REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT KISUMU

CRIMINAL APPEAL 203 OF 2009

BETWEEN

ALFAYO GOMBE OKELLO .....APPELLANT

AND

REPUBLIC .....RESPONDENT

(An appeal from a judgment of the High Court of Kenya at Kisumu (Mwera, J.) dated 8th June, 2009

In

H.C.CR.A. NO. 85 OF 2008)

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JUDGMENT OF THE COURT

Alfayo Gombe Okello (the appellant) was convicted by Nyando Senior Resident Magistrate, LN Mbugua, for the offence of defilement contrary to ***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 day of August, 2007 at Tuns sub-location in Nyando district of Nyanza Province, the appellant had carnal knowledge of ***S A***, a girl under the age of sixteen years. There was also an alternative count of indecent assault contrary to ***section 11 (1)*** of the Act. It will be apparent at once that the reference in the particulars of the main count to *"a girl under the age of sixteen years"* is a hangover from the provisions of ***section 145 (1)*** of the Penal Code which was repealed by the Act on 21st July, 2006. Under ***section 8 (2)*** of the Act, there is no reference to *"a girl under the age of sixteen years."* We shall revert to this aspect of the matter later in this judgment. Upon his conviction, the appellant was sentenced to serve twenty (20) years imprisonment. His appeal to the superior court (Mwera J) against conviction and sentence was dismissed, hence this second and final appeal.

In view of ***section 361*** of 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 two courts below unless such findings were made on no evidence at all or on a perversion of it, or if no tribunal properly directing itself on the evidence would make such findings. In such a case the decision would be said to be bad in law. See for example **M' Riungu v Republic [1983] KLR 455**.

The appellant has all along appeared in person to urge his case. He drew up the memorandum of appeal which puts forward the following three grounds, thus:

"1. THAT I was convicted on a defective charge – it was initially alleged that I defiled an idiot or an imbecile as is recorded in the trial proceedings;

2. THAT I pray for leniency.

3. THAT the sentence imposed is harsh and excessive."

Once again, we shall revert to those grounds and the submissions thereon later in this judgment.

The facts of the case present no difficulty.

S A (the child) was born retarded sometime in 1992. A clinical officer who medically examined her found a history of epilepsy and the investigating officer said she was mentally retarded. The trial court which had the advantage of seeing the child made a finding of fact that she was a complete imbecile who was unable to utter any comprehensive word, while the superior court found that she was mentally retarded. She did not testify at the trial of the appellant. Her mother was ***MA*** (PW3), a business lady. On 19th August, 2007 she had to go to Chemelil and therefore left the child at home with two other children. She did not return home until 8 p.m. when she was informed that her daughter had been defiled and was at Ahero Police Station. She went there and found the child had been taken to Ahero hospital where she found her lying down tired and sick. Her clothes were dusty and she had no underwear.

The details of what had happened to the child in her mother's absence were filled in by two eyewitnesses. The first was ***Cynthia Akinyi*** (PW2) who was a sister-in-law of the appellant and neighbour of ***MA***. That afternoon at about 3.30 p.m., she was outside her house bathing her 3 – year-old baby when she saw the appellant accompanied by the child, whom she knew as a retarded girl she called *"lady"*. They were heading towards a deserted or disused house and on reaching there she saw, in her own words:

"I then saw accused seizing the girl and put her down on the ground and the accused lay on the girl. He lay on top of her. I decided to rush and call the grandmother of the child."

The grandmother of the child was ***W O*** (PW2). W immediately called another man who was walking by her house and they both headed towards the deserted house. We shall let W speak for herself on arrival at the scene: -

"I spotted Alfayo with my grandchild behind that house. I found this girl's legs up (pointing at complainant) and Alfayo (accused) was lying on top of her. The place is a bit bushy. I asked "Gombe what are you doing with the small child". He stood up saying "Mother I have not done it". I saw that accused's trouser was unzipped and his penis was hanging outside trouser. The child (complainant) was having no inner pant and her genitalia was visible. The girl's underpant lay just there beside her. I took a sisal and Gombe came and knelt beside me with his hands up in the air and he begged me for forgiveness. I however still hit him 4 times with the sisal. He told me he had not done it. He told me I take him to police. Accused then went to his home."

It is W who took the child home and later, at around 6.40 p.m. to Ahero Police Station where she found ***Pc. Leonard Kimichir*** (PW4). After about one hour, as Pc Kimichir was recording W's report on the defilement, the appellant arrived at the station and told Pc. Kimichir that he had done nothing to the child and wanted a reconciliation. W then identified him and the child also pointed at him, whereupon Pc. Kimichir placed him under arrest forthwith and locked him up in a cell.

The following day, 20th August, 2007, the child and the appellant were examined by ***Fredrick Apindi*** (PW5), a clinical officer at Masogo Health Centre. The child was still shaggy and shabbily dressed and there was a sign of strangling marks on her neck. Vaginal examination revealed that her hymen was broken and had bruises on the labia majora and minora. Vaginal swab was taken and analysis revealed sperm deposits and a whitish discharge which was a sign of candidiasis, some form of sexually transmitted disease. In his opinion, there was forceful penetration in view of the bruises and sperm deposits. The injury inflicted on her was classified as "grievous" and appropriate treatment was prescribed. On examining the appellant, the clinical officer recorded his age as 63 years old and found he had no injuries on his person. His genitalia and inner pants were however dirty with foul smell, but no discharge. He was unable to establish whether the appellant *"did the act or not"*.

The appellant insisted in his defence that he did not commit the offence explaining that he would not have gone to the police on his own if he had done it. He asserted that he was not medically examined to establish his culpability.

The trial court had no difficulty in believing the evidence of the neighbour Cynthia *Akinyi*, who first saw the appellant and reported to W, the child's grandmother WO, who found them *in flagrante delicto*; Pc. Kimichir the investigating officer who also arrested the appellant; and the clinical officer, who supplied the medical evidence, all of whom he found credible and corroborative of each other. The learned trial magistrate drew a negative presumption from the conduct of the appellant in going to the police station to deny any offence as confirmation that he did in fact have an encounter with W at the scene of crime where he also pleaded that he had not done anything to the child.

The superior court upon evaluation of the evidence came to its own conclusions as follows: -

"The court's opinion, on reviewing all the evidence is that the appellant defiled the child S whose age PW5 put at 15 years. The mother PW1 said that she was 14 years having been born in 1992. By calculation the clinical officer (PW5) was right – the complainant was aged 15 years at time of the incident (Exh. P3). Physical examination revealed forceful penetration. She herself did not testify because she was mentally retarded. The evidence of O (PW2) and A(PW3) was direct and cogent. PW3 saw the appellant take the complainant behind a disused house; he knocked her down and lay on top of her. PW2 ran and called her grandmother (PW4). PW2 proceeded to the scene and found the appellant in the act. The child's under pant was on the side. His zip was down; his member was dangling out. The child's private parts were exposed. The appellant rose up and claimed that he had not "done it". He asked to be forgiven. When he followed PW2 and the child to the police station again there he said that he had not done it. And he asked to be reconciled with the complainant. From all the above, the appellant did defile the complainant. It is not true he was not medically examined. PW5 did so and filled P3 form in court. He did not find anything to the effect that he had "done it." PW5 did not tell the appellant that he was HIV positive either and in the circumstances of this case it did not matter that the undergarments of either the complainant or the appellant to be produced as exhibits. The direct evidence of PW2 and 3 who caughthave the appellant in the act during daylight was overwhelming. This is someone well known to the witnesses."

As stated earlier, there are three grounds laid out in this appeal to challenge those findings, but in his submissions before us, the appellant did not appear to challenge the conviction anymore. He briefly complained that he was not medically examined by any doctor to confirm that he committed the offence, and then focused on his prayers for leniency stating that he was an old man of 83 years having been born in 1929. He pleaded for interference with the sentence which, in his view, was excessive.

The appellant, owing to his level of literacy, was perhaps unable to articulate the first ground of appeal which states that the charge upon which he was convicted was defective. We did observe earlier that the particulars of the charge include a phrase that was omitted in the new Act. ***Section 8*** of the Act has 8 sub-sections, all relating to the offence of 'defilement'. It is pertinent that we reproduce the first 4 sub-sections which state as follows: -

"8 (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

(4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years."

In its wisdom, Parliament chose to categorise the gravity of that offence on the basis of the age of the victim, and consequently, the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under ***section 8 (1)***. Does the reference to *"a child under the age of sixteen years"* invalidate a charge framed under ***section 8 (3)*** of the Act which only relates to a *"child aged between the age of twelve and fifteen"*" We do not think so. That is because the provisions of the Act are amenable to the test of *"failure of justice"* provided for under ***section 382*** of the Criminal Procedure Code, stating in relevant part that:

"....no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal..... on account of an error, omission or irregularity in the complaint.....charge or other proceedings.....unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

Firstly, the issue was not raised since the trial began and was only raised for the first time in this second appeal. The appellant gave no reason for failure to do so earlier. We must therefore find, and we now do so, that it was not raised at the earliest opportunity although it could and should have. Secondly, there was no failure of justice occasioned by the irregularity. The substantive charge was one of defilement and by definition in law it could only be carnal knowledge with a female below the age of majority. Whether the female was *"below the age of sixteen"* as stated in the particulars or between *"twelve years and fifteen years"* as stated in the relevant section of the law has no reflection on the conviction so long as it is proved beyond reasonable doubt that there was penetration. The appellant had no illusion about the offence facing him and the defence he had to offer and he participated fully in the trial in a language understood by him. There was no prejudice or failure of justice. In our view, upon careful consideration of the evidence on record and the concurrent findings of facts made by the two courts below, we are in no doubt that the appellant was properly convicted and the appeal against conviction is rejected.

The remaining two grounds relate to severity of sentence which would ordinarily be outside the jurisdiction of this Court on second appeal as it is a question of fact. See ***section 361 (1) (a)*** Criminal Procedure Code. But the appellant was sentenced to serve 20 years imprisonment on the basis that ***section 8 (3)*** provided for that sentence as a minimum. That would indeed be the plain reading of the section, but only if, as stated earlier, the age of the offender which is a necessary ingredient of the offence charged is proved beyond reasonable doubt. The sentence of 20 years minimum can only be imposed if the child defiled was aged *"between the ages of twelve and fifteen years."*

In this case, the age of the child was never medically assessed or proved through any documentation. The nearest the evidence came to proving the age was the statement by her mother MAwhen she testified on 10th October, 2007 that:

"This child in court is mine aged 14 years born in 1992....."

The other piece of evidence on age was an estimate made in the P3 form dated 20th August, 2007 that she was 15 years old.

The offence was committed on 19th August, 2007. Counting back fifteen years would take the birth of the child to 19th August, 1992. So that, the child could only have been 15 years or below and therefore within ***section 8 (3)*** if she was born after 19th August, 1992. The evidence of the mother was that she was born in 1992. No month or date is mentioned. If she was born between January and July 1992, she would obviously have been above 15 years of age but below sixteen when the offence was committed. It seems to us that there is an obvious lacuna in the Act as there is no provision for punishment where the child is between the age of fifteen and sixteen years. ***Section 8 (4)*** caters for the ages of sixteen to eighteen years. We must therefore take the construction which is favourable to the appellant. In our view, there is a reasonable doubt over the actual age of the child as at the time of commission of the offence. The onus was on the prosecution to clear such doubts, failure to which the benefit would go to the appellant. We so find.

It follows upon such finding that the sentence imposed upon the appellant had questionable legality and thus entitles this Court to interfere. The punishment for defiling a child between the age of sixteen and eighteen is a minimum of 15 years unless there are reasons to enhance it under ***section 8 (4)*** of the Act. That is the lawful sentence which ought to have been imposed.

In the result, we allow this appeal, which was strongly opposed by the state through learned Senior State Counsel, Ms. Mary Oundo, but only to the extent that it affects the sentence. The appeal against conviction is dismissed. The appeal against sentence is allowed to the extent that the sentence of 20 years is set aside and substituted with a sentence of 15 years. The sentence shall run from the date of the appellant's conviction by the trial court on 24th January, 2008.

It is so ordered.

Dated and delivered at Kisumu this 20th day of April, 2010.

J.E. GICHERU

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CHIEF JUSTICE

S.E.O. BOSIRE

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR