IN THE COURT OF APPEAL

AT MOMBASA

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

CRIMINAL APPEAL NO. 65 OF 2015

BETWEEN

HADSON ALI MWACHONGO…..…….APPELLANT

AND

REPUBLIC.……RESPONDENT

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

(Muya, J.) dated 29th May 2014

in

H.C.CR.A. No. 249 of 2011)

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JUDGMENT OF THE COURT

The appellant, ***Hadson Ali Mwachongo***, was on 25th October 2011 convicted by the ***Principal Magistrate's Court, Voi*** for the offence of defilement of a girl aged 15 years, contrary to ***section 8(3) of the Sexual Offences Act***. The offence was alleged to have been committed in June 2010 at Taita Taveta County. Upon conviction, he was sentenced to 20 years imprisonment.

Aggrieved by the judgment, he filed a first appeal in the High Court at Mombasa which ***Muya, J***. found unmeritorious and dismissed on 29th May 2014, precipitating this second appeal.

The facts in this appeal are fairly straightforward. According to the evidence adduced by five prosecution witnesses who included the complainant ***(DC),*** her mother ***(PW2),*** and a medical doctor ***(PW5),*** DC was on the date of commission of the offence 15 years old. Her ***Certificate of Birth No. 733713***, which was produced in evidence as an exhibit, indicated that she was born on 3rd January 1995. Her mother too testified that her daughter was born on that date. In addition, by an age assessment report dated 16th November 2010 and produced as an exhibit, the Medical Superintendent, Moi Hospital, Voi, estimated DC to be 16 years old as at that date.

When the offence was committed on 16th June 2010, DC was a standard 8 pupil at Mwambita Primary School and was living with her grandmother, ***(PW3)*** at Fighinyi Village. The appellant had come to visit

his parents, who also lived in the same village. DC was well known to the appellant; indeed from the evidence of PW2, both families are from the same clan. At about 4.00 pm on the material day, DC was on her way home when she encountered the appellant on the road, who after exchanging greetings, demanded to have sexual intercourse with her. After turning down his overtures, the appellant nevertheless pushed the complainant on the ground and had sexual intercourse with her.

DC did not inform anyone of her sexual encounter with the appellant, apparently for fear of chastisement. Four months later, on 21st October 2010, what she was trying to conceal however became obvious when PW3 noticed fundamental changes to her anatomy, in particular the enlargement of her belly and breasts. PW3 demanded to know whether DC was pregnant upon which she owned up and disclosed that the appellant had defiled and impregnated.

DC's pregnancy was subsequently reported to her school, the chief, the Children's Department, and to the police. The appellant was apprehended and later charged with the offence of defilement as aforesaid. When he was put on his defence, he admitted that his home was in Fighinyi, but denied ever having had sexual intercourse with DC. It was his evidence that on the day when the offence was alleged to have been committed, he was at Mlago Village in Kaloleni and not at Fighinyi Village as claimed by DC. He also contended that he had not been medically examined to determine that he was indeed the father of DC's expected child.

In the appeal before us the appellant has raised five grounds of appeal in which he impugns the judgment of the High Court contending that DC's age was not proved; that his samples were not subjected to forensic testing to confirm that he was the one who had committed the offence as required by ***section 36 of the Sexual Offences Act***; that the prosecution case was not proved beyond reasonable doubt; that his right to a fair trial was violated by denial of access to prosecution evidence contrary to ***Article 50 (2) (j)*** of the ***Constitution;*** and that his defence was not considered by the trial and first appellate courts.

When he appeared before us, the appellant expounded on the above grounds in his written submissions. As regards proof of the age of DC, he submitted that while DC and PW2 testified that she was 15 years old, PW5 testified that her estimated age was 16 years. He contended that under the Sexual Offences Act, the punishment for defilement of a girl aged 15 years is different from that of defilement of a girl aged 16 years. Having failed to prove beyond reasonable doubt the exact age of DC, the appellant submitted, he was entitled to the benefit of doubt and to an acquittal.

On the second ground, the appellant submitted that he was not subjected to any DNA testing to confirm that indeed he was the father of DC's expected child. In his view, establishment of the paternity of DC's child would also establish the identity of the person who defiled her. He contended that PW5 had recommended that such DNA testing be conducted but it was never done. He also faulted PW5's evidence that DC was 24 weeks pregnant when he examined her on 16th December 2010, whilst by the appellant's own calculation she should have been 28 weeks pregnant. On the basis of the above complaints, the appellant contended that the prosecution had not proved the charge against him beyond reasonable doubt.

Next the appellant submitted that his right to a fair trial under Article 50(2)(j) of the Constitution and in particular the right to be informed in advance of the evidence the prosecution intended to rely on and his right to have reasonable access to it were violated. The violation, he contended denied him a proper opportunity to prepare his defence, resulting in a miscarriage of justice.

Lastly the appellant argued that both the trial and the first appellate courts failed to consider his defence, which was credible and cast doubt on the prosecution case. Had that defence been considered as it ought, he submitted, he could not have been convicted of defilement.

Mr. Yamina, Principal Prosecution Counsel opposed the appeal on behalf of the respondent. He submitted that cogent evidence was led to prove that DC was 15 years old when she was defiled. That evidence, it was contended, included her Certificate of Birth, the age assessment report and the testimony of her mother. In counsel's view, there was no basis for the complaint that DC's age was not cogently

proved or that there was any doubt in regard thereto.

As for the DNA samples, counsel submitted that the two courts below were alive to the distinction between paternity and defilement and that even in the absence of DNA testing, under ***section 24*** of the ***Evidence Act***, the appellant could be convicted on the basis of DC's evidence alone.

On the alleged violation of Article 50(2)(j) of the Constitution, it was submitted on behalf of the respondent that the complaint was a mere afterthought because the issue was never raised either before the trial court or the first appellate court. Nowhere on the record, it was further contended, did the appellant bring to the attention of the trial court the alleged denial of access to witness statements as would have been expected. Counsel concluded by submitting that the evidence on record proved the charge against the appellant beyond reasonable doubt and urged us to dismiss the appeal.

Since this is a second appeal, ***section 361(1)*** of the ***Criminal Procedure Code*** obliges us to consider only questions of law. At this stage, all questions of fact have been settled by the two courts below and this Court will pay homage to the findings of those courts, unless it is demonstrated that they considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law. (See ***Karani v. Republic (2010) 1 KLR 73, 77).***

The importance of proving the age of a victim of defilement under the Sexual Offences Act by cogent evidence cannot be gainsaid. It is not in doubt that the age of the victim is an essential ingredient of the offence of defilement and forms an important part of the charge because the prescribed sentence is dependent on the age of the victim. In ***Alfayo Gombe Okello v. Republic, Cr. App. No. 203 of 2009 (Kisumu)***, this Court stated as follows:

> ***"In its wisdom Parliament chose to categorize the gravity of that offence on the basis of the age of the victim, and consequently the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under section 8(1)..."***
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> (See also ***Kaingu Elias Kasomo v. Republic, Cr. App. No. 504 of 2010 (Malindi).***

Evidence of DC's age was given by her mother, PW2 who testified that DC was born on 3rd January 1995. DC herself confirmed that she was 15 years old when she testified on 17th January 2011. Her Certificate of Birth No. 733713, which was produced in evidence showed DC's date of birth to be 3rd January 1995 as, testified by her mother. There was also the age assessment report prepared by Medical Superintendent, Moi Hospital, Voi and dated 16th November 2010 estimating DC's age to be 16 years old.

The appellant contends that there was reasonable doubt whether DC was 15 or 16 years old. The evidence of DC's mother and the certificate of birth confirmed DC's specific date of birth, which means when the offence was committed, she was 15 years, 6 months and 13 days old. The age assessment report gave 16 years as the ***estimated*** age of DC. In light of the evidence of DC's mother and her certificate of birth which were very specific, we are satisfied that DC's age was appropriately proved and there is no room for reasonable doubt in that regard.

On the failure to conduct DNA testing to confirm the paternity of DC's child, section 36(1) of the Sexual Offences Act provides as follows:

> ***"36. (1) Notwithstanding the provisions of section 26 of this Act or any other law, 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.

That provision has been considered by this Court in among other cases, ***Robert Mutungi Muumbi v Republic, Cr App No. 52 of 2014 (Malindi)*** and ***Williamson Sowa Mbwanga v Republic, C App. No. 109 of 2014 (Malindi)***. In the former, we expressed ourselves thus:

> ***"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."***

And in the latter case we stated as follows on the issue of paternity and defilement:

> ***"...it is patently clear to us that whilst paternity of PM's child may prove that the father of the child had defiled PM, that is not the only evidence by which defilement of PM can be proved. The fact, as happens in many cases, that a pregnancy does not result from conduct that would otherwise constitute a sexual offence does not mean that the sexual offence has not been committed. In this case, there does not have to be a pregnancy to prove defilement. A DNA test of the appellant would at most determine whether he was the father of PM's child, which is a different question from whether the appellant had defiled PM. As the Court of Appeal of Uganda rightly stated, in the sexual offence of defilement, the slightest penetration of the female sex organ by the male sex organ is sufficient to constitute the offence and that it is not necessary that the hymen be ruptured. (See TWEHANGANE ALFRED V. UGANDA, CR. APP. NO. 139 OF 2001)." It is partly for this reason that section 36(1) of the Sexual Offences Act is couched in permissive rather than mandatory terms, allowing the court, if it deems it necessary for purposes of gathering evidence to determine whether or not the accused person committed the offence, to order that samples be taken from him for forensic, scientific, or DNA testing."***

Under the proviso to section 124 of the Evidence Act, a trial court can convict the accused person in a prosecution involving a sexual offence on the evidence of the victim alone if it believes the victim is truthful and records the reasons for that belief. (See ***George Kioji v. Republic, Cr App No. 270 of 20102 (Nyeri)*** and ***Jacob Odhiambo Omumbo v. Republic, Cr. App. No. 80 of 2008 (Kisumu)).*** The trial magistrate expressed himself as follows regarding the evidence of DC:

> ***"Having seen the confident and consistent manner in which the complainant testified, I have no doubt that she was telling the truth on the matter.***

Later in the judgment the magistrate re-visited the issue and stated:

> ***"I have already noted that the complainant gave her testimony in a confident and consistent manner leading me to believe that she was telling the truth. Furthermore, when the accused was cross-examined as to why the complainant should lie that he was the one who had sexual intercourse with her leading to her pregnancy, the accused could not ascribe any reason for it. Although it is never the duty of an accused to prove his innocence, his sworn statement and evidence in cross-examination did not raise any reasonable doubts as to the testimony of the complainant."***

We are satisfied that the trial and the first appellate courts properly directed their minds on proof of the sexual offence with which the appellant was charged and that even without DNA evidence, there was other sufficient evidence upon which the appellant could be properly convicted for defilement.

We are equally satisfied that the appellant's constitutional right to a fair trial was not violated. The record does not indicate the appellant raising any issue pertaining to access to witness statements. On the contrary, he is recorded informing the court that he was ready for the hearing of the case. When he was

put on his defence 18th April 2011, he informed the Court that he was ready for his defence but later stated that he needed to be provided with "the charge". The trial court adjourned the proceedings and directed that the proceedings be typed and supplied to the appellant. On 3rd June 2011 the record shows that the court noted that the typed proceedings were ready and directed that the appellant be supplied with copies in readiness for hearing of his defence on 8th July 2011. On the latter date the appellant indicated that he was ready for the hearing of his defence. In short, the appellant's complaint regarding denial of access to witness statements is simply not borne out by the record. As this Court stated in ***Francis Macharia Gichangi & 3 Others v. Republic, Cr. App. No. 11 of 2004*** it is to be reasonably expected that an accused person who claims that his or her trial rights have been violated will at the very least raise the issue with the trial court.

The last issue relates to failure by the two courts below to consider the appellant's defence. We have carefully considered the judgments of the two courts below and we are satisfied that the appellant's defence, which in the main consisted of denial of his having had sexual intercourse with DC, was adequately considered and found not to be credible in light of acceptance of DC's evidence as truthful.

The only ground upon which the two courts below may be validly criticized, which was not raised in this appeal, is their failure to specifically deal with the appellant's alibi defence, which was raised late in the day in his defence. In his defence he stated that on the material day he was in Mlago Village in Kaloleni rather than at Fighinyi Village where the offence was committed.

We have stated before that while it is desirable that an alibi defence be raised at the earliest opportunity to give the prosecution time to investigate its truth or otherwise, nevertheless where an alibi is raised in the defence, the court must still address it. (See ***Ganzi & 2 Others v. Republic [2005] 1 KLR 52).*** In the present case, when the appellant's alibi defence is weighed against the evidence adduced by the prosecution, which was accepted by the two courts below, the conclusion is inescapable that the alibi defence was effectively displaced.

Before we conclude this judgment, it is necessary to say a word on computation of the age of the victim. The Sexual Offences Act provides for punishment for defilement in a graduated scale. The younger the victim, the severe the punishment. Where the victim is aged 11 years or less, the prescribed punishment is imprisonment for life. Defilement of a child of 12 years to 15 years attracts 20 years imprisonment while defilement of a child aged 16 years to 18 years is punishable by 15 years imprisonment.

Rarely will the age of the victim be exact, say exactly 8 years, 10 years, 13 years etc., as at the date of defilement. It will be a few days or months above or below the prescribed age. The question then arises, is a victim who is, for example, 11 years and six months old at the time of defilement to be treated as 11 years old, or as more than 11 years old? If the victim is treated as more than 11 years old, to what term is the offender to be sentenced since the victim has not attained 12 years for which a sentence is prescribed? In the same vein, in the present appeal where the victim was aged 15 years and a couple of months old, but was not yet 16 years old, is the appellant to be sentenced as if the victim was exactly 15 years or as if she was 16 years old?

On the face of it, an attractive argument is that there is doubt as to the age of the victim and that the benefit of the doubt ought to be given to the accused person, so that the less severe sentence is imposed. Thus where the victim is say, 15 years and 2 months, she would be treated as 16 years so that the accused person is sentenced to 15 years imprisonment, as though the victim was aged between 16 and 18 years, instead of 20 years for a victim of 15 years.

Indeed, in ***Alfayo Gombe Okello v. Republic, (supra)***, this Court went about the issue as follows:

> ***The evidence of the mother was that she (the victim) was born in 1992. No month or date is mentioned. If she was born between January and July 1992, she would obviously have been above 15 years of age but below sixteen when the offence was committed. It seems to us that there is an obvious lacuna in the Act as there is no provision for punishment where the child is between the age of fifteen and sixteen years. Section 8 (4) caters for the ages of sixteen to***

eighteen years. We must therefore take the construction which is favourable to the appellant. In our view, there is a reasonable doubt over the actual age of the child as at the time of commission of the offence. The onus was on the prosecution to clear such doubts, failure to which the benefit would go to the appellant. We so find.

We are of a different mind for the following reasons. ***Section 2*** of the ***Interpretation and General Provisions Act*** defines ***"year"*** to mean a year reckoned according to the British Calendar. Under the ***British Calendar Act, 1751,*** a year means a period of 365 or 366 days. Thus a person who is, for example, 10 years and 6 months is deemed to be10 years old and not 11 years old. That approach entails not taking into account the period above the prescribed age ***so long as it does not amount to a year***. Back to the Sexual Offences Act, a victim who is days or months above 11 years will be treated as 11 years old so long as he or she has not attained 12 years of age. On the same reasoning, the victim in this case who was 15 years, 6 months and 13 days old must be treated to be 15 rather than 16 years old.

We have come to the conclusion that the trial court did not err in convicting and sentencing the appellant as it did and that the first appellate court did not err either in upholding the conviction and sentence. This appeal is accordingly dismissed.

Dated and delivered at Mombasa this 27th day of May, 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