IN THE COURT OF APPEAL

AT ELDORET

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

CRIMINAL APPEAL NO. 15 OF 2015

BETWEEN

FRANCIS KIPTANUI SITIENEI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya

at Eldoret, (Ochieng, J.) dated 14th November, 2013)

in

H.C.CR.A. NO. 9 OF 2011)

****

JUDGMENT OF THE COURT

Introduction

1) This is a second appeal by **Francis Kiptanui Sitienei,** ***(the appellant),*** following the dismissal of his appeal by the High Court against his conviction and sentence by the Principal Magistrate's Court at Kapsabet, for the offence of defilement contrary to ***Section 8 (1)*** as read with ***Section 8(4)*** *of the* ***Sexual Offences Act No. 3 of 2006 Laws of Kenya***.

2) The particulars of the charge against the appellant were that on 3rd day of March, 2009 at [particulars withheld] Location, in Nandi Central District of the Rift Valley Province the appellant did unlawfully cause his penis to penetrate the vagina of **EJ,** (name withheld) a child aged 16 years. The appellant was convicted and sentenced to serve 15 years imprisonment by the trial court.

3) Aggrieved by that judgment, the appellant preferred a first appeal to the High Court. The High Court (*Ochieng, J.) dismissed the appeal. The learned Judge found as follows:-*

> ***"I have come to the inescapable conclusion that the prosecution established beyond any reasonable doubt that the complainant was defiled … The age of the victim was proved through the evidence of the complainant and the evidence of the clinical officer. The identity of the assailant was proved through the direct evidence of the complainant, who saw him clearly…"***

4) This being a second appeal, our mandate is provided under ***Section 361*** of the ***Criminal Procedure Code.*** This Court has pronounced itself on this provision in a host of cases including ***Hamisi Mbela & Another -v- Republic –[2012] eKLR,*** in which the Court expressed itself as follows:_

> ***"This being a second appeal, this Court is mandated under section 361 (1) of the Criminal Procedure Code to consider only issues of law. As was held in M'Riungu v Republic [1983] KLR 445, where a right of appeal is confined to questions of law, an appellate court has loyalty to accept the findings of fact of the lower courts and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law and it should not interfere with the decision of the trial or first appellate court unless it is apparent that on the evidence no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision is bad in law. (Martin -v- Glyneed Distributors Ltd. t/a MBS Fastenings)".***

5) The appellant's grounds of appeal can be summarized as follows:-

a) The age of the complainant (PW1) was not proved.

b) The trial court failed to conduct voire dire examination on the complainant.

c) The appellant was not positively identified.

6) The appellant, who was unrepresented, relied on his written submissions. He submitted that there was no documentary proof of the age of the complainant and in the absence of such documentary proof the prosecution case was not proved beyond reasonable doubt; that the failure by the trial court to conduct a *voire-dire* examination on the complainant as provided under ***Section 19(1)*** of the **Oaths and Statutory Declarations Act (Cap 15)** and ***Section 125 (2)*** of the **Evidence Act,** rendered the reception of the complainant's evidence unjustified; that the investigating officer in the case testified twice as PW4 and PW6; that this irregularity was prejudicial to his case; and that his identification was doubtful since no identification parade was conducted. Based on these grounds the appellant urged us to allow his appeal.

7) Ms Brenda Oduor, the Public Prosecuting Counsel, (PPC), appeared for the State and made oral arguments opposing the appeal. Counsel submitted that all the ingredients of defilement were present; that the issue of penetration was proved beyond reasonable doubt, and corroborated by **PW5** the clinical officer who confirmed that the complainant's hymen was broken and that she sustained injuries. On the issue of identification of the appellant, counsel contended that the appellant was not a stranger to the complainant and that this was therefore a case of identification by recognition. On the issue of age, counsel submitted that the evidence of the complainant indicated that she was 16 years which was confirmed by the P3 Form. Counsel contended that the 1st appellate court found that complainant's age was proved to the required degree.

8) On the issue *voire-dire* examination, counsel contended that while *voire-dire* examination was not carried out, this was not fatal to the respondent's case. Counsel argued that ***Section 2*** of the **Childrens Act** defines a child of tender years as a child of 10 years and below and that in dealing with such minors *voire-dire* is mandatory. She contended that this was not the case in the instant appeal where the complainant was 16 years old. Counsel contended that the evidence of the complainant was well corroborated by **PW3** (the complainant's brother) who saw the complainant coming out of appellant's house while crying and that the complainant had informed PW2 (the complainant's mother) that the appellant had defiled her.

Determination

9) We have duly perused the record of appeal, the respective submissions, the authorities cited and the law.

Three main issues turn for our consideration in this appeal: the issue of the age of the complainant; the effect of the absence of *voire dire* examination of the complainant by the trial court and the identification of the appellant.

10) The appellant contended that the age of the complainant was not proved by any documentary evidence and in the absence of such evidence the prosecution failed to prove the case beyond reasonable doubt.

11) In the case of ***Stephen Nguli Mulili v Republic*** **[2014] eKLR,** this court faced with the issue of the age a of minor who was a victim of a sexual offence rendered itself thus:-

> ***"In the case of KAINGU ELIAS KASOMO V R, MALINDI CR. NO. 504 OF 2014, the Court of Appeal stated that age is a key ingredient to the offence of defilement and failure to prove it beyond reasonable doubt amounts to failing to prove the offence. However, as the Court clarified in TUMAINI MAASAI MWANYA V R, MSA CR.A. NO. 364 OF 2010, proof of age for purpose of establishing the offence of defilement which is committed when the victim is under the age of 18 years should not be confused with proof of age for purpose of appropriate punishment for the offence in respect of victims of defilement of various statutory categories of age."***

The learned Judge found that the age of the complainant was proved through the evidence of the complainant who testified that she was 16 years old. In addition, the evidence of PW5 (the clinical officer who filled the complainant's P3 form) indicated that the complainant was "approximately 16 years old."

We therefore find that the learned Judge properly considered the evidence before him and arrived at the correct determination regarding the age of the complainant.

12) On the issue that the identification of the appellant was doubtful since no identification parade was carried out; Mrs. Oduor submitted that this was a case of identification by recognition. The learned Judge found that the identity of the perpetrator was proved through the direct evidence of the complainant who saw him clearly.

The learned Judge found, correctly in our view that:-

> ***"There can have been no error in the identification, as the offence was committed in broad day light, at about 12.00 noon; the assailant's identity was not concealed by anything and the complainant's ability to see her assailant was not curtailed."***

This was a case of recognition and not identification and therefore there was no need for an identification parade which is required when the alleged perpetrator is unknown to the victim.

13) During the trial, the complainant testified as follows:

> ***"On 3/3/2009 at 12.00 noon. I went to the home of Francis Kiptanui Sitienei (accused identified). I went to buy tomatoes. He grabbed me and dragged me to his house."***

From the evidence of PW2 and PW3, the complainant informed them that the appellant had defiled her. PW3 on his part testified that he witnessed PW1 coming out of the appellant's house crying. We take cognizance of the fact that all this transpired in broad daylight. We therefore find that the learned Judge was right to hold that the circumstances of recognition were favourable and free from any possibility of error.

14) The appellant contended that failure by the trial court to conduct a *voire dire* examination of the complainant was fatal to the prosecution case. We note that this ground of appeal was not considered by the High Court.

Subjecting a witness of tender age to *voire dire* examination is founded under ***Section 19 (1)*** of the ***Oaths and Statutory Declarations Act*** which states as follows:-

> ***"Where in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth".***

15) Mrs. Oduor, in her submission admitted that indeed the trial court failed to conduct a *voire dire* examination as required under the law. As stated in the case of ***Samuel Warui Karimi v Republic [2016] eKLR,***

> **"In our own understanding of the above provisions of the law *voire dire* is an examination that serves two purposes; one, it is a test of the competency of the witness to give evidence and two, a means of testing whether the witness understands the solemnity of taking an oath. Thus under the *Evidence Act*, the test is one of competency as the court is supposed to consider whether the child witness is developmentally competent to comprehend the questions put to him or her and to offer reliable testimony in criminal proceedings. It, therefore, follows if the child is not competent to comprehend the evidence, they cannot also give sworn evidence."**

16) In **Mohammed v Republic [2005] 2 KLR 138**, the Court of appeal held that whether a child is of tender years remains a matter of the good sense of the court. In that particular matter, a complainant who was 8 years old was held to be a child of tender years. Under **Section 2** of the Children's Act 2006 "child of tender years" is defined as a child under the age of 10 years. This is consistent with the Mohammed decision.

17) The Court of Appeal had this to say on this aspect in **Haro Guffil Jillo –V- Republic [2014] EKLR**:-

> **"PW2 was aged 17 years, she gave sworn evidence; the age of seventeen cannot by any stretch of imagination be regarded as that of a child of tender years…The true purpose of a *voire dire* examination is to establish whether a child of tender years understands two things: the nature of an oath and the need to tell the truth. In sum the court would be trying to establish whether the child possessed sufficient intelligence to understand the duty of speaking truthfully….."**

In the case of the appeal herein, the complainant in the trial court was aged 16 years and gave sworn evidence. She did not fall under the category of a child of tender years, and therefore there was no requirement for a *voire dire* examination to be conducted. This ground of appeal therefore fails.

18) We find that there was ample sufficient and independent evidence to support the charge. The evidence of PW3, sufficiently, supported the charge. PW3 testified as follows:-

> ***"On my way to the shops I heard screams. I stopped and established the house where the screams were coming from. I stood outside the house. There were more screams. I saw that man coming out of the house (Accused identified). He closed the door. Somebody was still crying inside the house. I hid myself and I saw the accused coming back to his house and opening it. I saw PW1 coming out of the house. She was crying. I asked her and she told me she went to the shops and the accused had defiled her."***

19) PW2 who was the complainant's mother testified that:

> ***"….I asked PW1 and she told me Francis had defiled her. I checked the private parts of PW1 and saw whitish discharge on her vaginal opening."***

20) The learned magistrate made the findings of fact that the evidence tendered by the prosecution was air tight, that the complainant had been penetrated by the appellant, as her hymen was raptured and that the prosecution had proved beyond all reasonable doubt that the appellant defiled the complainant who was 16 years old as per the P3 form.

21) The learned Judge made the findings of fact that the prosecution established beyond reasonable doubt that the complainant was defiled;

that the age of the complainant was proved through evidence of the complainant and of the clinical officer **(PW5),** that the identity of the appellant was proved through direct evidence of the complainant who saw him clearly; that there was no error in the identification as the offence was committed in broad daylight; that the appellant was not concealed by anything and the complainant's ability to see her assailant was not curtailed. The learned Judge found that the evidence tendered by the prosecution proved the case against the appellant beyond any reasonable doubt.

22) The two courts below made concurrent findings of fact. We are satisfied that there was sufficient evidence to support the concurrent findings of fact by the two courts below and there are no reasons for this Court to interfere with those findings.

23) The upshot of the above is that this appeal is devoid of merit and it is dismissed in its entirety.

Dated and delivered at Eldoret this 22nd day of March, 2018.

E. M. GITHINJI

……

JUDGE OF APPEAL

HANNAH OKWENGU

……

JUDGE OF APPEAL

J. MOHAMMED

……

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR.