



**IN THE COURT OF APPEAL**

**AT MALINDI**

**(CORAM: KARANJA, KOOME & MUSINGA, J.J.A.)**

**CRIMINAL APPEAL NO. 47 OF 2017**

**BETWEEN**

**M A B1.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the Judgment of the High Court of Kenya at Garissa (Mutuku, J.) dated 27<sup>th</sup> March, 2014*

**in**

**H.C.C.R. App. No. 42 of 2013)**

\*\*\*\*\*

**JUDGMENT OF THE COURT**

1. The appellant, **M A B1**, was on 12<sup>th</sup> March, 2013 acquitted by the Senior Resident Magistrate's Court at Hola, under **Section 215** of the **Criminal Procedure Code**, of the offence of defilement of a girl, **N H**, who, as per the charge sheet, was 15 years old. The offence was alleged to have been committed on diverse dates between 2<sup>nd</sup> May and 6<sup>th</sup> June, 2012 in Tana River County.
2. Aggrieved by the trial court's decision, the State lodged an appeal in the High Court of Kenya at Garissa. In her judgment delivered on 27<sup>th</sup> March, 2014, **Mutuku, J.** reversed the trial court's judgment and sentenced the appellant to 20 years' imprisonment, thus precipitating this appeal. We shall later on consider the reasons that led to acquittal of the appellant and the subsequent reversal of that decision by the learned judge.
3. This being a second appeal, under **Section 361(1)** of the **Criminal Procedure Code** our jurisdiction is limited to a consideration of matters of law only, unless it is demonstrated that the two courts below considered, or 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 event such omission or commission would be treated as matters of law. See **KARANI v REPUBLIC [2010] 1 KLR 73**.
4. The appellant's first ground of appeal was that the learned Judge erred in law in failing to consider that his age at the date of the alleged commission of the offence was in contention, the prosecution arguing that he was an adult, while the appellant stated that he was a minor. Secondly, the appellant argued that the age of the complainant was also not established. Lastly, the appellant contended that the offence was not proved beyond reasonable doubt.
5. From the evidence on record, the trial court and the first appellate court established that on 18<sup>th</sup> April, 2012 during a wedding dance, the appellant approached the complainant and they struck a friendship. Thereafter they engaged in consensual sexual intercourse on several occasions. N.H. would sneak into the appellant's house for their sexual escapades. That went on unnoticed by her family members for sometime, until 6<sup>th</sup> June, 2012 when her brothers, **R M N** and **A N** found out. They reported to the authorities and the appellant was arrested and charged with the offence of defilement. These are concurrent findings of facts that were arrived at after careful consideration of all the evidence tendered. We cannot therefore interfere with the findings.
6. During the trial that commenced on 12<sup>th</sup> June, 2012, the complainant said that she was 14 years old, having been born in the year 2000. PW4, the complainant's elder brother, testified that she was 13 years old. The Doctor who examined the complainant testified that she was 14 years. That information was given to him by the complainant and that is what he stated in the P3 form. The Doctor did not conduct any

age assessment of the complainant.

7. Regarding the appellant's age, **PC Joab Ouma (PW3)**, the Investigating Officer, told the trial court that upon his arrest, the appellant told the police that he was 16 years old. PW3 learnt that the applicant had applied for a national identity card on 18<sup>th</sup> May, 2012. It was alleged that during the vetting exercise to determine suitability for issuance with national identity cards the appellant told the officials who were conducting the exercise that he was born in 1994. PW3 obtained a copy of the vetting committee's minutes from the District Registrar of Persons, which he produced before the trial court as P. Exhibit 2. One of the names there reads "**M A B2**", not **M A B1**. The year of birth of the said person was indicated as 1994. The maker of the said document was not called to testify.

8. When PW3 was cross examined by the appellant's learned counsel, Mr. Omwancha, regarding the appellant's age, this is what he stated:

***"I recorded the accused person's statement and he told me he was 16 years. The accused could have been taken for age assessment to establish his age. I did not take him to hospital for age assessment. The report before the court was certified today in the morning. I can see my statement which I recorded on 8.6.2012. I did not say that I made efforts to ascertain the age of the accused."***

9. In his defence under oath, the appellant said that he was 17 years old, having been born on 5<sup>th</sup> February 1996. He was a student at [particulars withheld] Secondary School and was living with his parents. He did not produce any document to confirm his age.

10. The learned Judge held that the complainant was 14 years old. She faulted the trial magistrate for acquitting the appellant on technicalities; holding that the exact age of the complainant was not established; and that the charge as drafted was fatally defective. The charge read as follows:

***"Defilement contrary to Section 8(1) (3) of the Sexual Offences Act No. 3 of 2006."***

The trial magistrate stated as follows:

***"I have carefully perused Section 8 of the Sexual Offences Act No. 3 of 2006 and I am unable to find Section 8(1) (3). This provision does not exist. What I have captured is that there is Section 8(1) which defines the offence of defilement and Section 8(3) which stipulates the penalty. As such, the charge sheet ought to have been drafted to read as follows:***

***'Defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act No. 3 of 2006.'***

***The words 'as read with' are very important and their absence or omission totally changes the meaning of the provision of the law. To that extent it is obvious that charge sheet is fatally defective."***

11. The learned Judge rightly stated that the trial magistrate, having established that the appellant defiled the complainant, ought to have invoked the provisions of **Section 382** of the **Criminal Procedure Code** to cure the defects in the charge sheet. We entirely agree. The charge as drawn substantially complied with the requirements of **Section 134** of the **Criminal Procedure Code** which states as follows:

***"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."***

12. Turning to the submissions before this Court, **Mr. ole Kina**, learned counsel for the appellant, firstly submitted that the age of the complainant was never proved. In his view, it was not clear whether the complainant was 15 years as indicated on the charge sheet; or 14 years as stated by the complainant during the trial; or 13 years as stated by PW4.

13. In response, **Mr. Monda**, Senior Assistant Director of Public Prosecutions, submitted that there was sufficient evidence that the complainant was 14 years old. He referred to the complainant's testimony and to the P3 form where her age was stated as 14 years.

14. In our view, although age assessment of a minor in a sexual offence is very important, there was no dispute that the age of the complainant herein, according to the evidence on record, was between 13 and 15 years. **Section 8(3)** of the **Sexual Offences Act** provides 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.

15. The importance of proving the age of a complainant under the Sexual Offences Act cannot be gainsaid. It is the complainant's age that determines the appropriate sentence to be passed by a trial court upon conviction of an accused person. In **ALFAYO GOMBE OKELLO v REPUBLIC [2010] eKLR**, this Court observed as follows:

***"In its wisdom, Parliament chose to categorize the gravity of that offence on the basis of the age of the victim, and consequently, the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt."***

16. In the matter before us, both the prosecution and the defence were in agreement that the complainant's age group fell between 12 and 15 years. In that regard, even in the absence of an age assessment report or any other appropriate documentary evidence, the complainant's testimony was sufficient. We are satisfied that the finding by the High Court that the complainant was 14 years old did not occasion any

miscarriage of justice.

17. Regarding the age of the appellant, serious doubts were raised from the beginning of the trial as to whether the appellant was above 18 years when he committed the offence. If the appellant was under the age of 18 years, he was then a child in terms of **Section 2** of the **Children Act** which defines a “child” to mean any human being under the age of 18 years.

18. When the appellant was first arraigned in court, he was in school uniform, and that was noted by the trial magistrate. During the trial, the appellant’s advocate told the court that the appellant was born on 5<sup>th</sup> February, 1996; although no documentary evidence was available to prove that allegation. However, as pointed out earlier, the appellant told the trial magistrate that as at the date of the trial he was 17 years old and was in form four at [particulars withheld] Secondary School.

19. To ensure a fair trial and obviate the possibility of dealing with a child offender as an adult, the trial court ought to have ordered that the appellant’s age be assessed by a doctor. Alternatively, the trial court ought to have made due inquiry as to the appellant’s age, in accordance with **Section 143(1)** of the **Children Act** which states as follows:

*“143(1) Where a person, whether charged with an offence or not, is brought before any court otherwise than for the purpose of giving evidence, and it appears to the court that such person is under eighteen years of age, the Court shall make due inquiry as to the age of that person and for that purpose shall take such evidence, including medical evidence, as it may require, but an order or judgment of the court shall not be invalidated by any subsequent proof that the age of that person has not been correctly stated to the court, and the age presumed or declared by the court to be the age of the person so brought before it shall, for the purposes of this Act and for all proceedings thereunder, be deemed to be the true age of the person.”*

20. Both the trial court as well as the first appellate court relied on a copy of minutes of the vetting board, (P. Exhibit 2) that showed that a person by the name “**M A B2**”, born in 1994, had applied for issuance of a national identity card. The prosecution alleged that the said person was the appellant and therefore he was not a child. The two courts below held that the appellant’s counsel did not object to the production of the minutes nor seek to have the maker of P. Exhibit 2 testify.

21. With great respect to the learned trial magistrate and the learned Judge, they misdirected themselves in that respect. Firstly, P. Exhibit 2 is neither conclusive proof that the person named therein as **M A B2** is the same as **M A B1**, nor is it sufficient proof that the named person was born in 1994. The minutes contain names of several people who are known as **M A B2** and others known as **M A B1**, two different names. These are common names in Bura-Tana River County.

Secondly, no evidence was led as to how the said document was prepared. The maker was not called as a witness.

22. The mere production of P. Exhibit 2 did not absolve the trial court of the obligation to make “**due inquiry**” as to the age of the appellant, since reasonable doubt had been raised regarding his age, despite the fact that the learned magistrate stated that he was “of the opinion that the accused person appears to be over eighteen years”. That statement was made in a ruling pursuant to an application by the appellant shortly after commencement of the trial, where it was contended that the appellant was a minor. Here was a young person who was presented to court in school uniform, he told the investigating officer and the trial court that he was a minor; that he was a student; and without any inquiry as to his age, the trial court proceeded with the trial on the presumption that he was an adult.

23. In the circumstances, we are satisfied that the lower courts’ finding that the appellant was not a minor, in the absence of any inquiry to his age, might have occasioned a miscarriage of justice.

24. Had the trial court found that the appellant was a minor but had defiled the complainant, who was also a minor, it would have dealt with him in any of the ways prescribed under **Section 191(1)** of the **Children Act**. Such ways include discharging the offender under **Section 35(1)** of the **Penal Code**. **Section 190(1)** of the **Children Act** expressly provides that no child shall be ordered to imprisonment or to be placed in a detention camp.

25. Having expressed doubt as to the legality of the sentence that was imposed by the first appellate court, considering that the appellant may have been under 18 years, we must allow the appeal as against sentence. The appellant has been in jail since March 2014. We now discharge him under **Section 35(1)** of the **Penal Code**. Consequently, the appellant is set at liberty forthwith unless otherwise lawfully held. It is so ordered.

**Dated and delivered at Mombasa this 26<sup>th</sup> day of July, 2018.**

**W. KARANJA**

.....

**JUDGE OF APPEAL**

**M. K. KOOME**

.....

**JUDGE OF APPEAL**

**D. K. MUSINGA**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR**