IN THE COURT OF APPEAL

AT NAIROBI

CORAM: MUSINGA, OUKO & GATEMBU, JJ.A

CRIMINAL APPEAL NO. 77 OF 2016

BETWEEN

NDIOO KITHUKU …… APPELLANT

AND

REPUBLIC …….. RESPONDENT

(Appeal from the Ruling /Judgment of the High Court of Kenya at Machakos (Jaden, J) dated 24th February, 2014

in

HC. CR.A. NO. 112 OF 2012*)*

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JUDGMENT OF THE COURT

1. The appellant was on 27th July 2012 convicted by the Senior Resident Magistrate's Court at Mutomo for the offences of defilement and indecent assault contrary to Section 8(1)(3) and Section 11(1) respectively of the Sexual Offences Act and sentenced to a prison term of 20 years. The trial court did not however indicate to which of the two offences, the sentence related. On appeal to the High Court, the conviction with respect to the offence of indecent assault was set aside while the conviction for the offence of defilement as well as the sentence for 20 years was upheld. This is a second appeal.

2. The background is that, in April 2012, the complainant, MM, (PW1) then aged 13 years, was a student in Standard 5 at [particulars withheld] Primary School. On 23rd April 2012 her father, (PW3), noticed that the complainant was not going to school and enquired from her why that was so. The complainant informed him that she was pregnant. PW3 then asked his wife, the complainant's mother, to intervene and make further enquiries with PW1. It was then that PW 1 disclosed what had transpired on the night of 15th December 2011 and the circumstances implicating the appellant, under which she became pregnant. Upon confirmation from his wife that PW1 was indeed pregnant, PW3 proceeded to make a report to the head teacher at her school. The matter was subsequently reported to the Mutha Police Station and thereafter the appellant was arrested.

3. In her testimony before the trial court, PW1 stated that at the material time she shared a bedroom in her parents' house with her younger brother, PW2. On 15th December 2011, the appellant had visited their

home. As she retired for the night, she left the appellant talking with her mother and went to sleep. At about midnight, she woke up after hearing the appellant leave her brother's bed. The appellant then got into her bed, removed her clothes after removing his own clothes and defiled her. She did not however inform her parents what had happened until 22nd April 2012 when she realised she was pregnant.

4. The complainant's brother, PW2, who was also a student at the same primary school but in a lower class, told the trial court that he was at home on 15 December 2011 and was asleep in his bed shared with the appellant who had visited their home. His sister, the complainant, was sleeping in the same room. He stated that at midnight the appellant left his bed and went to his sister's bed. He heard his sister talking and later the appellant returned to his bed and slept.

5. Police constable Samson Kerre (PW5) was attached to Mutha Police Station at the time. He stated in his evidence that on 29th May 2012 he was at the report office at the police station when the complainant's father (PW3) reported that the appellant had impregnated his 13 year old daughter. Following that report PW5 arrested the appellant and preferred charges after recording witness statements.

6. Daniel Mulwa (PW4), a Clinical Officer at Mutomo Health Centre, stated that he examined the complainant on 4th June 2012. The complainant informed him that she had been defiled on 15th December 2011 by a person who was well known to her. Upon examination, PW4 confirmed that the complainant was pregnant. He signed the P3 form which he produced before the trial court alongside the treatment card. The pregnancy was 28 weeks old at the time, he said.

7. In his defence, the appellant stated that he hails from Mutha location, Kaatene sub location, Ngelani village and that he is a friend of the complainant's father. He stated that they normally visited each other with the complainant's father and that he slept in his (PW3's) house. He stated that the complainant's father "takes me as his child." He asserted that the charges against him were framed up and that upon his arrest on 9th June 2012 he was not told what he had done.

8. Based on the evidence, the trial court was satisfied that the prosecution had proved its case against the appellant on both counts. The trial court had this to say:

> ***"I find that the evidence of the complainant (PW1) is fully supported by the evidence of PW2 who actually confirmed that the accused left their bed and went to her sister's bed the complainant (sic) on the material night of 15/12/11 whereby the accused had sex with the complainant resulting in her pregnancy. I do also find that the evidence of PW3 and PW4 supports the complainant's evidence since the same confirms that the complainant was pregnant. On the same note, I find that the accused was positively identified by the complainant (PW1), PW2 and PW3 as the one who impregnated the complainant. Likewise, I find the defence put forward by the accused is wanting and unconvincing. The same does not challenge the prosecution's case which I find credible. In fact, the evidence on record directly links the accused to the offence he was charged with. In a nutshell, I am convinced that the accused intentionally and unlawfully committed an act which caused penetration with the complainant a child aged 13 years and at the same time, he committed an act of indecency with the complainant, a child aged 13 years by touching her private parts."***

9. The trial court then proceeded to convict the appellant on both counts and to sentence to him to serve a prison term of 20 years.

10. Aggrieved, the appellant appealed to the High Court where he complained that the prosecution had not proved its case beyond reasonable doubt; that the prosecution witnesses were not credible, and that his defence had not been considered. Upon reviewing and re-evaluating the evidence, the High Court (B. Thuranira Jaden, J) in a judgement delivered on 24th February 2014 found no merit in the appellant's appeal. It upheld the conviction and sentence for the offence of defilement but set aside the conviction for the offence of indecent assault.

11. Still dissatisfied, the appellant lodged the present appeal. In his supplementary grounds of appeal and written submissions, the appellant, who appeared in person, complains that the two courts below failed to appreciate that the circumstances were not favourable for positive identification; that the burden of proof was shifted to him; that a critical witness was not called; that the provisions of Section 36 of the Sexual Offences Act and Section 169 of the Criminal Procedure Code were contravened; that his defence was disregarded; and that the prosecution did not prove its case to the required standard.

12. The appellant argued that the manner in which PW1 and PW2 claim to have identified him is unreliable as no evidence was led in relation to the light conditions prevailing at the time the alleged offence was committed and neither did PW2 say how he recognised the appellant's voice. In that regard, the appellant cited the case of **Maitanyi vs. Republic [1986] KLR 200.**

13. It was also the appellant's case that the complainant's mother was a crucial witness who should have been called to verify that the appellant was indeed in her home on the material night and to confirm where the appellant slept. In that regard, he stated that Section 150 of the Criminal Procedure Code was contravened.

14. As regards proof, the appellant argued that there was no medical evidence to show that the complainant's hymen was torn or to establish penetration. Furthermore, he went on to say, no DNA test was done to establish whether he was responsible for the complainant's pregnancy.

15. The appellant submitted further that the lower courts failed to consider that there was no age assessment to establish the age of the complainant and that the age of 13 years indicated in the charge sheet was not proved.

16. Opposing the appeal, Ms. Maina, learned SPPC, in her brief arguments submitted that the appeal has no merit; that the appellant was well known to the complainant; that the complainant's brother, PW2, corroborated the complainant's evidence; that the complainant informed her parents of the defilement when she discovered that she was pregnant; and that she informed the clinical officer, when she was being examined, that she knew the person who had defiled her.

17. We have considered the appeal and the submissions made before us. This is a second appeal. Consequently, our jurisdiction under Section 361(1) of the Criminal Procedure is confined to matters of law. As this Court stated, in **Wilson Oketch Dachi vs. Republic, Criminal Appeal No. 372 of 2009, Kisumu**:

> **"By dint of the provisions of *section 361(a) (sic)* of the Criminal Procedure Code, our jurisdiction is confined to matters of law only, unless it be demonstrated to us that the first appellate court considered matters it ought not to have considered or that it failed to consider matters it ought to have considered or that looking at the entire decision on such matters that court was plainly, wrong in which case our considering such matters amounts to considering matters of law as in such cases, it would be accepted that the first appellate court failed to revisit the evidence that was before it afresh, analyse it and evaluate it as is required of it in law."**

18. Keeping that in mind, the first issue raised by the appellant is on identification. He says the circumstances under which he was identified were not favourable. However he stated in his evidence that he was well known to the complainant's family. He said that he was a friend of the complainant's family and normally visited their home. He said that the complainant's father regarded him as his child. The complainant and her brother (PW2) had no doubt that the person they shared their bedroom with on the fateful night was the appellant.

19. This was a case of recognition. As Madan, JA stated in the often-quoted case of this Court in **Anjononi and others vs. Republic [1976-80]1KLR 1566**, **"recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant."**

See also **Wanjohi & 2 others vs. Republic [1989] KLR 415**. There is no doubt that the appellant was very well known to the complainant and to her entire family. There is no question of a mistaken identity. There is no merit in the appellant's complaint in this regard.

20. The appellant's other grievance, premised on Section 36(1) of the Sexual Offences Act, is that there was no DNA evidence to establish that he impregnated the complainant and neither was there medical evidence to show that the complainant's hymen was torn. Section 36(1) of that Act empowers the court to direct a person charged with an offence under the Sexual Offences Act to provide samples, including for DNA testing, to establish linkage between the accused person and the offence. The appellant's complaint in that regard is founded on the false premise that DNA evidence was the only evidence by which the commission of the offence would have been proved. As the Court stated in **Williamson Sowa Mbwanga vs. Republic [2016] eKLR "whilst paternity of PM's child may prove that the father of the child had defiled PM, it is not the only evidence by which defilement of PM can be proved."** (See also **Robert Mutungi Muumbi vs. Republic, Cr. Appeal No. 52 of 2014, Malindi).** In the present case, there was other cogent evidence linking the appellant to the offence. We do not think the appellant's complaint is well founded.

21. Next is the complaint that a crucial witness, namely the complainant's mother, was not called to testify. The High Court addressed this issue and concluded that "although the evidence of the complainant's mother would have shed light in the matter, her failure to testify was not fatal to the prosecution case." We share the same view.

22. The evidence before the trial court was that when the complainant's father, PW3, learnt that the complainant was pregnant, he asked his wife (the complainant's mother) to enquire further into the matter. He said that she did so and upon confirmation that the complainant was pregnant, it was the complainant's father who reported the matter to the school head teacher. The complainant also stated that as she went to bed, she left the appellant talking to her mother. Had the complainant's mother been called as a witness, she would no doubt have spoken to these matters. Although her testimony would have further strengthened the prosecution case, it was not necessary, considering the other evidence presented including the concession by the appellant that he was well known and was regarded as a child of the family.

23. Under Section 143 of the Evidence Act, no particular number of witnesses are required for the proof of any fact. The prosecution is not required to call "a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt." [See **Keter vs. Republic [2007]1EA135** cited with approval in **Sahali Omar vs. Republic [2017] eKLR**].

24. Next is the issue relating to the age of the complainant.

According to the appellant, the complainant's age was not established. Prior to her testimony, the trial court satisfied itself, though as the High Court stated it was not necessary to do so, that the complainant was competent to testify under oath. The complainant was clear that she was aged 13 years old. Her father, PW3, also informed the court that the complainant was aged 13 years. The medical examination report also indicated that she was aged 13 years. In **Mwalango Chichoro Mwanjembe vs Republic [2016] eKLR** this Court stated that age "can be proved by documentary evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof."

[Emphasis]. We are satisfied that the claimant's age was established. It is also noteworthy that the appellant raised this issued for the first time in this appeal.

25. Finally, the appellant complained that his defence was not considered. Beyond stating that the complainant's father is his friend and that they normally visit each other and that he sleeps in his house, all the appellant said was he was framed up. The trial court considered the defence and found it unconvincing. As already noted the court considered and rejected that defence stating:

> ***"I find the defence put forward by the accused is wanting and unconvincing. The same does not challenge the prosecution's case which I find credible. In fact, the evidence on record directly links the accused to the offence he was charged with."***

26. The trial court was better placed than we are to assess the credibility of the witnesses. As observed in **Joseph Kariuki Ndung'u & another v Republic [2010] eKLR (Criminal Appeal Nos. 183 & 188 of 2006).**

> **"**…**the trial judge is best equipped to assess the credibility of the witnesses and that it is a principle of law that an appellate court should not interfere with those findings by the trial court which are based on the credibility of the witnesses unless no reasonable tribunal could have made such findings or it is shown that there existed errors of law.", [**See also **R vs. Oyier [1985] KLR 353**].

27. We do not think there is merit in the appellant's complaint that his defence was not considered.

28. The upshot of the foregoing is that there is no merit in the appellant's appeal. It is hereby dismissed.

Orders accordingly.

Dated and delivered at Nairobi this 15th day of December, 2017.

D. K. MUSINGA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR