IN THE COURT OF APPEAL

AT KISUMU

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

CRIMINAL APPEAL NO. 289 OF 2010

BETWEEN

STEPHEN OTIENO WAMBI .....APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from a Judgment and Orders of the High Court of Kenya at

Kisumu (Lady Justice Ali- Aroni J) dated 23rd July, 2010

in HCCRA No. 47 OF 2008

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JUDGEMENT OF THE COURT

Section 361 (1) (a) of the Criminal Procedure Code limits us, in a second appeal like this one, to the consideration of only issues of law and not matters of fact that have been tried by the trial court and re-evaluated by the first appellate court. That position in law has been stated and restated in many of the decisions of this court such as **John Gitonga alias Kados v Republic Nyeri Criminal Appeal No. 149 of 2006 (ur)** this court stated that:-

> "**This being a second appeal, we are reminded of our primary role as the second appellate court namely to steer clear of all issues of facts and only concern ourselves with issues of law..."**

See also **M'Riungu v Republic [1983] KLR 455.**

Our examination of the facts, therefore, in this appeal, is purely to find out whether there are issues of law calling for our consideration.

The appellant, Stephen Otieno Wambi, was charged before the Senior Resident Magistrate's Court, Bondo, on a count of defilement of a child contrary to Section 8 (2) of The Sexual Offences Act No. 3 of 2006 and an alternative charge of Sexual Assault of a Child contrary to section 5 (1) (b) of the said Act. Particulars of the main charge were that on the said day of May 2006 at[particulars withheld] Sub-location in the then Bondo district he intentionally and unlawfully caused penetration to a child "AAJ"

aged nine years. Particulars of the alternative charge were that he on the said day at the said place intentionally and unlawfully manipulated the body so as to cause penetration of the genital organ of the said child. A trial took place before the learned Senior Resident Magistrate (D. K. Mikoyan) who in a judgement delivered on 6th May, 2008 convicted the appellant on the main charge and sentenced him to life imprisonment. A first appeal to the High Court of Kenya, Kisumu, failed as the learned judge (Ali-Aroni, J) found it to lack merit. The appellant then filed this appeal.

The facts as established by the two courts were simple and straightforward.

The appellant is a cousin to the complainant, **"AAJ"(PW3).** On 2nd May 2006 the complainants mother, "**JAJ" (PW1)** left home in the afternoon to run some errands. The complainant took the opportunity and went out to play with other children who included **"CO" (PW4).** While play went on the appellant approached the complainant and asked her to accompany him to go and buy paraffin or cooking fat. Enroute, and upon reaching a millet plantation in her own words:

> **"...In the farm, Otieno removed my pant and he touched my genital with his. It was painful (pointing at her genitals). Blood came out..."**

The appellant and the complainant returned to the appellants' house where he warned her not to reveal what had happened. **"CO"**, who was in that house, testified that the two had left him to go to the shop but had returned without the intended purchase.

"JAJ" came back home to find the complainant missing. She looked for her at various places and when she finally traced her at the appellants house the appellant quarreled her. She took her child home and in the course of the next two days she noticed a withdrawn character of her daughter who later revealed to her the happenings of the fateful day. She reported the matter to the authorities and the appellant was arrested by **No. 21658 APC Jacob Wanyonyi (PW2)** who handed him over to Bondo Police Station.

Dr. Austine Ochwila (PW5) of Bondo District Hospital received the complainant on 5th May, 2006, some three days after the incident. He testified that the complainant, aged nine years, had been defiled and had abrasions on the labia minora and the hymen was partly intact. He also noted two blood clots near the rectum. He concluded that penetrative intercourse had been attempted.

The appellant was put on his defence and in an unsworn statement he stated that he was a fisherman who returned home from the beach only to be arrested by an Assistant Chief who handed him over to the police. He further stated that the complainant had been examined and defilement had not been shown.

When the appeal came for hearing before us the appellant, who was unrepresented, relied on the homegrown Memorandum of Appeal he had filed and also relied on written submissions which he handed over to us and which we accepted as part of the record.

In the said Memorandum of Appeal and written submissions the appellant complains that the lower courts failed to consider certain provisions of law as regards production of primary evidence; that the case was not proved beyond reasonable doubt; that the complainants age was not proved because the prosecution did not produce a birth certificate and that some witnesses were not called.

Mr. L. K. Sirtuy, the learned Principal Prosecuting Counsel opposed the appeal submitting that the first appellate court had carried out its duty of re-evaluating the evidence and reaching its own conclusions.

The learned trial magistrate after analysing the evidence in the judgment referred to, found that the issue of identification was moot as the complainant and the appellant were related. He said:

> **"..immediately she named her cousin accused herein as the defiler. From her statement initially to her mother, her mother connected the events of 2/5/2006 when she confronted accused person for keeping (the complainant) in the rain..."**

The first appellate court found that the complainants' evidence was consistent and was well corroborated by the other witnesses and the medical evidence.

We have considered the evidence on identification of the appellant as the perpetrator of the offence and are satisfied that the trial court did not err in its findings on that issue. The first appellate court carried out its duty of re-evaluation of the evidence and reached its own conclusions correctly on the matter.

On the complaint by the appellant that certain witnesses like the Assistant Chief were not called to testify, the short answer to this is that the law does not require any number of witnesses to be called to prove a case. Section 143 of the Evidence Act on the number of witnesses provides that:

> **"No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact".**

In any event the appellant was faced with a sexual offence and by Section 124 of the Evidence Act the court was entitled to receive the evidence of the complainant if that court believed that evidence and recorded reasons for so believing. In the case before the trial court there was not only the evidence of the complainant but that of her mother, also that of a friend who was in the appellants house and finally medical evidence.

The appellant also complained in this appeal that the first appellate court failed in its duty of re-evaluation of evidence to reach its own conclusions because the complainants age was not proved by production of a birth certificate. The complainant stated in evidence before the trial court that she did not know her age. Her mother was not led in evidence on that issue and the only evidence taken by the court on that issue was that of Dr. Ochwila who testified that he examined the complainant who he found to be nine years old.

The trial court was satisfied in the judgement that followed the trial that the complainant was aged nine years and the first appellate court reached the same conclusion. The question of age assessment became one of the issues, in **Tumaini Maasai Mwanya v Republic (Mombasa) Criminal Appeal No. 364 of 2010 (ur)** where this court stated:

> **"In case of doubt about the categorization of age, the High Court on first appeal has power under Section 354 (3) (a) (of Criminal Procedure Code) to alter the finding and reduce the sentence in favour of the offender to correspond with the apparent age of the victim.**
>
> **Similarly, on second appeal, the Court has power under section 361 (2) to make an order including passing the appropriate sentence which the subordinate court should have made. An appellate court should follow that course particularly where it considers that no substantial injustice will be caused to the appellant."**

We reviewed the same position in **Paul Odhiambo Mbola v Republic (Kisumu) Criminal Appeal No. 16 of 2014 (ur)** where we found that the Sexual Offences Act adopts a definition of a child in The Children's Act and by Section 2 thereof "**age"** is defied as:

> **".. where actual age is not known means apparent age.."**

Therefore actual age need not be proved. What is important is that the court believes apparent age which is proved.

In this case there was the evidence of the medical doctor to the effect that the complainant was nine years old. This evidence was believed by those courts and there is no error in the manner that issue was treated by those courts.

We are satisfied that the first appellate court properly re-evaluated the evidence and reached its own conclusions in the first appeal. This appeal has no merit and is accordingly dismissed.

Dated and Delivered at Kisumu this 12th day of March, 2015.

W. KARANJA

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JUDGE OF APPEAL

D. MARAGA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR