IN THE COURT OF APPEAL

AT KISUMU

(CORAM: KIHARA KARIUKI (PCA), GATEMBU & MURGOR, JJ.A)

CRIMINAL APPEAL NO. 51 OF 2014

BETWEEN

GILBERT CHEMEI …… APPELLANT

AND

REPUBLIC …….... RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Kakamega (Chitembe, J.) dated 18th February 2014

in

H. C. CR. A. No 137 of 2011)

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JUDGMENT OF THE COURT

1. Gilbert Chemei, hereinafter referred to as the appellant, was arraigned before the Senior Resident Magistrate's Court at Hamisi and charged with the offence of defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act. It was alleged that on the 17th day of July 2009, at *[particulars withheld]* Village Makuchi sub location, Shaviranga location within Hamisi District of the Western Province, the appellant unlawfully and intentionally had carnal knowledge of D.M., a child aged seven years old.
2. He was charged in the alternative with the offence of committing an indecent act contrary to ***section 11(1)*** of the Sexual Offences Act, the particulars of that offence being that on the 17th day of July 2009, at *[particulars withheld]* Village Makuchi sub location, Shaviranga location within Hamisi District of the Western Province, the appellant caused his genital organ to make contact with that of D.M., a child aged seven years.
3. After trial in the magistrate's court, the appellant was convicted on the main count of defilement and sentenced to imprisonment for life. The appellant was aggrieved with the conviction and sentence so he filed an appeal in the High Court in which he challenged the conviction and sentence. That appeal was dismissed, the appellant's conviction upheld and the sentence affirmed. He is still aggrieved with the outcome of his first appeal and so he has filed this second appeal before us.

4. In determining a second appeal, Section 361 of the Criminal Procedure Code constrains this Court to consider only matters of law. Moreover, this Court will not interfere with the concurrent findings of fact of the courts below us unless we find them perverse, or if in our assessment, there was no evidence upon which those findings could be based. Decisions of this Court enunciating these principles abound and it is not necessary to delve into a multiplicity of them. In ***Boniface Kamande & 2 Others v Republic [2010] eKLR (Criminal Appeal 166 of 2004)*** for instance, the Court rendered itself as follows:

"On a second appeal to the Court, which is what the appeals before us are, we are under legal duty to pay proper homage to the concurrent findings of facts by the two courts below and we would only be entitled to interfere if and only if, we were satisfied that there was no evidence at all upon which such findings were based or if there was evidence, that it was of such a nature that no reasonable tribunal could be expected to base any decision upon it."

5. The concurrent findings of the courts below were as follows: on the 17th July 2009, D.M., the complainant (PW1) was at her home. She had woken up at about 7:00 am to take a bath so that she could go to school. The appellant approached her, blocked her mouth with a lesso and proceeded to defile her. He warned her not to tell her grandmother and gave her Kshs 20.00. The complainant then went to school as usual.
6. Later that day, when S L (PW2) her grandmother was cleaning up she found the complainant's blood stained pant. S waited for the complainant to return from school and enquired from her what had happened. At first, the complainant did not reply, but a short while later, she revealed that she had been defiled by the appellant. S went and reported the matter to the assistant Chief, Seth Givedi (PW3), who called Corporal Silverus Kogei (PW6) and apprised him of the situation. Corporal Kogei accompanied the assistant chief to the complainant's home. The complainant told him that she had been defiled by the appellant, so Corporal Kogei arrested the appellant. The complainant was then taken to the Kaimosi Friends Hospital and she was treated by Josephine Amwoga (PW5). During treatment, she found that the complainant was bleeding from her private parts, her hymen was broken and she had discharge that had blood. Josephine determined that the age of the injuries was two days, and gave the complainant ARVs, antibiotics and pain killers.
7. In this appeal, Mr. Omundi Bw'Onchiri, learned counsel for the appellant, submitted that the charge was not proved to the required standard. Counsel submitted that section 8(1) as read with section 8(2) of the Sexual Offences Act requires the element of the age be proved. However, in the present case, counsel argued, there were contradictions as to the complainant's age; the complainant herself testified that she was ten years old, while the P3 form indicated that she was seven years old. Counsel therefore submitted that in light of this conflict and in the absence of conclusive evidence before court on the age of the complainant, the charge was not proved beyond a reasonable doubt.
8. Counsel further submitted that the evidence linking the appellant to the crime was weak because while the appellant testified that she had been defiled for an hour, there were other people present in the house who were not called to testify or corroborate her version of events. He further urged that the medical evidence was weak because the clinical notes were not submitted into evidence by the clinical officer. He therefore submitted that the evidence on record did not prove that the appellant committed the crime he was charged with.
9. Mr. Evans Ketoo, Prosecution Counsel, opposed the appeal. He found no fault with the lower courts' appreciation of the evidence. He stated that the evidence showed that the complainant was defiled by the appellant herein at around 7:00am on the 17th July 2009. On the question of the age of the victim, Mr. Ketoo submitted that even if the age of the victim of a sexual offence is not known, then the court has the right to be guided by the apparent age of the victim. He urged

that in this case, the court was properly guided by the complainant that she was ten years old, and thus was correct in meting out the sentence of life imprisonment. He contended that the appellant was properly convicted and therefore urged us to dismiss the appeal.

10. The first issue that we will consider is whether or not the charge against the appellant was proved beyond a reasonable doubt. The evidence given by the clinical officer was that the complainant had a broken hymen, and that she was bleeding from her private part which was tender and painful. The medical evidence on record is therefore clear that the complainant was defiled. There is no merit in the appellant's complaint that the treatment notes were not produced in evidence by the clinical officer. Her testimony and the P3 form produced in court by her were sufficient to prove that the complainant had been defiled.
11. The complainant's evidence was that she was defiled by the appellant herein, who also happened to be a brother to her grandmother. Section 124 of the Evidence Act allows a court to take the uncorroborated evidence of a child by providing 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 was nothing to indicate that the complainant was being untruthful and we find that the trial court, as well as the first appellate court, were right to find that it was the appellant who had defiled the complainant.

12. The second issue of law that has been raised by the appellant regards the age of the complainant. We agree that age is a fundamental aspect of the charge of defilement. As was stated by this Court in in ***Kaingu Elias Kasomo v Republic Criminal Appeal No. 504 of 2010 (unreported)*** as cited in ***Martin Nyongesa Wanyonyi v Republic [2015] eKLR (Criminal Appeal No. 661 of 2010***:

"[The] age of the victim of sexual assault under the Sexual Offences Act is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim."

13. In the present case the complainant testified that she was ten years old, while the charge sheet indicated that she was seven years old. In dealing with this question, the High Court rendered itself as follows:

"The appellant contends that the age was not ascertained. Since the complainant indicated that she was 10 years old and the court was of the view that she was a young girl who had to be examined before testifying. I will take it that the complainant was 10 years old. The essence of age assessment in sexual offences matters is because the sentence is pegged on the age of the complainant. However, the mere fact that the age was not clearly ascertained should not lead to automatic dismissal of the prosecution case especially if the evidence on record shows that the act complained of was committed."

14. We agree with the learned judge of the High Court that this is the correct position in law. In ***Peter Omukunya Mango v Republic Criminal Appeal No. 243 of 2012 (unreported)*** this Court held that:

"… where the Court is satisfied that the offence of defilement has been committed (that is where it

is proved that the victim was below the age of 18 years), but the court entertains doubt whether or not the victim falls within any of the stipulated age brackets in [sections 8(2), 8(3) and 8(4) of the Sexual Offences Act respectively, both the High Court and this Court has power to pass a sentence which is favourable to the appellant and which corresponds with the apparent age of the victim."

15. Therefore, in ascertaining the age of the complainant, the Court was entitled to use the apparent age of the victim. The finding of the High Court that the complainant was ten years old was proper, especially in light of the fact that the complainant herself testified that she was ten years old. This ground of appeal must therefore fail as well.
16. Having considered the issues raised in this appeal, we are satisfied that the appellant was convicted on sound evidence. There is nothing to warrant our interference with the concurrent findings of the trial court and the High Court.
    Accordingly, this appeal lacks any merit and we order that it be and is hereby dismissed.

Dated and delivered at Kisumu this 17th day of December, 2015.

P. KIHARA KARIUKI, (PCA)

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JUDGE OF APPEAL

S. GATEMBU KAIRU (FCIArb)

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR