IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIHARA KARIUKI (PCA), M'INOTI & J. MOHAMMED, JJ.A)

CRIMINAL APPEAL NO. 279 OF 2011

BETWEEN

DENNIS OSORO OBIRI……………........………..............…….………APPELLANT

VERSUS

REPUBLIC………………………………….............…………………RESPONDENT

*(Being an appeal from the judgment of the High Court of Kenya (**Ochieng, J**.) dated 16th May 2011*

in

HC.C. CR. APP NO. 175 of 2009)

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JUDGMENT OF THE COURT

1. The appellant, ***Dennis Osoro Obiri***, was charged on 20th December, 2007 before the Chief Magistrate's Court, Kibera, with the offence of defilement contrary to section 8 (2) of the Sexual Offences Act, No. 3 of 2006. The particulars of the offence were that on the 17th December 2007, at [Particulars withheld] area within Kajiado District, Rift Valley Province, he committed an indecent act which caused penetration of a male organ into the female organ of ***MM***, ***(PW1),*** a child aged nine years. He was also charged with an alternative count of committing an indecent act with a child contrary ***to section 11 (1)*** of the ***Sexual Offences Act***, the particulars of which were that on the 17th December 2007, at [Particulars withheld] area within Kajiado District, Rift Valley Province, he committed an indecent act with a child by touching the private parts (vagina) of ***MM***, a child aged nine years.
2. In brief, the case against the appellant, as established by the evidence led before the trial court, was that on 17th December, 2007, at about 10.00 am, ***PW1***, who lived with her grandmother, went out to look for firewood. She encountered the appellant working by the side of the road. The appellant held her hand and led her into some bush. There, he laid her on her back, removed her pants and defiled her. After he was finished with her, the appellant threw ***PW1's*** pants in a toilet and warned her that he would beat her, should she ever tell anyone what had just happened.
3. ***PW1*** went back home at about noon when her aunt, ***W M S (PW2)*** noticed that she was walking with a limp. While bathing her, ***PW2*** noticed that ***PW1*** looked fearful and had a whitish substance

on her body. She also noticed that ***PW1*** had changed her dress and pants. Upon further inquiry, ***PW1*** informed ***PW2*** that she had been defiled by the appellant. Subsequently ***PW1*** lead ***PW2*** to the scene of the defilement, thence to the appellant's house; after which they reported the defilement at Keraropon Police Post.

4. Two officers from the Police Post, among them, **Corporal Joshua Mosia *(PW5),*** accompanied ***PW1*** and ***PW2*** to the appellant's house and arrested him and a co-worker. ***PW1*** identified the appellant as the person who had defiled her, before she was taken to the Nairobi Women's Hospital for treatment.
5. ***Dr. Ketra Muhombe, (PW3)*** examined ***PW1*** and found that her hymen had a tear at the 12 o'clock position. There was no bleeding or spermatozoa, and she formed the opinion that ***PW1*** had been sexually assaulted.
6. The evidence of ***Dr Z. Kamau, PW4***, who was based at the Nairobi Police Surgery and who completed the P3 form, was substantially similar to that of ***PW3***, again establishing that PW1 had no hymen and in addition, that she had hyperaemia in her vaginal area and could not control excretion.
7. When put on his defence, the appellant gave an unsworn statement and called not witness. The substance of his defence was that on the material day, he was working on his employer's farm. At noon he went for a haircut. On the way back, he passed by the place where ***PW1*** lived and then proceeded home. Thereafter the police arrived and arrested him together with his colleague. While his colleague was later released, he, the appellant, was taken to court and charged with the offence giving rise to this appeal.
8. On 21st April, 2009 the trial court found the appellant guilty of defilement contrary to ***section 8 (2)*** of the ***Sexual Offences Act, 2006***, convicted him and sentenced him to life imprisonment.
9. Being aggrieved by the judgement of the trial court, the appellant lodged an appeal in the High Court, contending that PW1's evidence was not corroborated as required by law and that the trial court had erred by failing to state the provision of the law under which he was convicted, as required by ***section 169(2***) of the ***Criminal Procedure Code, Cap 75 Laws of Kenya.***
10. On 16th May, 2011, the High Court ***(Ochieng, J.)*** dismissed the appeal, sustained the conviction of the appellant and upheld the sentence, thus precipitating the present appeal.
11. The appellant's memorandum of appeal, dated 6th March 2014 sets out four grounds of appeal as follows:

"a) ***The learned judge of the superior court erred in law in disregarding precedent law which was binding on him;***

b) The learned judge of the superior court failed to properly interpret section 124 of the Evidence Act by failing to appreciate that there was no other material evidence implicating the appellant other than the uncorroborated testimony of a child of tender age;

c) Both the learned trial magistrate and the judge of the Superior Court failed to direct themselves on relying on uncorroborated evidence of a child of tender age whose reliability was in doubt, and this was prejudicial and fatal to the conviction of the appellant; and

d) The learned judge failed to appreciate that the standard of prove (sic) required in the case was higher and requiring evidence of corroboration by other evidence irresistibly pointing at the guilt of the appellant but instead relied on conjecture and suppositions to confirm the conviction of the appellant."

12. **Mr Begi**, learned counsel for the appellant, argued all the four grounds of appeal together. Learned Counsel submitted that the first appellate court had erred by failing to warn itself of the danger of relying on the evidence of a minor. He criticised the trial court too, for finding that ***PW1*** was a witness of tender age, who seemed not to understand the nature of an oath, and yet accepted her evidence without corroboration and without recording the reasons why the court believed her.
13. Counsel relied on the judgment of this Court in ***<u>NYANAMBA VS REPUBLIC</u> [1983] KLR 599*** in support of the proposition that failure by the court to warn itself of the danger of convicting on the complainant's evidence in a sexual offence, without corroboration, is fatal to the conviction. The

judgement of this Court in ***JOHNSON MUIRURI VS REPUBLIC* (1983) KLR 445** was also cited to support the view that an accused person cannot be convicted on the unsworn evidence of a child of tender years, without material corroboration. Counsel faulted the first appellate court for failure to follow binding authority.

14. Learned counsel further submitted that there was no evidence to link the appellant to the offence of defilement. He contended that there was no spermatozoa found of ***PW1*** or any ***DNA*** evidence to link him to the offence. In counsel's view, the evidence of ***PW1*** required corroboration in accordance with ***section 124*** of the ***Evidence Act, Cap 80*** Laws of Kenya.
15. For good measure, ***Mr Begi*** concluded by arguing that the age of ***PW1*** was not proved, because in her evidence, she testified that she was 10 years old while ***Dr. Ketra Muhombe, PW3*** testified that she was 9 years old. In counsel's view, the offence was not proved beyond reasonable doubt.
16. **Mr. Kivihiya**, learned counsel for the respondent, in opposing the appeal, submitted that the evidence of both ***PW1*** and ***PW2*** was credible as to the identity of the person who had defiled ***PW1***. Counsel argued that the appellant was known to ***PW1*** and to that extent, no medical evidence was necessary so as to link the appellant to the offence. Learned counsel further submitted that the medical evidence adduced by ***PW3*** and ***PW4*** had confirmed that ***PW1*** had been defiled as she claimed. In counsel's view, the age of ***PW1*** was not an issue because it had been confirmed by the trial court itself.
17. We have duly perused the record of proceedings both before the trial court and the first appellate court. We have also considered the submissions by learned counsel as well as the authorities they sought to rely upon.
18. ***Section 361*** of the ***Criminal Procedure Code*** enjoins this Court to consider matters of law only when hearing and determining a second appeal. In ***KARINGO VS REPUBLIC* (1982) KLR 219,** this Court stated the principle underpinning ***section 361*** of the ***Criminal Procedure Code*** as follows:

"A second appeal must be confined to points of law and this Court will not interfere with concurrent findings 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"

See also ***THIAKA VS REPUBLIC* (2006) 2 EA 326.**

19. The first issue in this appeal is whether the trial court and the first appellate court erred in relying on the evidence of ***PW1***, the minor victim, as the basis of the appellant's conviction. ***Section 124*** of the ***Evidence Act*** as amended by ***Act No. 5 of 2003*** and ***Act No. 3 of 2006*** provides as follows:

"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth." (Emphasis added).

20. The effect of the proviso to ***section 124*** is to create, in cases of sexual offences, an exception to the general rule that an accused person cannot be convicted on the uncorroborated evidence of a child of tender years. In ***JACOB ODHIAMBO OMUMBO v REPUBLIC, Cr. App. No 80 of 2008 (Kisumu)***, this Court made the same point as follows:

"Though P's evidence was that of a child of tender years, the court can convict on it by virtue of the proviso to section 124 of the Evidence Act, Cap 80 Laws of Kenya, as amended by Act No. 5 of 2003."

Earlier in ***MOHAMED VS REPUBLIC* (2006) 2 KLR 138**, this Court asserted:

> ***"It is now settled that the Courts shall no longer be hamstrung by requirements of corroboration where the victim of a sexual offence is a child of tender years if it is satisfied that the child is truthful***."

21. In the present appeal, the trial magistrate conducted a *voire dire* examination and directed that ***PW1*** should give unsworn evidence. ***PW1*** identified the appellant as the person who had defiled her. She was known to the appellant and in fact she is the one who led ***PW2*** to the appellant's house. Her evidence was that the sexual assault on 17th December 2007 was the second time that the appellant had sexually assaulted her. Her evidence, as appears from the record of the trial court, was vivid and particularly graphic in the description of the act of defilement (though in the innocent words and language of a minor), which defilement ***PW1*** attributed to the appellant.
22. The trial magistrate specifically recorded that she could not find any reason why ***PW1*** would have framed the appellant, if indeed he was not the one who had defiled her. In our opinion, this is as good as stating that the trial magistrate found ***PW1*** trustworthy and her evidence reliable. This was more the case when the evidence of ***PW1*** was looked at against the appellant's defence. We also find from the judgment that the trial magistrate made specific reference to the ***section 124*** of the ***Evidence Act***, meaning that she was alive to her duty under the provision.
23. We do not think there is any merit in the charge that the first appellate court erred by refusing to follow binding judgements from this Court. The judgements in ***NYANAMBA VS REPUBLIC*** (supra) and ***JOHNSON MUIRURI VS REPUBLIC*** (supra), heavily relied upon by the appellant, pre-date the proviso to ***section 124*** of the ***Evidence Act*** which we have set out above. That proviso was introduced by the ***Criminal Law (Amendment) Act 2003 (Act No. 5 of 2003)***. It was further amended into its present wording by the ***Sexual Offences Act, No 3 of 2006***. The effect of the proviso, as we have already noted, is to enable the court to convict, in cases of sexual offences, on the evidence of the victim alone, if for reasons to be recorded, it believes that the victim is telling the truth. It is also important to bear in mind that prior to the above amendments, this Court in ***MUKUNGU VS REPUBLIC* (2002) EA 482**, had expressed the opinion that the requirement for corroboration in sexual offences affecting adult women and girls was unconstitutional to the extent that the requirement was against them qua women or girls. We accordingly find this ground of appeal lacking in merit.
24. The appellant secondly contends that there was no medical evidence adduced to link him with the defilement of ***PW1***. In our view, such evidence was not necessary the moment the trial court found that there was sufficient medical evidence to prove that the appellant had been defiled and that the appellant's evidence was trustworthy as to the identity of the person who had defiled her. In ***KASSIM ALI VS REPUBLIC*, Cr. App. No. 84 of 2005 (Mombasa),** this Court upheld the same view in the following terms:

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

We do not see the reason why the principle should be different in a charge of defilement. The same view was repeated by this Court in ***GEOFFREY KIOJI VS REPUBLIC*, Crim. App. No. 270 of 2010 (Nyeri)** where the Court stated:

> ***"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 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."***

We do not find any merit, either, in this ground of appeal.

25. On the appellant's complaint that the age of the appellant was not proved, we do not think much turns on that. ***Section 8 (2)*** of the ***Sexual Offences Act*** under which the appellant was charged relates to defilement of a child aged eleven years or less. To that extent, it did not matter whether PW1 was 9 or 10 years old. The critical issue is that she was less eleven years old. On that basis, it is not surprising that the trial Court did not consider the issue material or fatal to the prosecution. This ground of appeal too, lacks merit.
26. In ***<u>ADAN MURAGURI MUNGARA VS REPUBLIC</u>, Cr. NO. 347 of 2007 (Nyeri),*** this Court set out the circumstances under which it will disturb the concurrent findings of fact by the trial court and the first appellate court, in the following terms:

    "As this Court has stated many times before, it has a duty to pay homage to concurrent findings of fact made by the two courts below unless such findings are based on no evidence at all or on a perversion of the evidence, or unless on the totality of the evidence, no reasonable tribunal properly directing itself would arrive at such findings. That would mean that the decision is bad in law, thus entitling this Court to interfere."

27. We are satisfied that the appellant was properly convicted of the offence of defilement contrary to ***section 8(2)*** of the ***Sexual Offence Act, 2006***. This appeal is bereft of merit and the same is accordingly dismissed.

Dated and delivered at Nairobi this 9th day of May, 2014

P. KIHARA KARIUKI (PCA)

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true copy of the original

<u>DEPUTY REGISTRAR</u>