IN THE COURT OF APPEAL

AT KISUMU

CRIMINAL APPEAL NO. 7 OF 2014

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

BETWEEN

GEORGE OWITI RAYA …….……. APPELLANT

AND

REPUBLIC …..... RESPONDENT

(Appeal from the judgment of the High Court Of Kenya at Kisumu (Makau, J.) dated 22nd November, 2013

in

H.C.CR.A NO. 24 OF 2012

****

JUDGMENT OF THE COURT

1. The appellant was arraigned before the Resident Magistrates' Court at Tamu on a charge of defilement contrary to **section 8 (1) (2)** of the **Sexual Offences Act.** It was alleged that on 3rd December,2010, at [particulars withheld] Sub-Location, Muhoroni District within Kisumu County, the appellant intentionally caused his penis to penetrate the vagina of R. O., a girl aged 10 years.

2. After a full trial the appellant was found guilty, convicted and sentenced to 20 years' imprisonment. His first appeal to the High Court was unsuccessful and the appellant mounted a second appeal to this Court.

3. The complainant, **R. O. (PW 1),** told the trial court that she was aged 10 years and was in class three (3). On the material day she was in their house when the appellant called her, saying that he wanted to send her. She went and stood outside the appellant's house. The appellant asked her to get in but the young girl declined. The appellant pulled her into his house, closed the door and proceeded to defile her; having threatened her with dire consequences if at all she screamed.

4. After the ordeal the appellant opened the door and asked the child to leave. He warned her not to tell her older sister what he had done to her. But when PW 1 got home, her sister, PW 2, noticed that the child was walking in an unusual manner and asked her what had happened. PW 1 narrated the sad story to her

sister.

5. The incident was reported to the police at Koru Police Station, where a P 3 Form was issued and PW 1 referred to Muhoroni Sub- District Hospital for treatment. PW 1's evidence was corroborated by **Alice Miruka Kajonga, PW 3**, a nurse, and **Corporal Patrick Leweri, PW 4,** of Koru Police Station, the investigating officer. PW 4 testified that the child had difficult in walking as she led him to the house of the appellant at [particulars withheld]. They did not find the appellant in his house, as they learnt that he had gone to his rural home at Ndhiwa.

6. On 11th December, 2011, PW 4 and one Corporal Oruya proceeded to Ndhiwa and managed to arrest the appellant. The investigating officer obtained the complainant's immunisation card from her aunt and produced it in court to prove the complainant's age. The card indicated that the complainant was born on **18th June, 1999.** That was sufficient evidence that the complainant was about 11 years old when she was defiled.

7. **Paul Nyabaya Atera, PW 5,** a Registered Clinical Officer, examined PW 1 at Muhoroni Sub-District Hospital on 5th December, 2010. According to PW 5, the girl was walking in a hanging gait and was withdrawn. Her inner pant was stained with whitish yellow foul smelling discharge mixed with blood spots. On the lower limbs there was minimal pelvic movement. Her hymen membrane was intact, but the vaginal canal was inflamed and painful upon touch. It had also reddened and had healing bruises, showing that there was superficial penetration. PW 5 produced the P 3 Form that he had filled and which contained the aforesaid information.

8. In his defence, the appellant, who used to work at [pariculars withheld] Company, said that on 25th October, 2010 he differed with the complainant's sister, Pw 2, after he suspected that she had stolen his K.Shs.200/= and some fish from his house. When he went to her house to make an inquiry, PW 2 allegedly threatened him with undisclosed consequences. On 29th October, 2011 the appellant said that he travelled to his rural home when he was informed that his mother was unwell. While there he was arrested by PW 4.

9. In his memorandum of appeal, the appellant alleged that the first appellate court erred in law by failing to properly analyse the evidence on record, that the High Court erred in law in its analysis of the medical evidence, that the charge that he faced was defective and that his defence had not been considered.

10. In his brief oral submissions before this Court, the appellant stated that medical evidence showed that the complainant's hymen was intact and there was only superficial penetration. He further contended that the complainant's birth certificate ought to have been produced to prove her age.

11. **Mr. Ketoo,** learned prosecution counsel for the respondent, opposed the appeal. He submitted that the appellant's evidence was well corroborated by several witnesses, and in particular by the medical report that clearly showed that she had been defiled. He added that even if there was superficial penetration, the offence of defilement had been committed.

12. Regarding the age of the complainant, Mr. Ketoo submitted that the immunisation (Clinic) Card that was produced as an exhibit was sufficient evidence that the child was about 10 to 11 years old, as she was born on 18th June, 1999. The sentence of 20 years' imprisonment that was passed by the trial court and confirmed by the first appellate court was not in accordance with the provisions of **section 8 (1) (2)** of **Sexual Offences Act,** Mr. Ketoo submitted. He urged this Court to correct that error by setting aside that sentence and substitute therefor with a sentence of life imprisonment.

13. On our part, we have carefully considered the evidence on record. There is sufficient evidence that on the material day PW 1 was called by the appellant from their house and when she went and stood outside the appellant's house, he pulled her inside and proceeded to defile her. The complainant had no reason to lie against the appellant. The evidence of PW 1 was corroborted by PW 2, PW 4 and PW 5.

14. The Sexual Offences Act defines *"Penetration"* to mean*"the partial or complete insertion of the genital organs of a person into the genital organs of another person"*. It matters not whether the complainant's hymen was found to be intact, suffice it that there was evidence of partial penetration and the evidence of PW 5 was categorical about that.

15. Although the complainant's birth certificate was not produced, her age was sufficiently established by production of her immunisation card. Considering that the complainant was born on 18th June, 1999, as at 3rd December, 2010 when the offence was committed she was 11 years and 5 months or thereabout.

Section 8 (2) of the Sexual Offences Act states that:

"(2). A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life".

Sub-section (3) thereof provides for a sentence of not less than twenty years for a person who commits an offence of defilement with a child between the age of twelve and fifteen years.

16. The complainant herein was more than eleven years old but less than twelve years. In instances where statute prescribes the appropriate sentence in accordance with the proven age of the victim as herein, any accruing benefit because of age overlap must be given to the accused. That explains why the appellant, having been duly convicted of defilement of PW 1 who was slightly aged over 11 years, was sentenced to 20 years' imprisonment. That sentence was legal, we so find and hold. It would amount to miscarriage of justice if this Court were to enhance it to life imprisonment as urged by Mr. Ketoo.

17. In **ROBERT OLE GWENI V REPUBLIC,** [2015] eKLR where the complainant was a child aged 11 years and one month, the trial court sentenced the appellant to life imprisonment and his first appeal to the High Court was unsuccesfful.

In his second and final appeal to this Court, the appeal against conviction was unsuccesful but as against sentence, the Court held:

> ***"There is, however, no provision for sentence in cases of defiled minors who are between the ages of 11 and 12. Despite the mathematical precision that went into drafting of the Sexual Offences Act especially with regard to sentence, there is obviously a locuna in the two sub-sections: [[8 (2) and 8 (37)].***
>
> ***It however does not follow that the appellant in this case should not be given any sentence at all.***
>
> ***In the circumstances we have to give the appellant the "benefit of doubt" and move to section 8 (3) of the Act which provides for a minimum sentence of 20 years where the victim of the sexual assault is between the age of 12 and 15 years."***
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> See also **S. S. V REPUBLIC [2015] eKLR.**

18. We find this appeal lacking in merit and consequently dismiss it in its entirety.

DATED and delivered at Kisumu this 23rd day of October, 2015

D. K. MUSINGA

….....

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

….....

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