IN THE COURT OF APPEAL

AT MOMBASA

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

CRIMINAL APPEAL NO. 7 OF 2018

BETWEEN

MOSES MWARIMBO DAU ……………………………...…….. APPELLANT

AND

REPUBLIC ………………………………………...………… RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Mombasa (Odero, J.) dated 20th July, 2012

in

***H.C.CR.A No. 176 of 2011**.)*

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JUDGMENT OF THE COURT

1. **Moses Mwarimbo Dau** (the appellant), is before us on a second appeal challenging both his conviction and sentence for the offence of defilement. Consequently, our mandate in this appeal is restricted to consideration of points of law by dint of ***Section 361*** of the ***Criminal Procedure Code***. Briefly put, the law enjoins us not to interfere with the concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. See ***Mwita vs. R [2004] 2 KLR 60***.

2. Initially, the appellant together with one Stephen Onyango Biko were jointly charged in the Senior Resident Magistrate's Court at Taveta with one count of organizing for child prostitution contrary to ***Section 15(a)*** of ***the Sexual Offences Act***. In addition, the appellant was charged with an offence of defilement contrary to ***Section 8(1)*** as read with ***Section 8(3)*** of the ***Sexual Offences Act*** and an alternative count of indecent assault of a girl contrary to ***Section 11(1)*** of the ***Sexual Offences Act***.

3. The facts which gave rise to the aforementioned charges were that on 16th July, 2009 at 11:30 a.m. ETF, who was then a student at [particulars withheld] Primary School, was sent by the appellant who happened to be her English teacher, to collect a book from the co-accused, also a teacher in the said school. He specifically directed ETF to go to the co-accused's house which was nearby. Upon arrival, the co-accused seemed not to know what ETF was talking about and asked her to wait outside as he went to inquire from the appellant.

4. A few minutes later the appellant appeared, he took hold of ETF's hand and pulled her into the house and locked the door. He placed her on the bed and began fondling her before going on to undress himself and ETF. After that he put on a condom and defiled her. When he was through he gave ETF a *lesso* to cover herself and left her locked in the house. One hour later, he came back with treats which he instructed ETF to eat and thereafter, defiled her for the second time. Once again, he left her locked in the house as he went back to school.

5. At school, the head teacher, J L M, called for an impromptu meeting with the teachers concerning a fire that had burnt the school office the previous day. It was suspected that the inferno was to cover-up the theft of some books from the office. At the end of the meeting, it was resolved that the houses of all the teachers who lived nearby would be searched. Towards that end, the group tasked with that mandate decided to begin with the co-accused's house which was the closest.

6. According to M and MRM (PW4) who was also part of the team conducting the search, the appellant appeared anxious and left in haste ahead of the rest of the group. On reaching the co-accused's house the group found the appellant waiting for them. The search revealed nothing connected to the stolen books save that they noticed a used condom on the floor. It was after searching the third house that M questioned the appellant about his rather odd behaviour of going ahead of them to the co-accused's house. The appellant's response was that

he did so because there was a radio which belonged to the school in the said house.

7. This aroused M's curiosity and together with the rest of the group, they went back to the co-accused's house. Indeed a radio belonging to the school was recovered. However, before leaving the compound M decided to use one of the toilets within the compound. When he opened the door thereto, to his utter surprise, he saw ETF donned in only a tank top and a *lesso*. After inquiring from her what she was doing there ETF informed him of the events that took place. Apparently, moments before he found her the appellant had returned to the house and hurriedly took her to the toilet without allowing her to dress up.

8. Mr. M took ETF back to school and called a meeting in his office which the appellant and the co-accused attended. Once again ETF reiterated what had taken place and even intimated that it was not the first time the appellant had defiled her. He had defiled her on two previous occasions, *to wit*, on 26th June, 2009 and 29th June, 2009 within the school compound.

9. Faced with the foregoing M took ETF, the appellant and the co-accused to the police station and reported the incident. Both ETF and the appellant were taken for medical examination. As per Dr. Henry Ngeno's (PW7) observation, ETF's hymen was missing despite there being no injuries on her vaginal wall. Further, there were no spermatozoa found on the appellant.

10. With the foregoing evidence at hand the appellant was placed on his defence by the trial court. He gave a sworn statement denying all the charges preferred against him. His version of events was that on the material day after several houses had been searched, Mr. M interrogated him concerning the whereabouts of a school radio and he indicated that it was in the co-accused's house. As a result, the entire group went back to the co-accused's house and retrieved the radio. They then headed back to school on foot leaving Mr. M and the co-accused behind. Later on, he learnt that ETF had been found in one of the toilets outside the co-accused's house and that she had levelled false accusations against him.

11. The trial court weighed the foregoing and found that the evidence as a whole established the appellant's culpability with respect to the two main counts. He was convicted of the said offences and sentenced to 20 years imprisonment on each count. Conversely, the trial court acquitted the co-accused for lack of evidence against him. Aggrieved with that decision, the appellant lodged an appeal in the High Court wherein the learned Judge (**Odero, J**.) by a judgment dated 20th July, 2012 set aside his conviction and sentence for the offence of organizing for child prostitution. Nonetheless, the learned Judge upheld his conviction and sentence for the offence of defilement.

12. It is the High Court's judgment that has elicited this appeal premised on the grounds that the learned Judge erred by:

> ***i) Failing to find that the complainant's age had not been established to the required standard.***
>
> ***ii) Failing to appreciate that the charge sheet was defective.***
>
> ***iii) Failing to appreciate that the medical evidence did not link him to the offence.***
>
> ***iv) Failing to re-appraise the evidence before the trial court as required by law.***
>
> ***v) Upholding his conviction and the sentence meted out by the trial court***.

13. Addressing us on the appeal, the appellant who appeared in person, asserted that the age of a victim in any offence under the ***Sexual Offences Act*** is crucial not only for a conviction thereunder but also for issuance of the appropriate sentence. Nevertheless, the prosecution failed to establish the complainant's age by means of documentary evidence. In his view, the oral evidence as adduced by the prosecution was not sufficient to establish that fact. He went on to state that in the absence of proof of the complainant's age which is an essential ingredient for the offence of defilement, his conviction was not safe and should be set aside. In that regard, he relied on this Court's decisions in ***<u>Kaingu Elias Kasomo vs. R</u> - Criminal Appeal No. 504 of 2010*** **(unreported)** .3333 ***<u>Chiroto Nyamawi Mumba vs. R</u> – Criminal Appeal No. 373 of 2010*** **(unreported)**.

14. According to the appellant, the other vital ingredient of the offence of defilement, that is, penetration can only be established through medical evidence. We understood him to argue that absence of the hymen, as in the complainant's case, by itself was not conclusive proof of penetration because it may have been broken through other ways. He went as far as suggesting that there are instances where girls are born with missing hymens. To him, the evidence tendered by Dr. Ng'eno did not attribute the missing hymen to defilement.

15. He contended that the learned Judge's reliance on the used condom which was allegedly seen at the scene to uphold his conviction was not proper. This was because it was never produced in court and as such, remained as hearsay evidence. Moreover, there was no medical evidence which linked him to the offence as envisaged under ***Section 36(1)*** of the ***Sexual Offences Act.***

16. The appellant also took issue with his conviction which he believed was anchored on a defective charge sheet. He argued that the charge was not couched in the terms prescribed under ***Section 8*** of the ***Sexual Offences Act*** for the offence of defilement. In that, the charge read that he had carnal knowledge of a girl under the age of 15 years as opposed to that he committed an act that caused penetration of the complainant. To bolster his argument he referred to this Court's decision in ***<u>Mwanguo Gwede Mwarua vs. R</u> [2015] eKLR***.

17. In summing up, the appellant submitted that the evidence as a whole did not merit his conviction for the offence of defilement. He also urged us not to accede to the suggestion, as was put forth by counsel for the State in the first appellate court, that by virtue of ***Section 179*** of the ***Criminal Procedure Code*** he should be convicted of the minor offence of sexual assault under ***Section 5*** of the ***Sexual Offences Act***. Simply because he did not have an opportunity to give his defence on the said offence.

18. On his part, Mr.Yamina, Principal Prosecution Counsel, informed the Court that the appellant had raised the issue of the complainant's

age in his first appeal and the same was dismissed. However, his position was that there was no evidence with regard to the complainant's age hence the appellant should have been found guilty of the minor cognate offence of sexual assault. Be that as it may, the evidence of the surrounding circumstances as contemplated under ***Section 33*** of the ***Sexual Offences Act*** clearly indicated that the appellant committed the offence intentionally. More so, taking into account that he exploited and/or abused the teacher/student relationship that existed between himself and the complainant at the time. In that respect, he made reference to ***Section 43(1)(a) & (2) (c)*** of the ***Sexual Offences Act***. In his closing remarks, he urged us not interfere with the sentence meted out to the appellant.

19. We have considered the record, submissions by the appellant and counsel as well as the law. This Court in ***Edward Katana Safari vs. R [2018] eKLR*** appreciated that there are three elements which ought to be satisfied before conviction for the offence of defilement can arise. These are penetration, age of the victim and identity of the perpetrator.

20. Starting with the element of penetration, we focus our attention on ***Section 2*** of the ***Sexual Offences Act*** which defines penetration in the following terms:

> ***"Penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person; ..."***

This means that for this element to be established there should be evidence of partial or complete insertion of genital organs of the accused into the victim's genital organs. Such evidence is adduced by the victim and/or any other witnesses who witnessed the incident. More often than not, the evidence is corroborated by medical evidence which exhibits such penetration either through injuries on the genital organs or missing hymen.

21. Contrary to the appellant's allegation, we find that the fact that Dr. Ng'eno did not observe any injuries on ETF's vaginal wall by itself, did not render the element of penetration unproven. For that matter, Dr. Ng'eno did find that ETF's hymen was missing and also remarked that she could have been engaged in his own words, 'habitual sexual relationship'. This piece of evidence corroborated ETF's evidence that she had been defiled on more than one occasion. Moreover, the trial court which had the opportunity of observing ETF's demeanour as she testified found her to be truthful and we see no reason to interfere with such finding. See ***Martin Nyongesa Wanyonyi vs. R [2015] eKLR***.

22. As for the identity of the perpetrator, the only evidence available was that of ETF. It is trite that under the proviso to ***Section 124*** of the ***Evidence Act***, a trial court can convict on the evidence of the victim of a sexual offence alone. However, before the court can do so, it first must believe or be satisfied that the victim is telling the truth and secondly, it must record the reasons for such belief. See ***Arthur Mshila Manga vs. R [2016] eKLR***.

23. The two courts below found that ETF's evidence was not only consistent throughout but also that she gave a detailed account of what transpired. Moreover, the appellant was well known to her and there was no question of a mistaken identity. Consequently, the allegation that the learned Judge relied solely on the used condom to convict the appellant is far from the truth. The learned Judge merely expressed that the same corroborated ETF's version of events.

24. We also find that in as much as there was no medical evidence connecting the appellant to the offence, the same did not derogate that the prosecution had established his participation therein. Our positon is reinforced by the case of ***Matano Ngao Nzuma vs. R – Criminal Appeal No. 31 of 2010*** **(unreported)** wherein this Court while considering ***Section 36(1)*** of the ***Sexual Offences Act*** which provides as follows:

> ***"Notwithstanding the provisions of Section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence."***

expressed itself as herein under;

> ***"Our reading of the above section reveals that there is no mandatory requirement that an accused person charged with a sexual offence must be subjected to a DNA sampling unless the court believed it was a necessary step to take***."

25. It goes without saying that age of a victim is crucial for establishing the offence of defilement. However, a distinction is drawn between on one hand, proof of age for purposes of establishing the offence of defilement which is committed when the victim is under the age of 18 years; and the other, for purposes of meting out the appropriate punishment for the offence in respect of victims of defilement of various statutory categories of age. See ***Tumaini Maasai Mwanya vs. R - Criminal Appeal No. 364 of 2010*** **(unreported)**.

26. 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 in the aforementioned case, is to establish that the victim is below 18 years for a conviction of defilement to issue. From the record, it is clear that the fact that ETF was below 18 years during the incident is not denied thus, the offence of defilement was established.

27. Nevertheless, when it comes to the sentence to be meted out, proof of apparent or estimated age suffices. This much was appreciated in the case of ***Evans Wamalwa Simiyu vs. R [2016] eKLR*** where the Court observed 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."***

Was ETF''s apparent age established? The answer is a resounding yes. In her evidence she testified she was 14 years and the P3 form that was produced indicated the same as her estimated age.

28. Last but not least, the particulars of the charge for defilement read:

> ***"Moses Ndau Mwarimbo, on the 16th day of July, 2009 at about 11:30a.m. at Mahoo Village in Taveta District within Coast Province, had unlawful carnal knowledge of a girl aged 15 years namely ETF."*** *[Emphasis added]*

We agree with the appellant that the manner in which those particulars were crafted was not in line with ***Section 8(1)*** of the ***Sexual Offences Act***. Therefore, what is the consequence of this defect?

29. The applicable test of 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."***

Applying this principle, we are satisfied that in the instant case, the error in in the particulars of the charge of defilement did not in any way prejudice the appellant. In our view, he appreciated the nature of the charge against him.

30. Accordingly, we find that the appellant's conviction as well as the sentence meted out to him were in accordance with the law. It follows therefore that the appeal lacks merit and is hereby dismissed.

Dated and delivered at Mombasa this 6th day of December, 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