IN THE COURT OF APPEAL

AT NYERI

SITTING AT MERU

(CORAM: GITHINJI, KARANJA & KIAGE, JJ.A)

CRIMINAL APPEAL NO. 30 OF 2015

PATRICK GITUMA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the conviction and sentence of the High Court of Kenya

at Meru, (Wendoh, J.) dated 17th March 2015

in

***H.C.CR.A. NO. 31 OF 2012*)**

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JUDGMENT OF THE COURT

Patrick Gituma ('the appellant') was charged in the Chief Magistrate's Court at Maua with the offence of defilement contrary to **Section 8 (1) (2) of the Sexual Offences Act No. 3 of 2006**. The particulars are that the appellant, on 16th January, 2011 at Tira Location in Igembe South District within Meru County, intentionally caused his penis to penetrate the vagina of G M K (name withheld) a child of 10 years.

The appellant also faced an alternative charge of committing an indecent act with a child contrary to **Section 11 (1) of the Sexual Offences Act No. 3 of 2006**. The particulars are that the appellant on 16th January, 2011 at Tira Location in Igembe South District within Meru County, intentionally touched the vagina of GMK, a child age 10 years with his penis. He denied both counts and the matter proceeded to full hearing, after which he was found guilty and convicted on the main charge of defilement. He was sentenced to serve life imprisonment.

By way of brief outline of the facts, **G M K** (PW2), a child of tender years, after passing the *voire dire* test, testified that on 16th January, 2011 at around 6:00 pm she was on her way to get bananas for her grandmother when she met the appellant who took her to a bush, removed her clothes and underpants and proceeded to defile her. After the ordeal she was unable to walk but she was fortunate to meet her uncle **S M** who carried her home. Her mother conducted a brief examination of her genitalia as GMK recounted her attack and identified the appellant as her defiler. Her mother took her to the police station to file the

report and later to Maua General Hospital for treatment. The appellant was identified as brother to GMK's mother. **Paul Murunga** (PW3) a Clinical Officer at Maua Methodist hospital completed the P3 form and examined GMK noting that she was still bleeding from the genitalia with lacerations on the vagina. **No. 91710 PC Albert Abere** (PW4) received the report of the defilement and recorded the statements from GMK and the witnesses. The appellant was taken to the police station by some members of the public who found him as he attempted to run away.

When placed on his defence, the appellant, who made an unsworn statement of defence, denied committing the offence. He told the court that at the time of the incident he was in Athi; that he had left his home on Saturday and came back on Monday only to be arrested by a crowd of people, for allegedly committing an offence which he knew nothing about.

Being dissatisfied with conviction and sentence, the appellant filed an appeal in the High Court at Meru where upon re-analysis and re-evaluation of the evidence the appeal was dismissed by Wendoh J.

The appellant now prefers this second appeal on grounds and written submissions he presented to this Court and on which he relied fully. The grounds *inter alia* state that: *the learned Judge erred in law by awarding life sentence which is contrary to the Constitution; the learned Judge erred in law in failing to analyse and evaluate the prosecution evidence to the required standard; the learned Judge erred in law in rejecting his defence without cogent reasons contrary to S.169 as read with S. 212 of the Criminal Procedure Code; and the learned Judge erred in law in convicting the appellant on insufficient, inconsistent and unreliable evidence.*

At the hearing of the appeal, the appellant, who appeared in person, informed the Court that he did not wish to add anything to his written submissions. Mr. A. Musyoka, learned prosecution counsel, opposed the appeal and submitted that the evidence of the victim GMK was corroborated by the testimony of her mother PW1. Further that the appellant, who was GWK's uncle, was well known to her and therefore, there could be no case of mistaken identity.

Counsel also submitted that the sentence meted out was lawful since **Section 8 (2) of the Sexual Offences Act**, in respect of which the appellant was convicted, only provides for life imprisonment. Although learned counsel conceded that the child's age was not properly proved, he still maintained that the Court should maintain the life sentence meted by the trial court and upheld by the High Court on first appeal.

As the second appellate court the jurisdiction of this Court is clearly prescribed by **Section 361 of the CPC** and, expounded by a string of authorities from this Court. For instance, in the case of **Njoroge -vs- Republic [1982] KLR 388**, at page 389 this Court pronounced itself as follows:-

> ***"..On this second appeal, we are only concerned with the points of law and consider ourselves bound by the concurrent findings of fact arrived at in the courts below, unless shown to be based on no evidence. See M'Riungu -vs- Republic [1983] KLR 455."***
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> **Section 361 of the CPC** provides:
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> ***"(1) A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section :-***
>
> ***(a) on a matter of fact, and severity of sentence is a matter of fact; or***
>
> ***(b) against sentence, except where a sentence has been enhanced by the High Court, unless the subordinate court had no power under section 7 to pass that sentence."***

From the record and a look at the judgment of the High Court, it is clear that Wendoh J. re-analysed and re-evaluated the evidence to come to her own conclusion. The learned Judge was convinced from the

testimony of GWK herself, PW1 and medical evidence of PW3, that GWK was indeed defiled.

As to the question of the culprit, the learned Judge accepted the testimony of GWK as honest and true and had no qualms in accepting that the appellant had been properly identified. The learned Judge, like the trial magistrate, was satisfied that there was no possibility of mistaken identity as the appellant was actually a close relative of the complainant.

The learned Judge also dismissed the alibi defence given by the appellant terming it as vague and an afterthought. The learned Judge was satisfied that the prosecution evidence had dislodged the unsworn testimony of the appellant. The learned Judge examined the evidence and found no miscarriage of justice and found it safe to rely on.

We note that both courts below made concurrent findings on the veracity of the complainant's evidence. We have not been given any reason as to why we should deviate from these findings of fact.

In his written submissions, the appellant took issue with the medical evidence adduced by PW3. In his view, since the clinical officer testified that there were no spermatozoa found in the complainant's genitalia after a high vaginal swab was taken, then the act of defilement had not been proved. We reiterate here that the absence of spermatozoa in the genitalia, *per se*, does not negate the act of defilement, particularly if there is other credible medical evidence to show that there was actually intrusion in the complainant's genitalia. In this case, there was more than enough evidence to show that the child had been defiled. She had lacerations in her vagina and she was also bleeding. There is no requirement in law that blood stains or even spermatozoa are necessary ingredients to prove defilement. (See: **Boaz Kipleting Kemboi v R, Criminal Appeal 209 of 2013 [2016]).**

It is also not a requirement that the accused person be subjected to medical tests himself. We are satisfied, like the two courts below, that the child GWK was defiled on the date in question, by the appellant herein.

The only other point of law urged by the appellant which falls for our determination is the issue of the complainant's age. Was there conclusive evidence before the two courts below to the effect that the child was ten years old?

We must from the onset reiterate that lack of, or insufficiency of proof of actual age does not impugn a conviction on a charge of defilement. Proof of age only becomes relevant when it comes to sentencing.

This Court decisively dealt with this issue in **Tumaini Maasai Mwanya v R, Msa Criminal Appeal No. 356 of 2010 (unreported)**, where it categorically stated:-

> "***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***."

See also this Court's decision in Stephen **Nguli Mulili v R, Criminal Appeal No. 90 of 2013 [2014] eKLR**

In the present case, although GWK testified that she was ten years old, which age is repeated in the P3 form, evidence was not led from her mother, PW1, to confirm the age of the complainant. That was in our view a serious, though not fatal omission on the part of the prosecution. There is also concession by learned counsel for the State to the effect that the complainant's age was not properly proved. This being an almost boarder line age for purposes of sentencing under **Section 8(2) of the Sexual Offences Act**, the appellant should have been given the advantage of the sentence in the lower band which is provided for under **Section 8 (3) of the Sexual Offences Act.**

For the foregoing reasons, we are satisfied that this appeal fails as far the challenge on conviction is concerned. We dismiss the appeal and uphold the conviction as affirmed by the High Court. We

nonetheless interfere with the sentence and reduce the same from life imprisonment to twenty (20) years imprisonment.

Dated and delivered at Meru this 21st day of December, 2016.

E. M. GITHINJI

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR