IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, WARSAME & GATEMBU, JJ.A)

CRIMINAL APPEAL NO. 18 OF 2017

BETWEEN

SAMUEL MBURU WANYOIKE.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Nairobi (Kimaru, J)

dated 24th February, 2016

in

HC.CRA. 157 OF 2013)

****

JUDGMENT OF THE COURT

1. On 12th August 2013, the appellant was convicted by the Resident Magistrate's court at Kiambu for the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act. He was sentenced to serve life imprisonment. The particulars of the offence were that on 28th October 2012 at about 5.00 p.m. within Kiambu County, he unlawfully and intentionally committed an act which caused penetration with his genital organ (penis) into the genital organ (vagina) of DN a child aged seven years. He appealed to the High Court against the conviction and sentence. In a judgement delivered on 24th February 2016 the High Court (Kimaru, J) dismissed his appeal. Still dissatisfied, he lodged this appeal complaining that his conviction was not supported by evidence. In particular, he asserts that penetration, a necessary ingredient of the offence of defilement, was not proved.

Background

2. PW 2 the complainant (DN) a seven-year-old child at the time the offence was committed, was in October 2012 living under the care of her guardian and grandmother, EDT (PW1). DN's mother was at the time working overseas in Saudi Arabia leaving DN under the care of her grandparents. On 28th October 2012 at about 5.00 p.m., PW1 asked DN and her siblings to sell bananas alongside the road, about 15 meters from PW1's house. Posing as a customer, the appellant approached DN with a view to buying bananas. He asked DN and her sister to follow him to his house in order to get money to purchase the bananas. At the house the appellant gave DN's sister Kshs. 20 and sent her off to get change. Left alone with DN, the appellant carried her into his house, placed her on a bed, undressed her and defiled her. In her words, the appellant "did bad manners "tabia mbaya"". When DN began to scream for help, the appellant grabbed her throat thereby strangling her. Her grandmother, PW1, then stormed into the house screaming where she found DN and the appellant on the bed. PW1 shouted. Neighbours responded and gathered by the appellant's house. The appellant was immediately apprehended. DN was then taken to hospital where she was examined and treated.

3. DN's brother, DT(PW3) and SWM(PW4) were with DN by the roadside selling bananas when the appellant approached them posing as a customer. According to DT, the appellant then asked DN and PW4 to get change. They went off to do so. The appellant asked DN to enter his house. When DN and PW4 returned, they tried to open the gate to the appellant's house but did not succeed. DT then went to call his grandmother (PW1) who came, opened the gate and entered the appellant's house where she found the appellant and DN on the bed. PW1 screamed and many people came to the house. The appellant was then apprehended by members of the public before being taken to the police.

4. On 28th October 2012 at about 5.30 p.m., Bernard Njuguna Ithangi (PW 5), an Assistant Chief in the area was called on telephone and informed that a person suspected of defiling a minor had been apprehended by members of the public. He rushed to the scene where he found the appellant. The appellant's hands and feet had been tied up by members of the public. He spoke to the victim, DN, who narrated to him what had happened. He said that DN was in shock and had scratches on her neck and her voice was shaky. On entering the house, he found a girl's panty under the bed which was identified as belonging to DN by PW1. PW5 called the police. The appellant was then taken to Gathanga Police Post and later transferred to Karuri Police Station.

5. Richard Munene, (PW6) (erroneously labelled as PW5) a Clinical Officer at Karuri Health Centre testified that DN was examined and treated at that Health Centre on 28th October 2012 at 8.00 p.m. and again on 29th of October 2012 before being referred to Nairobi Women's Hospital. She presented with a history of defilement. Her undergarment was bloodstained. She had bruises on her neck which showed that she had been strangled. Her outer genitalia were tender. Her hymen was intact. A vulva swab showed pus cells showing infection. He drew the conclusion that the complainant was defiled and that there was partial penetration. He filled the P3 Form which he produced alongside the outpatient card as exhibits before the trial court.

6. Police constable Grace Opiyo (PW7) (erroneously labelled as PW6) was based at Karuri Police Station in October 2012. She was the investigating officer. The appellant was already in custody on 29th October 2012 when she was assigned the investigation. She recorded witness statements. Based on DN's birth certificate, she established that the victim was aged seven years. She thereafter preferred charges against the appellant.

7. In his defence, the appellant stated that on the material day, which was a Sunday, he went to church and then went to town. In the evening he met a group of people who demanded to know where he was coming from. The group of people descended on him and beat him up claiming that he had defiled a girl. He denied that he had done so.

8. The trial magistrate was satisfied that the prosecution had presented overwhelming evidence against the appellant and that the charge was proven beyond any reasonable doubt. The trial court was satisfied that the age of the victim was established as seven years; that the appellant committed the act which caused penetration of his genital organ into the genital organ of the victim; and that appellant had been properly identified. She termed the defence put forward by the appellant as "a barefaced denial." The appellant was accordingly convicted and sentenced to serve life imprisonment.

9. On appeal, the High Court re-evaluated the evidence and concluded that all the ingredients of the offence of defilement had been proven and upheld the conviction and the sentence. As already indicated, the appellant now complains that his conviction was not supported by evidence and asserts, in particular, that penetration, a necessary ingredient of the offence, was not proved.

Appeal to this Court

10. The appellant appeared in person before this Court and relied on his memorandum of appeal and written submissions in which he urged that the main ingredient of the offence of defilement, namely penetration as defined under Section 2 of the Sexual Offences Act was not proved. According to the appellant, it is clear from the testimony of PW1 and that of DN that there was no contact between his genital organs with those genital organs of the complainant. The appellant further submitted that considering that penetration was not proved, he should have been subjected to a medical examination in order to connect him with the alleged offence. In that regard, the appellant cited Section 36(1) of the Sexual Offences Act and the case of ***Benjamin Mbugua Gitau vs Republic*** **and** ***Robert Mutungi Muumbi vs Republic, Cr. App. No. 52 of 2014***. Absent any medical evidence linking him to the commission of the offence, he argued, he should have been acquitted.

11. The appellant's other complaint was that in sentencing him, the trial court should have complied with Section 333(2) of the Criminal Procedure Code which requires the period spent in custody prior to sentencing to be taken into account when imposing a sentence. In support, the appellant cited the case of ***Musyeki Lemoya vs Republic [2014] eKLR***.

12. Opposing the appeal, Mrs. G. Murungi, learned Senior Assistant Deputy Public Prosecutor submitted that the prosecution presented overwhelming evidence against the appellant and that he was properly convicted and sentenced; that all ingredients of the offence of defilement were proved in that the age of the complainant was established; the appellant, who was arrested at the scene of crime, was positively identified; and penetration was confirmed by the clinical officer who examined the complainant soon after the commission of the offence. Counsel urged that in light of the evidence presented, there was no need for medical evidence.

13. As regards the complaint that Section 333(2) of the Criminal Procedure Code was not complied with, counsel submitted that the question of the time spent in custody prior to sentence did not arise in this case as the appellant was sentenced to life imprisonment.

Analysis and determination

14. We have considered the appeal and submissions. By reason of Section 361(1) of the Criminal Procedure Code (CPC) we can only entertain matters of law in a second appeal such as this. In ***Dzombo Mataza vs. R, 2014 eKLR*** the Court stated:

> ***"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 – see Okeno v Republic (1972) E.A. 32***.
>
> ***By dint of the provisions of section 361(1)(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."***

15. In the earlier case of ***Karingo v Republic [1982] KLR 219***, the Court was clear that ***"a second appeal must be confined to points of law"*** and that the Court does not "***interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence"*** and further that ***"the test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did."*** See also the recent decision of this Court in ***Stephen Nguli Mulili vs Republic [2014] eKLR***.

16. Bearing that in mind, the appellant has raised three issues. The first issue is whether the ingredients of the offence of defilement were proved to the required standard. The second issue is whether it was necessary for the appellant to be subjected to a medical examination to prove the offence. The third issue is whether the time the appellant spent in custody prior to sentence should have been taken into account.

17. Regarding the question whether penetration as an ingredient of the offence, was proved, Section 2 of the Sexual Offences Act defines penetration as ***"the partial or complete insertion of the genital organs of a person into the genital organ of another person."*** In the case of ***Mark Oiruri Mose vs R [2013]eKLR*** this Court stated that, ***"…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…."***

18. In the present case, there was the evidence of PW1, who stated that immediately she got to the scene, she checked DN's private parts and saw watery discharge which looked like semen. DN stated that the appellant removed her panty and did bad manners "tabia mbaya." She stated that the appellant laid her on his bed and "he did bad manners in my vagina" and that she felt pain. The clinical officer(PW5) testified that on examination, DN's outer genitalia was tender and that although her hymen was intact, there was partial penetration. In light of all this evidence the conclusion reached by the courts below that penetration was proved was well supported by the evidence. There is therefore no merit in the appellant's complaint.

19. The appellant's further complaint that there was no medical evidence presented to connect him to the offence is equally without merit. Recently in ***Evans Wamalwa Simiyu vs Republic [2016] eKLR*** this Court stated that "***the offence of defilement is complete immediately there is an act that causes the partial or complete insertion of the genital organs of the perpetrator's genital organs into a child's genital organs.***" In effect, "***it is not necessarily a must that medical evidence be availed to prove penetration, but as long there is evidence that there was even partial penetration, only on the surface, the ingredient of the offence is demonstrated.***"

20. In ***AML v Republic 2012 eKLR*** this Court upheld the view that,

> "***the fact of rape or defilement is not proved by way of a DNA test but by way of evidence."*** In ***Kassim Ali v Republic Cr Appeal No. 84 of 2005*** (Mombasa)(unreported) this Court stated that, ***"the absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence."***

21. What remains is the question whether in sentencing the appellant, the court ought to have taken Section 333(2) of the Criminal Procedure Code into consideration. It provides:

> "***333(2) Subject to the provisions of section 38 of the Penal Code (Cap. 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.***
>
> ***Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody."***

22. That provision in effect requires the imposed sentence to be reduced by the period already spent in custody prior to the sentencing. That provision cannot apply to life imprisonment where the term of imprisonment is indefinite. It is impractical to apply Section 333(2) of the CPC in the context of the life sentence.

23. The upshot of the foregoing is that there is no merit in this appeal.

It is accordingly dismissed.

Dated and delivered at Nairobi this 27th day of April, 2018.

R. N. NAMBUYE

…….....……

JUDGE OF APPEAL

M. WARSAME

…….....…….

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

....……..…....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR