REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT MOMBASA

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

CRIMINAL APPEAL NO. 60 OF 2015

BETWEEN

DICKSON KARISA MAYA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Mombasa (Muya J.) dated 16th July, 2015

In

Criminal Appeal No. 272 of 2008).

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JUDGMENT OF THE COURT

1. This is a second appeal lodged by the appellant, against conviction and sentence by the Mombasa Senior Principal Magistrate's court; which saw him sentenced to 16 years' imprisonment. The appellant had been arraigned before the said court, to answer a charge of Defilement of a girl contrary to **section 8(4)** of the Sexual Offences Act No. 3 of 2006, whose particulars were given as follows:

> *DICKSON KARISA MAYA: On diverse days between 20th day of October, 2007 and 6th day of April, 2008 at [Particulars withheld] village in Mombasa District of the Coast Province, unlawfully and intentionally defiled M.D.L, a girl aged 16 years.*

2. He denied the charge and hearing began, with the prosecution calling four witnesses. According to the M.D.L, the complainant (PW1), the appellant is a person well known to her and had borrowed her book sometime in September, 2007. Though he promised to return the book later in the day, he never did, prompting her to ask him about it. In response, he asked her to accompany him to his house to pick up the same and PW1 acquiesced. Once there, he offered her a bar of chocolate and a soda which he invited her to have while he picked the book from his brother's house next door.

3. Upon consuming the refreshments, PW1 felt dizzy and dozed off, only to come to consciousness some three hours later; finding herself lying in bed, with not a stitch of clothing on her. She noticed too, that her private parts were bleeding and were also painful and itchy. On demanding answers, the appellant simply told her that he had done his job and that in case of anything; he was willing to marry her. He then unlocked the door and sent her on her way, warning her not to breathe a word of what had transpired to anyone and especially not to her father. Afraid and ashamed, PW1 kept the secret and it wasn't until she realized that she could be pregnant, that she revisited the matter by informing the appellant of the same. He instructed her to collect her belongings from her father's house and move in with him as his wife, which she did.

4. About a month later, her father (PW2) was able to locate her and when confronted about the pregnancy, PW1 named the appellant as the person responsible. PW2 then went to the police station and made a report to P.C No. 55577, PC Martin Mbuvi (PW4), who investigated the matter and while at it, had PW1 medically examined by Dr. Lawrence Ngone (PW3) who confirmed that PW1 had indeed been defiled. On the strength of these findings and based on information provided by PW2, PW4 located and apprehended the appellant and charged him as aforesaid.

5. Upon close of the prosecution case, the trial magistrate was convinced that the appellant had a case to answer and placed him on his

defense. The appellant opted to testify on oath and he called two witnesses in his defence.

6. In his testimony, the appellant denied the account rendered by the prosecution witnesses, contending instead; that he never defiled PW1 much less fathered her unborn child. While admitting that he knew PW1, he was quick to add that their relationship was purely confined to bible study and the allegations that he had cohabited with her were not true. To the contrary, he said, it is PW1's relatives who had brought her to his house on the material date, demanding that he takes responsibility for a pregnancy he had nothing to do with. He explained that upon his refusal to accede to their demands, the said relatives left PW1 at his place of abode then fetched and set the police upon him, which also explains, why the police found PW1 at his home at the time of arrest.

7. In support of this account, were the appellant's brothers James Kahindi (DW2) and Taabu Karisa (DW3). The two are neighbors to the appellant as well. According to DW2, a day prior to his arrest, the appellant had informed him that PW1 had arrived at the appellant's house; claiming to have been banished from home by her father due to her pregnancy. She is said to have gone to the appellant's house hoping that he would come to her aid on the matter. DW2 stated that in the end however, the appellant had resolved not to accommodate PW1 and instead, sent her back home. Nonetheless, the following day, PW1 came back to the appellant's home, this time accompanied by PW2, who demanded that the appellant must take responsibility for the pregnancy. The appellant refused to do so, at which point PW2 threatened to take action, pursuant to which he had the police promptly arrest the appellant.

8. By a judgment delivered on 28th August, 2008, the learned trial magistrate, **L. Mutende** (Ag. SPM, as she then was) held that the prosecution had proven its case beyond reasonable doubt, convicted the appellant as charged and sentenced him to serve a 16 year prison term.

9. Dissatisfied with this outcome, the appellant lodged an appeal before the High Court at Mombasa, challenging both conviction and sentence. By a judgment rendered on 16th July, 2015, the learned Judge (**Muya J.),** found the conviction by the trial court to have been safe, the sentence proper and the appeal to be without merit and accordingly, dismissed it. That judgment has in turn precipitated this second appeal.

10. The same is predicated on the appellant's homemade grounds of appeal, as well as the supplementary grounds of appeal filed by his counsel, **Mr. Nabwana** on 16th June, 2017. The appellant impugns the judgment on grounds that the learned Judge erred; by failing to analyze the totality of the evidence; holding that the case had been proved beyond reasonable doubt notwithstanding the failure by the prosecution to prove the complainant's age; admitting evidence of alleged previous sexual conduct, contrary to section 34 of the Sexual Offences Act; sustaining a conviction without ordering for DNA testing to confirm the paternity of the unborn child; disregarding the massive inconsistencies in the witness testimony; and failing to hold that the failure to call crucial witnesses was adverse to the prosecution case.

11. Urging the appeal, **Mr. Nabwana** submitted that the age of the complainant, which is a key ingredient in defilement cases, was never proven beyond reasonable doubt, since no birth certificate or medical report were produced attesting to the complainant's age. While conceding that the complainant was under 18 years of age, counsel submitted that the actual age ought to have been conclusively proven through documentary evidence.

12. With regard to the contradictions in evidence, counsel stated that while PW1 stated that she was in standard 4, PW2 said she was in standard 5. Addressing the issue of the DNA evidence, it was submitted that tests ought to have been done to ascertain the paternity of the unborn child and lastly, that the two courts below turned a blind eye to the appellant's case and defence, particularly on his denial of having had any sexual relations with the complainant. Consequently, he said, the two courts below failed to (re) analyze and (re)evaluate the evidence placed before them and in the process, arrived at wrong conclusions. Counsel thus urged this Court to allow the appeal and set aside the conviction.

13. Opposing the appeal, was **Mr. Ayodo,** the Senior Principal Prosecution Counsel who stated that though there were no documents produced to prove the complainant's age, the first appellate court had addressed the issue and that both the complainant and PW2 attested to her exact date of birth. Turning to the issue of DNA testing, counsel submitted that the complainant's pregnancy was not in doubt and that it is supported by the fact that the complainant had cohabited with the appellant; a fact confirmed by the appellant's own brother (DW2) and also by the complainant's assertion that she had not had sexual relations with any other men. In conclusion, he stated that the learned Judge had considered the appellant's defence and found it wanting and on that note, counsel urged this Court to dismiss the appeal and uphold the concurrent findings of the two courts below.

14. This being a second appeal, by dint of **section 361** of the Criminal Procedure Code, the jurisdiction of this court is confirmed to issues of law. As stated by this Court often times, this Court will not normally interfere with 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. ***Chemangong vs R [1984] KLR 611***).

15. The issues for determination in this appeal are threefold. Whether there was failure to prove the complainant's age and the effect thereof; whether the failure to conduct DNA testing was fatal and whether the appellant's defence was considered. On the first issue, learned counsel seemed to hold the view that the absence of proof of the victim's age vitiates a conviction. Although admitting that the complainant was below 18 years of age, learned counsel submitted that the appeal should be allowed on the ground of failure to proof age by way of documentary evidence. We believe that this Court has settled this issue. For instance, in the case of **Evans Wamalwa Simiyu v Republic [2016] eKLR**) this Court succinctly pronounced itself as follows:

> *"The appellant argued that the failure by the prosecution to provide an age assessment report or a birth certificate resulted in the failure by the prosecution to prove its case beyond reasonable doubt. The issue of age was considered in the case of* ***Kaingu Elias Kasomo V R, Malindi Criminal Appeal No. 504 of 2014****, (Unreported) where this Court (differently constituted) stated that age is a key ingredient to the offence of defilement and failure to prove it beyond reasonable doubt amounts to failing to prove the offence. This pronouncement was clarified by this Court in* ***Tumaini*** **Maasai Mwanya V R, Msa Criminal Appeal No. 364 Of 2010**

(Unreported) and in **Stephen Nguli Mulili V Republic 2014 eKLR** that:

> ***"Proof of age for purpose of establishing the offence of defilement which is committed when the victim is under the age of 18 years should not be confused with proof of age for purpose of appropriate punishment for the offence in respect of victims of defilement of various statutory categories of age."***

We need not say more on this issue which in our view is now well settled. In this case, PW1 stated with clarity that she was born in the month of February, 1992. That much was corroborated by PW2, who even gave the actual date as the 10th of February, 1992. There is no doubt whatsoever that the complainant herein was below 18 years of age, and so applying the above decisions of this Court, there is no doubt that ground 2 of the appellant's supplementary grounds of appeal falls on its face.

16. On whether the failure to prove the paternity of the unborn child was fatal to the prosecution case, it is to be remembered that the conviction was not based solely on the pregnancy, but on the medical report by the doctor (PW3), who found that the complainant had indeed been defiled as her hymen had been raptured. Coupled with PW1's identification of the appellant as the culprit; as well as the circumstantial evidence of her month long disappearance and cohabitation with the appellant and the fact that she was found having tea at the appellant's home on the date of arrest, all led to the inescapable conclusion that the appellant was indeed the culprit. The nature of that circumstantial evidence was such that it led to no other hypothesis than that of guilt and this court can find no reason to interfere with those findings.

17. Lastly, on whether the appellant's defence was considered, it is clear from the record that the learned Judge considered the appellant's defence, which was a denial, along with that of his witnesses but declined to believe it. This is what the learned Judge said in respect of the appellant's defence:-

> *'Although the accused denied that the complainant used to visit him, his own brother DW2 did testify that the complainant used to visit the accused in his house. The complainant's father also testified to have known the accused in the month of March 2008 when after his daughter had gone missing he found her in the house of the appellant'*

Evidently, the learned Judge did consider the defence evidence and having weighed the appellant's testimony against that of the other witnesses (including the defense witness DW2) found it insufficient to displace the cogent evidence tendered by the prosecution. Therefore the allegation that the appellant's defence was never considered, also fails.

18. On the whole, having considered the findings of the two courts below *vis a vis* the grounds of appeal raised by the appellant, we find no reason to interfere with the concurrent findings of fact by the two courts below. We also find that there are no points of law raised in this matter which can be resolved in favour of the appellant. Accordingly, we find this appeal devoid of merit, dismiss it and uphold the conviction and sentence.

Dated and delivered at Mombasa this 14th day of December, 2017

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

W.KARANJA

.....

JUDGE OF APPEAL

M.K.KOOME

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR