IN THE COURT OF APPEAL

AT ELDORET

(CORAM: E. M. GITHINJI, OKWENGU &

J. MOHAMMED, JJ.A.)

CRIMINAL APPEAL NO. 16 OF 2015

BETWEEN

SAMUEL MBUGUA NJENGA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Eldoret, ***(Kimondo, J.)*** *dated 18th October, 2013*

HCCRA NO. 44 OF 2009)

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JUDGMENT OF THE COURT

[1] This is a second appeal by **Samuel Mbugua Njenga** (*appellant),* against his conviction and sentence for the offence of defilement of a girl contrary to section **section 8(2)** of the **Sexual Offences Act No. 3** of **2006.** The appellant was convicted of the offence by the resident magistrate's court at Eldoret, and sentenced to life imprisonment. His appeal against conviction and sentence was dismissed by the High Court **(Kimondo, J).**

[2] On 31st March 2013 the appellant filed a memorandum of appeal raising seven grounds that can be compressed into three: that the 1st appellate court erred in relying on the pRcution case, which was full of contradictions and inconsistencies; that the evidence of the minor complainant was not corroborated; and that the defence of the appellant was disregarded without any cogent reason. On the day of the hearing of the appeal the appellant filed supplementary memorandum of appeal in which he raised 10 grounds. This was basically what he relied on during the hearing of the appeal.

[3] The supplementary grounds included a contention that the appellant was convicted on a defective charge sheet; that the particulars in the charge sheet were inconsistent with the evidence adduced by the pRcution witnesses; that the appellant's constitutional rights were violated as he was not produced in court within the required time and the proceedings were conducted in a language that is not known to the appellant; that the appellant's conviction was wrongly based on the evidence of a vulnerable witness who could not express herself; that no proper *voire dire* examination was conducted; that the record of proceedings was questionable as the trial was purportedly conducted nine months before the commission of the offence; and that the High Court erred in upholding the life sentence imposed upon the appellant, which sentence is against the spirit of the Constitution.

[4] We have carefully perused the record of appeal, and considered the submissions made by the parties and the authorities cited. We are alive to the fact that this being a second appeal the jurisdiction of this Court in hearing the appeal is by virtue of **Section 361** of the **Criminal Procedure Code**, limited to considering matters of law only.

[5] We reiterate the duty of a second appellate Court as stated by this Court in ***Boniface Kamande & 2 Others v Republic [2010] eKLR (Criminal Appeal 166 of 2004):***

> ***"On a second appeal to the Court, which is what the appeals before us are, we are under legal duty to pay proper homage to the concurrent findings of facts by the two courts below and we would only be entitled to interfere if and only if, we were satisfied that there was no evidence at all upon which such findings were based or if there was evidence, that it was of such a nature that no reasonable tribunal could be expected to base any decision upon it.***

[6] The appellant complained that his constitutional rights were violated as he was not produced in court within the time provided under section 72(3)(b) of the former constitution. We note that this ground was not taken up either in the trial court or in the 1st appellate court. Further, the evidence adduced by the pRcution was not clear on when the appellant was arrested. Be that as it may, from the records of the proceedings, the appellant was first produced in court on 12th November, 2008 when he took his plea. The charge sheet against the appellant was signed by the magistrate on that date. That charge sheet indicates that the appellant was arrested on the 11th November, 2008. The charge sheet indicates OB No.44 of 2nd September, 2008 and this is the date when the report of the offence was made and not the date of the appellant's arrest. We find that the appellant has not demonstrated that his constitutional rights with regard to being produced in court was violated nor has he shown any substantive prejudice to vitiate his trial.

[7] One of the grounds that the appellant has put forward in support of his appeal, is that he was convicted of a defective charge. The charge of which the appellant was convicted stated as follows:

> ***"DEFILEMENT OF A GIRL CONTRARY TO SECTION 8(2) OF THE SEXUAL OFFENCES ACT NO.3 OF 2006***
>
> ***Samuel Mbugwa Njenga: On 2nd day of September, 2008 at [particulars withheld] Estate in Uasin Gishu District within the Rift Valley Province did penetrate into the genital organ of a girl namely (name withheld) a girl aged 6 years old."***

[8] Section 8(2) of the Sexual Offences Act states as follows:

> ***"A person who commits an offence of defilement with a child aged 11 years or less shall upon conviction be sentenced to imprisonment for life".***

[9] It is evident that section 8(2) of the Sexual Offences Act is the provision that gives the penalty for the offence of defilement where the victim is 11 years or less. *The section which defines and creates the offence of defilement is actually section 8(1) of the Sexual Offences Act that states as follows:*

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

[10] The question then is whether a charge of defilement said to be under section 8(2) without mention of section 8(1) is proper. Under **Article 50 (2) (b)** of the Constitution of Kenya, an accused person's right to a fair trial includes the right to be informed of the charge with sufficient details to answer it. It was therefore desirable that both section 8(1) of the Sexual Offences Act that defines and creates the offence of defilement, and section 2 of the Sexual Offences Act that sets out the penalty of the offence for defilement of a minor under 11 years be included in the charge.

[11] Nonetheless, the failure to include section 8(1) of the Sexual Offences Act did not occasion any serious prejudice or injustice to the appellant as the particulars of the charge against the appellant were clear and provided sufficient detail that enabled the appellant to answer the charge. Indeed the appellant fully participated in the trial and was not in any way prejudiced. The defect can therefore be cured under section 382 of the Criminal Procedure Code that provides, inter alia, that a finding, sentence or order passed by a court cannot be reversed or altered on appeal on account of an error, omission or irregularity in the charge unless the error, omission or irregularity has occasioned a failure of justice. We therefore reject this ground of appeal.

[12] During the trial, there were five witnesses who testified against the appellant namely, the minor complainant who was alleged to have been defiled by the appellant; Dr. Imbenzi who examined the minor and filled the P3 form; the minor's mother who took the minor to the hospital for medical examination, One R N (R) who raised the alarm after she met the appellant carrying the minor complainant, and to whom the minor complainant reported having been sexually assaulted by the appellant; and Doris Shapata, a police officer attached to Langas Police Station who investigated the case.

[13] The evidence was that the appellant who was known to the minor complainant, lured the minor complainant to accompany him on the promise of buying her sweets. He then took her to a secluded area where he made her to suck his penis then removed her pants and sexually violated her. The minor screamed and the appellant carried her on his back trying to pacify her. On the way R met them and upon enquiring why the child was crying, the minor reported what the appellant had done to her. R sought help from some youths who chased the appellant. She then took the minor to the police station and reported the matter. The minor's mother was later called and she took the minor to Moi Teaching and Referral Hospital where she was examined and a P3 form later filled by Dr. Imbenzi. Dr. Imbenzi found that the private parts of the minor had a tear on the penurious though the hymen was intact. The appellant was arrested and charged. In his defence, the appellant denied the offence and explained that he found the child on the road when it was raining and merely rescued her.

[14] The 1st appellate court found that the minor complainant's evidence was clear, credible and sufficient in accordance with **section 124** of the **Evidence Act** to be the basis of the appellant's conviction; and that the evidence of the minor was consistent with that of R who rescued her from the appellant and Dr. Imbenzi who examined her. The 1st appellate court therefore upheld the appellant's conviction.

[15] It is evident that the appellant's conviction was anchored on the evidence of the minor complainant who gave unsworn evidence. As observed by the 1st appellate court, the trial magistrate did carry out a voire dire examination of the minor and came to the conclusion that she did not understand the meaning of an oath. The trial magistrate did not however record or make a finding as to whether the minor had sufficient intelligence to understand the importance of speaking the truth. She nevertheless proceeded to take the evidence of the minor as unsworn evidence. From the way the minor testified, it is clear that she had sufficient intelligence of understanding the importance of speaking the truth and had the trial magistrate properly directed her mind, she would have so found.

[16] The proviso to Section 124 of the Evidence Act provides that where in a criminal case involving a sexual offence, the only evidence is

that of the alleged victim of the offence, the court should 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. As stated by this Court, in **Mohammed vs Republic [2006] 2KLR 138:**

> **"It is now settled the court shall no longer be hamstrung by requirements of corroboration where the victim of a sexual offence is a child of tender years if it is satisfied that the child is truthful"**

[17] In this case the judgment of the trial magistrate did not make any reference to section 124 of the Evidence Act nor did the trial magistrate give any reasons for finding the pRcution case proved. In effect the judgment fell short of the requirements of **section 169** of the **Criminal Procedure Code** that requires a judgment to contain the points for determination, the decision and the reason for the decision.

[18] In **Republic vs Edward Kirui [2014] eKLR,** this Court in dealing with the effect of non-compliance with the provisions of section 169(3) of the Criminal Procedure Code, noted that non-compliance with the requirements of section 169 of the Criminal Procedure Code though constituting a grave irregularity would not automatically result in the trial process being vitiated but the appellate Court has to consider the case on its own merit and reverse the conviction only where the error has occasioned a failure of justice and reversal of the conviction is warranted.

[19] In considering and analysing the evidence that was on record, the 1st appellate court found that the minor complainant had no reason to frame up the appellant, that she gave credible evidence and was firm in cross examination. Further, the 1st appellate court found good reason to believe the minor's evidence contending that it was corroborated by the evidence of Dr. Imbenzi.

[20] On our part we are satisfied that the minor complainant's evidence was credible. This evidence was corroborated by the doctor to the extent that the minor was sexually violated. The minor's testimony identifying the appellant as her assailant was consistent with the evidence of R who found the appellant carrying the minor who was crying. In response to R's enquiry, the minor immediately explained how the appellant had sexually violated her.

[21] We concur with the 1st appellate court that penetration includes the partial insertion of the genital organs of a person into the genital organs of another. Thus penetration may be present even where the hymen of a minor remains intact, if there is evidence of partial penetration. In this case although the minor's hymen remained intact, the fact that the minor had a perineum with a tear, was sufficient evidence that there had been partial penetration of her genital organs, and the minor was clear that the penetration was caused by the appellant's organs. Although the appellant denied the offence and claimed to be a good samaritan who had rescued the child this was clearly refuted by the child.

[22] As regards the age of the minor, this was crucial to establish the defilement charge and also the penal section that required that the minor be under 11 years of age. Although the witnesses did not expressly testify as to the age of the minor, it is clear that the minor was a child of tender years who was in baby class at the time she was testifying. Moreover, in the P3 form that was filled by Dr. Imbenzi, the minor's age was estimated at 6 years. This estimation was sufficient to meet the ingredients of the defilement charge and the penal section. This ground of appeal therefore, also fails.

[23] For the above reasons, we are satisfied that the 1st appellate court properly revaluated the evidence and cannot be faulted in coming to the conclusion that the appellant was guilty of defiling the minor complainant.

[24] As regards the sentence, although the trial magistrate was of the view that his hands were tied as the offence of which the appellant was convicted carries a life sentence, the learned judge on appeal took note of the fact that the offence was a serious offence perpetrated against a defenceless child who will carry the scars of the violation for life and that it was fitting that the appellant spends the rest of his life in jail. We entirely agree with the 1st appellate court and find that even if the exercise of discretion was to be applied, the sentence meted out was appropriate for the offence and there is no justification for interference.

[25] Accordingly, we find no merit in this appeal and do therefore dismiss it in its entirety.

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

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.