IN THE COURT OF APPEAL

AT MOMBASA

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

CRIMINAL APPEAL NO. 19 OF 2014

BETWEEN

MUSA SAID …… APPELLANT

AND

REPUBLIC ……RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Mombasa (Muya,J.) dated 26th April,2013 In Criminal Appeal. No. 507 of 2009)

JUDGMENT OF THE COURT

After administering a *voir dire* examination on the complainant whose age was given as 7 years, the learned trial Magistrate received her testimony under oath. In that testimony she was categorical that on the material day at 3 p.m, the appellant, who was known to her, held her by the hand and led her to the bushes where she explained that the appellant;

> ***"..removed my clothes, the skirt I was wearing and the underpants. He then lowered his trousers to the knee level. Before accused could proceed further, Mama K came and screamed. People came…."****(Emphasis ours)*

It is the import of the above highlighted extract of the complainant's evidence that is central to the determination of this appeal. There being no doubt that the appellant was well known to the complainant, the latter has only argued in his written submissions that both the complainant's age and the fact of penetration, which are the essential elements of the offence of defilement were not established beyond reasonable doubt. In his view, from the totality of evidence, the offence disclosed was indecent act under **section 11(1)** of the Sexual Offences Act.

On the same day of the incident the complainant was subjected to medical examination which revealed that she had been involved in *"penetrative unprotected vaginal sex"*, the external genitalia was soiled with dry mud and 2 pieces of leaves around the clitoris, the labia minora were reddish on both sides and hymen broken and that the birth canal was also reddish. The appellant was also examined by the same doctor who found his genitalia to be normal, except for the presence of soil at the tip of his penis. From the analysis of his urine, the doctor found no traces of sperms.

PW2 and his wife PW3, gave evidence of how they found the appellant lying on top of the complainant with his trousers lowered to the knee. The complainant's skirt and underpant had been removed. PW2 said;

"The girl was facing upwards and accused was inserting his penis into the girl's vagina."

PW3, for her part recalled that when they got to the scene they;

"… found accused having sex with the girl. He was defiling her."

Dr. Dianga who examined both the appellant and the complainant testified that the latter told him in the presence of the former that the former had sex with her without using a condom. In cross-examination the doctor said that;

"I confirmed from the complainant and my examination of her that you had infact defiled her. Her private parts had mud and your private parts also had mud. Her hymen was also torn. … There were bruises on the interior of her private parts. You had not ejaculated on the child because she was rescued before you ejaculated. There was partial penetration."

The appellant in his sworn statement denied the charge and insisted that he was framed up by the parents of the complainant who he had worked for as a casual labourer but refused to pay him, and that the complainant's father wanted him to continue working even though he had not paid him Ksh.6,000/= for two previous months.

The learned trial Magistrate was instead persuaded by the prosecution evidence and in a terse judgment of 1 ½ pages, convicted the appellant and sentenced him to life imprisonment. In an equally sketchy judgment of 4 pages, the High Court (Muya, J.) agreed with the trial court and dismissed the appellant's first appeal. This second appeal as we have noted raises the broad issue of whether the offence of defilement was committed by the appellant. In his written submissions the appellant seeks to convince us that from the evidence both penetration and the age of the complainant were not proved. He cited two decisions of this Court in **Kaingu alias Kasomo** v **R** Criminal Appeal No.504 of 2010 and **Chiroto Nyamawa** v **R**, Criminal Appeal No.373 of 2010 in aid of his case that both the victim's age and the fact of penetration must be proved beyond any reasonable doubt.

Mr.Kiprop, learned counsel for the respondent, for his part urged us to dismiss the appeal as the evidence was sufficient to prove that there was penetration and that the complainant was below the age of 11 years.

The appellant, with respect is right that under **section 8** of the Sexual Offence Act two elements must be satisfied in order to found a conviction for defilement namely, that there was penetration and that the penetration was with a child. For the purpose of sentencing it becomes critical to establish whether the child was aged eleven (11) years and less, or between twelve (12) years and fifteen (15) years or between sixteen (16) and eighteen (18) years, because each age bracket attracts different punishment.

In this case under **section 8(2)** it had to be shown by evidence that the complainant was below the age of 11 years. Once penetration and the victim's age were established, that she was below 11 years, life sentence provided for under **section 8(2)** was the only sentence**.** The offence of defilement under section 8(1) is committed by *"an act which causes penetration with a child"*. *"Penetration"* on the other hand is defined in section 2 to mean*;*

"..the partial or complete insertion of the genital organ of a person into the genital organ of another person."

The ordinary meaning of the words used by the complainant in her evidence that "**before the accused could proceed further**" in our understanding, which is supported by the evidence of PW2, PW3 and the doctor, is that the insertion of the appellant's genital organ into the complainant's genital organ was partial, that before he could go any further into the complainant's organ he was interrupted, or that he was interrupted before ejaculation. We are satisfied from the evidence that the offence of defilement was committed. Likewise, we find that there was sufficient evidence in proof of the complainant's age from herself and the doctor. Her age having been confirmed as 7 years, under **section 8(2)** the two courts

below cannot be faulted for imposing a life sentence.

The appeal for these reasons must fail and we accordingly dismiss it.

Dated and delivered at Mombasa this 22nd day of April, 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