



IN THE COURT OF APPEAL

AT NYERI

(SITTING AT MERU)

(CORAM: WAKI NAMBUYE & KIAGE JJA)

CRIMINAL APPEAL NO. 37 OF 2014

BETWEEN

DANIEL MUGAMBI.....APPELLANT

AND

REPUBLICRESPONDENT

(Appeal against Conviction/Judgment of the High Court of Kenya at Meru (Makau, J.) Dated 30th October, 2013)

in

Meru H. C. CRA. NO. 148 OF 2011)

JUDGMENT OF THE COURT

The complainant **D M (D)** was a deaf and dumb girl who could only communicate through either a sign language or through a written communication. On the 10th January, 2010 at about 8.00 pm. **D** requested **D** her mother for permission to go and say hallo to her grandmother who apparently lived in the same homestead, which request **D** acceded to. She had been instructed to return early for supper. She delayed. Both **D** and PW2 **M M** a househelp to the grandmother became concerned. A search was mounted for her in the homestead. She was traced in the room where the appellant who was a worker in the homestead lived.

According to **D** and **M** they found the door of the said house not locked. With the help of a torch light, **D** and **M** saw the appellant standing in the room wearing a T.Shirt with his trouser unzipped and his pants on the bed, while **D** was seated on the bed but fully dressed. When questioned as to what had happened, between them, the appellant responded that nothing had happened while **D** said that both she and the appellant had had sex. The appellant made no response. Both the appellant and **D** were taken to the police station the same night where PW5 **Cpl Charles Regagitele (Cpl Charles)** received them, booked the report in the OB and then referred **D** to **Kanyakine** District hospital for treatment. At the said hospital **D** was received by **Sabarina Kaimathe (Sabarina)** who examined and treated her and then filled the P3 form. The findings on examination were that there was a tear on the vaginal orifice. The

hymen was broken. There was a whitish discharge from the vagina orifice but no spermatozoa were seen. The minoras were bruised. There was also puss and epithelial cells and bacterial infection. From the above findings **Sabarina** concluded that **D** had suffered penetration caused by a penis about two (2) hours before the examination. She signed the P3 form which she tendered in evidence as an exhibit.

The appellant was thereafter arraigned before the Senior Principal Magistrate's Court at **Nkubu** on the offence of defilement contrary to **section 8(3)** of the **Sexual Offences Act No. 3 of 2006**. The particulars of the offence were that on the 19th day of January, 2010 in Imenti South District within Eastern province, he committed an act which caused penetration with his genital organ in the genital organ of **DM** a child aged 15 years old. The appellant denied the offence prompting the trial, conviction and sentence handed out against him.

When put to his defence he gave sworn testimony asserting that the defilement case had been fabricated against him by **D** for an alleged misuse or theft of building material.

In a judgment dated the 26th day of September 2011 the trial magistrate **S. M. Githinji** S.R.M found the prosecution case proved to the required threshold, on account of which he found the appellant guilty of the offence charged, convicted him and sentenced him to twenty years imprisonment.

The appellant appealed to the High Court. In a judgment dated the 30th day of October, 2013. **J. A. Makau J.** dismissed the appeal. The appellant is now before us on a second appeal. He has raised seven (7) grounds of appeal in a homemade memorandum of appeal. These may be summarized as, the interpretation was not proper as the interpreter was not conversant with Australian sign language; the trial was erroneously conducted in the open as the complainant gave her testimony; the appellant was subjected to an unfair trial as the age of the complainant was not properly established as to whether it was fifteen (15) or sixteen (16) years as at the time of the commission of the offence; the prosecution evidence was contradictory and did not therefore meet the threshold of proof beyond reasonable doubt and lastly that medical evidence was not sufficient.

At the hearing, the appellant who appeared in person handed in written submissions which he adopted as his submissions for our consideration. In summary, the appellant contends that he has suffered a failure of justice by failure of the two courts below to establish the age of the complainant for purposes of determination whether the offence the appellant ought to have committed should have been laid under **section 8(4)** of the **Sexual Offences Act** (supra) as opposed to **section 8(3)** of the same Act; failure to conduct the *voire dire* on the complainant before receiving her testimony; failure to call vital witnesses namely the watchman who was on duty when the alleged offence was committed; the failure to test the appellant's evidence on the alleged existence of a grudge over the alleged loss of building material giving rise to the fabrication of the defilement charges against him; and lastly for the failure to fault the medical evidence on the ground that the injuries noted on the medical report could have been occasioned by factors other than sexual intercourse.

In response to the appellant's submissions, **Mr. A. Musyoka** the learned prosecution counsel urged us to dismiss the appeal on the grounds that variance in the age specified in the charge sheet of 15 years and the age given in the testimonies of both **D** and **D** of sixteen years was because eight months had lapsed since the commission of the offence hence the mention of 16 years. Further he submitted that in the absence of the production of a birth certificate, the estimate of the age given by the medical officer was sufficient for purposes of the trial; **Section 8(3)** of the **Sexual Offences Act** (Supra) provides for a mandatory sentence of twenty years imprisonment for any offence laid under that section; the interpreter was qualified in Australian sign language basics and that there was no contradiction in the medical evidence.

This is a second appeal. By dint of **section 361** of the **Criminal Procedure Code** this court is restricted to only consider matters of law. In **Chamagong vs Republic [1984] KLR 213** at page 219, this court held:

“As second appeal must be confined to points of law and this court will not interfere with

concurrent findings of facts arrived at in the two courts below unless based on no evidence. The test to be applied on a second appeal is whether there was any evidence on which the trial court could find as it did (Reuben Keruri s/o Karanja U.R 17 EACA 146”.

We have taken into account the record and considered it in the light of the rival submissions set out above. The issues that fall for our determination are matters of law raised by the appellant in his grounds of appeal summarized above and as submitted upon by him.

With regard to interpretation, the learned Judge dismissed that complaint because it was never an issue before the trial court. We have not traced on the record any complaint raised by either side with regard to the quality of sign language interpretation during the proceedings. We affirm the learned Judges rejection of that complaint.

With regard to the complaint on the disparity between the age of the complainant as given in the charge sheet and stated in the testimony of **D** and **D**, we do not agree with the learned Judge’s finding that no prejudice was suffered by the appellant. Our reason for saying so is that in **section 8(1)(2) (3) and (4) of the Sexual Offence Act No. 3 of 2006** pegs the severity of sentence of an offender to the age of the victim. The section provides:

“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 to imprisonment for a term of not less than fifteen years.

A period of eight (8) months and six (6) days had elapsed from the date of the commission of the offence to the date of the testimony. It is our view that in the absence of a birth certificate in circumstances where no explanation was given as to its unavailability, the appellant’s complaint that the complainant may very well have been sixteen (16) years as at the time of the commission of the alleged offence was sound and it should not have been brushed aside. The disparity ought to have been considered for purposes of sentencing. It is our view that had the learned Judge revisited this issue as requested by the appellant, he would have found, as we hereby do, that in the absence of production of a birth certificate to confirm the exact date of birth of **D**, the possibility of her having been sixteen (16) years of age as at the date of the commission of the offence could not be ruled out. Such a doubt if established could have been resolved in favour of the appellant. The appellant therefore suffered prejudice as the correct sentence fell under **section 8(4)** of the Act.

As for the failure to conduct a *voire dire* on **D** before tendering her testimony, we adopt the reasoning of the court on this issue in the case of **Patrick Kathurima versus Republic** [2015] eKLR thus:-

“Whereas the question of whether a child is of tender years remains a matter for the good sense of the court as was stated by this Court in Mohammed –vs- Republic [2008] IKLR (G&F) 1175, we see no reason for departing from the observation made in Kibangeny –vs- Republic (Supra) that the expression “child of tender years” for the purpose of Section 19 of the [Act] means, “in the absence of special circumstances, any child of any age, or apparent age, of under fourteen years.” That indicative age has been followed by courts ever since, See, for instance, Johnson Muiruri –vs- Republic [1983] KLR 445, where this Court, in respect of a 13^{1/2} year old child approved the step taken by the trial court;

“The learned Judge substantially followed the correct procedure before allowing her to be sworn by recording his examination of her whether she was possessed of sufficient intelligence to justify the reception of her evidence and that she understood the duty of speaking the truth”.

We take the view that this approach resonates with the need to preserve the integrity of the *viva voce* evidence of young children, especially in criminal proceedings. It implicates the right to a fair trial and should always be followed.”

On the basis of the court’s reasoning in the **Kathurima** case (*supra*), we agree with the learned Judge that no miscarriage of justice was occasioned to the appellant in this regard. This is because of the apparent doubts in the age of **D** which may well have placed her beyond a child of tender years and therefore obviated the *voire dire*. No miscarriage of justice was occasioned for the failure to conduct the *voire dire* on **D** before reception of her evidence in this regard.

With regard to the alleged failure to call the watchman, **section 143** of the **Evidence Act Cap 80** Laws of Kenya provides that:-

“No particular number of witnesses shall in the absence of any provision of law to the contrary be required for proof of any fact”.

The predecessor of this court in **Bukenya and others versus Uganda [1972] EA 549** provided the following guidelines when it held *inter alia* thus:-

- i. The prosecution must make available all witnesses necessary to establish the truth, even if their evidence may be inconsistent.**
- ii. The court has the right and the duty to call witnesses whose evidence appears essential to the just decision of the case.**
- iii. Where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.”**

See also **Keter versus Republic [2007] IEA 135**, where this court held *inter alia* thus:

“The prosecution is not obliged to call a superfluity of witnesses but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt.”

The watchman who was not called as a witness has not featured anywhere in the testimonies of the three key prosecution witnesses, that is, **D, M** and **D**. Neither was his involvement, if any, raised by the appellant during the cross-examination of those witnesses. The nature of the evidence that this watchman would have offered has not been stated. There is nothing on the record to suggest that this evidence, if any, was deliberately withheld by the prosecution. There is therefore no way an adverse inference could be drawn against the prosecution.

When called upon to defend himself the appellant simply stated: **“I will give sworn evidence. I have no witness to call.”** The appellant also had an opportunity to call the watchman in his defence if he so wished. By saying that he had an opportunity to call the watchman in his defence we are not in any way shifting the burden of proof to him to prove his innocence. We are simply demonstrating that the complaint is not only belated but also without basis.

With regard to testing the appellant’s defence of an alleged grudge against him by **D**, we agree the learned Judge’s finding that it was never raised by the appellant in his cross-examination of the three key prosecution witnesses that is **D, M** and **D**. The appellant also never challenged the three witnesses’ assertions that the appellant was found in his room with **D** after a long search for her with his trouser unzipped and his pants on the bed and that **D** though fully dressed confirmed to both **D** and **M** that the

two had had sex, which allegation the appellant did not refute and was in any event medically confirmed later. There was therefore, no evidence of bias against the appellant. The learned Judge was entitled to concur with the findings of the trial magistrate that the prosecution's evidence was unshaken and therefore credible and had dislodged the appellants alibi, and placed him at the scene of the commission of the offence as the perpetrator. We note from the record that there is no evidence of violence meted out on **D** in the cause of the defilement nor any resistance from her. In all probability the sex was consensual, but as the law stands **D** was incapable of consenting to it. An offence was therefore committed.

With regard to medical evidence, PW4, **Sabarina Kaimathe** had this to say:-

“She was examined and minoras were bruised. There was a tear on vaginal orifice and hymen was broken. There was a whitish discharge from vagina orifice. The discharge was examined and spermatozoa were not traced. There was puss cells and epithelial cells. There was bacterial infection. The injuries were about 2hours old. The injuries could have been caused by a penis....”

In cross examination by the appellant the witness had this to say:-

“The hymen breakage was fresh. I concluded she had been sexually penetrated. When hymen is torn there is always bleeding. It can take even minutes to stop. It is just a thin membrane.”

At no time was any suggestion ever made to **Sabarina that the injuries noted on D** private parts could have been caused by something other than sexual penetration. The appellant's complaint in this regard is baseless and the same is rejected.

The upshot of the above is that the appeal against convictions is dismissed. As for the sentence it is our view that in the light of our finding that there was a reasonable doubt that **D** may have been sixteen (16) years as at the time of the commission of the offence, the first appellate Judge ought to have substituted the appellant's conviction for the offence under **section 8(4)** of the Act as opposed to **section 8(3)** of the Act. In this regard, we find it prudent to interfere with the said conviction and sentence on account of its legality. We therefore set aside the sentence of 20 years imprisonment and substitute therefor a sentence of fifteen (15) years imprisonment effective the date of conviction by the trial court.

Dated and Delivered at Meru this 18th day of July, 2016.

P. N. WAKI

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JUDGE OF APPEAL

R.N. NAMBUYE

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

I certify this is a true copy of the original.

DEPUTY REGISTRAR