IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ONYANGO OTIENO, AZANGALALA & KANTAI, JJ.A)

CRIMINAL APPEAL NO. 342 OF 2011

BETWEEN

ELISHA OLOO OYUGI …..... APPELLANT

AND

REPUBLIC …..... RESPONDENT

(Appeal from Judgment of the High Court of Kenya at Kisumu (Aroni, J.)

dated 4th November, 2011

in

HCCR.A.NO. 125 OF 2010)

****

JUDGMENT OF THE COURT

This is a second appeal. The appellant, ***Elisha Oloo Oyugi,*** was charged in the subordinate court with the offence of defilement contrary to ***section 8 (3)*** of the Sexual Offences Act No.3 of 2006. The particulars of the offence were:

> ***"ELISHA OLOO OYUGI:- On the 25th Day of November 2008 at [particulars withheld]Trading Center in Nyando District within Nyanza Province, did an act, which caused penetration to S A O, A girl aged 12 years."***

The appellant also faced an alternative count of committing an Indecent Act contrary to ***section 11 (11)*** of the Sexual Offences Act particulars whereof were as follows:-

> ***"ELISHA OLOO OYUGI: On the 25th day of November, 2008 at [particulars withheld] Township in Nyando District within Nyanza Province, unlawfully made an indecent act to S A O By touching her private parts."***

The appellant pleaded not guilty but after full hearing the learned Resident Magistrate ***(RM Oranda)*** found him guilty as charged in the principal count, convicted him and sentenced him to serve twenty years in prison. He was not satisfied with that conviction and sentence and so he appealed to the High

Court against both conviction and sentence. That appeal was heard by a single Judge of the High Court ***(Ali-Aroni, J.)*** who, after hearing it, dismissed the entire appeal. The appellant was still dissatisfied and hence this appeal before us premised upon some sixteen grounds set out in his home made memorandum of appeal filed on 24th November, 2011. With the leave of the Court the appellant filed an amended memorandum of appeal in which he listed some thirty three grounds. He also filed written submissions. However, at the hearing of the appeal, the appellant condensed the grounds into four which raised the following issues.

1. ***Defective charge.***
2. ***Uncertain age of the complainant.***
3. ***Inadequate medical evidence.***
4. ***Improper identification.***

Brief facts as can be deciphered from the record are that the victim, SA (PW1) (S) who said she was born in September 1998 and was in class 6, was on 25th November, 2008 at home at Koru market with her mother ***MA*** *(PW2) (M).* In the evening at about 8.00 p.m, S took some utensils to wash outside their house. While doing so, she claimed the appellant, who lived at the same market, asked her to go to M J's shop. She obeyed and was followed by the appellant. While behind the said shop he removed S's pant and had sexual intercourse with her after which he told her to go home.

In the meantime M became anxious when she heard no activity like washing utensils outside her house and decided to investigate. S then appeared with a scared look prompting M to enquire about where she had been. When hesitated to explain, M beat her up and she disclosed that she had been called by the appellant who had had sexual intercourse with her. By that time neighbours including ***Jane Kerubo Momanyi*** (PW4) had been attracted to the scene. In the company of some of those neighbours, M and S went to Koru Police station the same night at about 9.00 p.m. and reported the matter to Corporal ***Patrick Leweli*** *(PW5) (Corporal Leweli)* who visited the appellant's house but failed to trace him. He then took S to Muhoroni Sub-District Hospital for medical examination which was conducted by ***Christopher Kipkoech Ruto*** *(PW3) (Ruto)* a clinical officer of that hospital. On examining S, Ruto found bruises on the labia majora/minora which had reddened. He also found in the genital area a white fluid which had oozed to her pant. Laboratory investigation of a vaginal swap removed from S revealed presence of spermatozoa and infection. He therefore formed the opinion that S had been defiled. Later, the appellant was arrested at Kisumu bus stage on 27th March, 2008. PC ***Benase*** *(deceased)* was sent to collect him and did collect and brought him to Koru Police station where he was charged with the offence.

On being charged with the stated offences and after the prosecution witnesses had been heard, the appellant, in his defence, set up an alibi that at the time S was defiled, he was on his way to his rural home in Koru area to obtain particulars of medicines for his ailing mother who sadly later died. He stated that he spent the night at his rural home and in the morning went to Kisumu City to purchase working tools for his studio. While in Kisumu, his wife, ***R A*** *(DW3) (R),* telephoned him that police officers had enquired about him the previous night. Together with his employee ***Julius Omondi Otieno*** *(DW2) (Julius)* who had accompanied him to Kisumu, they went to consult a lawyer in Kisumu but on their way back to Koru they were taken to police station in Kisumu on an allegation of having killed a six year old child. Kisumu police transferred them to Koru where the appellant alone was charged as stated herein before.

The above facts were analysed and evaluated by both the trial court and the High Court and both courts reached concurrent conclusions that the appellant was guilty of the principal charge of defilement.

Highlighting the main issues in his appeal, the appellant submitted that the act of the alleged defilement was not particularized in the charge sheet and further that all relevant sections under which the offence was allegedly committed were not stated. The appellant further complained that evidence of age of the complainant was not conclusive, thereby rendering the sentence imposed upon him improper. It was also the appellant's contention that the medical evidence adduced at his trial was inadequate. He was of that view because the medical evidence did not indicate the degree of injury sustained by the complainant and that supporting documents such as treatment notes and laboratory report were not produced. In his view,

the medical evidence was fabricated. He further complained that he too was medically examined but that that evidence was misplaced and was therefore not produced at the trial which event was prejudicial to him.

On the issue of identification, the appellant discredited the testimony of the complainant contending that she could not have disclosed what happened to her until she was beaten and should not therefore have been believed.

Mr. Abele, the learned Assistant Director of Public Prosecutions, opposed the appeal and submitted, with respect to the complaint regarding the charge, that the alleged defect was not fatal as the appellant was not prejudiced. With respect to the complaint regarding failure to clearly ascertain the age of the complainant, learned counsel argued that the date of birth of the complainant was given and her age was ascertainable. In any event, according to counsel, the discrepancies with regard to the age of the complainant did not prejudice the appellant .

With regard to the complaint made with respect to the medical evidence, Mr. Abele submitted that the same was without basis as the record spoke for itself. On identification, the learned Assistant Director of Public Prosecutions submitted that under the provisions of ***section 124*** of the Evidence Act the identification of the appellant by the complainant was sufficient. In counsel's view the evidence against the appellant was overwhelming and his conviction was safe.

We have anxiously considered the record of appeal, the judgment of the trial court and the High Court, the submissions made to us as well as the law obtaining. We remind ourselves that this being a 2nd appeal, only matters of law fall for our consideration by dint of the provisions of ***section 361 (1) (a)*** of the Criminal Procedure Code. We have also said time without number, that we will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making those findings. (See ***Chemogon -V- R [1984] KLR 611*** and ***Ogeto - V - R [2004) KLR 14****.)* In ***Koingo -V- R [1982] KLR 213***, at page ***219***, this Court said:

> ***"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 (Reuben Karuri S/O Karanja -V - R 1956 E.A.C.A. 146)"***

With regard to the complaint made with respect to the charge, the appellant made two-fold arguments namely that the main provision of ***Section 8*** of the Sexual Offences Act was not cited in the charge and that the particulars of the offence excluded the offending organ of penetration. We ask ourselves whether those omissions were fatal. We think not. We are of that opinion because the appellant would not be prejudiced by the same. ***Subsection (1)*** of ***Section 8*** of the Sexual Offences Act aforesaid which was omitted merely defines what defilement is. In this case even though the subsection was omitted, the particulars sufficiently described the act which constituted the offence. The particulars however omitted to state what the complainant was penetrated with. The omission in our view could not and did not prejudice the appellant. We say so, because the complainant herself testified that the appellant *"took his penis and penetrated"* her. In those premises we have come to the inevitable conclusion that the failure to state in the charge sheet what penetrated the complainant did not in any way prejudice the appellant. In our view the defect was, in any event, curable under the provision of ***Section 382*** of the Criminal Procedure Code.

With regard to the complaint that the complainant's age was not clearly ascertainable, we only need to refer to testimonies of the complainant herself, and that of Ruto, the clinical officer. The complainant stated in cross-examination that she was born in September, 1996 - which would put her age at 12 years. Ruto testified that the complainant was aged 13 years. However at page 3 of the P3 Form he completed in respect to her injuries, he indicated her age as 12 years. In our view whether the complainant was 12 years or 13 years of age would have been neither here nor there, since the sentence to be meted out to the appellant was the same for the victim aged between 12 years and 15 years. We have therefore come to

the conclusion that the discrepancy with respect to the age of the complainant did not prejudice the appellant.

With regard to the medical evidence adduced at the trial, our perusal of the record shows that Ruto was in no doubt that S had been defiled. When he examined her he observed bruises on the labia majora/minora which had reddened. He also found a white coloured fluid around her genital area. He further testified that there was presence of spermatozoa and infection in the complainant's vagina. The P3 buttressed those findings. In our view, the appellant's attack on the medical evidence was unfortunate as the same was conclusive that the complainant was defiled.

Related to this complaint was the issue the appellant raised to the effect that a medical report made on him was misplaced which event prejudiced him. With respect, that complaint has absolutely no substance. The admission of the report in evidence would only have fortified the case put forward by the prosecution, given the evidence of identification. The appellant was known personally by S who indeed testified that the defilement was not the first as the appellant had defiled her once before. It was also clear beyond peradventure that the appellant and the complainant were neighbours. We are therefore not surprised that although the appellant was not found red-handed yet once the two courts below believed S, corroboration of her evidence was not a requirement after the amendment to ***Section 124*** of the Evidence Act. The proviso to that section states:-

> ***"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."***

If corroboration was however required, the same was found in the evidence of Mary and Ruto a summary of which evidence has been given above. The two courts below accepted that S recognized the appellant as the person who defiled her. Those concurrent findings as we have already stated, can only be interfered with if certain factors we have already stated are demonstrated which factors are lacking in this case. We too are therefore of the firm view that Sharon properly recognized the appellant.

In view of the evidence which was placed before the trial court and which was reevaluated by the High Court Judge, we think the further claim by the appellant that he was framed is absolutely without basis and we reject the same.

In the end, there is no basis upon which we can possibly interfere with the concurrent findings of the two courts below. We order that the appeal be and is hereby dismissed in its entirety.

DATED AND DELIVERED AT KISUMU THIS 20TH DAY OF JUNE, 2014

J.W. ONYANGO OTIENO

….....

JUDGE OF APPEAL

F. AZANGALALA

….....

JUDGE OF APPEAL

S. ole KANTAI

….....

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR