



IN THE COURT OF APPEAL

AT ELDORET

(CORAM): MARAGA, MUSINGA & MURGOR, J.J.A)

CRIMINAL APPEAL NO. 81 OF 2015

BETWEEN

S W.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from judgment of the High Court of Kenya at Kitale (J.R. Karanja, J) dated 16th February 2012,

in

H.C.C.R.A No. 13 of 2011)

JUDGMENT OF THE COURT

The appellant, **S W**, was charged in the Principal Magistrates’ Court at Kabarnet with the offence of defilement by a male contrary to **section 8 (1)** as read with **section 8 (2)** of the **Sexual Offences Act No. 3 of 2006**, the particulars of which were that on 21st January 2009, at *Particulars withheld* in Tran Nzoia District within the former Rift Valley Province the appellant unlawfully and intentionally caused penetration with his genital organ namely; his penis, into the genital organ namely, vagina, of the complainant, **NK, PW1**, a child aged 8 years who he knew was his daughter.

He also faced an alternative charge of indecent act contrary to **section 11(1)** of the **Sexual Offences Act**, the particulars of which were that on the same day and place he intentionally and unlawfully caused his penis to come into contact with the complainant’s vagina.

The appellant denied committing the offence.

After hearing the case, the trial magistrate found that the main charge was proved, convicted and sentenced the appellant to life imprisonment. Dissatisfied with that decision, the appellant appealed to the High Court that upheld the trial court’s decision.

The appellant has now preferred an appeal to this Court. In the grounds of appeal and written submissions that were presented in Court, the appellant submitted that the courts below convicted him without having regard to the complainant's age which was a material ingredient in a offence such as this and that PW 5 was not competent to have produced the age assessment report. It was his submission that the charge sheet specified that the complainant's age was 8 years. When the complainant and her mother testified, they stated that she was 9 years, but then no expert witness was called to verify her age. The other complaint was that the High Court upheld the conviction without proper evaluation of the uncorroborated witness evidence. The appellant submitted that the complainant's evidence was contradictory, and was not corroborated by medical evidence.

On his part **Mr. Mulati**, Senior Principal Prosecution Counsel for the State opposed the appeal, and submitted that the appellant was properly identified by the complainant, and further submitted that the medical report addressed the question of the complainant's age.

We have considered the record of appeal and the submissions of the parties and find that the issues for our consideration are whether the complainant's age was assessed, and whether the High Court properly evaluated the evidence.

We will begin with the complaint that the High Court failed to properly evaluate the evidence. To do so, a brief outline of the facts is essential.

NK was returning home from the posho mill carrying flour when she met the appellant standing on the road. He knocked her down and pulled her into a nearby bush, pulled down her underpants and defiled her. It was then that **Moses (PW 4)** came to her rescue causing the appellant to flee. Moses helped her out of the bush and took her home. On the way they met her mother PW 2, and informed her of what had transpired. A report was made to the police and the appellant was arrested. Her father (PW 3) took NK to the hospital for treatment where **Reuben Bunyasi, (PW 6)**, a clinical officer at Kitale District Hospital, examined and issued her with a duly completed P3 form.

In evaluating the evidence, the High Court concluded thus:

“Having re-examined the evidence, this court is satisfied that the offence of defilement was duly established to the required standard by the testimony of the complainant (PW1) in conjunction with the medical evidence by the clinical officer (PW 6) which evidence was in the form of the findings made by his colleague after examining the complainant. This was punishable under section 77 of the Evidence Act. Therefore, grounds two (2) and four (4) of the appeal are unsustainable.

With regard to the identification of the assailant, the evidence by the complainant clearly indicated that the appellant was the culprit. He was previously and very well known to the complainant who not only knew his name and his house, but also his children by names, Particulars withheld Besides, the offence was committed in circumstances which were favourable for identification. The evidence showed that the offence was committed before darkness i.e between 4.00 p.m. to 6.00 p.m.

Indeed, the evidence of identification of the appellant by the complainant was based on recognition which is more reliable and in most cases, renders the possibility of mistaken identity remote”.

The High Court took into account the appellant's defence which it found to be ***“...clearly discredited by the totality of the evidence adduced against him by the prosecution. His suggestion that he was arrested and charged after failing to give money to the complainant's father was apparently an afterthought.”***

From the foregoing, we are satisfied that the High Court carried out an extensive reevaluation of the evidence, and in so doing rightly arrived at the conclusion that the appellant was the person who had

defiled NK. We find that this ground is without merit and accordingly fails.

We now turn to consider the issue of whether NK's age was ascertained, as the trial court assessed her age as between 9 and 12 years, and **section 8(1)** of the **Sexual Offences Act** is limited to children under the age of 11 years. When the issue was raised in the High Court, it was observed that;

“With regard to the complainant’s age, there is no dispute that she fell within the definition of a child of tender years contained in the Children Act (Cap 141 Laws of Kenya). Thus, she was a child under the age of ten (10) years at the time of the offence. She said that she was aged nine (9) years old. Her parents (PW 2 and PW 3) confirmed as much. The medical report indicated that she was eight (8) years old. There was therefore nothing wrong with the learned trial magistrate’s opinion that the complainant was aged between 9 to 12 years. This was the complainant’s apparent age and was only relevant for the purposes of sentencing. In any event, there was no dispute that the complainant was a child of tender years. This was established and confirmed by her own evidence coupled with that of her parents, when it was disclosed that she was aged nine (9) years old”.

Section 8 (1) of the Act restricts the age limit to children under 11 years. Therefore for the appellant to face a charge of defilement under this section, the child was required to be under 11 years. With due respect to the trial court and the High Court a 12 year old would be outside the age bracket contemplated by the provision.

But having said that, NK, her mother and father stated that she was 9 years old. On the P3 form her age was given as 8 years. From this evidence despite the fact that NK's age was indicated as 8 and 9 years, there was no doubt that the complainant's age fell within the age bracket specific to a child under 11 years of age. As such, we find that, for the purposes of the sentence preferred the age specified was correct, and the sentence safe, and no prejudice could be held to have been suffered by the appellant. Consequently, this ground also fails.

For the aforesaid 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 Eldoret this 28th day of October, 2016.

D.K. MARAGA

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is

a true copy of the original

DEPUTY REGISTRAR