IN THE COURT OF APPEAL

AT MALINDI

(CORAM: VISRAM, KARANJA & KOOME, JJ.A)

CRIMINAL APPEAL NO. 54 OF 2017

BETWEEN

EDWARD KATANA SAFARI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Malindi (Chitembwe, J.) dated 10th November, 2016

in

H.C.CR.A No. 43 of 2014)

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JUDGMENT OF THE COURT

1. Edward Katana Safari (the appellant) in an attempt to take a second bite at the cherry has preferred this second appeal challenging his conviction and sentence for the offence of defilement. Our role as the second appellate court was succinctly set out in ***Karani vs. R [2010] 1 KLR 73*** wherein this Court expressed:-

> "***This is a second appeal. By dint of the provisions of section 361 of the Criminal Procedure Code, we are enjoined to consider only matters of law. We cannot interfere with the decision of the superior court on facts unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law."***

2. The facts giving rise to the appeal are that on 7th December, 2013 at around 7:00 p.m. Furaha Kazungu Kavatsi (PW3) reported to work at [particulars withheld] Primary School where he had been employed as a guard. He saw G.W. (complainant) playing in the compound and told her to go home. After completing his routine inspection around the school, he noticed that G.W was still in the compound, in the company of a man later identified as the appellant. The appellant removed biscuits from his pocket and gave G.W. Thereafter, the two of them walked into a forest which was behind the classrooms. Suspicious of the appellant's intentions, Furaha informed his friend, Shida Kazungu Karisa (PW4) who had passed by, and they decided to follow them into the forest.

3. According to G.W, the appellant led her into the forest and directed her to lie down. He then undressed her, lay on top of her and proceeded to defile her. She began screaming out in pain. Meanwhile, Furaha and Shida heard the screams which led them to the scene. They found the appellant in the process of defiling G.W. They apprehended him and helped G.W, who they described as a child, to dress up. They then escorted the appellant and G.W to the area sub-chief. While on their way, they ran into C K M (PW2), G.W's mother who followed them to the sub-chief's office. The appellant was arrested while G.W was taken for medical attention.

4. As per the evidence in the P3 form which was filled by Ibrahim Abdullahi (PW5), a clinical officer, G.W's hymen was missing which evidenced penetration of her vagina. Consequently, the appellant was arraigned and charged at the Chief Magistrate's Court at Malindi with one count of defilement contrary to ***Section 8(1)*** as read with ***Section 8(3)*** of the ***Sexual Offences Act***. He also faced an alternative count of committing an indecent act with a child contrary to ***Section 11(1)*** of the ***Sexual Offences Act***.

5. The particulars of the main count were that on 7th December, 2013 at [particulars withheld] Village in Magarini District within Kilifi County, the appellant unlawfully caused his penis to penetrate the vagina of G.W, a girl aged 7 years. On the alternative count, the particulars

read that on the above mentioned date and place, the appellant intentionally and unlawfully touched the vagina of G.W, a girl aged 7 years.

6. The appellant pleaded not guilty to both counts and gave unsworn testimony. He stated that on the material day while heading to his uncle's house he was accosted by two men who were armed with *rungus*. He ignored their directive to stop and continued walking. They caught up with him, assaulted him and stole money from him. They did not stop at that but ordered him to continue walking with them. Upon arriving at [particulars withheld] Primary School another group of people pounced on him and assaulted him once again. He was later taken to the sub-chief's office and re-arrested by the police. He only learnt of the charges against him when he was arraigned in court.

7. At the conclusion of the trial, the trial court convicted the appellant for the offence of defilement and sentenced him to life imprisonment. Aggrieved with his conviction and sentence, the appellant appealed to the High Court. The High Court (Chitembwe, J.) in a judgment dated 10th November, 2016 dismissed the appeal. It is that decision that gave rise to this second appeal.

8. In his written submissions, the appellant cited this Court's decision in ***Kaingu Elias Kasomo vs. R - Criminal Appeal No. 504 of 2010 (unreported)*** to underscore the importance of establishing the age of the victim in an offence of defilement. To him, the prosecution had not established G.W's age at least, through documentary evidence. The P3 form as well as C's evidence was not sufficient to establish her age.

9. Equally, penetration on G.W had not been established. This is because the age of the injuries observed on G.W was not reflected on the P3 form. Furthermore, the said P3 form did not disclose the object that caused the alleged injuries. We also understood the appellant to argue that there was no evidence on record that he was present when the prosecution witnesses gave their testimonies. As such, his right to a fair trial had been infringed.

10. He challenged the sentence meted out to him as being illegal. He contended that despite being charged under ***Section 8(3)*** of the ***Sexual Offences Act*** which prescribes an imprisonment term of not less than twenty years, he was sentenced to life imprisonment. In his concluding remarks, he urged that the prosecution had not proved its case to the required standard.

11. In opposing the appeal, Mr. Fedha, Senior Prosecution Counsel, submitted that G.W's evidence with regard to defilement was corroborated by Furaha and Shida. Although she could not identify the perpetrator, Furaha and Shida positively identified the appellant as the person they caught defiling G.W. According to him, the clinical officer clearly testified that G.W's hymen was missing which is an indication of penetration. In addition, G.W's mother confirmed that she was 7 years old during the incident. As far as he was concerned, there was no reason for this Court to interfere with the concurrent findings of the two courts below.

12. We have considered the grounds of appeal, the record, submissions by counsel and the appellant as well as the law. First and foremost, our perusal of the record reveals that contrary to the appellant's allegations he participated in the trial court proceedings. It is clear that he was present and even cross examined the prosecution witnesses.

13. By the very definition of the offence of defilement under ***Section 8(1)*** of the ***Sexual Offences Act***, three elements should be satisfied before conviction of an accused person can arise. These are penetration, apparent age of the victim and identity of the perpetrator.

14. In our view, G.W's evidence to the effect that she bled after being defiled coupled with the observation of the clinical officer that her hymen was missing was enough to establish penetration. The fact that the said clinical officer did not indicate, as the appellant put it, the age of the injuries does not derogate that there was penetration.

15. As for G.W's age, it is common ground that the age of the victim is an essential ingredient of the offence of defilement and forms an important part of the charge because the prescribed sentence is dependent on the age of the victim. Ideally, age should be proved by means of a birth certificate, notification of birth or age assessment report. However, where such evidence is not available the next best thing, as has been noted by this Court, is to establish that the victim is below 18 years for a conviction of defilement to issue. However, when it comes to the sentence to be meted out, proof of apparent age suffices.

16. In this case, it is not in dispute that G.W was below 18 years at the time of the incident. Furthermore, her mother's uncontroverted evidence was that she was 7 years old and the P3 form indicated the same as her estimated age. This was sufficient to prove that G.W's apparent age was 7 years. Our position is guided by this Court's observation in ***Evans Wamalwa Simiyu vs. R [2016] eKLR*** that:-

> ***"As to whether the appellant's age fell within 12 and 15 years of age, the evidence was rather obscure. Although the complainant testified that her age was twelve years, she did not explain the source of this information. The Complainant's mother did not offer any useful evidence in this regard as she did not say anything about the complainant's age. This leaves only the evidence of Dr. Mayende who indicated at Part C of the P3 form that the estimated age of the complainant was 12 years. We have anxiously considered the purport of this evidence since the Doctor does not appear to have carried out a specific scientific age assessment. Nevertheless we do note that under part C of the P3 form the age required is estimated age and under the Children's Act "age" where actual age is not known means apparent age. This means that in the Doctors opinion the apparent age of the complainant from his observation was 12 years. Thus, although the actual age of the minor complainant was not established, the apparent age was established as 12 years."***

17. We take note that G.W was unable to identify the appellant as the perpetrator. Perhaps, it was because as per the prosecution, the dreadlocks he had at the material time had since been cut off. Nevertheless, we cannot help but note that both Furaha and Shida were categorical that it was the appellant who they caught red handed and led him to the sub-chief's office where he was arrested. Like the two courts below, we find that the two had positively identified the appellant as the perpetrator.

18. Last but not least, the appellant was charged under ***Section 8(1)*** as read with ***Section 8(3)*** of the ***Sexual Offences Act***. ***Section 8(3)*** stipulates that:-

> ***"A person who commits an offence 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."***

From the evidence, G.W was 7 years old hence, the appellant should have been charged under ***Section 8(2)*** which provides:

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

19. What was the consequence of this error in the charge sheet? Did it render the appellant's conviction unsafe? The applicable test by an appellate court when determining firstly, the existence of a defective charge, and secondly, its effect on an appellant's conviction is whether the conviction based on the alleged defective charge occasioned a miscarriage of justice resulting in great prejudice to the appellant. In the case of ***JMA vs. R [2009] KLR 671***, it was held inter alia that:-

> ***"It was not in all cases in which a defect detected in the charge on appeal would render a conviction invalid. Section 382 of the CPC was meant to cure such an irregularity where prejudice to the appellant is not discernible."***

20. Applying this principle, we are satisfied that in the instant case, the error in citing the provisions did not in any way prejudice the appellant. In our view, he appreciated the nature of the charge against him. Taking into account that G.W was 7 years old the appellant was appropriately sentenced in accordance with ***Section 8(2).*** Consequently, the sentence of life imprisonment was legal.

21. The upshot of the foregoing is that we find that the appeal lacks merit and is hereby dismissed.

Dated and delivered at Mombasa this 17th day of May, 2018

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR