IN THE COURT OF APPEAL

AT ELDORET

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

CRIMINAL APPEAL NO. 283 OF 2011

GC ……..... APPELLANT

AND

REPUBLIC …….... RESPONDENT

(Appeal from judgment of the High Court of Kenya at Kitale (S.M. Muketi, J) dated 24th November 2011,

in

HCCRA Case No. 98 of 2010)

JUDGMENT OF THE COURT

This is a second appeal from a conviction and sentence of ***GC***, ***the appellant***, for the offence of defilement contrary to ***Section 8(1)*** **as read with** ***section 8(4)*** **of the** ***Sexual Offences Act No. 3 of 2006*** **that on 29th October 2008, in Rift Valley Province, intentionally and unlawfully had carnal knowledge of** ***NC, the complainant,*** **a child aged 16 years.**

In brief, while NC, a girl aged 16 years, who was at the material time attending [Particulars Withheld] Girls Primary School, was on her way to school, she met the appellant who took her to Sigor trading centre where during the night of 28th October 2008, he had carnal knowledge of her.

When the NC did not return home that evening, ***F PW5***, her mother called ***S PW3***, her father who was away at Kakong Turkana who contacted ***John Chomil PW4***, Senior Assistant Chief Chepareria Sub Location, with regard to her whereabouts. Following a search carried out by the village elders, Administration Police and John Chomil, NC was found in the appellant's house. He was arrested and escorted to Kapenguria Police station and charged with the offence of defilement.

In his defence the appellant denied committing the offence. He claimed that the NC was an adult, and contended that he had differences with S and F (the complainants' parents) over land. He further claimed that he was a student at [Particulars Withheld] Mixed School, as evidenced by a letter dated 3rd November 2008 from the school.

NC was taken to Kapenguria District Hospital where she was examined by ***Danson Litole (PW2)***, a clinical officer who completed a P3 form. The report found that there was sign of penetration evidenced by an old penal penetration.

Upon considering the evidence before the court, the appellant was convicted and sentenced by the Principal 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 the late Justice S.M Muketi, on 24th November 2011, thus provoking this second appeal, which is before us.

In summary the appellant's grounds of appeal are that the prosecution did not prove its case as there was no proof of penetration, and that the complainant's age was not verifiable from the evidence.

In his written submissions that were presented to the Court, the appellant argued that the medical report was inconclusive, as the complainant was examined long after the alleged defilement. Additionally, there was no evidence of spermatozoa in the complainant's genitals, which instead showed old penile penetration, and as such, since there was no recent penetration, the appellant could not have been responsible for the alleged defilement. On the issue of the complainant's age, the appellant submitted that no proof of her age was presented to the court.

Learned Prosecution Counsel, Ms. R. N. Karanja, opposed the appeal and submitted that the appellant was convicted for defiling a girl aged 16 years, and that the complainant had proved her age, as from the evidence she was born on 28th August 1992. Both S and F also testified as to her age.

On the aspect of penetration, counsel submitted that from the evidence the appellant waylaid NC on her way to school and took her to Sigor trading centre where he defiled her. She was examined by the clinical officer where it was found that there had been penetration, as her hymen was open, though no tears or bruises were apparent. As such the prosecution had proved its case.

In his response, the appellant questioned why the complainant had not alerted other passengers in the public service vehicle that she was with the appellant against her will.

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 such an appeal, the appellate court will not normally interfere with concurrent findings of fact by the two courts below unless it is apparent that it was based on no evidence at all or, on evidence that was a perversion of the evidence or if no court would have reached that conclusion on the properly evaluated evidence– **see *M' Riungu v. R. [1983] KLR 455***; and ***Karingo v. R. [1982] KLR 213***.

Turning to the question of the complainant's age, the appellant has argued that the complainant's age could not be ascertained from the evidence, and no document presented to the court proving her age.

In ***Criminal Appeal No. 504 of 2010 Kaingu Elias Kasomo vs Republic*** 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".***

The appellant was charged under ***Section 8 (1)*** and ***(4)*** which appertains to the defilement of a child between the ages of 15 and 18 years. From the evidence, NC stated that she was born on 28th August 1992, and that she was aged 17 years. Danson Litole testified that the NC, the patient he had examined, was 16 years old. According to S, the complainant who was his daughter was 16 years old, while F her mother testified that at the time of the hearing her daughter was 18 years old, and so at the time of the incident the complainant would have been 16 years old.

From this evidence, despite the fact that NC's ages were indicated as 16, 17 and 18 years, there was no doubt that the complainant's age fell within the age bracket specific to a child between the ages of 15 and 18 years of age. As such, we find that, the charge and the sentence preferred were safe, and no prejudice could be held to have been suffered the appellant. This notwithstanding, we consider that the discrepancies not being material, are curable under ***section 382*** of the ***Criminal Procedure Code***. For these reasons, this ground fails.

The other issue was whether there was penetration, and if so whether it was the appellant who was responsible for defiling the complainant.

According to NC, the appellant took her to Sigor trading center where he had carnal knowledge of her on the night of 28th October 2008. Following a search that was carried out by John Chomil, the complainant was found in the appellant's house. Upon her examination by the clinical officer, it was found that there had been penetration as her hymen was open, though no tears or bruises were apparent.

As to whether the appellant was responsible for defiling the complainant, the trial magistrate's court stated thus,

> ***"PWI was clear in her evidence that the accused inserted his genital organ into her genital organ and she felt pains thereon. It was at night and the alleged offence committed in the house of the accused hence she could not scream for help. Exhibit 3 reveals that there was old penile penetration into the genital organ of PW1, who was examined 72 hours after the alleged act. Therefore, the evidence of PW2 especially Exhibits 3 affords corroboration to the sworn evidence of PW1 herein."***

The High Court added that the complainant was found in the appellant's house.

From the evidence, and the concurrent findings of the courts below, the only conclusion that can be reached is that it was the appellant who had defiled the complainant, and we see no reason to interfere with the conviction. Consequently, this ground also 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 29th day of October, 2015.

D.K. MARAGA

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR