IN THE COURT OF APPEAL

AT ELDORET

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

J. MOHAMMED, JJ.A)

CRIMINAL APPEAL NO. 101 OF 2015

BETWEEN

BENARD EMBENZI..........................APPELLANT

AND

REPUBLIC.....................................RESPONDENT

(Being an appeal against a Judgment from the High Court of Kenya at Kitale, (J. R. Karanja, J) dated 3rd May, 2012

in

HCCRA. NO. 110 OF 2010)

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JUDGMENT OF THE COURT

[1] The appellant was convicted by the Senior Resident Magistrate, Kitale of the offence of defilement contrary to **section 8 (2)** of the **Sexual Offences Act** and sentenced to life imprisonment. His appeal to the High Court against conviction and sentence was dismissed. He now appeals to this Court against the judgment of the High Court dismissing his appeal.

[2] The particulars of the charge alleged that on 18th November, 2008, the appellant caused his genital organ to penetrate into the genital organ of **RC *(name withheld),*** a girl aged five years. The prosecution called six witnesses including the child RC.

The child *(complainant), (PW2),* stated that on the material day, she, the appellant and other people were harvesting maize in her father's farm. The appellant who was an employee at the home found her alone at one end of the farm and took her to his house where he did *"Tabia mbaya"* to her. She demonstrated at the trial what the appellant did to her. According to the evidence of **J C**, ***(J)*** the complainant's mother, the child complained of discharge on the following day and she was washed and treated with herbs.

[3] On 22nd November, 2008, **L C R, *(L)*** a sister to Janet, who is married in the neighbourhood, visited the child after getting information that she was sick. She found the complainant sleeping on a bed and inquired from her what the problem was. The complainant pointed to her private parts. She checked her and saw what looked like pus on her private parts. The child disclosed in the presence of her mother, J that she was defiled and mentioned the name of the appellant. On the following day, neighbours were called who arrested the appellant, beat him and took him to Moi's Bridge Police Station where a report of defilement was made. The complainant was also taken to the police station where she was issued with a medical examination report form.

[4] On 24th November, 2008, the complainant was taken to Kitale District Hospital where she was examined by **Kirwa Labat** – a clinical officer. The medical examination revealed that the complainant had a discharge on vulva, inflated vaginal walls and a broken hymen. After investigations, **Corporal Rengongo** charged the appellant with the offence of defilement.

[5] The appellant gave unsworn evidence at the trial. He stated that he was employed by the complainant's uncle and that on 23rd November, 2008, he was arrested for reasons that he did not know, beaten and taken to the police station. He also stated that the grandmother of the complainant owed him money for work he had done for her.

[6] The trial magistrate considered the evidence after which he concluded:

> **"The incident occurred in broad daylight. The child knew the accused before as their worker. She was able to describe how accused called her to his house and defiled her.**
>
> **I have warned myself of the dangers of relying on the evidence of a single identifying witness. I believe the evidence of PW2 for aforestated reasons. This cannot be a case of mistaken identity. There is overwhelming evidence against accused."**

The trial magistrate rejected the appellant's defence as a mere denial and an afterthought.

[7] The High Court reviewed the evidence and concluded that the evidence of the complainant with regard to the identity of her assailant was believable, that investigations did not reveal that the appellant was owed money for work done and that there was sufficient and credible evidence of the appellant's responsibility for the offence. Regarding the age of the complainant, the High Court stated:

> **"Although there was contradiction between the particulars of the charge and evidence adduced by Albert (PW1) regarding the age of the complainant, there was sufficient evidence to show that she was aged below eleven (11) years."**

[8] The appellant appeals against the judgment of the High Court on several grounds including that the charge was defective; the prosecution case was not proved beyond all reasonable doubt; the evidence was contradictory and incredible; the court did not consider that the charge was fabricated because he was owed money; no *voire dire* examination of the complainant was conducted and that the court erred in dismissing his defence which was plausible.

In support of the grounds of appeal, the appellant relied on his written submissions. He also made oral submissions relating to the contradictory evidence on the complainant's age.

[9] Ms. Oduor, learned prosecution counsel opposed the appeal and submitted amongst other things, that, the ingredients of the offence were proved, the complainant recognised the appellant whom she knew before; that the clinical officer found that the complainant's hymen was broken, the complainant's age was proved and that the defence that appellant was owed money was a fabrication and an afterthought.

[10] The ground that the charge was defective because the words *"unlawful or unlawfully"* were omitted and for failing to state that the penetration was caused intentionally has no merit. **Section 8 (1)** of the Sexual Offences Act which creates the offence of defilement states:

> **"A person who commits an act which causes penetration with a child is guilty of an offence termed defilement."**

Defilement is absolutely unlawful and without any qualification.

[11] It is true that the record of the trial does not show that a preliminary examination of the complainant was conducted to test her competency to testify. The issue that no *voire dire* examination was conducted was raised in the first appeal but it was not apparently considered. The record does, however, show that the trial magistrate ordered that the complainant do adduce unsworn testimony. Thereafter the complainant gave unsworn testimony and was cross examined by the appellant.

[12] By **section 19** of the **Oaths and Statutory Declarations Act** ***(Cap 15 Laws of Kenya),*** if a child of tender years does not understand the nature of the oath, his evidence may be received, if, in the opinion of the court, he is possessed of sufficient intelligence to justify reception of his evidence and understands the duty of speaking the truth.

The complainant was a child of tender years. The fact that the trial magistrate ordered her to give unsworn evidence is an indication that the trial magistrate was satisfied that she did not understand the nature of the oath. Nevertheless, she was competent to testify, if, in the opinion of the trial magistrate, she was intelligent and understood the duty of speaking the truth.

[13] The procedure for testing whether or not a child understands the nature of the oath and if not, whether or not the child is intelligent and also understands the duty of speaking the truth has been prescribed in many decisions of various courts. **(See <u>Johnson Muiruri v. Republic</u> [1983] KLR 445)**.

It should appear on the face of the record that there was due compliance with the provisions of **Section 19** of the Oaths and Statutory Provisions Act **(<u>Nyasani s/o Bichana v. R</u> [1958] EA 190**). If *voire dire* is not carried out, the evidence of a child of tender years would be deemed to be wrongly admitted and may result in the conviction being quashed unless there was other evidence sufficient to sustain a conviction **(<u>Nyasani s/o Bichana v. R.</u> (supra)**; **<u>Dhamuzungu v. Uganda</u> [2002] 1EA 49**).

[14] Since the trial court did not conduct a *voire dire* examination before receiving the unsworn evidence of the child, it follows that the evidence was wrongly admitted and should have been excluded from consideration by the High Court.

[15] Although the appellant contends that the evidence adduced was not credible, the two courts below considered the evidence and made a concurrent finding that the complainant was indeed defiled. There was the evidence of J the mother of the child who testified that the child complained of pain in the stomach and she was treated with herbs. There was also the evidence of L that the child told her that she had pains and pointed at her private parts. The clinical officer examined the complainant and found that her hymen was broken and that the child had been treated of a venereal disease. Thus, the concurrent findings of defilement were based on overwhelming evidence.

[16] As regards the identity of the person who defiled the complainant, the two courts below solely relied on the evidence of the complainant. The finding of the trial court on the question of identity of the defiler has already been quoted at para. 6 above.

On its part, the High Court said:

> "The main issue that fell for determination by the trial court was whether the appellant was the person responsible for the offence. In that regard the complainant's evidence was sufficient to sustain a conviction. The appellant was a person very well known to her. He worked where she lived i.e. at home of her uncle (PW1). She indicated that the offence occurred in broad daylight inside a house occupied by appellant as an employee. Thus, the complainant's evidence with regard to the identity of the appellant as the offender was believable."

[17] The two courts below did not make a finding that there was other evidence apart from that of the complainant regarding the identity of the defiler and if so the sufficiency of such evidence. The evidence of the complainant being admissible in law for failure to satisfy the conditions precedent before its reception by the trial court and the two courts below having solely relied on the evidence of the complainant as to the identity of the defiler, it follows that the conviction of the appellant as the defiler was based on no evidence. It is regrettable that the omission by the trial court has led to this result.

[18] For the foregoing reasons, the appeal is allowed, the conviction is quashed and the sentence set aside. The appellant to be set at liberty unless otherwise lawfully held.

We so order.

DATED and Delivered at Eldoret this 8th day of November, 2018.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR