



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: GITHINJI, KARANJA & J. MOHAMMED, JJ.A.

CRIMINAL APPEAL NO. 90 OF 2013

BETWEEN

STEPHEN NGULI MULILI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at

Nairobi (Achode, J) dated 13th June, 2013

in

HCCR.A NO. 337 OF 2011)

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### JUDGMENT OF THE COURT

#### Background

This is a second appeal by *STEPHEN NGULI MULILI* against the conviction and sentence for the offence of defilement contrary to *Section 8 (1)* as read with *sub-section (3) of the Sexual Offences Act No. 3 of 2006 Laws of Kenya*. The Chief Magistrates Court in Cr. Case No. 593 of 2009 convicted the appellant and sentenced him to serve ten years imprisonment.

The High Court upheld the conviction but enhanced the sentence to twenty [20] years imprisonment.

The particulars of the charge were that on 25th December, 2009 at Donyo Sabuk Trading centre in Kyanzabe Location of Matungulu District within

Eastern Province, intentionally and unlawfully committed an act which caused penetration with his organ (penis) into the genital organ (vagina) of JWM a child aged 13 years.

The appellant denied the charge and in the trial the prosecution called a total of five witnesses. The appellant gave unsworn evidence and did not call any witnesses. The trial court considered the evidence and found that the prosecution had proved its case beyond reasonable doubt, convicted the appellant and sentenced him to ten years imprisonment.

Aggrieved by the decision of the trial court, the appellant filed an appeal in the High court. The High Court considered the evidence tendered before the trial court and concluded that the prosecution had proved its case beyond reasonable doubt. The learned Judge upheld the appellant's conviction and enhanced his sentence to twenty [20] years imprisonment as the Sexual Offences Act provides for "*imprisonment for a term not less than twenty years*" upon conviction of the offence of defilement of a minor aged between twelve and fifteen years.

Aggrieved by the High Court's decision, the appellant has preferred this appeal.

Submissions by counsel

At the hearing of the appeal, the appellant was represented by learned counsel, Mrs June Ashioya while the respondent was represented by Mr V.S. Monda (Senior Principal Prosecution Counsel). Mrs Ashioya relied on the Memorandum of Appeal filed on 2nd December, 2013.

The grounds of appeal can be summarized as follows:

1. *The prosecution did not prove its case beyond all reasonable doubt.*
2. *The age of the complainant (PW1) was not proved.*
3. *The enhancement of sentence by the High Court was erroneous.*
4. *The alibi defence was not considered.*
5. *There was no evidence to link the appellant to the offence.*

Mrs Ashioya submitted that the prosecution did not prove its case beyond all reasonable doubt; that the P3 form did not indicate whether the complainant's hymen was broken and that it also indicated that there was no laceration found; that there was no test done to establish the presence of spermatozoa on the complainant or the appellant or to link the appellant to the offence. In her view, therefore, the prosecution had failed to discharge its burden of proof.

Mrs Ashioya further argued that the age of the minor was not established as there was no birth certificate adduced in evidence or age assessment undertaken. In her view, there was no basis for the court to believe that the complainant was thirteen [13] years old.

Mrs Ashioya further argued that the trial court's failure to conduct *voire dire* is fatal to the prosecution's case; that the trial court has a duty to record whether it had made a finding whether the child was speaking the truth and is sufficiently knowledgeable to testify. She argued that this not having been done, the evidence of the complainant was inadmissible.

Counsel further submitted that the trial court relied on testimonies of PW2 and PW3 who are the parents of PW1 yet they were not present at the commission of the offence. Further that PW2 and PW3 did not make a report of their search for PW1 when she went missing.

Regarding the enhancement of sentence from ten years to twenty years, Mrs Ashioya argued that this was erroneous in view of the fact that the age of the complainant had not been established.

Regarding the *alibi* defence, Mrs Ashioya submitted that the appellant's defence was not considered. She argued that the trial court shifted the burden of proof to the appellant when the trial court found that the alibi was uncorroborated and unsubstantiated. Mrs Ashioya urged us to allow the appeal.

Mr Monda opposed the appeal and submitted that the two courts below properly evaluated the evidence and came to the correct finding that the appellant was guilty of the offence of defilement.

He submitted that the failure to conduct *voire dire* examination when the trial began *de novo*, was not fatal because the appellant through his counsel extensively cross examined the complainant and therefore tested the veracity of her testimony; that the appellant's counsel did not challenge the age of the complainant at the trial; that the learned Judge of the High Court properly re- evaluated the evidence on record and did not misdirect herself when analysing evidence; that the trial court believed the testimony of PW1 and as such there was no need in law for corroboration. He submitted that the two courts below believed the testimony of PW1 but nonetheless took into account medical evidence which was suggestive of sexual defilement.

Mr Monda further submitted that the two courts below found that the complainant was able to recognize the appellant as her assailant; that the two courts below considered the *alibi* defence and dismissed it after considering it *vis a vis* the prosecution case; that the two courts below properly directed themselves in dismissing the *alibi* defence raised by the appellant; that the High Court re-evaluated the evidence and found that the trial court arrived at the right decision.

On the issue of sentence, Mr Monda submitted that the appellant was issued with a notice that his sentence would be enhanced as the learned Judge was correcting an error on the face of the record; that the learned Judge was, therefore, correct in notifying the appellant of the intended enhancement of the sentence to twenty years imprisonment as provided in *Section 8(3) A of the Sexual Offences Act* and urged us to dismiss the appeal.

In reply, Mrs Ashioya submitted that the circumstances were not favourable for proper identification in that the incident took place at night and the lighting has not been stated. She submitted that there was no evidence that the complainant identified the appellant.

#### Analysis and determination

This being a second appeal, we are limited to considering points of law. This was emphasized by this Court in its recent decision in *DZOMBO MATAZA V*

*R*, 2014 eKLR where the court stated:

*“As already stated, this is but a second appeal. Under the law we are only concerned with matters of law and not fact. Put differently, in a second appeal such as this one, matters of fact are for the trial court and the first appellate court – see Okeno v Republic (1972) E.A. 32. By dint of the provisions of section 361(1)(a) of the Criminal Procedure Code our jurisdiction does not allow us to consider matters of fact unless it be shown that the two courts below considered matters of fact that should not have been considered or failed to consider matters that they should have considered or that looking at the evidence they were plainly wrong.”*

The question is whether the High Court erred in law in the evaluation of the evidence on the issues:

1. *Whether the prosecution discharged its burden of proof in respect of the following issues:*
  - a) *That the appellant was the person who defiled the complainant;*
  - b) *Whether the complainant's age was established;*
  - c) *Whether the complainant's evidence was properly corroborated and whether it was necessary to corroborate the said evidence;*
2. *Whether the appellant's alibi defence was considered and*
3. *Whether the High Court was correct in enhancing the sentence meted out by the trial court.*

On the issue of whether the prosecution discharged its burden of proof, it is not in doubt that the burden of proof lies with the prosecution. The *locus classicus* on this is the case of DPP V WOOLMINGTON, (1935) UKHL 1 where the court eloquently stated that the “golden thread” in the “web of English common law” is that it is the duty of the prosecution to prove its case. The

Kenyan Courts have upheld this position in numerous cases. See FESTUS MUKATI MURWA V R, (2013) eKLR.

The standard of proof required is “proof beyond reasonable doubt”. In reference to this Lord Denning in MILLER V MINISTRY OF PENSIONS, [1947] 2

ALL ER 372 stated:

*“That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.”*

As a general rule of evidence embodied in *Section 124 of the Evidence Act*, an accused person shall not be liable to be convicted on the basis of the evidence of the victim unless such evidence is corroborated. The proviso to that section make an exception in sexual offences and provides as follows:

*“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.”*

In the case of KAINGU ELIAS KASOMO V R, MALINDI CR. NO. 504 OF 2014, the Court of Appeal stated that age is a key ingredient to the offence of defilement and failure to prove it beyond reasonable doubt amounts to failing to prove the offence. However, as the Court clarified in TUMAINI MAASAI

MWANYA V R, MSA CRA. NO. 364 OF 2010, proof of age for purpose of establishing the offence of defilement which is committed when the victim is under the age of 18 years should not be confused with proof of age for purpose of appropriate punishment for the offence in respect of victims of defilement of various statutory categories of age.

From the facts of the present case we note that the complainant gave testimony that she was 13 years at the time of the offence. PW2 and PW3 corroborated the same. The “*Diagnostic HIV Testing and Counseling Patient/Client Card*”, the “*General Out Patient Record*” and the P3 form, which were all presented as exhibits, stated the complainant’s age as 13 years. Therefore, applying the law to the facts of the present appeal, we are satisfied that the complainant’s age was proved to the required degree. This view is fortified by the fact that during trial the defence did not question the age of the Complainant as offered before court.

With regard to the issues of corroboration and the appellant being proved as the one who defiled the complainant, *section 124 of the Act* is clear that the court may convict on the evidence of the alleged victim alone provided that the court is satisfied that the alleged victim was truthful. From the record it appears that the trial court was satisfied that the victim told the truth. In its judgment the trial court stated:

*“Though it [was] only PW1’s evidence which is incriminating the accused person to me this evidence is unchallenged. ... I have too considered the accused person’s alibi*

*defence, which to me remains to be a mere statement which is uncorroborated or unsubstantiated. No doubt I am convinced the accused whom the complainant knew very well before this incident, thus the offence of defilement. P3 form put the complainant at 13 years old. Though this is a single witness testimony, only PW1 [sic] I find it convincing and believable besides all prosecution witnesses were credible and honest.”*

The evidence on record shows that the complainant identified the appellant as the one who had defiled her. She knew him as he was a family friend and neighbor and recognized him. Similarly, the medical examination of the Complainant showed that her injuries were “*suggestive of sexual defilement*”. From all of the above, we are satisfied that the prosecution did indeed discharge its burden of proof.

On the issue of whether the appellant’s alibi defence raised reasonable doubt in the prosecution’s case, in his testimony, the appellant stated that on the material day he was at his sister’s residence in Mlolongo.

In the recent case of *VICTOR MWENDWA MULINGE V R, [2014] eKLR* the

Court of Appeal rendered itself thus on the issue of alibi:

*“It is trite law that the burden of proving the falsity, if at all, of an accused’s defence of alibi lies on the prosecution; see KARANJA V R, [1983] KLR 501 ... this Court held that in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused’s guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigation and thereby prevent any suggestion that the defence was an afterthought.”*

In the present appeal, the question is: did the alibi defence raise a reasonable doubt in the prosecution case? From the facts on record it appears that the prosecution made a strong and watertight case against the appellant. The evidence of the prosecution witnesses corroborate each other and form a clear and logical sequence of events establishing the appellant’s guilt.

The trial court stated:

*“I have too considered the accused person’s alibi defence, which to me remains to be a mere statement which is uncorroborated or unsubstantiated.”*

Taking all the facts into consideration, it is our opinion that the alibi defence did not shake the prosecution’s case. The finding of the High Court that the appellant was properly identified and convicted of the offence of defilement was based on overwhelming evidence and cannot be faulted.

Having found that the appellant was correctly convicted, we proceed to consider the issue of enhancement of sentence. *Section 354 (3) (a) (ii) of the Criminal Procedure Code* gives the High Court the power to enhance the sentence of a lower court. The said section provides:

*“The court may then, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may.*

*(a) in an appeal from a conviction-*

*(ii) after the finding, maintaining the sentence, or, with or without altering the finding, reduce or increase the sentence.”*

In the matter before us there was some indication that a State Counsel informally applied for enhancement of sentence on the date the appellant’s appeal came for hearing.

In POK VR, (2013) eKLR the court held:

*“As regards the sentence, this court agrees with the learned state counsel that the sentence of 10 years imprisonment should be enhanced. The minimum sentence for the offence of defilement is*

*15 years imprisonment. That is when the age of*

*the victim is between 16 and 18 years. To that extent, the trial magistrate fell into error by passing a sentence without considering the provisions of the law. It is trite that when a sentence is passed without considering a relevant factor, the sentence is open to review on appeal.”*

Considering the facts of the instant appeal, we note that the prosecution did serve a notice of enhancement of sentence. The learned Judge ruled on it stating:

*“Although it is good practice to file the notice in good time the respondent is not in breach of any law in filing the notice at this stage.”*

On the issue of sentencing, *Section 8(3) of the Sexual Offences Act* clearly provides the sentence for the offence of defilement of a child between the age of twelve and fifteen years.

The Sexual Offences Act removed discretion in sentences particularly where the victims are minors. The sentence provided for is therefore, mandatory and not discretionary.

We, therefore, find that the trial court erred in meting a sentence of 10 years. The prosecution proved that the offence of defilement occurred and that the Complainant was 13 years old at the time the offence occurred. Accordingly, the High Court was correct to enhance the sentence in accordance with the provisions of *section 8 (3) of the Sexual Offences Act*.

The upshot of our assessment is that the appeal is devoid of merit and is dismissed in its entirety.

Dated and delivered at Nairobi this 31st day of July, 2014.

E. M. GITHINJI

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR

J. MOHAMMED

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JUDGE OF APPEAL