



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: MARAGA, AZANGALALA & KANTAI, JJ. A)**

**CRIMINAL APPEAL NO. 244 OF 2012**

**BETWEEN**

**SIMON MWANDE ..... APPELLANT**

**AND**

**REPUBLIC .....RESPONDENT**

**(Appeal from a Judgment of the High Court of Kenya at Kakamega (Chitembwe, J)**

**dated 21st June, 2012**

**in**

**HCCRC NO. 194 OF 2010)**

**\*\*\*\*\***

**JUDGEMENT OF THE COURT**

This is a second appeal and as such only matters of law fall for our consideration pursuant to the provisions of Section 361 (1) (a) Criminal Procedure Code. As this court has stated in many of the decisions, we will not normally interfere with the 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. In **Koingo v Republic [1982] KLR 213** that proposition was put as follows at page 219:

**"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 Karari s/o Karanja vs. R. [1956] E. A. C. A. 146)."**

See also our recent decision in **Kassin Nyangau v Republic (Kisumu Criminal Appeal No. 290 of 2012 (ur))**.

We will therefore examine the facts of the case that were before the trial court as reanalysed by the first appellate court for the purpose of establishing whether the said legal standards were satisfied because it is only when they were not satisfied that we would have jurisdiction to interfere.

The appellant, Simon Mwande, was charged with defilement of a girl contrary to **Section 8 (1)** as read with **Section 8 (2)** of the Sexual Offences Act No. 3 of 2006. The particulars set out in support of that charge were that on 1st December, 2009 at *[particulars withheld]* village in the then Kakamega North District he unlawfully inserted his genital organ namely penis into the vagina of "J A", a girl aged eight years. The appellant was charged in the alternative with the offence of indecent act with a child contrary to **Section 11 (1)** of the said Act particulars being that on the said day at the said place he unlawfully touched the vagina and thighs of the said girl with his genital organ namely his penis.

A trial took place before the learned Senior Resident Magistrate ( S. N. Abuya) who in a judgment dated 24th September, 2010 convicted the appellant on the main charge and sentenced him to serve a life term in prison. A first appeal to the High Court of Kenya at Kakamega (L. Kimaru, J) failed in the judgement delivered on his behalf by S. Chitembwe, J on 21<sup>st</sup> June, 2012. Those findings provoked this appeal.

The appellant, who has been unrepresented all along, in a "**Written Submission**" which we accepted and adopted as doubling up as his Memorandum of Appeal has raised the following as grounds of appeal which for brevity we summarize as follows: that the age of the complainant was not proved; that there was no proof of either partial or complete penetration; that the courts below failed to note and hold that the prosecution was actuated by a grudge over a land issue and finally that some witnesses were not called which prejudiced his defence.

A summary of the facts as found by the trial court and as confirmed by the first appellate court were that during the school holidays of December, 2009, upon request by the appellants' wife, the complainants' mother, "MA", (PW1) allowed the complainant "J A." (PW2) to stay at the appellants home for the period of those holidays to assist in house chores. In the course of that stay, and as fate would have it, a person died in the area forcing the appellants wife to leave home to attend to the funeral wake. So on 1st December, 2009 little J A, then aged eight years as per her own testimony, corroborated by that of her mother and that of the medical officer, was all alone in the appellants house. She was tired and fell asleep on a chair and she suddenly awoke to find herself on the appellant's bed with her panty removed. The appellant proceeded to defile her as he muffled her cries by covering her mouth with his hand as he mocked her that crying out meant that she was a coward. When it was morning the appellant left promising to buy her clothes and shoes as he asked her to remain in the house. She however defied him and left to inform one Owiri and this led to a chain of events leading to the appellants' arrest.

**No. 88392 PC Cleophas Tindonglok (PW3) (the Police Officer)** of Kabras Police Station received a report of the incident on 3rd December, 2009. J A told him that she had been defiled by the appellant. He prepared a P3 Form which was completed by **Dr. Kizito (PW4) (the Medical Officer)** at Malava District Hospital who received and examined J A later that day. The medical officer found that J A was eight years old and had been defiled on 1st December, 2009. The P3 Form and treatment notes from Malava District Hospital were produced as part of the evidence before the trial court.

At the close of the prosecution case it was found that there was sufficient case for the appellant to answer and he chose to give an unsworn statement. He stated that he attended a funeral on 28th November, 2009 in Butere where he remained for four days but received word that his lawyer required money. He therefore left Butere to go and visit his lawyer in Kakamega but while on-route there he met a village elder who informed him that he was wanted by the Assistant Chief. He hastened to the Assistant Chief who however took him to a police station where he was locked up and thereafter charged in court. He further testified that the whole matter arose from a dispute over the land he had bought from the complainant's grandfather but had been denied access to the same. He speculated that the complainant and her family conjured up his arrest and incarceration so that they could grab his land and sell it in his absence.

The trial magistrate, upon analysing the evidence produced before him, stated as part of his findings in the said judgment:-

**"There is no doubt that the accused person was the one who defiled the complainant (PW2) as the complainant was able to see and identify the accused person well as the person who defiled her to his house (sic) and left in the morning when it was bright and the complainant was able to see and identify him well as the defiler and no issue of mistake identity could arise herein. On the other hand I find the accused line of defence that he was just framed that he committed the offence because of the shamba dispute he has with the complainant grandfather is not a believable defence as he produced no documents to prove this and the doctor (PW4) who treated the complainant (PW2) 2 days after the incident confirmed that she had sperms in her urine and she had been defiled."**

On the first appeal, and upon re-evaluating the evidence, the learned judge found that:-

**"Having re-evaluated the evidence adduced before the trial court, it was clear to this court that the decision whether or not to convict the appellant turned on the evidence of the complainant and on the question whether the appellant had access to the complainant at the material time. The uncontroverted evidence was that the complainant was in the house of the appellant on the material night when she alleged that she was defiled. The mother of the complainant (PW1) had allowed the complainant to live with the appellant and his wife during the school holidays. According to the complainant, the appellant got hold of her as she was sleeping in a seat in the house of the appellant. The appellant then took her to his bed and had sexual intercourse with her.**

**The fact that the complainant was defiled is not in dispute. This is because the doctor who examined her found sperms inside her vagina. It should be noted that the complainant was at the material time a girl aged eight years. In the normal circumstances, it cannot be expected that such a girl is sexually active. The complainant testified that the appellant threatened her when she wanted to raise alarm. On the following day after the incident, the complainant made the report of her defilement to the local Provincial Administration who later made the report to the police. The appellant was arrested and charged. When he was given the opportunity to defend himself, the appellant did not directly answer the evidence that was adduced against him by the prosecution witnesses. It was clear from the above evidence, that the prosecution proved its case to the required standard of proof beyond any reasonable doubt.**

**To constitute a crime of defilement, the prosecution must establish the fact that the appellant had sexual intercourse with a person less than eighteen (18) years. The sexual intercourse must involve penetration of the genital organ of the accused into the genital organ of the complainant. In the present case the prosecution did establish to the required standard of proof beyond any reasonable doubt that the appellant defiled the complainant. The defence put forward by the appellant did not dent the otherwise strong case put forward against him by the prosecution. The appeal against conviction lacks merit and is hereby dismissed."**

As already pointed out our duty is not to re-examine the facts but to deal with points of law, if any, that are raised in the appeal.

On sentence the appellant complains that the age of the complainant was not proved to the required standard.

The charge sheet gives the age of the complainant as eight years.

Apart from the testimony of the girl herself as to her age, there was the evidence of her mother and that of the medical officer all to the effect that the complainant was eight years old when she was defiled. It will

always be preferable that the prosecution produces a document in the form of a birth certificate or baptismal certificate to help in ascertaining the age of a complainant. This is more poignant because the imprisonment terms provided by the various subsections of Section 8 of the Sexual Offences Act No. 3 of 2006 are dependent on the ages of complainants.

It will however be noted that the said Act adopts a definition of a child in the Children's Act and by Section 2 thereof "age" is defined as:

**"...where a child's age is not known means the apparent age..."**

So the actual age does not have to be proved. It will do if apparent age is proved (**Paul Odhiambo Mbola v Republic Kisumu Criminal Appeal No. 16 of 2014 (ur)**).

In the case before the trial magistrate there was overwhelming evidence through the testimony of the complainant, her mother and the medical officer that the complainant was eight years old when she was defiled. She was way below the age of eleven years that is prescribed by Section 8 (2) of the said Act and the prescribed sentence was properly awarded as provided in law.

The appellant has complained before us that the courts below erred by convicting him when, according to him, there was no proof of complete or partial penetration.

The complainant testified that she was defiled in the night by the appellant. She informed authorities the very morning when the appellant left to go and buy her goodies in an apparent attempt to buy her silence. The medical officer, upon examining the complainant, found that she had been defiled some four days earlier. This evidence was believed by both courts below.

The said Sexual Offences Act defines "penetration as:-

**"penetration means the partial or complete insertion of the genital organs of a person into the genital organs of another person."**

There is no merit in the complaint by the appellant that penetration was not proved as there was the evidence of the complainant supported by evidence of the medical officer that she had been defiled.

On the complaint that some witnesses were not called it was held as long ago as 1953 by the predecessor of this Court in **Abdallah Bin Wendo & Sheth Bin Mwambere v Republic [1953] vol 20 EACA 166** that a fact could be proved by the testimony of a single witness.

Moreover in Section 124 of The Evidence Act on "corroboration required in criminal cases" it is provided that:

**"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 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."**

And Section 143 of the said Act provides that no particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact. Those were also our findings in **John Otieno Mumbo v Republic (Kisumu) Criminal Appeal No. 85 of 2011 (ur)**.

In the case before the trial court in the present appeal it was proved beyond reasonable doubt that the appellant defiled the complainant. This appeal has no merit and it is accordingly dismissed in its entirety.

**Dated and Delivered at Kisumu this 20th day of November, 2014**

**D. K.MARAGA**

.....

**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**