IN THE COURT OF APPEAL

AT ELDORET

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

CRIMINAL APPEAL NO. 661 OF 2010

MARTIN NYONGESA WANYONYI.....APPELLANT

AND

REPUBLIC…….....RESPONDENT

(Appeal from judgment of the High Court of Kenya at Kitale

(J.R. Karanja, J) dated 16th February 2012,

in

HCCRA Case No. 69 'A' of 2010)

JUDGMENT OF THE COURT

This is a second appeal from a conviction and sentence of ***Martin Nyongesa Wanyoni***, ***the appellant***, for the offence of defilement contrary to ***section 8(1)*** **as read with** ***section 8(3)*** **of the** ***Sexual Offences Act No. 3 of 2006,*** **the particulars of which are that, on diverse dates between 14th October 2009 and 6th November 2009, at [particulars withheld] area within Uasin Gishu West District, the appellant unlawfully and intentionally caused penetration of his genital organs into the genital organs of *Z N, the complainant,* a child aged 12 years. The appellant was in the alternative charged with Indecent Assault of a child contrary to *section 11(1) of the Sexual Offences Act*,** that on **diverse dates between 14th October 2009 and 6th November 2009, at [particulars withheld] area within Uasin Gishu West District, he unlawfully caused penetration of his genital organs into the genital organs of *ZN, the complainant,* a child aged 12 years.**

Briefly, the facts are that, at about 1.00pm on 10th December 2009, while the complainant was at a neighboring home attending a funeral, the appellant who was at the funeral informed her that her grandmother was looking for her and intended to beat her. He persuaded her to spend the night at his sister T's house. She agreed and went with the appellant to T's house. After a week, he told her to go to her aunty's house in Eldoret, but instead of taking her to Kipkaren where her aunt lived, he took her to his brother's house where he slept with her from 22nd to 24th November 2009.

As ZN's mother, ***PW2,*** was looking for her, she was informed that the appellant had been seen with ZN on the day she disappeared.

On 5th November 2009, when the appellant was on his way to Kitale, he was seen by PW2 who was

travelling in a matatu. She immediately reported to the nearby Bidii chief 's camp and Administration policemen, including ***APC Pokot Marei (PW 3),*** were able to apprehend the appellant. The next day, he led them to a house in Eldoret where he had left ZN. By this time, ZN had been removed from the appellant 's brother's house, and taken into the safe custody of a good Samaritan.

Upon being found, by her mother and the police, ZN was escorted to Kitale Police station, and thereafter to Kitale District Hospital where she was examined by ***Chrisantus Masinde (PW3)***, a clinical officer who completed a P3 form. He found that ZN's hymen was torn, and she had healed bruises on the Labia Minora. The report concluded that there had been penetration. The appellant was subsequently charged with the offence of defilement leading to his prosecution, conviction and sentence by the Chief Magistrate's court.

Being dissatisfied with the conviction and sentence of the trial court the appellant then filed an appeal at the High Court at Kitale, where upon re-evaluation of the evidence the appeal was dismissed by J.R. Karanja, J, on 16th February 2012, thus provoking this second appeal, which is before us.

This Court is now called upon to consider the appellant's appeal with four grounds of appeal summarized as thus:-

1. *That the learned judge of the High Court erred in law and fact in upholding the conviction but failed to hold that the charge sheet was defective under section 214 of the Criminal Procedure Code;*

2. *That the learned judge of the High Court erred in law when he upheld the conviction and sentence yet failed to find that the evidence adduced is incredible hence impeachable under section 163 (1) (c) of the Evidence Act;*

3. *That the learned judge of the High Court erred in law when he upheld the conviction and sentence yet failed to find that a crucial and vital witness did not testify contrary to section 150 of the Criminal Procedure Code;*

4. *That the learned judge of the High Court erred when he acted on the evidence of an incompetent witness to uphold the verdict of the trial court contrary to section 48 of the Evidence Act;*

5. *That the learned judge of the High Court erred in law when he upheld the conviction and sentence yet failed to find that the allegations raised were not proved under section 107 (1) of the Evidence Act;*

6. *That the learned judge erred in law when he upheld the conviction and sentence in failing to find that section 2 (1) of the sexual offences Act No. 3 of 2006 was not observed.*

7. *That the learned judge erred in law when he made a partial evaluation of the evidence on the record.*

When the appellant appeared before us in person, he stated that he would rely entirely on his written submissions presented in court on 25th May, 2015, wherein he contended that the charge was defective as there were contradictory statements pertaining to the complainant's age. It was submitted that the charge sheet showed the complainant's age as 12 years. Then, while the complainant had testified that she was 15 years, her mother stated that she was 13 years. Additionally, the Investigating Officer had concluded that she was 16 years, yet no age assessment report was produced in court; that vital witnesses were not called to testify, in that, the wrong arresting officer testified, and the persons at the house where the complainant was found also did not testify; that the clinical officer who completed the P3 form was incompetent, and therefore the evidence produced in court could not be relied upon; that the offence was not proved as he was not subjected to any laboratory forensic examination; and that the High Court did not fully re-evaluate the evidence as it failed to appreciate that the complainant did not identify her medical report, and that his defence was not taken into account.

Mr. J. Mulati, learned Principal Prosecution Counsel, stated that the appeal was conceded on grounds 1, 2 and 5, given the discrepancies in the complainant's age. Counsel however opposed the other grounds in particular that the evidence had showed that the complainant had been defiled. That with respect to the issue of the failure to conduct a medical examination on the appellant, there was no requirement for the appellant to be examined. On the issue of abduction, counsel submitted that this did not arise as the appellant was charged with defilement which was proved. On the contention that there was no spermatozoa present in the complainant's genitals, counsel contended that this was not an ingredient to prove that the offence was committed. Counsel concluded that pursuant to ***section 186*** of the ***Criminal Procedure Code***, the Court should vary the appellant's sentence to conform to complainant's age bracket.

We have carefully considered the submissions and the record of appeal. This being a second appeal only matters of law may be considered – **see *section 361(1)(a)* of the Criminal Procedure Code**. It is trite law that in a second appeal the appellate court will not normally interfere with concurrent findings of fact by the two courts below unless it is apparent that on recorded evidence no reasonable tribunal could have reached that conclusion – **see *M' Riungu v. R. [1983] KLR 455***; and ***Karingo v. R. [1982] KLR 213***. It is also trite law that an appellate court will not normally interfere with the findings by the trial court which are based on credibility of witnesses unless it be shown that no reasonable Court could have made such findings - see ***Republic v. Oyier*** **[1985] KLR 353.**

In the light of the aforestated principles, we turn to the first issue, which concerned the discrepancies in ZN's age. Despite Mr. Mulati having been prepared to concede the appeal on this basis, we are not mandated to interfere with the concurrent findings of the two Courts below unless they were unreasonable or perverse.

Having said that, it is trite that the ascertainment of the complainant's age under the Sexual Offences Act, is a fundamental and material ingredient in establishing the offence of defilement, as this facilitates the determination of the provision under which the accused is to be charged and sentenced.

In ***Criminal Appeal No. 504 of 2010 Kaingu Elias Kasomo vs R*** this Court stated thus,

> ***"Age of the victim of sexual assault under the Sexual Offences Act is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim".***

In ***Criminal Appeal No. 486 of 2010 Robert Kabwere Kiti vs Republic [2012] eKLR*** this Court when addressing the situation where different ages attributed to the complainant fell within the same age bracket stated thus,

> ***"With regard to the alleged defects in the charge sheet the learned trial Magistrate found no defects in the charge itself. If the defect in the charge is attributable to the discrepancy in the age of the victim as stated in the charge sheet 8 years and PW1's evidence of 7 years, and the P3 from reading 8 years, the said discrepancies are in our view minor and are curable under Section 382 of the Criminal Procedure Code. They have not caused any miscarriage of justice because whether 7 years or 8 years, "H's" age fell in the age bracket for the offence of defilement of a girl below the age of 11 years and the penalty has been clearly allocated in terms of the complainant's age".***

In the instant case, the appellant was charged under ***Section 8 (1)*** and ***(3)*** which appertains to the defilement of a child between the ages of 12 and 15 years. From the evidence, besides the evidence of PC Paul Mwangi, who we consider was incompetent to ascertain the child's age, all other evidence indicated that ZN was either 12, 13 or 15 years. When this is considered against the backdrop of the charge sheet which specified the complainant's age as 12 years, it is evident that the ages indicated, all fell within the age bracket specified under ***section 8 (1) and (3)*** of the Act, and concerned the defilement of a child within the particular age bracket. As such, we find that, the charge and the sentence preferred were sound,

and no prejudice could be held to have been suffered by the appellant. At any rate, we consider that the discrepancies are not material and curable under ***section 382*** of the ***Criminal Procedure Code***. For these reasons, this ground fails.

On the issue that vital witnesses were not called to testify, it was the appellant's contention that the correct arresting officer who was a crucial witness did not testify, since APC Pokat Marei initially testified that his force number was 8707316 and later stated that his force no. as 211824, and further that the persons who took the complainant into safe custody were also not called to testify.

APC Marei testified that he arrested the appellant, and further stated that he had recorded a statement to this effect. When the appellant cross examined him, no doubt was raised as to his identity, which was not disputed or challenged by the appellant at any time during the proceedings. As his identity was never in dispute, we consider this to be an afterthought, and this Court is not at liberty to interfere with the facts that were believed and relied upon by the courts below, **see *section 361(1)(a).***

With respect to the persons who took the complainant into safe custody, since the prosecution conclusively connected the appellant to the offence, there was no further evidence that was required from these persons to assist the prosecution prove its case. We are also satisfied that no prejudice was visited upon the appellant by the failure to call them. In any event, ***section 143*** of the ***Evidence Act*** provides that no particular number of witnesses is required to prove a particular fact, and, we take the view that it was the prerogative of the prosecution to determine and call such witnesses as it deemed necessary to prove its case. As a consequence this ground fails.

On the next issue that the clinical officer was not competent, the clinical officer Chrisantus Masinde, testified that, after she had examined ZN, he completed and signed the P3 form. In this regard, this Court has stated time and again that a Clinical officer possessed with the requisite qualifications as specified in the ***Clinical Officer Act (Training, Registration and Licensing Act (Cap 260 (Laws of Kenya)*** is authorized to prepare and sign the P3 form, and in so doing, is also competent to attest to the contents of the medical report produced in court. See ***Raphael Kavoi Kiilu vs R (2010) eKLR***, ***Frappyton Mutuku Ngui vs R [2014] eKLR*** and ***Mutua Kivaya Nthenge vs R 2014 eKLR***.

In the circumstances, we are satisfied that Chrisantus Masinde was competent to complete and testify on the P3 Form, and we find that his testimony was admissible as evidence. This ground lacks merit and as a consequence fails.

Turning to the question that the appellant was not subjected to a medical examination contrary to the provisions of ***section 26*** of the ***Sexual Offences Act,*** in ***Kassim Ali vs Republic Cr. App. No 84 of 2005 (Mombasa)*** this Court stated,

> ***"[T]he absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by oral evidence of a victim of rape or circumstantial evidence."***

In ***Geoffrey Kionji vs Republic Cr. Appeal No 270 of 2010***, this Court found no reason why the same principle should not be applied in the case of defilement, and stated thus,

> ***"Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by the accused person. Indeed, under the proviso to section 124 of the Evidence Act, Cap 80, Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief."***

As such, it is evident that subjecting an accused to a medical examination to prove that he

committed the offence is not a mandatory requirement of law and we find this ground to be unfounded.

On the final issue that the High Court failed to reevaluate the evidence, upon consideration of the judgment, there is no doubt that the High Court reevaluated the evidence and came to its own independent conclusion that ZN was defiled by the appellant on more than one occasion between the 14th October and 6th November 2009. In so doing, the High Court considered the appellant's defence and found that though the appellant denied responsibility, the evidence pointed to him as the culprit who committed the offence. As both the lower courts found that the prosecution had proved its case based on the evidence since all the ingredients for defilement were found to exist, we must refrain from interfering with these concurrent findings, and as a consequence this ground fails.

For the aforestated 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 25th day of June 2015.

D.K. MARAGA

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JUDGE OF APPEAL

D. MUSINGA

….....

JUDGE OF APPEAL

A. **K. MURGOR**

….....

JUDGE OF APPEAL

I certify that this is a true

copy of the original

DEPUTY REGISTRAR