IN THE COURT OF APPEAL

AT KISUMU

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

CRIMINAL APPEAL NO. 85 OF 2011

BETWEEN

JOHN OTIENO MUMBO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from Judgement of the High Court of Kenya at Kisumu (Nambuye,J)

dated 29th March, 2011

in

HCCR.A.NO. 35 OF 2008)

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JUDGEMENT OF THE COURT

John Otieno Mumbo, the appellant, was convicted by the Kisumu Principal Magistrate, ***A.C. Onginjo***, for the offence of defilement contrary to ***section 8 (1)*** as read with ***section 8 (2)*** of the Sexual Offences Act, No. 3 of 2006 (the Act). It had been alleged, in the charge sheet, that on 19th August, 2007 at [particulars withheld] village in Kisumu East District within Nyanza Province, the appellant "caused penetration with his genital organ to a child namely ***A A***". There was also an alternative count of indecent assault with a child contrary to ***section 11 (1)*** of the same Act. Upon his conviction, the appellant was sentenced to serve twenty (20) years imprisonment. His appeal to the High Court (***R.N. Nambuye, J.*** as she then was) against conviction was dismissed. With regard to sentence, the learned Judge found that as the complainant was aged ten years, the sentence of 20 years imprisonment imposed upon the appellant was illegal. She therefore revised the same under ***section 364*** of the Criminal Procedure Code and substituted it for life imprisonment which, in the learned Judge's view, was mandatory. That decision triggered this second appeal.

In view of ***section 361 (1) (a)*** of the Criminal Procedure Code, only issues of law may be raised for consideration as this Court has stated times without number that it will not interfere with concurrent findings of fact by the courts below unless such findings were made on no evidence at all or on a misapprehension of it, or if no tribunal properly directing itself on the evidence would make such finding which would be the same thing as saying that the decision is bad in law. See for example ***M'Riungu -Vs-***

Republic [1983] KLR 455.

The appellant appeared in person before us as he did before the two courts below. He put forward the following issues of law:

1) That the age of the complainant was not clearly ascertained;

2) That the medical evidence adduced was not conclusive;

3) That the complainant's testimony was not corroborated;

4) That his fair trial rights under the Constitution were infringed;

5) That essential witnesses were not called to testify;

6) That his defence was not considered;

7) That the sentence imposed by the High Court was unlawful.

We shall revert to these Issues and the submissions thereon later in this judgment.

The facts of the case, in our view, were straight forward and presented no difficulties. A A, the complainant, who said she was aged 9 years and was in Standard 3 when she testified, was on 19th August, 2007 sent to graze their family goat by her mother ***M A N*** (PW2) (M). The complainant took the goat for grazing near the appellant's house. At about 6.00 p.m, she claimed, the appellant grabbed her and dragged her to his house, removed her underpants and inserted his penis into her private parts. She felt pain and when she tried to scream the appellant held her by the neck and threatened to kill her with a knife.

In the interim at about the same time, M became anxious as the complainant had delayed in returning home. She therefore decided to go and collect the goat. Her evidence suggested that she could see where the goat was which was near the appellant's house. As she passed by the appellant's house which was open, she saw the appellant lying on the complainant. He had partly removed his trousers. M raised alarm which attracted members of the public. The appellant and the complaint got out of the house and the latter ran away. M took the appellant's bicycle to her husband and when the appellant followed, her husband wanted to cut him but was restrained by M. When the complainant returned at about 9.00 p.m. M examined her and found blood and discharge no doubt from her private parts. A report was made to the village elder who arrested the appellant on 20th August, 2007 and took him to the Assistant Chief, ***Wycliffe Odhiambo Nyagilo*** (PW5) and the two together with members of the public took the appellant to Kisumu police station where he was re-arrested by PC ***Violet Nyagah,*** *(PW4) (PC Nyagah).*

The complainant was escorted to Kisumu District Hospital. where she was examined and treated by Bernard Omollo (PW3) (Bernard), a clinical officer at that hospital. Bernard found tears on the complainant's labia. She was also discharging blood from her vagina. Further laboratory tests indicated presence of an infection. Those findings were crystalized in the P3 Bernard produced at the trial. In his view, the findings were consistent with defilement. Bernard also (In the P3) gave the approximate age of the complainant as 10 years.

Put on his defence, the appellant, in unsworn statement, contended that he was arrested on 20th August, 2007 for unlawfully ploughing land belonging to an out-grower company and not for defilement.

The learned Principal Magistrate had no difficulty in believing the evidence of the complainant, M and of Bernard. In her view the defence proffered by the appellant lacked credibility.

The High Court, upon evaluation of the evidence came to its own independent conclusion as follows:-

> ***"The learned trial magistrate relied on the oral testimony (sic) of PW1, and PW2 as well as medical evidence though PW3 to confirm the defilement as well as the penetration of the defiled minor. This Court has revisited the said finding on the evidence and it agrees with the state counsel that the said finding was based on sound evidence. It is sufficient to support a conviction."***

The appellant was still aggrieved and, as stated earlier, raised the issues already identified above.

Mr. Abele, the learned Assistant Director of Public Prosecutions, opposed the appeal against conviction as, in his view, the evidence against the appellant was overwhelming. Learned counsel did not however, support the sentence imposed upon the appellant given the uncertainty regarding the age of the complainant.

We have considered the record, the grounds of appeal and submissions made to us. On the complaint regarding the age of the complainant it cannot be gainsaid that under ***section 8*** of the Act, the age of the victim of the offence is a necessary ingredient and should, in our view, be proved. We say so, because dire consequences flow from proof of the offence under ***section 8 (1)*** of the Act. The learned Judge concluded that the complainant was aged 10 years. She came to that conclusion on the basis of evidence in the P3 form produced in respect of injuries sustained by the complainant. The said P3 at both pages 1 and 3 indicated the age of the complainant as 10 years. In their oral testimonies at the trial however, none of the witnesses gave the age of the complainant as 10 years. The complainant herself, in the ***voire dire*** examination, stated that she was 9 years of age. Her mother M, did not say anything about the age of the complainant neither did Bernard and PC Nyagah. In our view, the evidence of the age of the complainant did not conclusively determine that she was below 12 years of age. Bernard did not testify that he carried out an age assessment of the complainant and his approximation of her age as 10 years at page 3 of the P3 could probably have been influenced by the figure of 10 given at page 1 of the P3 by the police.

It is probably that uncertainty which influenced the learned trial, Magistrate to mete out the sentence of 20 years imprisonment upon the appellant. We shall later on in this Judgment revert to this issue when we consider the appellant's complaint against sentence.

With regard to the complaint with respect to medical evidence we have no difficulty in summarily rejecting this complaint. We do so, because both courts below concurred that the medical evidence adduced through Bernard, the clinical officer, demonstrated that the complainant had been defiled. , The concurrent findings were based on evidence adduced at the trial. We have ourselves considered the testimony of Bernard and the P3 he produced and are of the firm view that the same cannot be impeached. Bernard said after examining the complainant thus:-

> ***"There were tears on labia. There was blood discharge from Vagina. Specimen were sent to lab and there was slight infection on (sic) urine.***
>
> ***.....***
>
> ***I signed P3 on 28/8/2007 and wish to produce it as exhibit 1. The findings were consistent with defilement"***

The record shows that, at the trial, the appellant did not challenge the medical evidence of the complainant's defilement. He was more concerned that he had not also been medically examined.

In those premises, it is our considered view that the medical evidence adduced at the trial could not be discredited and was properly accepted by the two courts below.

On whether the complainant's testimony was corroborated, we have no hesitation, on our consideration of the record, in saying that it was. The appellant and the complainant were found in ***flagrante delicto*** (red handed) by M. M immediately examined the complainant and found blood stains

and a discharging vagina. Bernard, on examining the complainant, found tears on the labia and blood being discharged from the vagina. He produced the P3 which documented those injuries. In our view if corroboration was required the same was amply supplied. However, given the proviso to section 124 of the Evidence Act, corroboration was not a requirement if the complainant's testimony was believed. The section reads:-

> ***"124. Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for the 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."***

There is no doubt that the learned trial magistrate believed the complainant. She said, inter alia, as follows:-

> ***"The child's labia could not have been torn if when (sic) was not defiled. Discharge of blood from genitalia is evidence of forced penetration and proof of defilement I do find that evidence ..... overwhelming."***

So, clearly even if corroboration was not furnished, conviction would still stand on the evidence of the complainant.

Related to the preceding complaint was the complaint that essential witnesses were not called to testify. Under ***section 143*** of the Evidence Act, no specific number of witnesses are required to prove any fact unless the law says so. The duty of the prosecution is to present before the trial court such witnesses as it thinks will establish its case beyond reasonable doubt. Our consideration of the record has convinced us that it discharged its duty in the appeal before us. The appellant's complaint in that regard is accordingly without merit.

The appellant also complained that his defence was not considered. With due respect, we find that complaint unfortunate because the testimony of the complainant, her mother, M, and Bernard completely dislodged the appellant's defence that he was arrested for ploughing land which belonged to an out-grower company. The defence, in our view was considered and properly rejected.

Then there was the complaint that the appellant was not accorded a fair hearing because he was not informed in advance of the evidence the prosecution intended to adduce. Firstly this issue was not raised at the appellant's trial and before the High Court. It is being raised for the first time in this second appeal. The appellant gave no reason for the belated complaint. Yet he was aware of his fair trial rights when he presented his appeal before the High Court. We say so, because, the record shows that the appellant there, claimed that he was not taken to court within a reasonable time in breach of his fair trial rights under the Constitution then obtaining ***(Article 72 (3)***. That complaint was considered by the High Court and rejected, in our view, properly so. We see no reason why the appellant did not raise his present complaint about breach of his fair trial rights earlier. In any event in our view, there was no failure of justice occasioned by the irregularity if indeed any occurred. Besides, our consideration of the record reveals that the appellant fully participated in the trial which suggests that if at all he did not have access to witness testimonies before their tendering the same the denial of access did not affect the quality of the trial.

The remaining complaint relates to sentence. A complaint against severity of sentence is, by dint of the provisions of ***section 361 (1) (a)*** of the Criminal Procedure Code, one of fact and ordinarily would not be for our consideration. However, the appellant's complaint, is not one of mere severity of sentence. The record shows that he was sentenced to 20 years imprisonment by the learned trial magistrate and when he

appealed to the High Court, the same was set aside and substituted by a sentence of life imprisonment. The record does not show that the learned Judge ever warned the appellant that in the event of his appeal failing, the sentence which had been imposed upon him by the trial court would be enhanced to life imprisonment. In our view, the appellant was entitled to the warning for him to consider his options which would probably have included preparation to specifically address the issue and the eventuality. He was unfortunately not afforded that opportunity.

We have also observed earlier in this judgment, that there was no assessment of the complaint's age. We do not consider the evidence of Bernard on the age of the complainant in the P3 as evidence of age assessment. The complainant herself had claimed that she was 9 years of age when she testified at the trial. The figure of 10 years which the learned judge of the High Court accepted was, in our view not based on any conclusive evidence adduced at the trial. We have also observed that, given the testimony of the complainant and that of the contents of the P3, the complainant could possibly be within the next age bracket of 12 to 15 years especially since the complainant was not medically assessed nor was her age proved through any document. Given the evidence it, is our view that the determination of the relevant age bracket should have been favourable to the appellant. The onus, of course, was on the prosecution to clear doubts about the age of the complainant and failure of which the benefit would go to the appellant.We so find. It follows, upon such finding that the sentence imposed upon the appellant by the High Court Judge had questionable legality and thus entitles this Court to interfere. The punishment for defiling a child between the age of twelve and fifteen years is a minimum of 20 years imprisonment. We think that is the lawful sentence which ought to have been imposed and which indeed the learned Principal Magistrate had imposed upon the appellant.

In the result we allow the appeal on sentence. The appeal against conviction is dismissed. The appeal against sentence is allowed to the extent that the sentence of life imprisonment is set aside and the sentence of 20 years imprisonment imposed by the Principal Magistrate is reinstated.

The sentence shall run from the date of the appellant’s conviction by the trial Court on 9th April, 2008. It is so ordered.

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

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

F.AZANGALALA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR