IN THE COURT OF APPEAL

AT MOMBASA

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

CRIMINAL APPEAL NO. 105 OF 2014

BETWEEN

ROBERT MWERI CHARO……..…APPELLANT

AND

REPUBLIC…….....…RESPONDENT

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

in

H.C.CRA. No. 5 of 2012)

****

JUDGMENT OF THE COURT

The appellant and complainant were neighbours at ***[particulars withheld]*** Village, Kaloleni Sub County of Kilifi County. Indeed their houses were hardly 10 metres apart. The complainant was by then aged 16 years and lived with her mother **D K** (*PW2*). These three people were all known to each other. Indeed on occasions, the appellant would ask the complainant to run errands for him, particularly in the absence of his wife and children.

One such occasion was on the 11th February, 2011 at 2 p.m. when the appellant wanted her to go to the nearby shops and buy him credit for his cell phone. Unknown to the complainant, however, the appellant had other designs. When the appellant beckoned the complainant for the errand, PW2 witnessed as she stood outside her house. She had previously come by the information that under the guise of asking the complainant for assistance, the appellant had severally sexually assaulted her in his house. Being suspicious of the appellant's intention, this time she was on high alert and on the lookout.

When the complainant responded positively to the appellant's entreaties and went to the house, the appellant immediately grabbed her, tossed her on the bed, removed her skirt and pant and sexually assaulted her. Thereafter, the appellant allowed the complainant to walk back to her parent's house and when confronted by PW2, the complainant informed her that she had just been sexually assaulted by the

appellant. PW2 took the initiative and reported the incident to the village elder, who organized for the arrest of the appellant as PW2 and the complainant proceeded to Mariakani Police Station to report the incident and to be issued with P3 Form. At the Police Station, they were met by **PC Rose Kwamboka** (*PW4*) of the Gender Desk. She took down the complaint, issued the P3 Form and escorted them to Mariakani District Hospital. At the hospital, the complainant was attended to by **Mwangolo Chigulu (PW3)**, a clinical officer. On examination, he observed that the vulva was swollen, the cervix was intact and that the hymen was broken with whitish discharge. In his opinion, this was a case of confirmed penetration. He filled the P3 Form which he subsequently tendered in evidence.

The appellant having been arrested earlier and brought to Mariakani Police Station was subsequently arraigned before the Senior Resident Magistrate's Court at Mariakani on one count of defilement of a child contrary to **Section 8(1)** as read with **Section 8(4)** of the Sexual Offences Act, particulars being that: "*on the 11th February, 2011 at [particulars withheld], in Kaloleni Sub County of Kilifi County, the appellant unlawfully and intentionally committed an act which caused penetration of his male genital organ namely, the penis into the female genital organ namely the vagina of the complainant, a girl aged 16 years old*". The alternative charge was one of indecent act with a child contrary to **Section 11(1)** of the Sexual Offences Act. The particulars being that on the same day and place, he indecently touched with his genital organ, the penis, the genital organ of the complainant namely, the vagina.

On arraignment the appellant pleaded not guilty and his trial thereafter ensued in earnest. In his unsworn statement of defence, the appellant denied committing the offence stating that he was a watchman and had on the material day gone home at 6 a.m. following night duties. He rested until lunch time when he went to meet a friend at a nearby bus stage. Upon his return he saw the complainant peeping in his house and on approaching her she ran away crying. PW2 immediately confronted him alleging that he had sexually assaulted her daughter. He was then arrested and taken to Mariakani Police Station where he was charged with an offence he did not commit. As far as he was concerned he was framed by PW2 in the case on account of a dispute over a parcel of land.

On 9th January, 2012, the appellant was convicted of the main count and sentenced to sixteen (16) years imprisonment with hard labour. One aspect of this sentence is however illegal. It is the aspect of hard labour. It is not one of the prescribed punishments under the Sexual Offences Act.

Be that as it may, being aggrieved by the conviction and sentence, the appellant lodged **Criminal Appeal No. 5 of 2012** in the High Court at Mombasa. By a judgment dated and delivered on 27th February, 2014, the High Court (**Muya, J.)** found the appeal lacking in merit and accordingly dismissed it in its entirety.

The appellant was still aggrieved by that decision and preferred a second and perhaps last appeal in this Court on grounds that:-

i. The prosecution case was riddled with contradictions and therefore the provisions of Section 146(1) of the Evidence Act were violated.
ii. The complainant was not subjected to *voire dire* examination before her evidence was taken down.
iii. Section 36(1) of the Sexual Offences Act was violated when both courts did not order DNA testing of the complainant.
iv. Both courts failed to consider his defence which cast doubts on the prosecution case.

On the day of the hearing of the appeal, the appellant filed written submissions. He subsequently informed us that he wholly relied on them in the prosecution of the appeal and had nothing else to add. The written submissions merely reinforced the above grounds of appeal. We have carefully read and considered them alongside cited authorities.

In response, **Mr. Kiprop**, learned Principal Prosecution Counsel took the view that the complainant having been adjudged to be 16 years old, there was no need for *voire dire* examination. In any event such failure did not occasion the appellant any prejudice since he cross-examined her. On contradictions, counsel submitted that there were none, and even if there were, they were minor and curable by virtue of **Section 382** of the Criminal Procedure Code. On **Section 36** of the Sexual Offences Act, counsel

submitted that the section deals with DNA sampling. Its application was not couched in mandatory terms. The trial court had a discretion to make such an order. For this proposition, counsel relied on this Court's decision in the case of **Robert Mutungi Muumbi v Republic [2015] eKL**R. On *alibi* defence, counsel maintained that the same was duly considered and rightly dismissed in his view. Both courts evaluated the defence and found it wanting in material aspects.

This is a second and perhaps final appeal and by dint of **Section 361(1)** of the Criminal Procedure Code, our jurisdiction is confined to points of law only. We must pay homage to concurrent findings of facts by the two courts below unless such findings are made on no evidence at all or on a misapprehension or perversion of the evidence, or it is apparent on the evidence that no tribunal, properly directing itself, could have made such findings. See **M'Riungu v Republic [1982] KLR 455** and **Kaingu v Republic [1982] KLR 213.**

The concurrent facts established by the two courts below were that the complainant was a 16 year-old girl attending ***[particulars withheld]*** Primary School. The appellant was a neighbour and would occasionally send the complainant on personal errands. That on the material day under the pretext of sending her to buy credit for his cellphone, he got her into his house and defiled her. That this was not the first time it had happened. He had done it before and infact continued doing so whenever his wife and children were away for one reason or another. The medical evidence adduced pointed to the offence of defilement; that none other than the appellant committed the offence; that the complainant did not have a grudge against the appellant as would have precipitated her to falsely accuse him and finally, the *alibi* defence advanced by the appellant dissipated into thin air following the overwhelming evidence tendered by the prosecution. These concurrent findings are in our view based on the appreciation of the evidence led in support of charge sheet by the two courts below, which we have no reason to disturb.

As stated earlier, there are basically four grounds of appeal which to our mind raise pure questions of law. The first one is about violation of **Section 146(1)** of the Evidence Act. It is the contention of the appellant that because of numerous contradictions in the prosecution case, that section of the law was violated. However, in his written submissions, the appellant does not point out any single contradiction in support of his assertion. On our part, we have carefully gone through the record and have not discerned any element of contradiction in the prosecution case. In any event, **Section 146(1)** of the Evidence Act, deals with the order and direction of examination of witnesses. It is in terms that witnesses shall first be examined -in-chief, then, if the adverse party so desires, cross-examined, then, if the party call them so desires, re-examined. The record of the trial court does not reveal any departure from this well laid down procedure. Nor did the appellant allude to this aspect in his written submissions. We therefore find that this ground of appeal has no merit and is accordingly dismissed.

The second issue raised by the appellant is that no *voire dire* examination was conducted on the complainant before her evidence was taken as she was a child of tender years. In response, Mr. Kiprop contended that the complainant being 16 years of age was not a child of tender years to warrant a *voire dire* examination.

We agree with Mr. Kiprop that *voire dire* examination is only necessary where the court deems that the child witness is of tender years. It is not that every child who offers to testify must undergo the process of *voire dire* examination. It is only limited to a child of tender years. It is meant to achieve two things; one to find out whether the child understands the nature and meaning of an oath. Secondly, where the court finds that the child of tender years does not understand the nature of the oath but is possessed of sufficient intelligence and understands the duty to tell the truth, the child may give unsworn testimony.

So who is a child of tender years? It has been said that whether the child is of tender years is a matter of the good sense of court and that the term "*tender years*" referred to or meant a child under the age of 14 years. See **Kibangeny Arap Kolil v Republic [1959] E.A. 92** and **Samuel Wahiri Ngugi v Republic Cr. App. No. 218 of 2007 (UR)**. We think this is still good law.

We are however not oblivious of the fact that a child of tender years is defined in Children's Act as a child under the age of ten years. Does this definition oust the jurisprudence that has been developed over

the years by our Courts on this issue? We do not think so. Reason, the essence of the Children's Act was to cater for the welfare of the children and not the rights of an accused person in relation to the testimony of a child witness. Accordingly, the definition of "*a child of tender years*" in Children's Act should not be confused with a child of tender years for purposes of giving evidence in a criminal trial. It cannot now be that any child above the age of ten years should testify on oath without the trial court conducting that examination.

As correctly observed by **Mutuku** and **Korir**, **JJ.** In **Gamalden Abdi Abdiraham v Republic [2013] eKLR**:-

> **"…...In our view, the jurisprudence established over a long period of time is still good jurisprudence despite the definition provided in the Children's Act. In saying so, we are guided by the fact that a child's development both physically and intellectually is governed by the social, cultural and economic environment under which a particular child is brought up. Some children are slow developers while others are fast learners. It would therefore be prudent to test the intellectual capacity of a child witness before putting the child in the witness box…"**

In the circumstances of this case, the complainant was aged 16 years. It follows that she was not a child of tender years whose evidence required testing by way of *voire dire* examination. This ground of appeal therefore fails.

The appellant's third complaint is that the medical evidence adduced did not link him to the crime as both the complainant and himself were not subjected to DNA test as required under **Section 36(1)** of the Sexual Offences Act. In those circumstances, he submitted, the prosecution's case was not proved beyond reasonable doubt.

On this, we can do no better than reproduce in extenso what we said recently on that aspect in the case of **Robert Mutungi** (supra):

> **"…….Section 36(1) of the Act empowers the Court to direct a person charged with an offence under the Act to provide samples for tests, including for DNA testing to establish linkage between the accused person and the offence. Clearly that provision is not couched in mandatory terms. Decisions of this Court abound which affirm the principle that medical or DNA evidence is not the only evidence by which commission of a sexual offence may be proved."**

In **GEORGE KIOJI V. REPUBLIC, CR. APP. NO. 270 OF 2012 (NYERI),** this Court expressed itself thus, on proof of commission of a sexual offence:

> **"Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to section 124 of the Evidence Act, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief."**
>
> (See also **KASSIM ALI V. REPUBLIC, CR. APP. NO. 84 OF 2005** and **JACOB ODHIAMBO OMUMBO V. REPUBLIC, CR. APP. NO. 80 OF 2008 (KISUMU).**

On the question of the appellant's defence, we have no doubt having looked at both records of the two courts below that the same was given thorough consideration. The appellant's defence was that the case was a set up following a dispute over a piece of land. The trial court in dismissing that defence held that

the complainant did not have any grudge against the appellant and or his parents as to trigger false testimony against him. The High Court whilst addressing that concern stated this:

> "**……On the issue of the existence of a grudge between the Complainant's mother and the appellant, the learned trial magistrate found that there was none. A careful analysis of the evidence adduced before the lower Court shows that at no time did the appellant allude to the existence of a grudge between himself and the Complainant's mother during cross-examination of the Witness. He only mentions this in his defence. This is clearly an afterthought….."**

The defence put forth by the appellant was given due consideration and rejected by both courts.

The upshot is that we find no good grounds to disturb the appellant's conviction. However, as regards sentence, whilst retaining the sentence of 16 years imprisonment, we shall vacate and set aside the aspect of hard labour on the basis that **Section 26** of the Penal Code, provides that a sentence of imprisonment for any offence shall be to imprisonment or to imprisonment with hard labour as may be required or permitted by the law under which the offence is punishable. As we have always stated, the Sexual Offences Act under which the appellant was charged does not provide for imprisonment with hard labour.

Dated and delivered at Mombasa this 11th day of March 2016

ASIKE-MAKHANDIA

…….

JUDGE OF APPEAL

W. OUKO

…….

JUDGE OF APPEAL

K. M'INOTI

…….

JUDGE OF APPEAL

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

DEPUTY REGISTRAR