IN THE COURT OF APPEAL

AT NYERI

(CORAM: WAKI, NAMBUYE & KIAGE, JJ.A)

CRIMINAL APPEAL NO. 6 OF 2015

BETWEEN

ISAAC MUTUMA IRIKIA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the Judgment of the High Court of Kenya

at Nyeri(Wakiaga, J.) dated 28th November, 2014

in

H. C. Cr. A. No. 2 of 2011)

****

JUDGMENT OF THE COURT

1. **Isaac Mutuma Irikia** appeals in person against the dismissal of his first appeal by the High Court (**Wakiaga J**.) which had challenged his conviction by Nanyuki Resident Magistrate, **E. N. Gichangi,** for the offence of defilement contrary to ***Section 8(1)(3)*** of the ***Sexual Offences Act*** (SOA). It had been alleged in the count on which he was convicted that on the 28th December 2009 at *[particulars withheld]* area of Buuri District in Eastern Province, he penetrated the minor, RNM who was 15 years old.

2. As this is a second appeal, it can only lie on issues of law by dint of ***Section 361(1)*** of the ***Criminal Procedure Code*** (CPC). This Court is bound to defer to concurrent findings of fact and only interfere to the limited extent that they are based on no evidence, or on a perverted appreciation of the facts. **See *J.A.O v Republic* [2011] eKLR.** *The memorandum filed by the appellant and the written submissions raise six grounds of appeal but, in our view, there are only two issues of law,* which we shall consider shortly. These are:

> i. **whether the officer who conducted the prosecution of the appellant before the trial court was qualified to do so; and**
>
> ii. **whether the age of the complainant, which is a necessary ingredient of the offence, was proved.**

3. The concurrent findings of fact made by the two courts below, after evaluation of the evidence of four prosecution witnesses and the appellant, were that the minor (PW1) was on the evening of 28th December 2009 beaten up by her mother (PW2) for leaving home without her permission. The minor in protest walked off in a huff and decided to go to another home of one Mama N for shelter. On her way there, she met the appellant outside his rented hotel in *[particulars withheld]* Market and he asked her what her problem was which she told him. It was not the first time to meet the appellant as the appellant had once before tried to seduce her but she rejected his advances on the advice of her friend. The appellant this time round persuaded her not to go Mama N but to sleep in his room at the back of the hotel and the minor agreed to do so. It was a small room with a bed, a seat and a cupboard. Later, the appellant went into the room with his friend who was told to sleep on the seat while the appellant slept on the bed with the minor. And so they did, but during the night, the appellant forcefully removed the minor's skirt, petticoat and pants and inserted his penis into her vagina. He had sex with her till morning when he and his friend left to prepare the hotel for the day's customers. She was left in the room bleeding from her vagina and feeling a lot of pain.

4. In the meantime, the mother spent the night of 28th/29th looking for the minor's whereabouts without success. But at around 9a.m, as she passed by the appellant's hotel, she heard the voice of the minor and went behind to check through the window. She confirmed it and called the police who came under the command of PW4, found her hiding under a seat, took her into a vehicle and headed to Timau town looking for the appellant who was said to have left for the town. They found him and arrested him. They took him to Timau Police Station while the minor was taken to Nanyuki District Hospital for medical examination. It was confirmed by PW3 that she had vaginal discharge, the hymen was broken and sperms were visible in her vagina. The appellant was then charged with the main offence of defilement and an alternative count on indecent assault. In his defence, he said he had slept in his hotel room on the 28th December 2009 and in the morning of 29th he went to Timau to sell some milk. He was arrested by some policemen who asked him for money which he did not have and they took him to Timau Police Station where he found the minor who alleged he had raped her. He denied the offence and blamed his arrest on a grudge he had with PW2 over the hotel.

5. The trial court found that the prosecution witnesses were "consistent, honest and truthful" and believed them. The defence was rejected as it did not create any doubts on the prosecution case and, in any event, the issue of a grudge was raised at the tail-end of the trial without putting it to PW2. The appellant was convicted on the main count and sentenced to serve 20 years in prison. Both the conviction and sentence were confirmed by the High Court after re-evaluating the evidence and rejecting all the factual grounds of appeal as well as the issue of law relating to proof of age. However, the court said nothing about the qualification of the prosecutor despite recording submissions on the issue. We now re examine the two issues of law.

6. The first issue which was raised before us, as it was before the High Court, was that the prosecution of the appellant was carried out by one **PC Ihaji** who was not qualified to do so as he was below the rank of Inspector. He was indeed a Police Constable. The case of ***Roy Richard Elirema & Another v Republic [2003] eKLR*** was cited in aid of that submission. The state counsel in the High Court responded that PC Ihaji was a gazetted officer through Gazette Supplement No 77 of 17th October 2010 as a Police Prosecutor and was therefore qualified to prosecute. As earlier stated, however, no decision was made on that issue. Before us, learned **Senior Assistant Director of Public Prosecutions Mr. Kaigai** reiterated those submissions and asked us to dismiss that ground of appeal.

7. It goes without saying, and the appellant was right to raise the issue, that for a prosecution to be lawful it has to be conducted by a qualified prosecutor and if it is not, it becomes a nullity. This Court said so, as long ago as 2003 in the ***Elirema case (Supra)*** followed by many others including ***John Odhiambo Kapteng vs. Republic*** *(2005) e KLR* and ***Nicholas Shirao & Another vs. Republic*** *(2005) e KLR*. Officers below the rank of Assistant Inspectors had previously purported to rely on and prosecute criminal cases under **Legal Notice No. 234 of 1972** issued by the Attorney General stating thus:

> ***" All police officers, other than administration police officers, of the rank of Assistant Inspector***

or above are appointed public prosecutors for Kenya generally".

But the trials in the authorities cited above, and many others, were nullified and soon Parliament had to do something about ***Section 85(1)*** of the ***CPC***, which at the time provided as follows:

> ***85(1) The Attorney-General, by Notice, in the Gazette, may appoint public prosecutors for Kenya or for any specified area thereof, and either generally or for any specified case or class of cases.***
>
> ***(2) The Attorney-General, by writing under his hand, may appoint any advocate of the High Court or person employed in the public service, <u>not being a police officer below the rank of Assistant Inspector of Police</u>, to be a public prosecutor for the purposes of any case.****(Emphasis added).*
>
> ***(3) Every public prosecutor shall be subject to the express directions of the Attorney-General."***

8. By ***Act No. 7 of 2007***, the emphasized words in ***Section 85(2)*** were removed leaving it lawful for "*any person employed in the public service"* capable of being appointed a public prosecutor. The amendment appears to have regularized many prosecutions which continued to be conducted by Police Officers below the rank of Assistant Inspectors. Further amendments were made through ***Act No. 12 of 2012*** after the promulgation of the new Constitution in August 2010, to substitute the Director of Public Prosecutions for the Attorney General and to redefine a "**Public Prosecutor"** in ***Section 2*** of the ***CPC*** as:-

> ***"..the Director of Public Prosecutions, a state counsel, a person appointed under section 85 or a person acting under the direction of the Director of Public Prosecutions"***

9. The prosecution in this case commenced on 30th December 2009 when the plea was taken and continued until 16th November 2010 when an order was made for judgment. The entire prosecution was conducted by PC Ihaji. In our view, PC Ihaji was clothed with the necessary authority to prosecute after the amendment of the law in 2007. We are further informed by Mr. Kaigai, as the High Court was by state counsel, that there was a gazettement of PC Ihaji in Gazette Supplement No. 77 of 17th October 2010 but there is no copy of the Supplement in the appeal record before us. Our efforts at google-searching the entry was also unsuccessful. We have found, nevertheless, that there was no impropriety in the prosecution of the case. That ground of appeal fails.

10. On the 2nd ground, the appellant submitted, correctly so, that the age of a victim of sexual assault under the SOA forms a critical component of the offence, and the prosecution is under a duty to prove such age. He relied on this Court's decisions in ***<u>Kaingu Elias Kasomo vs R</u>, Criminal Appeal No. 504 of 2010*** *and* ***<u>Alfayo Gombe Okello v Republic [2010] eKLR</u>*** .

The appellant submitted that the age of the minor as stated in the charge sheet was 15 but that age was not strictly proved. That is because the minor testified she was born in 1995 which would make her 14 years old when she was allegedly defiled. He also submitted that, neither PW2, PW3 nor PW4 tendered any evidence on the minor's birth by producing a birth certificate or any other medical evidence on age and therefore the age remained doubtful.

11. In response Mr. Kaigai submitted that there was sufficient evidence of age in the Medical Examination Report (P3) which stated the "estimated age" as 15. The minor and her mother had also testified that 'she was aged about 15 years' and therefore the complaint had no factual or legal basis.

12. We have examined the record of appeal and confirmed that there was medical evidence stating the estimated age of the minor at 15. The minor herself testified that she was in class 7 when she was defiled and in class 8 when she testified on 25th August 2010. She stated her date of birth as 18th February 1995. By December 2009 when the offence was committed she would certainly be above 14 years and almost 15 years. The mother (PW2) also testified that "she was around 15 years old". There was no serious challenge to those pieces of evidence which were cumulatively evaluated and believed.

13. ***Section 8(1)(3)*** *of* ***SOA*** *on Defilement under which the offence was charged provides as follows:*

> ***(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.***
>
> ***(2) ……***
>
> ***(3) 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****. (emphasis added).*

14. This Court has had occasion to consider complaints relating to age brackets in the case of ***Martin Nyongesa Wanyonyi v Republic [2015] eKLR*** *where it followed the earlier decision in* ***Robert Kabwere Kiti vs Republic [2012] eKLR*** *stating thus:-*

> ***"With regard to the alleged defects in the charge sheet the learned trial Magistrate found no defects in the charge itself. If the defect in the charge is attributable to the discrepancy in the age of the victim as stated in the charge sheet 8 years and PW1's evidence of 7 years, and the P3 form reading 8 years, the said discrepancies are in our view minor and are curable under Section 382 of the Criminal Procedure Code. They have not caused any miscarriage of justice because whether 7 years or 8 years, "H's" age fell in the age bracket for the offence of defilement of a girl below the age of 11 years and the penalty has been clearly allocated in terms of the complainant's age".***

15. It is our finding in all the circumstances that the age bracket under ***sub-section 3*** *of* ***SOA*** *was satisfied by the age assessed in the evidence of the three prosecution witnesses. It did not matter whether the proved age was 14 or 15 since both constitute the vital element of the offence under* ***sub section (3).*** *The 2nd ground of appeal also fails.*

16. The upshot is that this appeal is devoid of merit and we order that it be and is hereby dismissed.

Dated and delivered at Nyeri this 5th day of April, 2017

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR