REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT MALINDI

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

CRIMINAL APPEAL NO. 62 OF 2016

BETWEEN

EMMANUEL OMARA JILLO …….……..……..……. APPELLANT

AND

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

(Being an appeal from the judgment of the High Court at Malindi, (Omondi, J.) dated 28th September 2016

In

H.C.CR.APP.No. 154 of 2009)

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JUDGMENT OF THE COURT

[1] This is a second appeal by **Emmanuel Omara Jillo** (appellant) against the judgment of the High Court (**Omondi J**.) dated 28th September, 2016 in which the learned Judge affirmed the conviction and sentence of the appellant by the Senior Resident Magistrate's Court at Lamu where he was originally tried in Criminal Case No. 70 of 2009. The appellant was charged with the offence of defilement of a child under 11 years contrary to **section 8(2)** of the Sexual Offences Act, 2006. He also faced an alternative charge of indecent act with a child contrary to **section 11(1)** of the Sexual Offences Act. The particulars of the two charges were that; on the 18th day of January, 2009 in Lamu district within Coast Province, caused his penis to penetrate the vagina of Z.C.K, (name withheld) a child under 11 years of age. The alternative count stated that on the 18th day of January, 2009 in Lamu district within Coast Province, he committed an indecent act with a child, namely Z.C.K by touching her private parts.

[2] The appellant denied the charges, was tried, found guilty and upon conviction was sentenced to a term of 21 years imprisonment. The appellant's appeal before the High Court was unsuccessful hence the present appeal which by dint of the provisions of **Section 361** of the Criminal Procedure Code, this Court is enjoined to consider only matters of law. In doing so, this Court will not interfere with concurrent findings of fact arrived at by the courts below unless it is shown demonstrably, that the same were based on no evidence (See **Karingo v Republic** [1982] KLR 219 and also **Okeno v Republic** [1972] EA 32). The test to be applied is whether the two courts below considered matters of fact that should not have been considered or failed to consider matters that they should have considered, or that looking at the evidence, they were plainly wrong.

[3] Both courts below clearly set out the facts of the case before them in detail but we will recapitulate briefly the background information so as to put this judgement in perspective and in order for us to isolate the points of law that fall for determination. The prosecution relied on evidence by 4 witnesses. After a *voire dire* examination, Z.C.K, the complainant, a girl child at the time, aged 9 years testified as (PW1). She told the trial court that she was in nursery school at the time of the offence. She narrated how on the material day, her mother sent her on an errand to the appellant's house, to fetch some coconuts and cashew nuts. She had been to the appellant's home on three prior occasions and the appellant was a person well known to her. When she arrived, the appellant led her to a bush, pushed her on the ground, removed her clothes, unzipped his pants and placed his penis in her vagina. Once done, the appellant ordered the complainant to put on her clothes and promised to buy her shoes. According to the complainant, the appellant had repeated the same acts on three other occasions, but this time, the complainant's mother became suspicious and upon examining the complainant, she found some injuries on her private parts. On inquiring, the complainant told her mother what the appellant had done to her. When she did so, and her mother confronted the appellant, the appellant also told her mother that he would buy the complainant a Christmas present.

[4] According to D.M.K, (PW2) the mother of the complainant, she told the court that on the 15th January, 2009, the appellant came to her home and requested her to allow the complainant to help him harvest some *sukuma wiki* (kales) with the promise that once done, he would give her some of the kale to take home with her. However, the complainant returned home earlier than expected and her mother became suspicious and on examining the child, she found her vagina had injuries and mucus. Upon interrogation, the complainant revealed what had transpired. PW2 reported the matter to the police and took complainant to Mpeketoni Sub –district hospital where a P3 Form was filed on the 19th January 2009 detailing that the complainant was treated for injuries arising from sexual assault on the previous day.

[5] The matter was reported at Mpeketoni police station to PC Joan Atieno (PW3) the police officer who was on duty at the time the report was made. Upon recording the report, she accompanied the complainant and her mother to the hospital, where the complainant was treated and a P3 form filled out. Later, the appellant was arrested, he was also taken to hospital for physical examination and a P3 form was also filled out. The medical examination and reports were done by one Dr. Waki but the same were produced in evidence by his colleague, Dr. Said Mariam Abeid (PW4); who said he was familiar with Dr Waki's hand writing. He confirmed as per the report, the complainant's estimated age was 9 years. Further, that the examination revealed that the complainant's hymen was torn and that she had a whitish discharge from her vagina. The witness however stated that while the medical examination revealed the complainant was a victim of defilement; it was inconclusive on whether the appellant was the culprit.

[6] On the basis of the above testimony, the learned trial magistrate was convinced that a prima facie case was made out by the prosecution requiring the appellant to answer. When put on his defence, the appellant elected to make a sworn statement; he did not call any witness. It was the appellant's case that the complainant's father had on 8th January, 2009 borrowed some Kshs.1050/- from him, which he promised to repay on 16th January, 2009. The loan was witnessed by a village elder. Subsequently however on the date of repayment, PW2 was caught by the village elder and his guards with 18 litres of palm wine, as a result of which the couple were ordered by their landlord to vacate his premises. All the while, the appellant was busy minding his business of selling charcoal; he even went to enquire from PW2 if she was interested in purchasing the charcoal. He was shocked to learn the complainant had accused him of defilement. Pointing out that PW1 is a habitual liar; the appellant stated that there was no evidence implicating him with the heinous act.

[7] The learned trial magistrate considered all the evidence but found the defence lacking in substance in view of the prosecution's case that was found not to have been dented at all by the defence. The appellant was convicted of the main charge of defilement and sentenced to serve a 21 year jail term. Aggrieved by that outcome, the appellant preferred an appeal before the High Court at Malindi and upon hearing the appeal and the respective submissions thereon; the learned Judge found no merit in the appeal, dismissed it and upheld the sentence imposed by the trial court. That in turn provoked the present appeal.

[8] The appellant who was acting in person relied on his home grown grounds of appeal and further supplementary grounds of appeal. The appellant challenges the concurrent judgment of the High Court which he argued erred in law by failing to conclude that the prosecution had failed to prove its case beyond reasonable doubt; failing to establish the actual age of the complainant; failing to find the medical evidence fell short of proving the age of the injuries, their nature and that the P3 form was never signed by the maker; that the two courts failed to appreciate the contradictions in the evidence of PW1 and PW2; that *voir dire* examination of the complainant was never conducted as per section 19 of the Oaths and Statutory Declarations Act; shifting the burden of proof despite the fact that the prosecution had failed to discharge its burden; and by failing to consider the appellant's defence.

[9] At the hearing of this appeal and with leave of court, the appellant filed written submissions in support of his contestations. Firstly, on age assessment, the appellant argued the prosecution had failed to adduce evidence of the complainant's age which was a necessary ingredient for the charge he was facing; further, given the failure to generate an age assessment report, complainant's own admission that she did not know her age and coupled with her mother's failure to produce a birth certificate, the prosecution had failed to prove a critical element to the charge of defilement. As such, the conviction should not stand. He cited the cases of **Kaingu Elias Kasomo v. Republic, Malindi Criminal Appeal No. 504 of 2010** as well as **Alfayo Gombe Okello v. Republic, Kisumu Criminal Appeal No. 109 of 2003** in support of this assertion.

[10] On the issue of the medical evidence, the appellant contended that the P3 form failed to reveal the extent of the injuries sustained, the age of the injuries, the probable type of weapon which caused the injury and any treatment administered prior to examination. In addition, that the P3 form as presented was a photocopy which was wholly unreliable as it was not dated, signed and stamped by its maker, thus offending **sections 70** and **83(1)** of the Evidence Act. The appellant went on to point out that there were contradictions on the date of the offence. According to the complainant, she could not remember the date of the offence; the charge sheet on the other hand gave the date as 18th January, 2009 while PW2 had stated it to be 15th January, 2009.

[11] On the part of the State, this appeal was opposed by Mr. Wangila, learned Senior Prosecuting Counsel. He submitted that the age of the complainant was properly established by the doctor who completed the P3 form by stating the age of the victim as 9 years. This is in line with the provisions of **Section 2** of the Children Act that define age as the apparent age. During the *voire dire* examination the learned trial magistrate asked the victim her age and she repeated that she was 9 years old. Further counsel argued that failure to indicate the age of injuries in the P3 form does not vitiate the fact that the complainant was defiled by somebody she knew. The medical report pointed out that the complainant's vagina had tears coupled with a white discharge which were clear evidence of sexual assault. The complainant's evidence was collaborated by that of her mother, the incident was reported to the police, and PW3 accompanied the complainant to the hospital upon recording the incident. Counsel urged us to disregard minor inconsistencies in evidence regarding the dates which are curable under **section 382** of the Criminal Procedure Code.

[12] As pointed out in the opening paragraphs of this judgment we have considered the record, submissions by the appellant as well as the prosecuting counsel and the authorities cited. Arising therefrom we discern three principle issues for our determination to wit;-

a) whether the complainant's age was proven to the required standard or at all;

b) whether the P3 form and the witness' testimonies were reliable and if the court relied on contradictory evidence as the basis for its decision

c) Whether proper *voir dire* examination of the complainant was conducted as per the Oaths and Statutory Declarations Act.

[13] On the first issue, this court has adopted a more liberal approach as to what constitutes proof of age. 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 as it affects the sentencing. **Section 8(2)** thereof stipulates that any person found guilty of defiling a child under the age of 11years shall be sentenced to life imprisonment. In this case, the only mention of the complainant's age was in PW4's testimony and the P3 form, stated that the girl was a 9 year 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 was relied on by the appellant. 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 4 and the P3 form credible in this regard? According to PW1, she was a nursery school pupil at [particulars withheld] primary school. As stated earlier, the testimony of PW4 revealed that PW1 was 9 years old. In addition to the P3 form, the trial court found this to be satisfactory proof that the child was under the age of 11 years. In addition, **section 2** of the Children Act 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 doctors 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 medical doctor (PW4) 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 that controverts these findings; furthermore, the 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 age which was never argued before her.

[15] The second issue was whether there were contradictions and inconsistencies in the evidence, to wit; that the P3 form and the testimonies of PW1 and PW2 evidence did not add up, they did not state the date of the offence; the date on the charge sheet is different from when the complainant was taken to hospital. To the appellant, the P3 form had material discrepancies that rendered it unreliable. Not only was it not signed, its maker never testified in court and the P3 form failed to disclose the nature and extent of the injuries as well as what had occasioned the said injuries. Thus on the whole therefore, it was the appellant's view that neither the P3 form, nor the testimony of PW1 and PW2, should have been relied on by the two courts below. To us these were issues of fact that were also raised before the first appellate court and the learned judge considered them in details as follows:

> ***"You told me your name is Emmanuel Omara alias Rama. It is not just identification by name, she knew the accused physically as had been in their home and this physical identity was confirmed by her mother PW2. It is true that there appears to be a contradiction as regards what PW1 had gone to do at the appellant's home – she says it was to collect cashewnuts and coconuts while her mother says it was to help accused harvest sukuma wiki and come home with some. My view is that the contradiction does not affect the material particulars of the case which would still go on to demonstrate that appellant got an opportunity to be alone with the young girl which I think was the trial magistrate's primary consideration."***

We find no justifiable reason to fault the above conclusions bearing in mind also the fact that the complainant was subjected to the same acts of defilement in three other previous occasions by the same appellant.

[16] On the issue of defective charge the appellant's contention was that the charge sheet failed to disclose the time when the offence was committed which to him is a fatal defect rendering his conviction unsafe. The pertinent part of the charge sheet stated as follows;

> ***'EMMANUEL OMARA JILLOH: On the 18th day of January, 2009 in Lamu district within Coast Province, caused his penis to penetrate the vagina of Z.C.K, a child under 11 years of age'***

[17] To determine whether the mention of the time of offence is critical in a charge sheet, we have looked at the provisions of Section134 of the Criminal Procedure Code for guidance. It stipulates the essentials of a valid charge sheet as:-

> ***'Offence to be specified in charge or information with necessary particulars***
>
> ***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.'***

[18] The time the offence was committed is not a pre requisite under the aforesaid provision. A charge sheet is proper if it contains the statement of offence together with reasonable information as to the nature of the offence charged as it affords an accused person sufficient particularity regarding the charges she/he is faced with. Going by the above charge sheet the appellant knew he was facing a charge of defilement. Its particulars were clearly spelt out; including the date of the offence, the place of the offence, the act constituting the offence and the name of the victim. There is no apparent prejudice suffered by the appellant simply because the exact time of the offence was not included in the charge sheet. The learned Judge cannot be faulted for not having addressed that issue as well.

[19] Lastly, the question of whether *voir dire* examination of the complainant was done as required. Under **section 19(1)** of the Oaths and Statutory Declarations Act, it is required that:

> ***"Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 233 of the Criminal Procedure Code (Cap. 75), shall be deemed to be a deposition within the meaning of that section".***

A child of tender years is described as a child under the age of 10 years (See **Section 2** of the Children Act 2001), though this age has in some cases been extended to include children as old as 14 years of age in criminal trials. In this case, the record indicates that on 2 nd April, 2009, before the complainant could testify, a *voir dire* examination was conducted to ascertain whether she understood the meaning of taking an oath. The transcript reads as follows:

> ***"PW1 MINOR***
>
> ***VOIR DIRE EXAMINATION***
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> ***My name is Z.C. I don't know my age. Am a pupil at [particulars withheld] Nursery school. My home is at [particulars withheld] area. I attend church New Christ in town. My mother is D and my father is C. A liar is punished. We are six in our family. I know accused.***
>
> ***COURT: The witness is intelligent enough to give evidence on oath".***

[20] The purpose of *voir dire examination* is for a court to satisfy itself that a child witness understands the importance of taking an oath and of telling the truth. If a child does not understand the meaning of oath, then the child is allowed to give an unsworn testimony, which in turn is relied upon with great caution by the court. In **Johnson Muiruri -*Vs- Republic* *1983 KLR*** this Court made the following remarks in this regard:-

> ***"We once again wish to draw the attention of our courts as to the proper procedure to be followed when children are tendered as witnesses. ….Where, in any proceedings before any court, a child of tender years is called as a witness, the court is required to form an opinion, on a voir dire examination whether the child understands the nature of an oath in which event his sworn evidence may be received. If the court is not so satisfied his unsworn evidence may be received if in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth. In the latter event an accused person shall not be liable to be convicted on such evidence unless it is collaborated by material evidence in support thereof implicating him (Section 19, Oaths and Statutory Declarations Act, cap 15 Laws of Kenya. The Evidence Act, Section 124, Cap 80, Laws of Kenya)*** *(Emphasis added)*

[21] As per the provisions of the Sexual Offences Act and the proviso 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 in our view it was better placed to judge their credibility as it heard and saw them testify. The learned Judge was of the same view and on our part we find no justifiable reasons to interfere with those concurrent findings.

[22] In the upshot, the three grounds of appeal fail, the appeal lacks merit and we order it dismissed with the result that the conviction and sentence imposed by the trial court are upheld.

Dated and delivered at Mombasa this 12th day of October, 2017.

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