



IN THE COURT OF APPEAL

AT MOMBASA

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

CRIMINAL APPEAL NO. 24 OF 2015

BETWEEN

MWALANGO CHICHORO MWANJEMBE.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal against the Judgment of the High Court of Kenya at Mombasa (Muya, J.) dated 27th May, 2014

in

H.C.C.R.A. No.14 of 2013)

JUDGMENT OF THE COURT

The appellant was charged in the Magistrate's Court at Mariakani with the offence of defilement of a child contrary to **Section 8(1)** as read with **Section 8(2)** of the Sexual Offences Act. The victim was said to be 9 years old at the time of the alleged offence. She told the trial court under oath after a *voir dire* examination that on 27th January 2012, at 3 p.m. while walking to church, she was joined on the way by the appellant who was also a member of her church and therefore known to her. They walked as they chatted. Suddenly he grabbed her, brought her to the ground and defiled her. As the complainant emerged from the bush where she had been defiled she met PW3, who noted blood oozing from her mouth and back of the neck. She told him that she had been defiled by a member of her church. PW3 took her to the police station at Taru where she also informed the investigating officer that she knew the person who had defiled her. When she eventually met her mother later that day, the complainant once more repeated that she had been defiled by a church member who was later identified as the brother to the church pastor's wife. The appellant was ultimately arrested and charged as explained above.

In his sworn defence the appellant denied the charge maintaining that he was at work up to 7 p.m. on the day in question. Two days later he was arrested. He called three workmates to confirm this *alibi* defence, that on the day in question he was with them at work at a sisal factory throughout the day without leaving the workplace.

The learned trial magistrate was convinced, on the prosecution evidence that since the appellant was

known to the complainant, and the offence was committed in broad daylight, there was sufficient evidence of identification placing the appellant at the scene of the crime. The learned trial magistrate also found sufficient proof that the complainant was 9 years old and that she had indeed been defiled.

With that, the learned trial magistrate dismissed the appellant's *alibi* defence holding that it was not convincing. Upon conviction, the appellant was sentenced to twenty five (25) years imprisonment. He proffered five (reduced to four) grounds of appeal to the High Court, arguing that the sentence was harsh and excessive; that the prosecution evidence was unreliable, inconsistent and contradictory; that his *alibi* defence was ignored; and that without DNA examination of the appellant to establish penetration and infection of the complainant with a sexually transmitted disease, the magistrate was in error in convicting him.

The learned Judge (**Muya, J.**) found that although the complainant's age was not a ground of appeal, it was established by the evidence of her mother that at the time of the offence she was 9 years old. The learned Judge further found that there was overwhelming evidence from the complainant herself and the clinical officer proving penetration. He rejected the appellant's *alibi* defence describing it as an afterthought and holding that failure to conduct a DNA test on the appellant to ascertain whether he infected the complainant with sexually transmitted disease was not fatal as there was sufficient independent evidence of penetration and that in any case the appellant had an opportunity to seek medical treatment before arrest, hence no purpose would have been served to subject him to an examination. The appeal, for those reasons was dismissed prompting this second appeal.

According to the memorandum of appeal filed on 30th July, 2014 and the supplementary grounds filed on 12th November, 2015, the appellant has challenged the decision of the High Court on the grounds that it failed to re-evaluate the evidence recorded by the trial court; that **Section 36** of the Sexual Offences Act, dealing with medical and forensic evidence was not complied with to establish penetration and to link the complainant's infection with venereal disease to the appellant and further to establish the presence of spermatozoa; and finally, that the age of the complainant was not established beyond reasonable doubt hence the sentence of 25 years was without any basis. On this ground **Mr. Otwere** for the appellant submitted that it was not enough for the complainant's mother to state that she was born in 2002 without the date and supporting documentary proof. On the fact that the complainant was infected with a sexually transmitted disease, the learned Judge was faulted for failing to see that without DNA examination, it was not possible to link the offence with the appellant; that instead the learned Judge advanced a theory that the appellant may have sought and obtained treatment in the meantime.

Mr. Kiprof learned counsel for the respondent supported the conviction but asked us to interfere with the sentence. He submitted that there was overwhelming evidence of defilement; and that the complainant's age was proved beyond reasonable doubt. Regarding the sentence he observed that under Section 8(1) (2) of the Sexual Offences Act, the appellant ought to have been sentenced to life imprisonment as such the learned Judge erred in failing to correct an illegal sentence.

These arguments, in our view, raise questions of law for which **Section 361** of the Criminal Procedure Code donates to this Court power to consider on second appeal. We cannot, in that regard, interfere with the concurrent findings of fact by the two courts below unless such findings are demonstrated to have been made on no evidence at all or on perversion of the evidence, or if no court would reasonably have concluded as the lower courts did if it followed that evidence. See **M'Riungu v R** [1983] KLR 455.

In view of the sentence imposed by the trial court and confirmed by the High Court, we warned the appellant at the commencement of the hearing on two occasions (22nd October and 23rd November, 2015) that should his conviction be upheld by this Court, the consequence would be to disturb the sentence of 25 years by enhancing it to life imprisonment. On both occasions the appellant insisted on arguing the appeal, having understood the risk.

The point taken strongly by learned counsel for the appellant in the appeal was the question of the complainant's age. This is a critical point in the determination of appropriate sentence. See **Tumaini Maasai Mwanya v R** Msa Criminal Appeal No. 364 of 2010.

The question of proof of age has finally been settled by recent decisions of this Court to the effect that it 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. It has even been held in a long line of decisions from the High Court that age can also be proved by observation and common sense. See **Denis Kinywa v R**, Cr.Appel No.19 of 2014 and **Omar Uche v R**, Cr.App.No.11 of 2015. We doubt if the courts are possessed of the requisite expertise to assess age by merely observing the victim since in a criminal trial the threshold is beyond any reasonable doubt. This form of proof is a direct influence by the decision of the Court of Appeal of Uganda in **Francis Omuroni v Uganda**, Crim.Appel No.2 of 2000. We think that what ought to be stressed is that whatever the nature of evidence presented in proof of the victim's age, it has to be credible and reliable.

In this case the complainant, herself confirmed that she was 9 years old and in class 5 when the offence was committed. Her mother, for her part corroborated that evidence by stating that she was born in February, 2002. The offence was committed on 27th January, 2012. In view of this evidence the correct age of the complainant was 10 years. In terms of **Section 8(2)** aforesaid a defilement committed against a child aged eleven years or less attracts life imprisonment upon conviction. Whether the complainant was 9 or 10 years, the sentence remains life imprisonment.

Regarding the question of identification we have no doubt that the appellant was known to the complainant. It was confirmed by the latter's mother that he was a member of their church. The complainant herself told PW3, the first person she met after the occurrence that she had been defiled by a person known to her. She repeated this to her mother and later to the investigating officer and the clinical officer. The attack occurred after the complainant had been in the appellant's company walking towards the church in broad daylight. There was, in our view, no likelihood, in the circumstances, of a mistaken identity.

Turning to penetration, both courts below made concurrent findings that there was medical evidence in proof thereof. PW1 the clinical officer noted that the complainant's hymen was broken leading to the conclusion that there was penetration. Apart from this evidence the learned trial magistrate who had the advantage of observing the complainant's demenour found her truthful and noted that she had no personal vendetta against the appellant. Under the provision to **Section 124** of the Evidence Act, it was sufficient that the trial court believed that the complainant was a witness of truth and noted down the reasons for the belief.

The learned Judge, properly analyzed the evidence and came to the correct conclusion with regard to the question of the age of the complainant, the evidence of identification and penetration. He however erred in failing to correct the illegal sentence of 25 years, even after finding that the complainant's age was proved. He ought, pursuant to **Section 8(1)** of the Sexual Offences Act, to have imposed a life sentence. There is no merit in this appeal which we, accordingly dismiss, save for our substitution of 25 years with life imprisonment. We so order.

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

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