IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, KOOME & OKWENGU, JJA)

CRIMINAL APPEAL NO. 118 OF 2013

BETWEEN

EVANS WAMALWA SIMIYU…….....……APPELLANT

VERSUS

REPUBLIC……..……..……RESPONDENT

*(Being an appeal from the judgment of the High Court of Kenya at Nairobi (**Mbogholi, J**.) dated 18th July 2013)*

in

H.C.CR.A. NO. 129 OF 2009

****

JUDGMENT OF THE COURT

[1] This is a second appeal by Evans ***Wamalwa Simiyu*** (hereafter referred to as the appellant), following the dismissal of his appeal by the High Court against his conviction and sentence by the Senior Principal Magistrate's Court at Limuru, for the offence of defilement contrary to *Section 8 (1)* as read together with *Section 8 (3) of the Sexual Offences Act No. 3 of 2006 Laws of Kenya*.

[2] The particulars of the charge against the appellant were that on 11th August, 2009 at Kiawaroga Village in Kiambu West District within Central Province he intentionally and unlawfully defiled SWW by penetrating with his male organ namely penis into the female organ namely vagina of SWW a child aged 12 years.

[3] During the trial the appellant denied the charge and six witnesses were called in proof of the prosecution case, whilst the appellant gave unsworn evidence and did not call any witnesses. The trial court having considered the evidence found that the prosecution had proved its case beyond reasonable doubt convicted the appellant, and sentenced him to twenty years imprisonment.

[4] Aggrieved by the decision of the trial court, the appellant lodged an appeal in the High court. The learned Judge of the High Court (Mbogholi J), having reconsidered the evidence that was tendered before the trial court, concluded that the evidence was sufficient to prove the charge against the appellant. The learned Judge therefore dismissed the appeal and upheld the appellant's conviction and the sentence

imposed against him by the trial court. This precipitated the second appeal to this that is now the subject of this judgment.

[5] The appellant's initial memorandum of appeal, filed in person on 28th November 2012, raised five grounds of appeal as follows:

i. ***That both the lower and High Court judges erred in law and facts by failing to note that this case was not proved beyond reasonable doubt***

ii. ***That both the lower and high court judges erred in law and facts by relying on circumstantial evidence which did not have independent witness to corroborate the same.***

iii. ***That both the lower and high court judges erred in law and facts without bearing in mind that the P3 findings did not link me with the alleged offence thus I was not examined by any medical expert.***

iv. ***That both the lower and high court judges erred in law and facts by failing to note that essential witnesses were not summoned to testify thus violating Section 150 of the CPC***

v. ***That both the lower and high court judges erred in law and facts by disregarding my defence thus violating section 169 (1) of the CPC***

[6] When the matter came up for hearing before us the appellant added three supplementary grounds of appeal in which he faulted the two lower courts for:

i. ***convicting and upholding his conviction on a charge of defilement which was unproved in accordance to the legal standards required by law as enshrined in the Sexual Offences Act No. 3 of 2006;***

ii. ***failing to consider that he was detained in police custody for a period of six (6) days before being arraigned in court which was contrary to Article 49 F***

(i) and (ii) of the Constitution; and

iii. ***failing to adequately consider his defence.***

[7] The appellant who was unrepresented appeared in Court, but made his arguments by way of written submissions. The appellant submitted that the two crucial ingredients for the offence of defilement that must be proved in order to sustain a conviction are penetration and age of the victim. The appellant argued that an age assessment report and a birth certificate were important documentary evidence required to prove the charge of defilement. He maintained that Prosecution failed to produce an age assessment report from the examining doctor as well as a birth certificate, and that by so doing failed to discharge the burden of proof beyond reasonable doubt. Secondly, the Appellant argued that the trial magistrate erred in failing to invoke the powers bestowed upon him by **Section 36** of the **Sexual Offences Act** which empowers the court to order a DNA test so as to prove a link between the appellant and the complainant.

[8] In support of his second supplementary ground of appeal, the appellant submitted that he was held for six days in police custody before being arraigned in court in breach of his constitutional rights. The appellant argued that the unexplained violation of his constitutional rights should have resulted in an acquittal irrespective of the nature and strength of the evidence adduced in support of the charge. On ground three, the appellant posited that the failure to consider his defence by the High Court was prejudicial and total disregard of natural justice and that his defence was sufficient to create doubt on the prosecution case.

[9] Learned Prosecution Counsel Ms. Maina who appeared for the State made oral arguments opposing

the appeal. Counsel submitted that the Charge was proper since the complainant was 12 years old. Counsel maintained that penetration was proved through the evidence of the complainant's mother and the doctor. Counsel argued that even if one was to assume that the appellant was kept in custody for more than the period allowed by law that did not vitiate the evidence in his criminal trial as he could still be compensated for that constitutional breach. With regard to the appellant's defence counsel argued that the two courts appropriately considered the same. Counsel therefore urged us to dismiss the appeal.

[10] We have duly perused the record of proceedings both before the trial court and the first appellate court. We have also considered the submissions of the appellant and that of the learned counsel as well as the authorities they sought to rely on. **Section 361** of the **Criminal Procedure Code** enjoins this Court to consider matters of law only when hearing and determining a second appeal.

[11] In **Karingo v Republic [1982] KLR 219**, this Court stated the principle underpinning section 361 of the Criminal Procedure Code as follows:-

> ***"A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did."***

[12] This Court has restated this position numerous times as evident in the recent decision of **Dzombo Mataza vs. R,** ***2014 eKLR*** where the Court stated:

> ***"As already stated, this is but a second appeal. Under the law we are only concerned with matters of law and not fact. Put differently, in a second appeal such as this one, matters of fact are for the trial court and the first appellate court – see Okeno v Republic (1972) E.A. 32.***
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> ***By dint of the provisions of section 361(1)(a) of the Criminal Procedure Code our jurisdiction does not allow us to consider matters of fact unless it be shown that the two courts below considered matters of fact that should not have been considered or failed to consider matters that they should have considered or that looking at the evidence they were plainly wrong.***

[13] The first issue that arises in this appeal is what is the relevance of the age of the complainant in establishing the offence of defilement? **Section 8** of the **Sexual Offences Act** that deals with the offence of defilement states as follows:

> ***"8(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.***
>
> ***2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.***
>
> ***3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.***
>
> ***4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction for a term of not less than fifteen years.***
>
> ***(5)…"***

[14] From the above quoted **section 8(1),** it is apparent that the offence of defilement is complete immediately there is an act that causes penetration and the victim of the act is a child. **Section 2** of the **Sexual Offences Act**, defines an '***act that causes penetration***' as '***an act contemplated under the Sexual offences Act***'. The same section defines "*penetration*" to mean '***the partial or complete insertion of the genital organs of a person into the genital organs of another person***.' As regards the definition of '*Child*' **Section 2** of the **Sexual Offences Act**, adopts the definition of 'Child' provided under the

Children Act, that is '***any human being under the age of eighteen years.***" Therefore in establishing the offence of defilement proof of age is only relevant to show that the victim is under eighteen years of age and therefore a child within the definition of the Children Act. Thus the offence of defilement is complete immediately there is an act that causes the partial or complete insertion of the genital organs of the perpetrator's genital organs into a child's genital organs regardless of the age of the child.

[15] The appellant argued that the failure by the prosecution to provide an age assessment report or a birth certificate resulted in the failure by the prosecution to prove its case beyond reasonable doubt. The issue of age was considered in the case of **Kaingu Elias Kasomo V R, Malindi Criminal Appeal No. 504 of 2014**, (Unreported) where this Court (differently constituted) stated that age is a key ingredient to the offence of defilement and failure to prove it beyond reasonable doubt amounts to failing to prove the offence. This pronouncement was clarified by this Court in **Tumaini Maasai Mwanya V R, Msa Criminal Appeal No. 364 Of 2010** (Unreported) and in **Stephen Nguli Mulili V Republic 2014 eKLR** that:

> ***"Proof of age for purpose of establishing the offence of defilement which is committed when the victim is under the age of 18 years should not be confused with proof of age for purpose of appropriate punishment for the offence in respect of victims of defilement of various statutory categories of age."***

[16] Thus in relation to the appellant's case proof of age was relevant at two levels. First, to establish that the complainant was under the age of 18 years and therefore a child; and secondly, to establish that the complainant was between the age of 12 and 15 years such as to bring the sentence of the appellant, if convicted, within the minimum provided under section 8(3) of the Sexual offences Act.

[17] In this regard the evidence before the trial court was that of the complainant who stated during her *voir dire* examination that she was 12 years old. Her evidence was corroborated by PW5 who examined the complainant and filled the P3 form, which was produced as an exhibit and which stated the complainant's age as 12 years. Although no age assessment report, nor a certificate of birth or baptism certificate was produced in proof of complainant's age, the fact that the trial court found it necessary to carry out a

'voir dire' examination to determine whether the complainant understood the nature of an oath or was of sufficient intelligence to understand the importance of speaking the truth, is a clear indicator that the trial court formed the impression that the complainant was a child of tender years, and therefore the fact of her being under eighteen years of age was apparent. Indeed **section 2** of the **Children Act** define "age" as meaning apparent age in cases where actual age is not known. Thus we are satisfied that there was ample evidence before the trial court, to show that the complainant was under 18 years of age and we have no hesitation in finding that for the purpose of establishing the offence of defilement the complainant was established to be a child.

[18] As to whether the appellant's age fell within 12 and 15 years of age, the evidence was rather obscure. Although the complainant testified that her age was twelve years, she did not explain the source of this information. The Complainant's mother did not offer any useful evidence in this regard as she did not say anything about the complainant's age. This leaves only the evidence of Dr. Mayende who indicated at Part C of the P3 form that the estimated age of the complainant was 12 years. We have anxiously considered the purport of this evidence since the Doctor does not appear to have carried out a specific scientific age assessment. Nevertheless we do note that under part C of the P3 form the age required is estimated age and under the Children's Act "**age**" where actual age is not known means apparent age. This means that in the Doctors opinion the apparent age of the complainant from his observation was 12 years. Thus although the actual age of the minor complainant was not established, the apparent age was established as 12 years. This mean her actual less her or more and this was sufficient to bring the complainant within the age bracket of 12 – 15 years or the purposes of the penalty under **section 8(3)** of the **Sexual Offences Act**.

[19] Another issue for consideration is the contention by the appellant that the trial Court failed to order a

DNA test on him contrary to **Section 36** of the **Sexual Offences Act** which evidence could have exonerated him. In **AML v Republic 2012 eKLR** (Mombasa), this Court upheld the view that:

> ***"The fact of rape or defilement is not proved by way of a DNA test but by way of evidence."***

[20] This was further affirmed in **Kassim Ali v Republic Cr Appeal No. 84 of 2005** (Mombasa) (unreported) where this Court stated that:

> ***"The absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence."***

[21] Moreover, **section 36** of the **Sexual Offences Act** that gives the trial court powers to order an Accused person to undergo DNA testing uses the word "**may**".

Therefore the power is discretionary and there is no mandatory obligation on the court to order DNA testing in each case. In our view, in the case of the appellant DNA testing was not necessary. This is because the minor complainant identified the appellant who was known to her as the person who sexually violated her. The trial magistrate who saw and assessed the demeanor of the witnesses believed the complainant that it was the appellant who violated her. Moreover the trial court found material corroboration of the complainant's evidence in the evidence of Dr. Mayende a medical doctor (PW4) who examined the complainant and confirmed that vaginal swab taken from her had spermatozoa.

[22] The appellant also raised a constitutional issue regarding his being held in detention after his arrest, for more than the twenty-four hours allowed by law; and that he was not afforded a fair and impartial trial. The appellant contended that he was held incommunicado in police custody for six days and thus his constitutional rights were violated. **Section 72(3)(b)** of the former **Constitution** stipulated that a person arrested for an offence other than a capital offence, should be arraigned in court within twenty-four hours of his arrest.

[23] This issue has been the subject of several decisions of this Court. The correct position in law was set out in ***Julius Kamau Mbugua v Republic (2010) eKLR***, where the Court stated that the violation of the appellant's right to be produced in court within twenty-four hours would not automatically result in his acquittal. Instead, the appellant would be at liberty to seek remedy, in damages, for the violation of his constitutional rights. On this basis, we do not consider the issue fatal to the prosecution even if proved.

[24] The last issue for consideration is whether the trial court and the first appellate court failed to adequately consider the defence of the appellant. From the proceedings before the trial court we note that the appellant gave an unsworn statement and said as follows:-

> ***"On 11th August 2009 at 7.28pm members of the public came to my place. They met my wife. She was told to call me. I was told something had happened in the factory. I was taken to the factory. I was then taken to Karabaini Police Post. The following day I was taken to Tigoni Police. Complainant and her mother were there. I know nothing about the offence."***

[25] In rejecting the appellant's defence the trial magistrate stated as follows:

> ***"Accused has not accounted for himself on the day the offence was committed. He did not challenge PW 2's evidence. His defence is merely an account of how he was arrested…his defence does not challenge prosecution evidence. "***

[26] Clearly the trial magistrate misdirected himself. In his defence the appellant had stated that he knew nothing about the offence. Therefore his defence was a total denial, and the burden remained entirely upon the prosecution to prove its case. The appellant was not under any obligation to challenge the

prosecution evidence. He could as well have opted to say nothing in his defence and no adverse inference could be drawn from that silence. However, notwithstanding this misdirection on the part of the trial magistrate, we are satisfied as already observed that there was sufficient evidence adduced by the prosecution that would have justified the rejection of the appellant's defence, and therefore the appellant did not suffer any prejudice or injustice.

[27] We come to the conclusion that the appellant was properly convicted of the offence of defilement contrary to **section 8(1)** of the **Sexual Offences Act**, 2006, as read with **section 8(3)** of the **Sexual Offences Act**. Accordingly we confirm the appellant's conviction and sentence and dismiss his appeal in its entirety. Those shall be the orders of the Court.

Dated and delivered at Nairobi this 19th day of May, 2016

E.M. GITHINJI

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JUDGE OF APPEAL

M. KOOME

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JUDGE OF APPEAL

H. OKWENGU

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR