Case Number:	Criminal Appeal 63 of 2015
Date Delivered:	11 Mar 2016
Case Class:	Criminal
Court:	Court of Appeal at Mombasa
Case Action:	Judgment
Judge:	Milton Stephen Asike-Makhandia, William Ouko, Kathurima M'inoti
Citation:	Bakari Ndoro v Republic [2016] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Criminal
History Magistrates:	-
County:	Mombasa
Docket Number:	-
History Docket Number:	H.C.CRA. No. 15 of 2011
Case Outcome:	appeal dismissed
History County:	Kilifi
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A.)

CRIMINAL APPEAL NO. 63 OF 2015

BETWEEN

BAKARI NDORO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of the High of Court of Kenya at Malindi (Meoli, J.)

dated 19th December, 2012

in

H.C.CRA. No. 15 of 2011)

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JUDGMENT OF THE COURT

The appellant worked for **M N** (PW9) as a farm hand and resided in her homestead. PW9 was a neighbour of **M N W** (PW3) and **P M** (PW4), a couple. Infact their homesteads were hardly 100 metres apart. The couple had children one of whom was PW1, the complainant then aged 8 years. On 19th June 2009, whilst PW3 had taken one of her children to hospital and PW4 had taken his bicycle for repairs, the complainant and her younger sister who had been left alone at home decided to visit another neighbour. On the way, they encountered a man who according to them was the appellant who persuaded them to go to his house nearby and wait for him. At nightfall, he appeared, by which time the complainant's sister aged 3 years was fast asleep. He then removed the complainant's skirt, her pant and sexually assaulted her. She experienced a lot of pain and cried during the encounter. When done he gave her some money and a mango to silence her. The complainant and the sister then left for home. When the parents came home at about 9 p.m., they found the complainant crying. She told them what the appellant had done to her. PW3 examined her genitalia and found them "*dirty*". As it was at night, they took no action until the following day when PW4 confronted PW9 with the information. PW4 advised him to get Administration Police Officers in the neighbourhood to come and arrest the appellant. **APC Dickson Anyanga Akwato** (PW1) in the company of **APC Onyango** acted on the complaint and duly arrested the appellant. It was then that PW4 took the complainant to Witu Police Station to report the incident. **PC Gerald Nyamita** (PW7) received the report and subsequently issued a P3 Form and escorted them to Mpeketoni Sub District Hospital. **Dr. Stephen Otieno Ngwera** (PW5) the medical superintendent at the said hospital examined and treated the complainant. Subsequently, he filled the P3 Form. In his examination he noted that parts of the hymen were torn and there was whitish discharge from the vagina. He concluded that there was evidence of intercourse.

Armed with this evidence, PW8 then charged the appellant with offence of defilement contrary to **Section 8(2)** of the Sexual Offences Act. Ideally, it should have been defilement contrary to **Section 8(1)** as read together with **Section 8(2)** of the Sexual Offences Act. However, nothing turns on this. The particulars of the charge were that the appellant on the night of 19th and 20th June 2009 at [particulars withheld], Kipini Division of Tana Delta District within Coast Province caused his penis to penetrate the vagina of the complainant, a girl under the age of eleven years. There was also a second count of indecent act with a child contrary to **Section 11** of the Sexual Offences Act. Ideally, this charge should have been framed as an alternative to the main charge and not as a second charge. Again nothing much turns on this. The particulars in support thereof were that the appellant on the same day and place intentionally caused his penis to touch the vagina of the complainant a girl under the age of eleven years.

When arraigned before the Senior Resident Magistrate's Court at Lamu on 25th June 2009, the appellant pleaded not guilty to both charges and in his defence denied ever committing the offences though he conceded that the complainant was a neighbour.

The learned trial magistrate accepted the prosecution evidence and rejected the defence thereby convicting the appellant. Upon such conviction the appellant was surprisingly sentenced to 21 years although the legal sentence should have been life imprisonment. We shall revert to this aspect later in this judgment. The appellant's appeal to the High Court was rejected in its entirety by that court (**Meoli, J.)**, notwithstanding the legality or otherwise of the sentence hence this appeal.

In his grounds of appeal, the appellant complains that the High Court erred in law as follows;

i. by not considering that the age of the complainant was not proved beyond reasonable doubt,

ii. vital witnesses were never summoned to testify,

iii. not considering that the doctor's evidence was inconclusive on the question of defilement,

iv. prosecution case was not proved to the required standard, and lastly,

v. his defence raised reasonable doubt and the case should have been resolved in his favour.

On the eve of the hearing of the appeal, the appellant filed written submissions in support of the appeal and wholly relied on them at the hearing.

Opposing the appeal, **Mr. Kiprop**, learned Principal Prosecution Counsel submitted that the age of the complainant was proved beyond reasonable doubt, that she was under the age of eleven years as charged. Her own evidence, that of her mother, PW2, the doctor who examined and treated her (PW5) all attest to this fact.

Regarding vital witnesses, counsel submitted that relevant witnesses were called and that the appellant had not shown which others that ought but were not called and lastly, the evidence of the doctor was emphatic that the complainant had been defiled. Finally counsel submitted that the appellant's defence was duly considered by the two courts below and rejected and rightly so in his view. To counsel therefore the prosecution's case was proved as required. He therefore urged us to dismiss the appeal.

This is a second appeal and we are, by dint of the provisions of **Section 361(1)(a)** of the Criminal Procedure Code to consider only matters of law. This position has been restated in a string of the

decisions of this Court. Suffice to mention **Stephen M'Riungu & 4 others v Republic [1982-88] 1 KAR 360** and **John Kados v Republic, Cr. App. No. 149 of 2006** (UR). In the latter case, this Court expressed itself on the issue thus: " ……..*this being a second appeal, we are reminded of our primary role as a second appellate court namely to steer clear of all issues of facts and only concern ourselves with issues of law…."*

The points taken, in our view, raise questions of law and we shall address them in the manner they were presented to us. However, before we do so, we need to say something about the sentence. In view of the sentence imposed by the trial court and confirmed by the High Court, which we deem illegal, we warned the appellant during the hearing of the appeal that should his appeal not succeed, we were likely to disturb the sentence of twenty one (21) years imposed by enhancing it to life imprisonment. The appellant elected to pursue the appeal the warning notwithstanding.

On the question of age of the complainant, the appellant vehemently argued that the age of the complainant was not proved as no birth certificate or age assessment report were tendered in evidence to establish the exact age of the victim. The appellant placed much reliance on the decision of this Court differently constituted in the case of **Elias Kaingu Kasomo v Republic [2014] eKLR**. That the evidence of the complainant herself, that of the mother and doctor all giving the age of the complainant as 8 years was not sufficient to prove age. The respondent on the other hand took a contrary view. That the evidence by the above three witnesses proved beyond reasonable doubt the age of the complainant.

In the recent case of **Mwalongo Chichoro Mwanjembe v Republic, Msa Cr.App. No. 24 of 2015** (UR) we addressed at length the issue of age of complainants in defilement cases thus:-

"…the question of proof of age has finally been settled by recent decisions of this Court to the effect that it can be proved by documentary evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. It has even been held in a long line of decisions from the High Court that age can also be proved by observation and common sense. See Denis Kinywa v R, Cr. Appeal No.19 of 2014 **and** Omar Uche v R,Cr.App.No.11 of 2015**. We doubt if the courts are possessed of the requisite expertise to assess age by merely observing the victim since in a criminal trial the threshold is beyond any reasonable doubt. This form of proof is a direct influence by the decision of the Court of Appeal of Uganda in** Francis Omuroni v Uganda, Crim. Appeal No.2 of 2000**. We think that what ought to be stressed is that whatever the nature of evidence presented in proof of the victim's age, it has to be credible and reliable…"**

In this case the complainant herself in her *voire dire* examination as well as in her evidence under oath stated her age to be 8 years. By the act of the court conducting a *voire dire* examination of the complainant before receiving her evidence, the court was satisfied that the complainant was a child of tender years. PW3, her mother, also testified and stated emphatically that the complainant's age at the time was 8 years. Similarly, PW5 the doctor who examined and treated the complainant determined that her age was 8 years. He proceeded to fill the P3 Form on that basis. The appellant did not at all cross-examine these witnesses on this aspect. Finally, from the particulars of the charge sheet, it is clear that the complainant was said to be a child below the age of 11 years. Under **Section 8** of the Sexual Offences Act, the gravity of the offence is determined by the age bracket of the victim. The first age bracket is a child aged eleven years and below, followed by the age bracket between twelve and fifteen years and lastly sixteen and eighteen years. The complainant fell within the first category. We are certain that whoever prepared the charge sheet was deliberate in the particulars thereof to state that the complainant was under the age of eleven years. In terms of **Section 8(2)** of the Sexual Offences Act

aforesaid a defilement committed against a child aged eleven years or less attracts life imprisonment upon conviction. It has not been suggested by the appellant that the complainant's age bracket was not that of below eleven years.

On the whole we are satisfied that the age of the complainant was proved to the required standard. She was aged below eleven years as per the particulars of the charge sheet.

The complaint by the appellant that the evidence of PW5 was inconclusive with regard to the offence charged cannot be true. In his testimony, the doctor stated that upon examining the complainant's genitalia he noted that the hymen was torn as well as the presence of vaginal tear. This suggested intercourse. How then can the appellant claim that the doctor's evidence was not conclusive with regard to the defilement of the complainant" This examination was conducted a day after the incident

On the question of failure to call vital witnesses, the appellant has not indicated who these witnesses were. Indeed in his written submissions he does not revert at all to this aspect of his appeal. In our view all the relevant witnesses were summoned and they testified. The evidence on record was thus sufficient to sustain the conviction. Accordingly, the appellant's further complaint that the prosecution did not prove its case to the required standard in law holds no water at all.

Finally, we would also dismiss the appellant's last ground of appeal that his defence was reliable though not considered and that had it been considered, it was capable of displacing the prosecution's case. What did the appellant say in his defence" He knew the complainant as a neighbour. On the day of his arrest, he merely saw two police officers approach who requested him to accompany them to the police station. He complied and at the police station he was charged with the offence he did not know. How can this defence be said to create doubts in the prosecution case" He did not address at all what he was up to the previous day. He only concentrated on the events of the day of his arrest.

In the final analysis, we are satisfied that the two courts properly analyzed the evidence and came to the correct decision with regard to the question of the age of the complainant and indeed the defilement of the complainant. However, both courts erred in imposing the illegal sentence of twenty one (21) years even after finding that defilement of a girl under the age of 11 years had been committed by the appellant. They ought, pursuant to **Section 8(1)** of the Sexual Offences Act, to have imposed life imprisonment.

The appeal on conviction is accordingly dismissed. We shall however interfere with the sentence imposed to the extent that we substitute the sentence of twenty one (21) with that of life imprisonment.

Dated and delivered at Mombasa this 11th day of March 2016

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

K. M’INOTI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR