IN THE COURT OF APPEAL

AT MOMBASA

CORAM: MAKHANDIA, OUKO & M'INOTI JJ.A.

CRIMINAL APPEAL NO. 115 OF 2014

BETWEEN

JILO ABDALLA AKARE....APPELLANT

AND

REPUBLIC.……..…....…RESPONDENT

(Appeal from the conviction and sentence of the High Court of Kenya at Malindi, (Meoli, J.) dated 4th June 2013 in H.C.CR.A. NO. 88 OF 2011)

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JUDGMENT OF THE COURT

On 3rd May 2009, at about 7.00 am, ***DK,*** a girl then aged 8 years old, left her home in ***Kilifi Township*** to pick wild fruits called *Kunazi* in the neighbourhood. When she returned home at about 9.00 am, she sat down and asked for some food, which she was unable to consume. When she shortly rose to go to the toilet, ***R K***, her elder sister ***(PW2)*** and ***M A***, her sister-in-law ***(PW3),*** noticed a patch of blood where DK had been sitting. Upon inquiry, DK informed them that the appellant, ***Jilo Abdalla Akare***, had defiled her.

The appellant was employed as a watchman in a house opposite that of DK. He used to live in that house and had worked there for about four years. He was therefore well known to DK and members of her family. Occasionally he used to send DK to run his errands such as buying milk and bread.

On the material day, as DK was returning home after picking her fruits, she found the appellant at his employer's gate. He invited her in purporting that he wished to send her to the shop. Inside the house, the appellant took DK to his bed, tied a piece of cloth round her mouth and nose, and defiled her. He then let her leave, warning her not to disclose to any one what had happened.

At 10.43 am the same morning, PW2 and PW3 in the company of DK reported the defilement to ***PC John Ndiema (PW5)*** at the ***Gender Based Violence Desk and Forensic Investigations*** at ***Kilifi Police Station***. DK was then bleeding profusely with blood clots forming on her legs. She was immediately escorted to ***Kilifi District Hospital*** where she was admitted for emergency surgery and post rape care. ***Dr. Barbara Mambo (PW4)***, the Hospital's Senior Medical Officer attended to DK and noted that she was admitted within 4 hours of defilement. She also noted a small laceration near the perineum, numerous clots from the vagina and bilateral lacerations in the vagina, which were actively bleeding. The Doctor classified the injuries suffered by DK as harm before filling and signing the P3 Form. A dentist

subsequently assessed the age of DK and prepared a report, which indicated that as of 24th June 2010, she was approximately 10 years old. That report was produced in court as an exhibit.

The appellant was arrested on 4th May 2009 and arraigned in court the next day to answer to a charge of defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act. He was also charged with an alternative count of committing an indecent act with a child contrary to section 11(1) of the same Act, to which he pleaded guilty on 5th May 2009.

After a trial in which the prosecution called 5 witnesses while the appellant gave unsworn evidence and called no witness, the trial court, on 23rd August 2011 found the appellant guilty of defilement as charged, convicted him and sentenced him to life imprisonment. Nothing was said regarding the alternative count to which he had pleaded guilty, presumably because he was ultimately convicted of the main offence. His first appeal to the High Court was found to be unmeritorious and dismissed on 4th June 2013, precipitating this second appeal.

The appellant has proffered 7 grounds, some overlapping, on the basis of which the judgment of the High Court is impugned. Sans the repetitions, he claims that the first appellate court erred by:

i. ***Convicting him on a contrived and made up case;***

ii. ***Disregarding the fact that the blood stained clothes allegedly worn by DK had not been examined to confirm that the blood thereon was DK's***

iii. ***Convicting him of defilement while the age of DK was not proved beyond reasonable doubt;***

iv. ***Allowing DK to testify without being sworn;***

v. ***Disregarding his defence.***

The appellant elected to argue his appeal through written submissions in which he expounded the above five grounds of appeal. At the hearing, we allowed the appellant to highlight his written submissions, where he added that the prosecution and DK's mother, who owed him money, made up the case against him so as to avoid payment. He contended that the fact that PW1, PW2 and PW3 were from the same house and were all related, was further proof that the case against him was made up.

Mr. Ayodo, learned counsel, appeared for the respondent and submitted, in opposition to the appeal, that the first ground of appeal did not raise issues of law; that the age of DK was properly proved by dental evidence; that a trial court may, if it deems it fit, admit unsworn evidence of a child of tender years; and that the defence of the appellant was considered by the two courts bellow, but was found to be incapable of displacing the prosecution case.

In a second appeal like this, we are obliged by ***section 361*** of the ***Criminal Procedure Code*** to consider only issues of law. Issues of fact are not within our remit, having been determined and settled by the first appellate court. As this Court stated in ***CHEMAGONG V. REPUBLIC (1984) KLR 213, 219:***

> ***"A second appeal must be confined to points of law and this Court will not interfere with concurrent finding of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did."***

The appellant's defence that his prosecution was motivated by the wish of DK's mother to avoid repayment of unspecified amount of money lent to her by him was considered and rejected by the two courts below. As it is, there are concurrent findings of fact in that regard which we have no basis for interfering with. It has also not been demonstrated that the findings of the two courts bellow were based on no evidence or on misapprehension of evidence.

As regards whether the blood stained garments that DK was said to have worn at the time of defilement were ever tested to confirm that the blood thereon was hers, we are satisfied that nothing in this appeal turns on that complaint, in light of the evidence of DK which, as required under the proviso to ***section 124*** of the ***Evidence Act***, was specifically found and recorded by the trial court to be truthful evidence. There was also the compelling medical evidence by PW4 that DK had a small laceration near the perineum, numerous clots expelled from the vagina, bilateral lacerations in the vagina and was actively bleeding. We have no doubt in our minds that the medical evidence pointed to penetration and was consistent with defilement. In our view, the evidence against the appellant was simply overwhelming: DK was well known to the appellant who had lived in the neighbouring premises for about 4 years; the appellant had previously been sending her on errands; the defilement took place in day time; DK was firm that it was the appellant who had defiled her; the offence was reported to the police within a few hours after it was committed; DK was admitted for emergency surgery within four hours of the commission of the offence; and in his own defence, the appellant placed himself in the house where DK said he was at the time of the defilement.

The next question raised by the appellant relates to the age of DK. Again, we do not think there is any basis for that complaint in this appeal. As of the date of commission of the offence on 3rd May 2009, DK was said to be 8 years old. When she testified on 7th May 2010, she told the court that she was 9 years old and in class 2. A dentist also assessed DK's age and expressed the view that as of 24th June 2010 she was approximately 10 years. The dentist's report was produced by PW4 as an exhibit. We are satisfied that there was evidence on record to satisfy both courts below that as of the date of the defilement, DK was 8 years old.

The last issue is whether DK should have been allowed to give unsworn evidence. The appellant contends that under ***section 151*** of the ***Criminal Procedure Code*** it is mandatory for every witness in a criminal case to give evidence under oath. In this case the trial court conducted a *voir dire* on 7th May 2010 and concluded that although DK was an intelligent girl capable of giving evidence, she did not understand the meaning of an oath. Accordingly she was allowed to give unsworn evidence. This was in accordance with the law. See ***AYIEYO V REPUBLIC. (2008) 1 KLR (G&F) 684***.

Section 19 of the ***Oaths and Statutory Declarations Act*** allows a trial court, where a child of tender years who does not understand the nature of an oath is called as a witness, but who is otherwise possessed of sufficient evidence, to receive the evidence of such child even though not given under oath. This clearly is one exception to the requirement in the Criminal Procedure Code that all evidence in a criminal trial must be given under oath. In this case, we note too that even though DK gave unsworn evidence, the appellant's advocate was afforded an opportunity which he duly took up and cross-examined DK. It was not demonstrated what prejudice, if any, the appellant suffered in the circumstances.

We have come to the inevitable conclusion that the case against the appellant was proved beyond reasonable doubt and that his conviction was safe. Accordingly, this appeal lacks merit and the same is dismissed in its entirety.

Dated and delivered at Malindi this 31st day of July 2015.

ASIKE-MAKHANDIA

JUDGE OF APPEAL

W. OUKO

JUDGE OF APPEAL

K. M’INOTI

JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR.