IN THE COURT OF APPEAL

AT MOMBASA

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

CRIMINAL APPEAL NO. 95 OF 2014

BETWEEN

S J M……...……APPELLANT

AND

REPUBLIC……RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Mombasa (Odero, J.) dated 4th February 2014

in

H.C.CR.A. No. 453 of 2010)

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JUDGMENT OF THE COURT

On 29th July 2010, the Senior Resident Magistrate's Court at Taveta convicted the appellant, ***S J M***, for the offence of defilement of a girl contrary to ***section 8(1)*** as read with ***section 8(2)*** of the ***Sexual Offences Act.*** The particulars of that offence were that on 25th November 2009 at Lesesia, Taveta, the appellant ***"had unlawful carnal knowledge"*** of ***MS***, a girl under the age of 11 years. The appellant also faced an alternative charge of ***"indecent assault"*** of a female contrary to ***section 11(1)*** of the Sexual Offences Act, the particulars being that on the date and at the place earlier referred to, he touched MS's private parts. The appellant was convicted of the main charge and sentenced to 30 years imprisonment instead of the prescribed life imprisonment.

Aggrieved by the decision, he lodged an appeal in the High Court. Not only did ***Odera, J***., on 4th February 2014, dismiss the appeal, but the learned judge also set aside the sentence of 30 years imprisonment and substituted it with a sentence of life imprisonment. Staggered by the turn of events, the appellant now comes before us in this second appeal, contending among other things that he was sentenced to life imprisonment without any form of notice or warning.

The facts upon which the appellant was convicted are as follows. The victim, MS is the appellant's daughter; at the material time a class one pupil aged 6 years old. On 25th November 2009 at about 1.00 pm MS was at home with her father and two brothers, ***M*** and ***MS (PW3)*** who was aged 16 years. Her

mother, ***MK, (PW2)*** was away at the local market. The appellant asked MS to bring him drinking water in the house. When she did, the appellant grabbed her, removed her underpants and defiled her after applying oil to her private parts. She screamed in pain, drawing the attention of PW3, who went to the house and found the appellant in *flagrante delicto*.

When PW2 came back home at about 6.00 pm, MS informed her what had happened. The incident was reported at Taveta Police Station and MS was taken to Taveta District Hospital where she was admitted for five days. Dr. Dianga Odep (PW4), a medical officer at that hospital examined MS at about midnight the same day she was defiled. He noted that MS was not able to walk. As regards her private parts, he noted that the external genitalia was swollen; that the *labia majora* was inflated, reddish and bruised; that the vaginal walls had lacerations and cuts that were bleeding; that the hymen was missing; that there was a whitish slimy discharge from the vagina; and that there were blood stains around the vulva.

PW4 concluded in his report that MS was approximately 6 years old; that the injuries she had suffered were approximately 12 hours old; that the injuries were probably caused by penetrative unprotected vaginal sex; that MS was defiled; and that the degree of injury that she sustained was grievous harm.

When the appellant was put on his defence, he elected to give an unsworn statement in his defence and called no witness. Stating that he perfectly understood the charge against him, the appellant denied having defiled MS or otherwise indecently assaulting her. The gist of his defence was that he had spent the material day working on the *shamba*. At about 1.00 pm he went home, took lunch and MS gave him some water to drink. After that he left the home and came back at 7.00 pm and found his wife, PW2 away. He did not see her until the next day when she looked angry and insisted on sleeping in the kitchen. He was subsequently arrested on 27th November 2009 and eventually charged with the offences, which he had not committed. It was his defence that three days before the incident in question he had quarreled with PW2 and for that reason she had contrived the charges and framed him.

The appellant's appeal is premised on 7 grounds, which he argued individually in his written submissions. The grounds are that the trial and the first appellate courts erred because:

i. ***the charge against the appellant was fatally defective;***
ii. ***the age of MS was not proved beyond reasonable doubt;***
iii. ***the voire dire was not properly conducted;***
iv. ***the first appellate court enhanced his sentence without warning or notice;***
v. ***PW2's grudge against him was not considered;***
vi. ***he was denied witness statements; and***
vii. ***his defence was not considered.***

On the defects in the charge, it was the appellant's view that since the evidence showed that he was MS's father, he ought to have been charged with the offence of incest contrary to section 20(1) of the Sexual Offences Act. The charge was fatally defective, he claimed, because he was charged with defilement instead.

On the age of MS, the appellant submitted that it was never proved beyond reasonable doubt. It was only MS who stated that she was 6 years old, he argued, while her mother did not testify to how old MS was. Relying on ***ALFAYO GOMBE OKELLO V. REPUBLIC CR. APP. NO. 203 of 2009 (KSM***) and ***KAINGU ELIAS KASOMO V. REPUBLIC, CR. APP. No. 504 of 2010,*** the appellant submitted that age is a critical component of the charge of defilement under the Sexual Offences Act and must be proved beyond reasonable doubt.

As regards the *voire dire* examination, the appellant submitted that the same was not conducted in accordance with the procedure set out in ***JOHNSON MUIRURI V. REPUBLIC [1983] KLR 445,*** which among other things, requires the questions put during the *voire dire* examination and the answers thereto to be set out on record. The appellant further contended that the record did not indicate why the trial court concluded that MS should give evidence on oath. Lastly on this issue, the appellant faulted the trial court for allowing PW2, who was 16 years old, to testify without first conducting a *voire dire examination*. As

far as the appellant was concerned, PW2 was a child and a *voire dire* examination was necessary before he could testify.

On the enhancement of his sentence, the appellant contended that the first appellate court erred by enhancing the sentence to life imprisonment without any form of notice or warning, which could have enabled him to determine whether to pursue or abandon his appeal. In his view, the enhancement of the sentence was in violation of the rules of natural justice and should not be allowed to stand. He relied, for that proposition, on the judgment of this Court in ***AGGREY OTIENO OSANGA V. REPUBLIC, CR. APP. NO. 257 of 2012.***

The last three grounds of appeal were that the two courts below erred by ignoring evidence on record regarding the existence of a grudge between the appellant and PW2 after they had quarreled a few days earlier, and that MS had admitted in her evidence that it was her mother, PW2 who told her what to say in court. For the first time, the appellant claimed before this Court that he had been denied access to the statements of the prosecution witnesses and lastly that his defence, which he claimed was an alibi defence, was not considered. He accordingly prayed that his appeal be allowed.

The respondent opposed the appeal through ***Mr. Kiprop,*** learned Principal Prosecution Counsel. It was contended that the fact that the appellant could have been charged with incest, instead of defilement did not render the charge of defilement defective. All that matter, it was submitted, was whether there was sufficient evidence to convict the appellant for the offence with which he was charged. In any event, it was argued, defilement of a girl of less than 11 years of age and incest with a girl of less than 18 years of age attracts the same sentence of life imprisonment.

Turning to the age of MS, counsel submitted that it was properly proved as the child herself stated that she was 6 years old; that PW4, who examined MS assessed her age to be six years; and that the trial court, which had the advantage of seeing MS was satisfied that she was six years old.

As regards the *voire dire* examination, Mr. Kiprop submitted that it was properly conducted because the answers that MS gave were recorded in full on the record and on the basis of those answers the trial court was satisfied that MS understood the nature of the oath and the duty to tell the truth. In support of that view, counsel relied on ***JAMES MWANGI MURIITHI V. REPUBLIC, CR. APP. NO. 10 of 2014 (NYERI).***

On enhancement of the sentence, the respondent submitted that the first appellate court had acted within the law because the trial court having convicted the appellant of defilement, it had sentenced him to an illegal sentence of 30 years instead of the prescribed and lawful sentence of life imprisonment. Relying on section 354 (3) of the Criminal Procedure Code, it was contended that the High Court had the power to reduce or increase the sentence.

Lastly, on the appellant's failure to obtain witness statements, it was contended that the issue was never raised before the High Court and was being raised for the first time before this Court, that the two courts below had reached concurrent findings that the appellant was not framed by PW2 and that the appellant's defence was exhaustively considered and found to lack any merit. Accordingly we were urged to find that there was no basis for interfering with the conviction and sentence and to dismiss the appeal.

We have anxiously considered the grounds of appeal, submissions by the respective parties and the authorities they have cited. To the extent that this is a second appeal, we shall consider only issues of law and pay homage to the concurrent findings of fact by the two courts below unless we are satisfied that there was no evidence upon which their findings were based or if there was evidence, it was of such nature that no reasonable tribunal, properly applying its mind, would have come to those findings. (See ***section 361***, Criminal Procedure Code and ***BONIFACE KAMANDE & 2 OTHERS V. REPUBLIC, CR APP NO. 166 of 2004).***

While it is true that from the facts proved by the prosecution the appellants could have been charged with the offence of incest under section 20(1) of the Sexual Offences Act, that of and in itself does not render a

charge of defilement under section 8 of the same statute defective. We would agree with the respondent that so long as the particulars and the evidence disclose the offence of defilement, the charge cannot be faulted. We would add that it is in the discretion of the Director of Public Prosecution to determine which offence to charge a suspect with where the facts disclose possible commission of two distinct offences. (See ***Article 157(10)*** of the ***Constitution***). There is no suggestion that in deciding to charge the appellant with defilement in lieu of incest, the DPP was abusing his discretion.

As regards the age of MS, she testified that she was 6 years old and a class one pupil. It is true that her mother, PW2 did not testify regarding MS's age. However, PW4, the doctor who attended MS assessed her age to be 6 years, as appears on page 20 of the record, independent of the age recorded by the police who filled the P3 Form, which incidentally was also 6 years. The trial court, which had the benefit of seeing both MS and PW4 testify, accepted that MS was 6 years old.

More compelling however, under section 8(1) of the Sexual Offences Act as read with 8(2) under which the appellant was charged, the offence of defilement is committed if the act causing penetration involves a child aged ***11 years or below.*** Much as it is accepted that the age of the victim in a sexual offence must be strictly proved, we must venture to state that as far as section 8(2) of the Sexual Offences Act is concerned, the more critical issue is proof that the victim was indeed under 11 years of age. We are satisfied therefore that the age of MS was properly proved to be 6 years, and that in any event, so long as she was proved to be below 11 years, the appellant's appeal cannot succeed on the argument that MS's age was not strictly proved.

Turning to the *voire dire* examination, we understand the appellant's complaint to be that the trial court did not set out verbatim the questions that were put to MS and her answers thereto. In ***JOHNSON MUIRURI V. REPUBLIC, (supra)***, this Court held that it is *important* to set out the questions and answers when deciding whether a child of tender years understands the nature of an oath so that the appellate court is able to decide whether the issue was rightly decided. And in ***SULA V. UGANDA [2001] EA 556,*** a decision that was followed by this Court in ***JAMES MWANGI MURIITHI V. REPUBLIC (supra),*** the Supreme Court of Uganda observed that a *voire dire* examination could be recorded in two ways. Firstly by writing down the question put to the witness followed by the witness's answer, in dialogue form and secondly by recording only the answers given by the witness.

The Court in ***JAMES MWANGI MURIITHI V. REPUBLIC (supra),*** concluded that while it was the best policy to record both questions and answers in a *voir dire* examination, ultimately whether the manner in which the examination was recorded would vitiate the conviction, would depend on the facts of each case.

In this case the trial magistrate did not record the questions that were put to MS. However she did record MS's answers from which it is not difficult to surmise the questions put. The first appellate court was satisfied that the from the *voire dire* examination on record, MS understood the nature of the oath and the duty to tell the truth. Having perused the record, we do not find any basis for concluding otherwise.

As regards the failure to conduct a *voire dire* examination before PW2 was allowed to testify, there is no substance in this complaint because PW2, who was 16 years old when he testified, was not a child of tender years. Under ***section 19*** of the ***Oaths and Statutory Declarations Act***, ***cap 19***, it is only in respect of evidence of children of tender years that a *voir dire* examination is required. In ***KIBAGENY ARAP KOLIL V. R (1959) EA 92***, the former Court of Appeal for Eastern Africa held that in the absence of a statutory definition, whether a child is of tender years is a matter for the good sense of the court, and that in the absence of special circumstances, a child of tender years is a child of any age, or apparent age, of under 14 years. (See also ***JOHNSON MUIRURI V. REPUBLIC, (supra))***. It is important also to point out that although ***section 2*** of the ***Children's Act*** now defines a child of tender years to mean a child under the age of ten years, this court held in ***SAMUEL WAHINI NGUGI V. REPUBLIC, CR. APP. No. 218 of 2007*** and in ***PATRICK KATHURIMA V. REPUBLIC, CR. APP. NO. 131 OF 2014 (NYERI)*** that for purposes of the Oaths and Statutory Declarations Act, a child of tender years remains one of any age or apparent age below 14 years.

The next issue is the enhancement, by the High Court, of the sentence imposed upon the appellant from 30 years imprisonment to life imprisonment. From the outset it is necessary to point out that the case of ***AGGREY OTIENO OSANGA V. REPUBLIC*** ***(supra)*** does not stand for the proposition that the appellant ascribed to it. In that appeal, the appellant was charged with robbery with violence contrary to section 296(2) of the Penal Code. The trial court convicted him of simple robbery contrary to section 296(1) of the Penal Code and sentenced him to 7 years imprisonment. On appeal, the High Court, without any notice or warning to the appellant quashed the conviction and set aside the sentence and instead substituted a conviction for robbery with violence and sentenced the appellant to death. On further appeal to this Court, it was held that while the High Court had power to proceed as it did, it nevertheless erred by failing to caution or warn the appellant before substituting the conviction from that of a lesser offence to a more serious offence.

In the present appeal the first appellate court did not convict the appellant for a more serious offence. It sustained the conviction by the trial court for defilement but interfered with the sentence, which it found to be illegal. Under ***section 354*** of the Criminal Procedure Code, the High Court has power in an appeal against conviction to increase or reduce the sentence. In ***KENNETH KIMANI KAMUNYU V. REPUBLIC*** ***(2006) EKLR***, this Court re-iterated that an appellate court has jurisdiction to interfere with an illegal or unlawful sentence. While we agree that it is good practice for the court to warn an appellant before the hearing of the appeal that should the appeal fail it would be obliged to substitute an illegal or unlawful sentence with the proper sentence prescribed by the law, the duty of the appellate court to impose the lawful sentence as prescribed by law is not undermined by the failure to issue such warning or caution.

On the grudge between PW2 and the appellant, the two courts below addressed the issue directly and found as a fact that the case against the appellant was not founded on vendetta. We have no basis for interfering with that concurrent finding. Indeed, we can only add that the evidence of MS and PW2, who was an eyewitness to the defilement, completely destroyed the appellant's claim that his prosecution was founded on a grudge. The medical evidence too, was simply overwhelming.

On the issue of witness statements, we note this issue was not raised before the first appellate court and therefore we do not have the benefits of its reasoning on the matter. Lastly, we are satisfied that the appellant's defence, constructed largely around the theory of a grudge was considered and properly rejected. The contention by the appellant that he had raised an alibi defence which was irregularly rejected does not hold any water because in his own unsworn statement, the appellant placed himself at the seen of the offence and for that matter at 1.00 pm when MS was defiled. His evidence was that he was at home at 1.00 pm when he took lunch and asked MS to bring to him some drinking water. This tallied in material particulars with the prosecution case and completely discounted the appellant's alleged alibi defence.

We have come to the conclusion that this appeal has no merit. Accordingly the same is dismissed in its entirety. It is so ordered.

Dated and delivered at Mombasa this 11th day of March 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