



IN THE COURT OF APPEAL

AT MOMBASA

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

CRIMINAL APPEAL NO. 46 OF 2017

BETWEEN

N N C..... APPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Mombasa, (Ongeri J.) dated 2nd August, 2016

in

H.C.Cr.App.No. 102 of 2016)

JUDGMENT OF THE COURT

[1] In this second appeal, N N C (the appellant), is challenging his conviction and sentence by the Resident Magistrates court, Mombasa. He was convicted for the offence of defilement contrary to **section 8(1)** as read with **section 8(2)** of the ***Sexual Offences Act (the Act)***.

[2] The background facts of the matter was that on 30th July, 2013, the complainant (E.M.M- PW1); a minor aged 9 years old and a standard two pupil, was busy fetching firewood in a forest. While at it, she realized that she needed a piece of rope with which to tie the firewood, but was unable to cut the rope to size. Fatefully, her uncle, the appellant happened to live nearby and came to her aid. Once he was done cutting the rope for her, he offered to escort her back into the forest. However, once they got there, he forced her to the ground, took off her clothes and proceeded to defile her. Her cries and screams came to naught as there was no one else in the vicinity. Thereafter, the appellant threatened her with dire consequences should she tell anyone what had transpired. That notwithstanding, she went home and revealed to her mother what had happened.

[3] Upon learning of her daughter’s unfortunate experience at the hands of the appellant, N S M (PW 2) examined her daughter’s private parts and was of the opinion that indeed she had been defiled. She then took the complainant to the village chairman, Mr. Ndegwa Mrinzi Ngoro (PW 3) who accompanied them to Mwanguli police station to report the matter. At the police station, they found PC Livingstone Koech (PW4) who took their statements, issued them with a P3 form and referred the child to Msambweni

District Hospital for medical examination and treatment. At the hospital, they were received by Mr. Phillip Kibet Chebii (PW5), a clinical officer who examined the complainant and filled out the P3 form. He assessed the age of the complainant at 9 years and his further findings were that the complainant had been defiled and her hymen ruptured and consequently, he administered treatment and counseled her.

[4] The following day, PW2 went back to the police station with the appellant in tow; at which point the appellant reportedly sought forgiveness from the complainant for what he had done. Such was the case presented before the trial court by the prosecution in this matter. In view of the foregoing, the appellant was arrested and charged with the offence of Defilement of a child contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act No. 3 of 2006, with the particulars of the offence being given as follows:

‘On 30th day of July, 2013 at Kibotoni village Dsombo Location in Kwale county within Coast region intentionally and unlawfully committed an act which caused his penis to penetrate the vagina of E.M.M, a child aged 9 years’

[5] The appellant denied the charge and trial began with the prosecution calling their aforesaid witnesses. At the close of the prosecution case, the learned trial magistrate was of the view that the appellant had a case to answer and placed him on his defence. On his part, the appellant elected to make an unsworn statement of defence and did not call any witness. In his defence, he painted a rosy picture of a cordial relationship between himself and his brother’s family, saying that he had no idea why they would lay trumped up charges against him in the manner they did. He stated that on the material date, he had been going about his business as usual, herding the family goats which included those of his brother. Later, he returned home and was taking an afternoon nap when he was awoken and invited for a meal with his brother’s family. He joined them for the meal then resumed his nap until 3 pm when the complainant woke him asking for a *panga* (machete) with which to cut firewood; which he gave her. He then continued napping till 5 p.m. when he woke up and herded the family goats until 6pm and once done, he summoned the complainant to come and fetch the goats which she did. Thereafter, he was sent by his father on some errand to the local shopping centre and upon his return, was once again invited for a family meal by the complainant’s family, which he declined. He then went to bed and slept until 6am the following day when he was given a rude awakening by the village chairman who apprehended and tied him with a rope and thereafter, he was taken to the police station where he was charged with an offence he knew nothing about.

[6] Satisfied that the prosecution had proven its case, the learned trial magistrate (C. Njagi RM), convicted the appellant as charged and sentenced him to life imprisonment. The appellant unsuccessfully appealed to the High Court against the conviction and sentence and by a Judgment delivered on 2nd August, 2016, the High Court (Ongeri J.) upheld the conviction and sentence, hence this second appeal.

[7] Before us, the appellant faults the findings of the High court on the grounds that the learned Judge erred; by failing to find that the charge as preferred was fatally defective; failing to find that the prosecution had failed to prove their case beyond reasonable doubt; failing to find the age assessment report produced in evidence was illegally obtained and contrary to the law; failing to find that the non production of the underwear worn by the complainant at the time of the offence was contrary to the provisions of section 63 (3) of the Evidence Act and; finally the two courts below failed in their cardinal duty of evaluating the evidence and to consider the appellant’s defence.

[8] The appeal was ventilated through written as well as oral submissions. In his written submissions, the appellant contended that the charge and conviction was defective because though the charge sheet stated that he was charged with defilement contrary to 8(1) as read with section 8(4) of the Sexual Offences Act (the Act), his conviction was based on section 8(1) as read with section 8(2) of the Act. To the appellant, this variance rendered the charge and his conviction fatally defective. He added that though the court allowed the amendment of the charge sheet, no amended charge sheet was ever filed, nor was he allowed to plead to the amended charge.

[9] With regard to the prosecution’s failure to prove its case, the appellant further argued that the age of

the complainant and the act of penetration by the appellant were never proven. The appellant was emphatic that even though the prosecution produced an age assessment report in court, the same was unlawfully adduced in evidence as the witness who tendered it in court was not the maker of the document. Citing the case of **Kaingu Elias Kasomo v Republic, Malindi Court of Appeal Criminal Case No. 504 of 2010**; the appellant submitted that proof of age is a critical component in proving defilement which must be supported by credible evidence. With regard to the act of penetration, he contended that a ruptured hymen did not constitute evidence of penetration as the medical evidence and the testimony of PW5 appeared to suggest. To the contrary, that a ruptured hymen could have been occasioned by other factors, such as fingernails as the complainant took a bath. On that note, he urged the court to find merit in this appeal, quash the conviction and set aside the sentence.

[10] This appeal was opposed by Mr. Yamina learned Principal Prosecuting counsel holding brief for Mr. Wamotsa. He submitted that the appeal is based on new grounds, which were never raised at the first appellate court. On the contention that the charge was defective, counsel stated that the appellant suffered no prejudice and to the contrary, he was accorded full participation in the trial including cross examination of witnesses as well as being heard in his defence. He also reiterated that as with the other issues raised in the appeal, the issue of age assessment was never raised on first appeal and should not be entertained at this stage. Consequently, counsel urged the appeal be dismissed.

[11] This being a second appeal, this Court is required to only consider issues of law. (See Section 361 of the Criminal Procedure Code and **Karani v Republic (2010) 1 KLR 73**).

That said, the question of whether the prosecution proved the complainant's age or the act of penetration are issues of facts that were fully considered by the trial court and are strictly speaking not suitable for consideration before this Court on second appeal. Nonetheless, on the said issue of penetration, the complainant testified and gave a detailed account of how she was defiled by the appellant, her own uncle who was well known to her. The complainant's mother examined the child's private parts and confirmed there were lacerations evidencing an act of penetration; the matter was reported to the police station and a P3 form was issued documenting the injuries that were consistent with defilement. As per the provisions of the Sexual Offences Act and the provision to Section 124 of the Evidence Act, the trial court can convict on the basis of the complainant's evidence, if satisfied that the complainant is a truthful witness. However in this case the conviction is supported by the evidence of the complainant's mother, the medical examination that revealed the complainant was a victim of defilement and the police officer who recorded the statement and escorted the complainant to the hospital. The trial court believed all these witnesses and found the defence evidence lacking in credibility and in our view it was better placed to judge their credibility as it heard and saw them testify.

[12] On the issue of age assessment which was similarly never raised before the High Court, the record shows the clinical officer who examined the complainant stated her age as 9 years, her own mother said she was the same age but during the *voire dire* the child said she was 8 years. Granted, the age of a victim of a sexual assault under the Sexual Offences Act is a critical component of the charge and one which requires conclusive proof due to sentencing. **Section 8(2)** thereof stipulates that any person found guilty of defiling a child under the age of 11 years shall be sentenced to life imprisonment. In this case, the mother of the complainant who would naturally be the best placed person to tell the age of her own child said she was 9 years old; the P3 form, stated that the girl was 9 years old. This age assessment has been questioned by the appellant, who contends that other than a birth certificate or an age assessment report, nothing else could suffice as proof of age. In this regard, the holding in **Kaingu Elias Kasomo v. Republic in Malindi Criminal Appeal No.504 of 2010 (upon which the appellant also relied), provides some guidance.**

[13] In the said case, this Court acknowledged that age assessment may come in many forms. In fact, nowhere in that judgment does the superior court declare that the only acceptable means of proof of age is by an age assessment report. The court merely stated that:-

'Age of the victim of the sexual assault under the sexual offences act is a critical component. It forms part of the charge which must be proved in the same way as penetration in the cases of

rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed upon conviction will be dependent on the age of the victim....'
(Emphasis added).

[14] Was the testimony of PW 2 and the P3 form credible in this regard? In answering this question we are not lost to the fact that the complainant testified that she was 8 years old and was in class 2 at xxxx Primary school. We have also taken into account the provisions of; **Section 2** of the Children Act which defines “**age**” to mean the ‘apparent age’ in cases where actual age is not known (See **Evans Wamalwa Simiyu v Republic [2016] eKLR**. The apparent age of the complainant to the doctor who examined the complainant in this case, was 9 years. Though PW1’s level of schooling may not be conclusive proof of her age, when it is looked at together with the fact that a clinical officer (PW5) had pegged her age at 9 years, we are not satisfied the trial court erred by concluding the complainant was below the age of 11 years. There is nothing on record to controvert these findings; furthermore, just like the issue of penetration even this issue of age was never raised on first appeal. There is therefore no legal foundation upon which the learned Judge can be faulted for failing to determine an issue of proof of penetration and age which were never argued before her. Those two grounds of appeal would as of necessity fail.

[15] Consequently, the core legal issue that calls for our determination in this appeal is whether the charge herein was defective. The appellant impugned the charge on the ground that he was never given an opportunity to plead afresh following the amendment of the statement of offence. Section 8(1) of the Sexual Offences Act is the provision that creates the offence of defilement while section 8(2) prescribes the punishment for defilement of a girl aged 11 years and below. In this case the charge sheet had stated the charge to be:

‘Defilement of a child contrary to section 8(1) as read with subsection 4 of the sexual offences Act No. 3 of 2006’

However, from the court record, at the commencement of trial, on 14th July, 2014, the prosecution called the complainant as its first witness but just after her *voir dire* examination, the prosecution made an application to have the charge amended, to which the appellant responded ‘*No problem. Hakuna shida*’.

[16] The court allowed the amendment, which was to the effect that section 8(4) was substituted with section 8(2) in the charge sheet. This meant that the appellant was now charged with defilement contrary to section 8(1) as read with section 8(2) of the Act. However, no fresh plea was ever taken and the appellant contends that the failure to take fresh plea rendered the charge and subsequent conviction defective. The substitution of section 8(2) in the charge in place of section 8(4) only meant that if convicted, the appellant would be handed an automatic life sentence; as opposed to what would have been the case under subsection 8(4) which carries a sentence ranging from 15 years to life imprisonment. This is because, while section 8(4) is concerned with defilement of a girl aged between 16 to 18 years, section 8(2) is concerned the punishment for defilement of a girl aged of lesser years (under 11 years old), which calls for a harsher sentence. Given the circumstances, did the failure to have the appellant take fresh plea render the charge defective?

[17] The purpose of taking plea is to ensure that the accused person understands the charge facing him and to enable him give an indication of whether he admits or denies having committed the offence charged. (See section 207 of the Criminal Procedure Code). Should he admit the charge, a summary determination of the case follows but if he denies the charge, a formal trial is held. In order to determine whether it was necessary for the appellant to take fresh plea, the principle to be adopted was well stated by this Court in the case of **David Irungu Murage & Another v. Republic**, Criminal Appeal No. 184 of 2004 at Nakuru, (unreported) which has also been cited in **Peter Gachigwa Migwi -vs- Republic [2013] eKLR**. The principle is that fresh plea will not be held to have been necessary if from the record, it is evident to this Court that the appellant was accorded a satisfactory trial, was able to cross examine witnesses and suffered no prejudice notwithstanding the failure to plead afresh.

[18] In this case, as rightly submitted by learned state counsel, the appellant was able to fully participate in the proceedings before the trial court. In addition, the amendment of the statement of charge cannot be

said to have resulted in any prejudice to the appellant, nor can he claim to have been taken by surprise because from the very beginning, the particulars of the offence as per charge sheet made it clear that the complainant was a child under 11 years of age. In the circumstances, failure to take fresh plea is in this case a non fatal defect and curable under the provisions of section 382 of the Criminal Procedure Code.

[19] In the upshot, and for the aforesaid reasons all the grounds of appeal fail, we find it lacking merit in its entirety and we order it dismissed with the result that the conviction and sentence imposed by the trial court and confirmed by the Judge of the High court is upheld.

Dated and delivered at Mombasa this 7th day of June, 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