IN THE COURT OF APPEAL

AT MALINDI

(CORAM: OUKO, M'INOTI & OTIENO-ODEK, JJ.A.)

CRIMINAL APPEAL NO. 54 of 2013

BETWEEN

AMBROSE MWAWINDO NGWATU.....APPELLANT

AND REPUBLIC.....RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Mombasa (Muya, J.) dated 12th June 2013

in

MSA H. C. CR. A No. 263 of 2011)

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JUDGMENT OF THE COURT

1. The appellant, ***Ambrose Mwawindo Ngwatu***, was charged with defilement of a girl contrary to ***Section 8 (1)*** as read with ***Section 8 (3)*** of the ***Sexual Offences Act No. 3 of 2006***. The particulars were that on diverse dates between the months of July 2009 and August 2009 at [particulars withheld] village in Voi District within Coast Province, he unlawfully caused his penis to penetrate the vagina of ***GM*** a child aged 14 years thereby causing her to conceive.

2. The prosecution case rested on the testimony of the complainant ***GM***, ***PW3 A N K***, ***PW4 - APC Isiaka Mboi*** and ***PW5 PC Stephen Cheruiyot***. The prosecution also relied on the testimony of ***PW2 Dr. Charles Omondi*** who produced a P3 medical examination report (PEX 1) and age assessment report (PEX 2). The defence case was premised on the unsworn testimony of the appellant and the testimony of ***DW1 Raphael Mwanjala Mashao*** and ***DW2 Francis Mwajuma Mwambisi***.

3. At the time of the alleged offence, ***GM*** was a girl 14 years of age and at the time of testimony she was 17 years old. She testified that she knew the appellant and they made love together severally at his home; that she became pregnant but was not sure if the pregnancy belonged to the appellant as she had an affair with another boy.

PW3, ***A N K***, a teacher at [particulars withheld] Primary School where the complainant PW1 was a pupil narrated that she had noticed change in behaviour on the complainant; that she asked the complainant whether she had seen her menstrual period and upon receiving a negative answer advised the complainant to seek medical examination which confirmed that PW1 was pregnant.

4. The appellant gave unsworn testimony and called two witnesses in his defence. In his unsworn testimony, he stated that a DNA test was not done to determine who was the father of the child and who impregnated the complainant; that he wanted a DNA test conducted and he did not know why it was not done and that there is a man who came up and owned up to the offence. ***DW1 Raphael Mwanjala Mashao,*** the father of the appellant testified that he was not aware he was going to testify; that the appellant called him the previous day and informed him the case was due for hearing the next day and he attended the son's case accompanied by his uncle; that when he got the report that the appellant had impregnated the complainant, so many people were implicated and when the appellant's name was mentioned, the complainant's grandmother stuck to him; that if the appellant denied that he was responsible, a DNA test should have been conducted to confirm paternity and that there is a boy who claims he was responsible. ***DW2 Francis Mwajuma Mwambisi*** testified that the appellant was his cousin; that the appellant had been falsely accused of impregnating PW1; that the appellant is saved; that he does not know anything about the pregnancy and that the case can only be proved through a DNA test.

5. The trial magistrate upon hearing and evaluating the prosecution and defence evidence convicted the appellant and sentenced him to a term of 20 years imprisonment. In convicting the appellant, the magistrate expressed himself/herself as follows:

> *"The complainant in this case testified that she had an affair with the accused person from the month of June 2009. The accused on his part denied the existence of any relationship with the complainant. At one stage, the complainant had this to say in response to a question put to her by the accused person: "I am not sure whether the pregnancy is his". This answer insinuated that the complainant could have had multiple sex partners concurrently. The critical question that this court needs to answer is whether there is sufficient evidence to show that the accused person was one of the complainant's sexual partners. Since this is a case where the complainant was pregnant, the allegations and counter allegations suggested that the complainant had sexual intercourse with the accused person. By the time the complainant was called to testify against the accused person she had already given birth. The accused person had on 23rd February 2010 sought a court order for a DNA test to be conducted after birth to establish paternity. Though by the time the complainant testified she had given birth, the prosecution did not see the need to conduct a DNA test to seal this loophole which the accused person used as his defence....It is noteworthy that the accused denied impregnating the complainant but he neither challenged the complainant's assertion that they had sex nor did he unequivocally deny that fact in his unsworn statement. All he contested was that the pregnancy was not his....The fact that the complainant was a child aged 14 years and had been involved in sex had been proved by way of age assessment (PEX 2) and the medical examination report (PEX 1) that were tendered by PW2. The only issue to be determined is who defiled the complainant. I have already made a finding that the complainant had multiple sex partners. She alleged that the accused person was one of them and the accused was unable to exonerate himself from the allegation...I find that the prosecution has proved beyond reasonable doubt that the accused person had carnal knowledge of the complainant. He is consequently found guilty of the offence of defilement contrary to Section 8 (1) as read with Section 8 (3) of the Sexual Offences Act No. 3 of 2006. The minimum sentence under Section 8 (3) is 20 years in prison which I hereby award to the accused person."*

6. Aggrieved by the conviction, the appellant lodged his first appeal to the High Court. The appeal was dismissed prompting the present second appeal. The learned judge of the High Court (Muya, J.) in dismissing the appeal stated as follows:

> *"The complainant told the court that she had sexual intercourse with the appellant on various many (sic) occasions between the months of June 2009 and October 2009. She did not deny that before having sex with the appellant she had a sexual affair with another boy and she was not sure who was the father of the child. The complainant did not conceal her other relationships. She appears to have been a truthful witness. At the time of the incident she was aged 14 years as per the Doctor's Assessment Report. The appellant has not alleged that the complainant had convinced him that she was over 18 years at the time of the incident. It must be taken that when the appellant engaged in sexual relationship with the complainant he must or ought to have known that she was*

a primary school going child aged fifteen years and below, the fact she was not a virgin notwithstanding. The conviction was safe and sentence the one prescribed in law. The appeal has no merit and it is disallowed."

7. In this second appeal, the appellant urges five grounds *to wit* that the learned judge failed to note that the conviction and sentence were unsafe because the age of the complainant was not proved beyond reasonable doubt; that DNA test was not conducted in order to seek and determine paternity of the child contrary ***to Section 36 (1)*** of the **Sexual Offences Act**; that ***Section 354*** of the **Criminal Procedure Code** and ***Section 109*** of the **Evidence Act** were violated and the defence evidence was not considered.

8. At the hearing of this appeal, the appellant was present in person while the State was represented by the Assistant Director of Public Prosecution Mr. V.S. Monda.

9. The appellant in his written submission reiterated the grounds of appeal emphasizing that the age of the complainant and penetration were not proved beyond reasonable doubt. This Court was urged to note that the report by ***Dr. Charles Omondi*** (PW2) of Voi Hospital indicated that the age of the complainant was 15 years at the time of the alleged offence while the complainant in her testimony said she was born in 1994 which placed her age to be 15 years and 6 months which was approximately 16 years old at the time of the offence; that the Doctor who assessed the complainant's age gave the same to be 14 years; it was submitted that these conflicting ages meant that the age of the complainant was not proved beyond reasonable doubt. The appellant urged that the P3 Form tendered by the prosecution indicated that the complainant's age was 15 years; the appellant submitted that the evidence on record relating to the age of the complainant was contradictory and neither the parents nor other form of evidence was tendered to prove the age of PW1 and that the P3 Form produced in evidence was filled by the police officers and was not supported by any medical evidence. Citing the case of **Chiroto Nyamawi Mumba Appeal No. 373 of 2010,** the appellant urged this Court to find that age must be established and proved beyond reasonable doubt; that in the instant case, the age of the complainant was not proved to the required standard with the consequence that the offence of defilement was not proved beyond reasonable doubt.

10. On pregnancy, the appellant contended that PW1 admitted to having multiple sexual partners; that there was no contention that PW1 was defiled and impregnated; however, to the appellant, the issue was who defiled and impregnated PW1? The appellant submitted that he was aware that ***Section 124*** of the **Evidence Act** stipulates that the evidence of a minor in sexual offences does not require corroboration. However, in the instant case, where the complainant is alleging to have been defiled and impregnated by somebody, a DNA test ought have been done to establish the paternity of the child and to determine if the appellant committed the offence. It was submitted that the two courts below erred in failing to enforce ***Section 36 (1)*** of the Sexual Offences Act that stipulates that the court may direct an appropriate sample(s) be taken, including DNA, to ascertain whether or not the accused person committed an offence. The appellant submitted that on 23rd March 2010, the trial court directed that a DNA test be conducted upon the birth of the complainant's baby and this was not done and that failure to conduct the DNA test prejudiced the appellant.

11. It is the appellant's contention that he was not given a right to reply to submissions made by State Counsel at the High Court and this was contrary to ***Section 354 (2)*** of the Criminal Procedure Code that confers upon him the right to reply on any matter of law or fact raised in appeal; that failure by the High Court to give him an opportunity to reply resulted into gross prejudice and following the decision in **Mark Oiruri Mose -vs- R, Criminal Appeal No. 295 of 2012,** the appellant urged us to allow his appeal.

12. Mr. Monda opposed the appeal. He submitted that the two courts below evaluated the evidence and came to the right conclusions; that the appellant's contention that the age of the complainant was not proved is not supported by the evidence on record as the complainant gave evidence that she was born in 1994 and both the medical assessment report and P3 Form reveal that the complainant was a girl child below the age of 15 years; that the learned judge re-evaluated the evidence relating to the age of the complainant and established as a fact that PW1 was below 15 years; and that there was concurrent findings of fact by the two courts below that the complainant was under 15 years of age.

13. Regarding the absence of a DNA test, the State submitted that the issue before the trial court was defilement and penetration of the penis of the appellant into the vagina of the complainant; that the issue was never and is not paternity of the child; that the issue is neither the identity of the person who impregnated the complainant nor if the appellant impregnated PW1 and that the issue relevant to the offence is whether the appellant penetrated and defiled the complainant who was a child aged 14 years. It was submitted that the prosecution proved its case to the required standard without the DNA test being conducted; that the appellant was accorded a fair trial before the High Court; that he was never prejudiced and no constitutional right of the appellant was violated.

14. We have considered the record of appeal, the written submissions by the appellant as well as the oral submissions by the State. This is a second appeal which is confined to matters of law. In **Chemagong vs. Republic (1984) KLR 213** at page 219 this Court held*:*

> **"A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of facts arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did. (Reuben Karari s/o Karanja vs. Republic 17 EACA146)"**

15. The appellant was charged with the offence of defilement contrary to **Section 8 (1)** as read with ***Section 8 (3)*** of the **Sexual Offences Act No. 3 of 2006**. ***Section 8 (1)*** provides that "*A person who commits an act which causes penetration with a child is guilty of an offence termed defilement*." ***Section 8 (3)*** provides that " *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*."

16. For the purposes of this appeal, there are two essential ingredients of the offence of defilement: first, there must be proof of penetration and second, there must be proof that the complainant was a child between the ages of twelve and fifteen years. ***Section 2(1)*** of the **Sexual Offences Act 2006** defines penetration to mean "the partial or complete insertion of the genital organs of a person into the genital organs of another person."

17. We have analysed the evidence on record. The appellant was a person known to the complainant and the issue of mistaken identity does not arise. The critical issue for determination by the two courts below was whether the appellant committed the offence of defilement as charged. In accordance with the definition of penetration in ***Section 2 (1)*** of the **Sexual Offences Act**, was there a partial or complete insertion of the appellant's genital organs into the genital organs of the complainant? Was the complainant a child between the ages of 12 and 15 years? Is there evidence on record to support the charge and findings by the two courts below?

18. PW1 testified that on diverse dated between June and October 2009, the appellant had sexual intercourse with her; that whenever she went to visit the appellant they made love. This item of evidence was not challenged by the appellant. We are satisfied that penetration as an essential ingredient of the charge under ***Section 8 (1)*** of the **Sexual Offences Act** was proved beyond reasonable doubt. As this Court has stated time and again, by *dint* of the proviso to ***Section 124*** of the **Evidence Act**, a court can convict on evidence of a victim of a sexual offence if it is satisfied that the victim is telling the truth and needs the reasons for being so satisfied.

19. In a defilement case, it is not an essential ingredient of the offence that the complainant must conceive a child. In the instant case, conception was a factual matter that is not part of the *actus reus* in a charge of defilement. ***Section 36 (1)*** of the **Sexual Offences Act** allows the trial court to direct that a DNA test be conducted. In the instant case, the trial court directed that a DNA test be conducted and none was done. We are satisfied that no prejudice was occasioned to the appellant by absence of the DNA test because penetration was proved by the testimony of PW1. Neither the appellant nor defence witnesses controverted the evidence on penetration. In a charge of defilement, what is required is proof of penetration not proof of paternity. We agree that proof of paternity may be proof of penetration when fertilization and sexual intercourse takes place in accordance with the order of nature. However, paternity

is not proof of penetration in in-vitro fertilization. In the instant case, from the testimony of PW1, we are satisfied that there is direct evidence on record to the required standard that proves penetration of the appellant's genital organs to the complainant's genital organs.

20. A salient ground of appeal is the appellant's contention that the age of the complainant was not proved beyond reasonable doubt. The age of the complainant is a question of fact to be proved by evidence. We have examined the record and are satisfied that the age of the complainant was proved by the medical assessment report (P EX 2) and P3 Form (P EX 1) that shows the complainant was below the age of 15 years. We are satisfied that the complainant was a child falling within the age bracket of 12 to 15 years envisaged under ***Section 8 (3)*** of the **Sexual Offences Act**.

21. We are further satisfied that both the trial magistrate and the first appellate court evaluated the defence evidence which did not controvert the complainant's testimony in so far as it relates to the essential ingredients of a charge of defilement. The appellant misapprehended the issue before the trial court and the High Court as being who impregnated the complainant. This was not the issue. The decisive issue was whether the appellant had sexual intercourse with the complainant who was at that time a girl between 12 and 15 years of age. The appellant's unsworn statement and the evidence of DW1 and DW2 did not controvert this critical ingredient of the charge of defilement; the defence evidence did not shake the complainant's testimony that she had sexual intercourse with the appellant. Having considered all the grounds of appeal, we have come to the conclusion that this appeal has no merit and is hereby dismissed.

Dated and delivered at Mombasa this 26th day of February, 2016.

W. OUKO

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR