IN THE COURT OF APPEAL

AT KISUMU

(CORAM: E. M. GITHINJI, HANNAH OKWENGU &

J. MOHAMMED, JJ. A.)

CRIMINAL APPEAL. 50 OF 2013

BETWEEN

NOAH OCHIENG KUDADI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Busia

(D. N. Onyancha, J.) *delivered on 14th July, 2011*

in

HCCRA NO. 55 OF 2009)

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JUDGMENT OF THE COURT

[1] Noah Ochieng Kudadi, who is the appellant before us is aggrieved by the judgment of the High Court in which his appeal against the judgment of the Resident Magistrate's Court in Busia was dismissed. The appellant had been convicted by the Resident Magistrate of the offence of defilement contrary to **section 8(1)(3)** of the **Sexual Offences Act** No. 3 of 2006 and sentenced to serve twenty (20) years imprisonment.

[2] M. O. (name withheld) complainant, who was alleged to be 14 years at the time of the commission of the offence was the victim of the alleged defilement. The circumstances of the offence were that on the material day the complainant and two other children, L and L had gone to the appellant's home to buy "ndumas" (Arrow roots). The appellant asked the complainant to accompany him to the shamba to get the "ndumas". While in the shamba, the appellant accosted the complainant, pushed her down, ripped off her underpants and defiled her. The complainant reported the incident to her grandmother who in turn reported to one Ogutu, who took the complainant to hospital and also reported the matter to the police and one Benjamin Akoth, a village elder. Benjamin Akoth, went to the house of the appellant the next morning arrested him and took him to Butula AP Camp. The complainant was later examined by a Clinical Officer, one Carolyne Soi who filled a P3 form confirming that the complainant had a tear in the lower part of the vagina and a thick whitish discharge suspected to be semen. In his judgment, the trial magistrate found that the evidence was sufficient to prove that the appellant committed the offence.

[3] During the hearing of the appeal in the High Court, the appellant challenged the judgment of the trial court on six (6) main grounds that is: that the evidence before the trial magistrate was not corroborated; that the trial magistrate did not consider that the investigation officer produced contradictory evidence; that the witnesses were basically family members and their evidence planned and rehearsed; and that the evidence of the witnesses could not therefore be relied upon.

[4] The appellant relied on written submissions in which he raised the issue of corroboration and pointed out that he was never taken for examination; that the evidence on the P3 form was not clear nor was it corroborated and that the trial magistrate did not examine the appellant's defence in light of the evidence of the complainant and L.

(5) In his judgment, the learned judge found that the trial magistrate properly addressed the evidence of the appellant and warned himself of the danger of relying on the evidence of the sole witness but that he still found that there was sufficient evidence against the appellant. The learned judge found the medical evidence and the complainant's report to her grandmother consistent with the complainant's evidence. He therefore dismissed the appeal.

[6] In this second appeal, the appellant has raised eleven (11) grounds. In a nutshell, he contends that there was no medical evidence that linked him to the alleged offence; that the evidence adduced was not consistent with the charge; that the appellant's conviction and the evidence of the complainant was contrary to section 19 of the Oaths and Statutory Declarations Act and Article 50(4) of the Constitution; that the appellant was not medically examined; that the appellant was not given a fair hearing nor was he supplied with copies of witness statements; that in the absence of the birth certificate, the evidence in regard to the appellant's age was not satisfactory; that the appellant's conviction was contrary to section 124 of the Evidence Act; that the learned judge failed to note that the trial magistrate did not comply with section 169 of the Criminal Procedure Code.

[7] During the hearing of the appeal, the appellant who was in person urged the Court to consider the above grounds of appeal and allow his appeal against conviction and sentence. Learned Prosecution Counsel, **Mr. Evans Ketoo,** urged the Court to dismiss the appeal. He contended that the age of the minor (complainant) was proved to be 15 years through an age assessment that was done. He submitted that the issue of breach of fundamental rights under **Article 50** of the **Constitution** were not supported by the evidence that was on record.

[8] We have carefully considered this appeal and the submissions made before us. This being a second appeal, it is restricted to matters of law only. The appellant was charged under section 8(1)(3) of the Sexual Offences Act No. 3 of 2006 that states as follows:

> **"8(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.**
>
> **(2) ……**
>
> **(3) A person who commits an act 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".**

[9] Therefore, the age of the complainant was a necessary ingredient of the offence as a matter of law. In her evidence, the complainant testified that she was fourteen (14) years and she produced a Baptism Certificate to confirm her age. The Clinical Officer who examined the appellant, gave her estimated age as 14 years. The complainant was also taken for age assessment which was done on 25th May, 2009 and a report produced showing that she was 15 years old. It is clear that there was no contradiction as the age assessment was done almost one year after the date on which the offence was alleged to have been committed. In light of the above evidence, we are satisfied that the age of the appellant was established, and that it fell within the bracket given in section 8(3) of the Sexual Offences Act.

[10] As regards the appellant's alleged violation of his constitutional rights to a fair hearing, the appellant did not raise any such complaint during the trial nor was the same raised during the first appeal. We reject these allegations as mere after thought having no foundation. Section 124 of the Evidence Act, states as follows:

> **"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:**
>
> **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."**

[11] It is clear that the proviso allows a magistrate to convict on the sole evidence of a victim of defilement provided that the magistrate is satisfied that the victim is telling the truth. Both the trial magistrate and the learned judge were satisfied that the complainant spoke the truth and that her evidence was consistent with the evidence of L. There was further consistency in the report that the complainant made to her grandmother, and the finding of the Clinical Officer that there was a tear in the lower part of her vagina. In the circumstances, the complainant's evidence could be relied upon even without corroboration.

[12] We are satisfied that in light of the overwhelming evidence against the appellant his defence denying having committed the offence was properly rejected. His conviction was therefore sound.

[13] As regards the sentence, section 379(1)(b) of the Criminal Procedure Code allows this Court to consider an appeal against sentence, where the sentence is one fixed by law. As mentioned above, under section 8(3) of the Sexual Offences Act where one is convicted of a defilement offence and the victim's age is between 12 years and 15 years, the penalty is fixed by law as a minimum of twenty years. This is the sentence that was imposed by the trial magistrate and upheld by the learned judge. No arguments have been made before us that would justify our interference with the sentence. In the circumstances, we find no merit in this appeal and do therefore dismiss it in its entirety.

Dated and delivered at Kisumu this 24th day of May, 2018.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

……...……..……

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.