IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, GATEMBU, MURGOR JJ,A)

CRIMINAL APPEAL NO. 62 OF 2013

BETWEEN

BASIL OKARONI……..……..…….APPELLANT

AND

REPUBLIC……RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Busia

(F. Tuiyott, J) dated 5th July 2013

in

H.C.CR.A. NO. 49 OF 2012)

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JUDGMENT OF THE COURT

The appellant, **Basil Okaroni**, was tried by the Chief Magistrate 's court on a charge of defilement of a girl contrary to ***Section 8 (1)*** as read with ***section 8(4) of the Sexual Offences Act No. 3 of 2006***.

The particulars of the offence were that on 5th June 2009, in Teso District, within the former Western Province intentionally and unlawfully inserted his genital organ namely a penis into the genitalia of a girl aged 14 years namely, ***PM (PW 1), the complainant***.

The brief facts are that on 6th June 2009 at about 2.00 pm, PM went to the home of SOK, the appellant's son to get a story book which he had borrowed from her the previous day.

After SOK returned the story book, PM requested him for some drinking water. He told her to get the water from inside the house as he was going out to cut grass. As she looked around for the water pot in the kitchen, the appellant who had been sitting outside under a mango tree went into the house, grabbed PM, pushed her onto the floor unzipped his trousers and defiled her. She said she felt a lot of pain, and after he finished she saw blood and mucus ooze from her vagina. The appellant ordered her to bath and dress, and threatened to kill her if she reported the incident to anyone. A week later he gave her Kshs.20/- coin and a Kshs. 200/- note, from which she was to get change and return Kshs. 170/- to him.

V PW 4, the complainant's mother stated that on 14th June 2009 after she had returned home from visiting her sick mother in Khwisero, she noticed that PM was unusually quiet. She was told by PM that the appellant had given her money which she had left with ***Selina Itinot PW 3 (Selina)***, a neighbor, and that the appellant had defiled her.

Selina confirmed that PM had told her that the appellant had given her Kshs. 200/- and that she was to change it and retain Kshs.30/-, and that the appellant had also informed her that he had given money to PM. The offence was reported to the village headman ***Gervane Okaroni PW 5***, on 15th June 2009, and then to the police on 19th June 2009.

Moses Khaemba PW 7, a clinical officer at Nambale Hospital examined PM on 19th June, 2009, and completed a P3 form where it was found that the evidence pointed to forceful penetration.

In his defence, the appellant denied committing the offence, and claimed that he had given PM the money to buy food as her siblings had complained to him that they had not eaten all day. When he enquired about the change, PM had informed him that she had given the money to Selina, but later claimed to have lost it. It was this, he stated, that had prompted him to inform Violet about the money.

The appellant also testified that on 6th June 2009, he had left home to attend a funeral and had not returned until 7.30 pm in the evening.

The trial magistrate found that the offence had been proved and convicted and sentenced the appellant. Dissatisfied with the decision, he appealed to the High Court that upheld the trial court 's decision.

The appellant now prefers an appeal to this Court. In the grounds of appeal and submissions that were presented in Court, the appellant submitted that he was not subjected to a medical examination; that the complainant's age was not ascertained; that the High Court failed to appreciate that a grudge concerning a land dispute existed; that the appellant diligently reported to the police station as required; that the appellant's confession was not admissible; that the court did not consider the appellant's submissions and the lower courts did not take into account the appellant's alibi evidence.

Mr. Ketoo, learned counsel for the State opposed the appeal and submitted that the appellant was properly identified as he was known to the complainant and was her neighbor. After defiling her, the appellant threatened to kill the complainant which was the reason PM did not report the incident earlier. After a week the appellant sought to bribe her with Kshs.200/-. When the clinical officer examined the complainant he concluded that she had been defiled. On the complainant's age, counsel submitted that from the evidence, the complainant was 14 years old. Counsel further submitted that the trial court and the High Court considered the question of a grudge and found this to be an afterthought.

We have considered the evidence and the submissions, and are of the view that the grounds to be addressed by this Court are;

i. *Whether the appellant should have been subjected to a medical examination to determine if he defiled the complainant;*

ii. *Whether or not the complainant's age was ascertained;*

iii. *Whether a grudge concerning a land dispute existed between the appellant and the complainant's family;*

iv. *Whether the appellant's alleged confession was admissible;*

v. *Whether the lower courts took into account the appellant's alibi evidence.*

The appellant has complained that he was not subjected to a medical examination to prove that there was

a nexus between the appellant and the alleged defilement which was contrary to the provisions of ***section 26*** of the ***Sexual Offences*** Act which provides**,**

> ***"where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence."***

In ***Geoffrey Kionji vs Republic Cr. Appeal No 270 of 2010***, this Court stated that the medical examination of the accused is not mandatory, and that the Court could convict if it is satisfied even on the victim's evidence alone that the defilement was perpetrated by the accused person.

In this case, the evidence of V and the clinical officer, including the P3 form showed that PM had been defiled. Furthermore, the courts below found PM's evidence to be cogent and reliable. On this basis, the trial court was entitled to convict the appellant without his having been subjected to a medical report, which in any event as we have said, was not mandatory. As a consequence, this ground fails.

On the issue of the complainant's age, the appellant argued that as no assessment was carried out to ascertain the age of PM, since PM had stated in evidence that she was age 14 years, and that at the time she testified she was 15 years old.

We agree with the appellant that in sexual offences ascertainment of the victim's age is crucial and the Courts have underscored the necessity of this requirement.

In ***Criminal Appeal No. 504 of 2010 Kaingu Elias Kasomo vs Republic*** this Court stated thus,

> ***Age of the victim of sexual assault under the Sexual Offences Act is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim.***

In the case of ***Francis Omuromi vs Uganda Court of Appeal criminal Appeal No. 2 of 2000*** it was held:

> ***"In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense…."***

In this case, however, during her testimony, V produced PM's Certificate of Birth which stated the 9th May 1995 as her date of birth. This would mean that by the time the offence was committed PM would have been 14 years old. We find that her age was properly ascertained and as such, this ground lacks merit.

On the issue that a grudge existed, it was the appellant's case that he had been framed with the offence on account of a land dispute.

In considering this issue the trial court had this to say,

> ***"The accused in one breath contends that Selina framed him up in the offence owing to differences with her family. This was however denied by Selina. In another breath he conceded that he had no grudge with Selina. This contention by the accused that he was framed up by Selina lacks basis and I accordingly dismiss it."***

We find that the evidence did not point to the existence of a land dispute between the appellant and PM's family. Like the trial court we find that the allegation is baseless, and is accordingly dismissed.

In addressing the appellant's complaint that a confession he allegedly made to village headman Gervane Okaroni was inadmissible, the term confession is defined under ***section 25*** of the ***Evidence Act*** as comprising:

> ***"… Words or conduct, or a combination of words and conduct, from which, whether taken alone or in conjunction with other facts proved, an inference may reasonably be drawn that the person making it has committed an offence."***

Section 25 A (1) of the ***Evidence Act***, stipulates that confessions and admissions are inadmissible unless made before a judge or magistrate or a police officer above the rank of inspector, and who is not the investigating officer.

The appellant was alleged to have made a confession before the village headman, and not before a judge or magistrate or a police officer above the rank of inspector. On this basis it could not be considered to be a confession for purposes of ***section 25*** of the *Evidence Act*. That said, from the record, the trial court did not convict the appellant on the basis of the purported confession, but on the evidence produced in court by the prosecution, which it found had been proved to the required standard. Accordingly, this complaint is unfounded.

Turning to the alibi defence, the appellant testified that on 6th June 2009 when he left his home at 10.00 am, the complainant's mother was at his home waiting to accompany his wife to a funeral. He also stated that he had returned home at about 7.30 pm.

Upon evaluating the evidence, the High Court observed that the trial court had not taken the alibi evidence into account and in so doing, went on to consider the alibi evidence against that of the prosecution. In weighing out this evidence, the High Court stated thus;

> ***"A person who would have been critical in sewing up the Alibi would have been the wife of the Appellant. She could have disproved the evidence of PW4 that the Appellant was left at home. Curiously, she was not called by the Appellant to testify on his behalf. When I weigh out the evidence of the Defence witnesses against that of the prosecution witnesses (which includes, medical evidence) I reach the conclusion that the strength of the prosecution case displaces the Alibi defence."***

We are satisfied that when the High Court weighed the alibi evidence, it rightly came to the conclusion that the alibi evidence did not water down or interfere in any way with the prosecution's case. We accordingly dismiss this ground.

For the aforestated reasons, we find that the appellant's appeal is without merit, and we order that the same be and is hereby dismissed.

We so order.

DATED and delivered at Kisumu this 4th day of March, 2016.

D.K. MARAGA

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

JUDGE OF APPEAL

A. K. MURGOR

JUDGE OF APPEAL

I certify that this is a true copy

of the original

DEPUTY REGISTRAR