thereafter to Moi Teaching and Referral Hospital. Just like the two courts below we are satisfied that the evidence of PW1, 2 and 3 was sufficient and established the culpability of the appellant beyond reasonable doubt. The evidence of Rael and MK's father would not have brought out anything new that was not captured by the evidence of the above three witnesses.

For the foregoing reasons, we find no reason to upset the findings of the two courts below with the result that the appeal fails and is dismissed in its entirety.

Dated and delivered at Eldoret this 17th day of October, 2019.

R. N. NAMBUYE

.....

JUDGE OF APPEAL

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

OTIENO-ODEK

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR