IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, AZANGALALA & KANTAI JJ.A)

CRIMINAL APPEAL NO. 363 OF 2011

BETWEEN

FRANK OCHIENG OTIENO …… APPELLANT

AND

REPUBLIC …… RESPONDENT

(*An Appeal from a Judgment of the High Court of Kenya at Kisii (Sitati, J.) dated 20th January, 2012*

in

H.C.CRA. NO. 262 OF 2010)

****

JUDGMENT OF THE COURT

Frank Ochieng Otieno, the appellant herein, was on 12th August, 2010 arraigned before the Senior Principal Magistrate's Court at Migori on one count of defilement of a girl aged 16 years, contrary to ***Section 8(1) 3*** of the Sexual Offences Act No. 3 of 2006. It was alleged that the appellant, on diverse dates between 3rd and 7th August, 2010, at [particulars withheld] village in Migori District (now Homabay County), of Nyanza Province, intentionally and unlawfully caused his penis to penetrate the vagina of ***R A O*** *(hereinafter "the complainant")*, a female child aged 16 years.

The appellant also faced an alternative count of committing an indecent act with a child contrary to ***Section 11*** of the same Act. As the appellant was convicted of the principal count of defilement, we need not set out the particulars of the alternative count.

The appellant's trial commenced on 13th August, 2010 before Kibet Sambu *(Senior Resident Magistrate)*, when the complainant testified by way of a sworn statement. She narrated to the court how, on 2nd August, 2010 while on a visit to her uncle, ***E A (PW2) (A),*** she met the appellant whom she had met in April of the same year and they had become friends. He invited her to his house on 3rd August, 2010 where she spent the night with the appellant and were intimate. She stayed with the appellant at his home until 5th August, 2010 when they relocated to Awendo Town to continue with their romp. The appellant however, ran out of money and they parted company with the complainant going to the home of her aunt who alerted her mother, ***A O O (PW4) (A).***

In the meantime, A had informed A that the complainant was not at his home prompting A to report to the police at Migori that the complainant was missing.

The appellant was subsequently arrested by ***PC Abdul Wario (PW6)*** and detained at Migori Police Station cells. The complainant was later taken to the same police station where she made her statement of her escapades with the appellant. She was then escorted to Migori District Hospital where she was examined by ***Dr. Gregory Ganda (PW5)*** who observed that the complainant could have had sexual intercourse prior to the period it was alleged she was defiled by the appellant.

As a result of the foregoing the appellant was charged before the trial court as already stated.

In defending himself, the appellant stated, in his unsworn statement, that he met the complainant who, according to him, was looking for a man who could marry her. He accepted the challenge and the complainant told him that she was infact over eighteen years of age.

The learned trial magistrate considered the evidence before him and came to the conclusion that the appellant was guilty on the principal count of defilement. He accordingly convicted him and sentenced him to fifteen (15) years imprisonment. In concluding his judgment, the learned trial magistrate stated:-

> ***"It was not challenged either that the girl victim being a girl under the age of eighteen years was continuously defiled by the accused person between the 3rd August 2010 to 7th August 2010, at Accused's house at [particulars withheld]village and subsequently in a lodge at Sirare. It is on record that the accused person is an immediate neighbor to the girl victim and it must have been with the accused's knowledge that the girl victim was school going. The accused's defence that the girl victim had wanted his hand in marriage to me (sic) is not only unreasonable but unbelievable, given that, ordinarily, it is always a man's responsibility to propose for a marriage but not the vice versa. There is no evidence on record to prove that the girl victim had deceived the accused person into believe (sic) that she was over the age of eighteen (18) years at the time of the alleged commission of the offence as alleged by the accused person in his dfence. The accused person in this regard, under the provision of Section 8(1) of Sexual Offences Act No. 3 of 2006 did not in his defence show the steps he had taken in ascertaining the age of the girl victim, notwithstanding his alleged reasonable belief that he had been made to believe, that the girl victim was aged over eighteen years. It is my respectful finding to this extent. ……...***
>
> ***that the accused's sole intent was to sexually, exploit the girl victim, oblivious of her age, but not for a marriage."***

With those findings, the trial magistrate ultimately convicted the appellant as already stated and sentenced him as aforesaid.

Being aggrieved, the appellant filed an appeal to the High Court at Kisii where Sitati, J. considered the evidence and came to the same conclusion as did the trial magistrate that the appellant was indeed guilty of defilement. The learned Judge stated:

> **"16. ……**
>
> **From the appellant's testimony, he had found someone who was looking for a man to marry her and since he was also looking for someone to marry, he accepted to "*marry*" her. I however do not accept the appellant's contention that he was still courting her and had not made up his mind to marry her. The evidence is clear that he took the victim to his home and defiled her there for two nights and then decided to take the victim for a treat at Sirare. Infact if the appellant had not run out of money, they would not have found out for a long time, but as luck would have it, the appellant ran out of money and they had to leave Sirare ….."**

The learned Judge proceeded to dismiss the appellant's appeal for lacking merit.

Still aggrieved, the appellant now comes to this Court by way of a second appeal. That being so, only matters of law fall for our consideration – See ***Section 361(1)*** of the Criminal Procedure Code.

In his home made Memorandum of Appeal filed on 1st February, 2012 the appellant cited four (4) grounds of appeal. His advocate, ***Mr. K'Opot*** also, on 30th July, 2014, filed a Supplementary Memorandum of Appeal citing five (5) grounds and when he prosecuted the appeal before us he abandoned grounds 2 to 4 of the Memorandum of Appeal and consolidated the surviving ground one (1) thereof with grounds 3 and 4 of the Supplementary Memorandum of Appeal. Learned counsel also consolidated grounds 1 and 2 together and argued ground 5 separately. Those clusters raised the following issues of law:

1) Defective charge

2) Failure to evaluate the evidence

3) Absence of medical evidence.

On the charge, Mr. K'Opot submitted that the appellant was alleged to have contravened ***Section 8(1) 3*** of the Sexual Offences Act No. 3 of 2006 which provision is nonexistent. In counsel's view, the appellant, by reason of that default, was convicted on a nonexistent offence contrary to the provisions of Article 50(1) (n) of the Constitution. It was also counsel's view that as the appellant was charged for having allegedly committed the offence on various dates between 3rd and 7th August, 2010, the charge was duplex.

On failure to analyze the evidence, learned counsel submitted that the two courts below failed to appreciate that the age of the complainant was not demonstrated to the required standard as witnesses gave conflicting evidence on the same.

On the medical evidence, learned counsel made reference to the testimony of the Doctor which evidence did not demonstrate penetration, an essential ingredient of the offence of defilement.

Mr. Sirtuy, learned Senior Prosecution Counsel, supported the appellant's conviction and sentence. In his view the defect identified by learned counsel for the appellant was not fatal to the charge. Further, according to him, the age of the complainant was demonstrated beyond reasonable doubt. In learned counsel's view, only the apparent age need be demonstrated which was done in this case. On the complaint with regard to medical evidence, learned counsel submitted that the complainant's own evidence supported the doctor's evidence on the issue. In those premises, he prayed that the appeal be dismissed in its entirety.

We have considered the record, the grounds of appeal argued before us, the submissions of learned counsel and the applicable law.

On the issue of alleged defective charge, there cannot be any gainsaying that there was indeed a defect: instead of the charge stating that the appellant was charged with defilement contrary to ***Section 8(1)*** as read with ***Section 8(4)*** of the Sexual Offences Act No. 3 of 2006, it read that the offence was contrary to ***Section 8(1) (3)*** of the said Act. The anomaly was not noticed by the learned trial magistrate. However, he still sentenced the appellant as if he had been properly charged. The learned Judge of the High Court clearly appreciated the defect and specifically stated that the appellant had been sentenced under ***Section 8(4)*** of the said Act given the age of the complainant. Without saying so, it is clear that the learned Judge resolved the defect under ***Section 382*** of the Criminal Procedure Code. She plainly had jurisdiction to do so. In our view, nothing should turn on this complaint as the irregularity did not in any case cause any prejudice to the appellant. He infact does not appear to have noticed that defect himself when he appealed to the High Court because he did not complain about it. Accordingly, we find that the defect in the charge sheet was curable and was indeed properly resolved by the High Court under the

provisions of ***Section 382*** of the Criminal Procedure Code.

The second complaint concerning the charge was that it was duplex for having charged the appellant for committing the alleged defilement on various dates. This complaint, in our view, does not merit any detailed consideration. We are of that view, because the particulars of the charge in this case did not allege that the appellant had committed more than one offence of defilement. The prosecution alleged he had committed one offence of defilement on any of the dates indicated in the charge sheet. That allegation could not be duplex.

On the complaint regarding absence of medical evidence to demonstrate penetration, we are of the view that notwithstanding what the doctor stated at the trial, the evidence of the complainant was explicit that she had sex with the appellant who was her boyfriend. Her evidence was not at all challenged by the appellant at the trial. Indeed in his statement before the trial magistrate, the appellant never denied what the complainant stated. In the premises penetration was demonstrated beyond reasonable doubt.

We have deliberately left the complaint regarding failure of the two courts below to evaluate the evidence until now because, in our view, the complaint is not altogether without merit. The appellant in his defence stated, *inter alia*:-

> *"It is true that I met the girl child R A who wanted a man to marry her and I accepted. The said girl told me that she was above eighteen years and needed someone to marry her."*

Section 8(5) of the said Act provides:-

> **"(5) It is a defence to a charge under this section if –**
>
> (a) **it is proved that such child deceived the accused into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence.**
>
> (b) **the accused reasonably believed that the child was over the age of eighteen years.**
>
> **(6) The belief referred to in subsection (5) (b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant."**

In the instant case, the appellant, in his defence, stated that the complainant wanted someone to marry her and he accepted. He further stated that she told him that she was above eighteen years. The appellant clearly raised the defence envisaged in ***subsections 5(a)*** and ***(b)*** of the Sexual Offences Act. The complainant told him that she was above eighteen (18) years which was not true. She therefore deceived him into believing that she was above eighteen (18) years of age at the time of the alleged commission of the offence. The statement of the appellant had some support in the evidence of the complainant herself. She stated, *inter alia*, that she first met the appellant in April, 2010 long before the period of the charge when the appellant asked her *"to be his girlfriend"*. She must have accepted the request because in August of the same year they met and had **consensual** sex for several days before the appellant ran out of money.

The appellant's statement received further support from the testimony of the doctor who stated at the trial that upon his examination of the complainant, he formed the opinion that she *"must have had sexual intercourse prior to the alleged incident"* which suggested that the complainant was used to sex before the date of the alleged commission of the offence. It was also illustrative that the complainant made no complaint of the alleged defilement.

The totality of this evidence, in our view, suggested that the appellant could easily have believed the complainant's statement that she was over eighteen years. We cannot appreciate why, given that

evidence, the trial magistrate found the appellant's statement unreasonable and unbelievable. We also cannot appreciate what other steps the appellant could have taken to ascertain that the complainant was over eighteen years when the complainant herself had said so and had conducted herself like one aged over eighteen years.

Our perusal of the High Court judgment shows that the learned Judge did not adequately consider the statement of the appellant together with that of the prosecution witnesses. The learned Judge did not, with all due respect to her, assign any reason why the appellant should not have believed the complainant's statement to him on her age.

In the premises, we think the complaint made by the appellant that the two courts below failed in their duty to evaluate the evidence adduced at the trial has considerable merit and raises doubt as to whether the appellant's conviction was safe.

The above being our view of the matter, we have to interfere with the decisions of both the trial magistrate and the learned Judge. The appeal is therefore allowed, conviction quashed, sentence set aside and the appellant is released forthwith unless otherwise lawfully held.

DATED AND DELIVERED AT KISUMU THIS 12TH DAY OF FEBRUARY, 2015.

D.K. MARAGA

……

JUDGE OF APPEAL

F. AZANGALALA

……..

JUDGE OF APPEAL

S. ole KANTAI

…….

JUDGE OF APPEAL

I certify that this is a true

copy of the original

DEPUTY REGISTRA