



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MAKHANDIA, OUKO & M'INOTI, J.J.A)

CRIMINAL APPEAL NO. 91 OF 2016

BETWEEN

REUBEN DENA MAKOMBA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from a Judgement of the High Court of Kenya

at Malindi (Meoli J.) dated 27th May, 2014)

in

H.C.CR.A 23 of 2012)

JUDGMENT OF THE COURT

This appeal arises from the decision of the High Court at Malindi, (Meoli, J) confirming the appellant's conviction for the offence of defilement for which he was sentenced to 15 years imprisonment.

It was alleged that after the first sexual encounter in December, 2010, between the appellant and the complainant, whose age was found by the two courts below to be 15 years, the two subsequently continued to engage in such exploits to the extent that the complainant, her age notwithstanding, began to regard the appellant as her fiancé. The proverbial straw that broke the camel's back came on 21st April, 2011 at a funeral wake at the appellant's home. The complainant testified that she attended the funeral wake and spent the night having sex with the appellant in the bush. The next morning when she returned home and upon being challenged by her parents, the complainant confessed to having an affair with the appellant claiming that he had promised to marry her. The father reported the matter to the assistant chief who summoned the appellant. The matter was also reported to the police and the appellant arrested and charged with defilement of a child contrary to **section 8(4)** of the Sexual Offences Act of 2006 and in the alternative with committing an indecent act with a child contrary to **section 11 (a)** of the Sexual Offences Act. Both courts below came to a concurrent determination on the complainant's age, that she was 15 years old.

The appellant denied the charges and maintained that, although he knew the complainant, he was surprised when he was summoned by the area assistant chief and then the police on allegations that he had defiled the complainant.

The learned trial magistrate, upon assessing and analyzing the evidence presented before him found the charge in the main count proven. The conviction and the 15 years imprisonment term aggrieved the appellant who moved to the High Court, where Meoli, J., after re-evaluating the evidence on record agreed with the trial magistrate on the appellant's culpability, and further that the complainant was indeed a child in terms of the Sexual Offences Act. For those reasons, the learned Judge dismissed the appeal in its entirety and upheld the conviction and sentence.

This is a second appeal in which the appellant has raised six (6) grounds, which we have condensed below. Conducting his own appeal, the appellant submitted that charge sheet was defective for failing to cite **section 8(1)** of the Sexual Offences Act. In support of that submission he relied on **sections 137 (a) (i) (ii) and 214** of the Criminal Procedure Code and the cases of **Mutinda Mwai Mutana V R** Cr. Appeal No. 282 of 2008 (Unreported) and **Chemang'ong' V R** (1984) KLR 611. Second, he complained that the learned Judge ought to have found that *voir dire* inquiry was not properly conducted on the complainant by the trial court contrary to **Section 19** of the Oaths and Statutory

Declaration Act. For that, he cited **Ben Maina Mwangi V. R.** HC Cr. Appeal No. 471 of 2001 at Nairobi. The third ground was with regard to the failure of the learned Judge to hold that the trial court did not ascertain the age of the complainant in accordance with the law and as was laid down in **Kaingu Elias Kasomo V R** Cr. Appeal No. 504 of 2010. Regarding the burden of proof, the appellant submitted that no evidence was adduced linking him to the offence.

Mr. Ayodo, Senior Principal Prosecuting Counsel (SPPC) in opposing the appeal submitted that, although in the charge sheet only **section 8(4)** which contains the sentence was cited instead of **8(1)**, which is the definition section of the offence as read with **Section 8(3)**, no injustice or prejudice was occasioned to the appellant; and that the appellant fully participated in the trial. Citing the case of **Amedi Omurunga V R** (2014) Cr. Appeal No. 178 of 2012, counsel also submitted that the complainant gave credible evidence that was corroborated by that of the doctor (PW5), proving the charge beyond any reasonable doubt; that the complainant's age was equally proved by her vaccination card and the testimony by her mother; and that failure to conduct *voir dire* inquiry on the complainant did not weaken the prosecution case.

This is a second appeal and the jurisdiction of this Court is circumscribed by **section 361** of the Criminal Procedure Code. Only issues of law can be considered and determined. See **Kaingu V R** (1982] KLR 213 at page 219 wherein this Court stated thus:-

“A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The rest to be applied on second appeal is whether there was any evidence on which the trial court find as it did (Reuben Karoti s/o Karanja V Republic (1956) 17 EACA 146.**”**

The essence of this is that in a second appeal, the issues of fact will have been tried and settled by the court trying the case and the first appellate court and that this Court will, except in exceptional circumstances, concern itself only with the application of the law to the facts as settled by the two courts below.

The points of law raised in this appeal relate to the question of the identity of complainant's violator, her age, whether the charge was defective, whether it was necessary to conduct a *voir dire* examination on the complainant and whether the standard of proof was established.

We have reviewed the record and submissions by both the appellant and the learned counsel for the respondent. The appellant denied having met the complainant before he was arrested. But the complainant, in a graphic account of events of the first time in December, 2010, when the complainant defiled her, confirmed that she knew the complainant prior to this day; she knew his home and had a conversation, before the ordeal. The time was 6 pm. Then there was the second occasion at the appellant's home when the two spent the whole night together. The evidence of the complainant's identity was corroborated by her mother and PW2 who was in her company. We have no doubt that the appellant was properly identified.

On the complainant's age it is now firmly established that in cases of defilement, the age of the complainant is crucial in determining the sentence upon conviction of an accused. In **Kaingu Elias Kasomo V. R.** Cr. Appeal No. 504 of 2010, this Court stated thus:

“Age of the victim of sexual assault under the Sexual Offences Act is a critical component. It forms part of the charge which must be proved 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 will be dependent on the age of the victim.”

In this appeal the penalties imposed by **sections 8(3)** and **8(4)** of the Sexual Offences Act are key to this question. They provide, for instance that;

“8 (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.

8 (4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years”. (Emphasis supplied).

The trial court concluded that the complainant was about 15 years of age based on the evidence by her mother and age assessment report by the doctor, (PW8). The date of birth on the vaccination card, however showed that the complainant was born on 12th October, 1995. That places her age at 15 years and about 6 months old as at 21st April 2011, when she was defiled. Likewise, the doctor who examined her after the incident assessed her age at about 15 years. The trial court did not address this discrepancy but sentenced the appellant to 15 years imprisonment, clearly under **Section 8(4)** which bears the lesser sentence of 15 years as opposed to **section 8(3)** which attracts 20 years, without any explanation.

Having found that the complainant was 15 years, the magistrate had no option but to proceed under **section 8(3)**. The learned Judge noted the discrepancy but was of the view that, in the circumstances of the case, it was “a small discrepancy” and that it was proper for the magistrate to impose a sentence under **section 8(4)**. The seeming discrepancy in the evidence as to age of the complainant, whether 15 or 16 years of age is, in our view, of no significance.

The best evidence on proof of age of the complainant was the biological mother's evidence, then the evidence of the complainant herself, being 15/16 years. Forensic evidence could only augment this.

The trial court failed to consider the fact that in the particulars of the charge sheet, it was alleged that the complainant was defiled by the appellant, first in December, 2010. The complainant herself presented that evidence. The learned Judge found as a fact that it was from that date that an affair between the complainant and the appellant developed. So that as the question of the complainant's age was being considered, the relevant date ought to have been December, 2010, that would place the complainant's age at 15 years. That being the case,

both courts below erred in imposing 15 years sentence. But because the State did not give notice to the appellant of the likelihood of enhancement of the sentence, it would be prejudicial at this stage to correct the sentence. We confirm it. See J.J.W V. R, Criminal Appeal No. 11 of 2011.

In conclusion, having confirmed that the complainant was, at the time she testified in 2011 16 years of age, it was not necessary to administer *voir dire*. In the result, we find no substance in this appeal and dismiss it in its entirety.

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

ASIKE - MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR