REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CRIMINAL APPEAL NO. 11 OF 2017

JOSHUA LIJODI KAZAKALI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(*Being an appeal from the original conviction and sentence in criminal case number 66 of 2015 in the*

***Senior Principal Magistrate's Court at Kimilili – D. O. Onyango (SPM) on 9/01/2017*)**

JUDGMENT

1. The Appellant **Joshua Lijodi Kazakali** was charged with the offence of defilement contrary to **section 8(1)** as read with **section 8(3)** of the **Sexual Offences Act No. 3 of 2006**. The particulars were that on diverse dates between 23rd October, 2015 and 25th October, 2015 at [particulars withheld] village Bungoma County, the Appellant intentionally caused his penis to penetrate into the vagina of J. W. a child aged 15 years (name deducted to protect the identity of the minor).

2. In the alternative, the Appellant faced charges of indecent act with a child contrary to **section 11(1)** of the **Sexual Offences Act**. The particulars were that between 23rd October, 2015 and 25th October, 2015 at [particulars withheld] village in Bungoma County, the Appellant intentionally caused his penis to come into contact with the vagina of the said J.W.

3. The gist of the prosecution's case was that the Complainant, who was a 15 year old minor at the time, accompanied the Appellant at his behest to attend a funeral in a neighboring home on 23rd October, 2015. After the funeral, the Appellant took her to his house where he defiled her. He thereafter locked her up in his friend's house and went away. When she did not return home, PW2 her mother, acting on information from her older sister V who had seen the Complainant leave with the Appellant, traced and arrested the Appellant with the help of members of the public. The Appellant directed PW2 and the police to where the Complainant was hidden and they located and rescued her.

4. The Appellant when placed on his defence gave sworn testimony in which he told the court that on 23rd November, 2018 he was going about his bodaboda business at [particulars withheld] as usual when members of the public pounced upon him and arrested him on allegations of having abducted a school girl. They escorted him to Kiminini police station. The police took him to the house of a person unknown to him, where they found a girl. He was later arraigned in court and charged with the offence herein. The Appellant was subsequently convicted on the main charge of defilement and sentenced to serve twenty years imprisonment, following a full trial.

5. Aggrieved by both the sentence and conviction, the Appellant filed the present appeal in which he raised six grounds. In the

grounds he stated that the prosecution failed to highlight the ingredients constituting the offence of defilement; the sentence was extra judicial as he was aged eighteen (18) years at the time of his arrest; the evidence presented at the trial was inconsistent and contradictory; crucial prosecution witnesses were not called; and the age of the complainant was not conclusively proved.

6. Learned state counsel Mr. Oimbo opposed the appeal on behalf of the Respondent stating that the prosecution had proved its case to the required standard, and urged the court to dismiss the appeal and uphold both the conviction and sentence.

7. This being the first appeal, I re-considered and re-evaluated the evidence adduced by witnesses to arrive at my own independent decision whether or not to uphold the sentence and conviction of the Appellant. In doing so, I was cognizant of the fact that I neither saw nor heard the witnesses as they testified and gave allowance therefor. – See **Ngunu vs. Republic [1984] KLR 729**.

8. The first ground as argued by the Appellant is that the trial court failed to consider his age before he was sentenced. Mr. Oimbo submitted that the Appellant did not raise the issue of his age during trial and that there is nothing on record to indicate that he is underage. The record indicated that during mitigation, all the Appellant said was "*I pray for forgiveness*" and nowhere in his defence is it indicated that he was a minor at the time of the offence.

9. On the second ground, the Appellant argued that the evidence tendered by the prosecution was insufficient and inadequate to sustain a conviction. Mr. Oimbo submitted that the prosecution had conclusively proved all the ingredients of the offence of defilement.

10. The critical ingredients forming the offence of defilement are: the age of the complainant, proof of penetration and positive identification of the assailant as highlighted in the case of **Charles Wamukoya Karani vs. Republic, Criminal Appeal No. 72 of 2013**.

11. The record shows that the Complainant testified as PW1 and in her sworn testimony stated that she was aged 15 years at the time. This was corroborated by PW2 the Complainant's mother who testified that the Complainant was born on 15th May, 2000. However, the court observes that the child health immunization card produced in court indicates that the Complainant was born on 9th September, 2000. The name entered on the clinic card is also different from that of the Complainant herein and there is nothing on the record to indicate that J.W, the Complainant, and V N as indicated in the card refer to one and the same person.

12. In the case of **Francis Omuroni vs. Republic Criminal Appeal No. 2 of 2000**, the Uganda Court of Appeal stated *inter alia* that:

"In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense... "

In the circumstances of this case, the evidence of the Complainant's mother that the Complainant was born on 15th May, 2000 and was therefore 15 years old at the time of the offence shall suffice.

13. On whether penetration was proved, Mr. Oimbo submitted that this was conclusively proved by the evidence of the Complainant which was corroborated by PW5. Penetration is defined under **section 2** of the **Sexual Offences Act** to mean the partial or complete insertion of the genital organs of a person into the genital organs of another person.

14. The record shows that in her sworn testimony concerning what happened, the Complainant stated as follows:

"*Inside his house he removed his clothes. He asked me to remove my clothes. He removed his thing and inserted into my thing. The thing is here (points to her crotch). He inserted his thing into my thing several times. After he finished he rested.*"

15. The medical evidence tendered by PW5 Ignitious Okumu, a clinical officer at Tongaren health centre, was that he examined the Complainant on 26th October, 2015 and used the clinical notes to fill the P3 form. Both documents were produced in court. His findings were *inter alia* that:

· J.W was aged 14 years at the time of the offence.

· There were blood stains on the labia majora and labia minora.

· There was fresh blood from the vagina and the cervical opening

· The hymen was absent.

He testified that the Complainant was presented with a history of defilement by a person known to her. It is therefore clear that the penetration was conclusively proved by the evidence of the Complainant which was corroborated by PW5.

16. On identification, the record indicates that the Complainant stated that the Appellant was a person known to her. It was therefore a matter of recognition as opposed to identification. In the case of ***R -vs- Turnbull & Others [1976] 3 All ER 549*** the learned Judges stated on page 552 as follows:

"Recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."

17. Further, the Complainant's sister V who testified as PW3 confirmed that the Appellant came to their home on his motorcycle and left in the company of the Complainant on the date on which she disappeared. From the evidence of the Complainant and PW3, it is therefore not in doubt that the Appellant was positively identified.

18. The upshot of the foregoing is that all the three ingredients needed to sustain a conviction on a defilement charge were conclusively proved by the prosecution before the trial court.

19. On the complaint that crucial witnesses were not called, Mr. Oimbo submitted that the state called sufficient witnesses to prove its case. Further that there are no sufficient numbers of witnesses required to prove a case. **Section 143** of the **Evidence 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. The prosecution therefore has the latitude to call the witnesses necessary to prove their case. This view was expressed by Chemetei J in **Martin Ochieng Opiyo vs. Republic Criminal Appeal No. 54 of 2011 [2013] eKLR** when he observed thus:

"As the practice is, the prosecution is always at liberty to call the witnesses they deem relevant to their case. Those witnesses called were able to establish the prosecution case."

20. The Appellant also argued that the charge sheet was defective since the word "unlawfully" was omitted. Not all defects detected in the charge sheet on appeal will render a conviction invalid. The present charge is one of defilement and based on the age of the Complainant, there is no sexual act of whatever description which could be regarded as lawful. The irregularity is therefore one that is curable under **section 382** of the **Criminal Procedure Code** there being no discernable prejudice occasioned to the Appellant as a result.

21. This position was reaffirmed by R.S.C Omolo, S.E.O Bosire and J.G Nyamu in **JMA vs. Republic [2009] KLR 671** where the learned appellate judges opined thus:

"Rape was an offence which involved adults who are able to consent, unlike a situation where a child was involved, and the issue of consent or lack of it is wholly irrelevant. For a child of the age of the complainant there was no sexual act which could be regarded as lawful. This was a case in which the superior court should have invoked the provisions of section 382 of the Criminal Procedure Code to cure irregularity which on the facts and circumstances of this matter was minor."

22. On the complaint that the Appellant was not supplied with witness statements on the day directed by the court, Mr. Oimbo submitted that this was not prejudicial to the Appellant because the statements were supplied before the case commenced. He urged

that the Appellant was consequently given adequate time in which to prepare his defence and he fully participated in the trial.

23. The record shows that when the accused appeared before the trial court on 18th January, 2016 he asked to be supplied with witness statements whereupon the court directed the prosecutor to supply him with the statements. The record is not clear whether the statements were supplied or not. The record however shows that the Appellant fully participated in the trial and cross-examined the prosecution witnesses.

24. Lastly, the Appellant argued that the sentence imposed was prejudicial as his age was not considered before he was sentenced. On this, Mr. Oimbo submitted that the Appellant never raised the issue of his age during trial and that there is nothing on record to indicate that he was underage at the time.

25. Indeed there is nothing on the record to show that the Appellant raised the issue of his age during trial. The Charge sheet did not indicate the age of the Appellant. The only evidence pointing to the Appellant's age is the Patient record book which indicated that he was aged 20 years. The record book was filled after the Appellant's medical examination on 26th October, 2015 following his arrest. Further in his grounds of appeal, the Appellant stated that he was aged eighteen (18) years at the time of his arrest.

26. This court can therefore conclude that the Appellant was an adult at the time of his arrest. This is because at eighteen years of age one is an adult having attained the age of majority.

27. Sentence is a matter of the court's discretion. I wish to however point out that in imposing a sentence, the court must take into account various factors such as the nature and prevalence of the offence, the penalty imposed by the law and the mitigation offered by an accused person. From the record, it is clear that all these were considered by the trial court.

28. In the case of **Shaddrack Kipkoech Kogo vs. Republic Criminal Appeal No. 253 of 2003** (unreported) the Court of Appeal (Omollo, O'kubasu & Onyango Otieno JJ A) stated thus:

"Sentence is essentially an exercise of discretion of the trial court and for this court to interfere it must be shown that in passing the sentence the sentencing court took into account an irrelevant factor or failed to take into account a relevant factor or that a wrong principle was applied or short of those the sentence itself is so harsh and excessive that an error in principle must be inferred."

In the instant case, the Appellant was sentenced to serve twenty years imprisonment which is the minimum sentence prescribed in defilement cases where the Complainant is aged between twelve and fifteen years as is the case in this matter. Further the Appellant did not raise the issue of his age in mitigation, as all he did was ask for forgiveness. I therefore find that the sentence imposed was proper and not excessive as alleged by the Appellant.

29. In light of the above, I find that the trial court, directing itself to the evidence before it and the law applicable, reached the correct conclusion. The conviction entered against the Appellant was well founded. I find that this appeal is unmeritorious and consequently dismiss it.

It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 28TH DAY OF NOVEMBER 2018.

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L. A. ACHODE

HIGH COURT JUDGE

DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUNGOMA THIS 14TH DAY OF DECEMBER 2018.

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H. K. CHEMITEI

HIGH COURT JUDGE