Case Number:	Criminal Appeal 43 of 2016
Date Delivered:	13 Nov 2019
Case Class:	Criminal
Court:	High Court at Garsen
Case Action:	Judgment
Judge:	Roseline Lagat-Korir
Citation:	Smk v Republic [2019] eKLR
Advocates:	Mr. Mwangi for the Respondent
Case Summary:	-
Court Division:	Criminal
History Magistrates:	J.W. Onchuru (PM)
County:	Lamu
Docket Number:	-
History Docket Number:	Criminal Case No. 126 of 2016
Case Outcome:	-
History County:	Lamu
Representation By Advocates:	One party or some parties represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

CRIMINAL APPEAL NO. 43 OF 2016

SMK.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in the Principal Magistrate Court

at Mpeketoni Criminal Case No. 126 of 2016 by Hon. J.W. Onchuru (PM)

dated 19th October 2016)

JUDGMENT

1. The Appellant was charged with the offence of defilement contrary to section 8 (1) as read with section 8(2) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on 2nd March 2016 at around 1000hrs at [particulars withheld] Village, Mpeketoni Division in Lamu West Sub-County within Lamu County, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of JM a child of 8years old.

2. He faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act (SOA). The particulars were that on 2nd March 2016 at around 1000hrs at [paritculars withheld] Village, Mpeketoni Division in Lamu West Sub-County within Lamu County, the Appellant intentionally and unlawfully touched the vagina of JM a child of 8 years old with his penis.

3. The prosecution called five witnesses in support of its case. PW1 (JM), the victim, told the court that on the day of the offence she had been sent home from school when she met with the Appellant along the way. The Appellant got hold of her and carried her to his house where he undressed her before he undressed himself. The Appellant then did “bad manners” by putting his “thing” into her and she felt pain and cried. Afterwards she went home and informed her mother who then informed the chief. She said that she was taken to the police where she recorded her statement and then she was taken to hospital where the doctor checked her as he wrote down his report. She told the court that she knew the Appellant from before the incident.

4. PW2 (EN), the victim’s mother, told the court that on 2nd March, 2016 she was informed by Mama Kavaiko that PW1 had been sent away from school. She took a motor cycle and went to look for PW1 whom she found sitting near a bush next to the chief’s office. She caned PW1 before taking her to school where she caned her again before a teacher intervened. When PW1 returned home in the evening, PW2 noticed that she was walking with difficulty and on inquiring what had happened, PW1 told her what the Appellant had done to her. She took PW1 to the police station where their statements were recorded and thereafter they were referred to the hospital where PW1 was examined and a P3 was issued. PW 2 also testified that she took PW1 for age assessment on the 23rd March, 2016.

5. Police Constable Claris Opiyo (PW3), of Mpeketoni police station was the investigating officer. She told the court that she recorded statements from the witness and also escorted the victim to hospital where she was examined. She thereafter had the Appellant arrested and charged. PW3 produced the age assessment report (Pexh 1).

6. Evans Munene Gitari, (PW4), a Kenya Police Reservist (KPR) from Uziwa arrested the Appellant on the instruction of the OCS Mpeketoni police station.

7. PW6 Stephen Ewoi was the clinical officer from Mpeketoni sub-County hospital. He told the court that the victim's hymen was missing and there was evidence of penetration. He produced the P3 (Pexh 2) which he filled on the 10th March, 2016; and the treatment notes (Pexh 3) which he relied on to fill the P3. He also produced the treatment notes (Pexh 4) for the Appellant, which showed that he had pus cells and blood cells.

8. The trial court found a *prima facie* case against the Appellant and placed him on his defence. The Appellant elected to give a sworn statement and did not call any witnesses. He told the court that on 2nd March, 2016, he left his work as a farm hand at around 5pm and passed by a certain lady's house to collect money owed to him. That as he went home he saw a KPR officer who arrested him and took him to the police station where he was charged yet he did not know anything about the allegation.

9. At the end of the trial, the learned magistrate found the Appellant guilty. He convicted and sentenced him to 30 years imprisonment.

10. The Appellant being aggrieved by the conviction and sentence lodged his homemade petition of appeal. His six grounds of appeal were that the court relied on the evidence of the victim (PW1) who was not a reliable witness; that the production of the victim's age assessment report was un-procedural; that the sentence of 30 years imprisonment was illegal as he was underage during the trial; that he was never furnished with witness statements; that the prosecution never proved its case to the required standard, and; that his defence was not considered.

11. Before the hearing proceeded, the Respondent issued a notice seeking to enhance the Appellant's sentence to life imprisonment as prescribed by the SOA. The court explained the consequences of the notice of enhancement to the Appellant and granted the Appellant time to consider his decision to appeal. On the return date to court, the Appellant expressed his considered decision to proceed with his appeal.

12. At the hearing of the appeal on 10thJuly, 2019, the Appellant relied on his written submissions filed on 5th December, 2017. His submissions were to the effect that PW1 was not a reliable witness, because she had been beaten by her mother before she informed her what had happened. He argued that the victim being 8 years old could not have walked without bleeding if indeed she had been defiled. He further submitted that a police officer produced the victim's age assessment report contrary to section 77(1) of the Criminal Procedure Code (CPC).

13. It was the Appellant's further submission that the sentence of 30 years was illegal as he was 17 years old at the time of trial and hence a minor. He argued that there was no evidence that his age assessment was conducted and that the age assessment contradicted PW5's evidence which indicated that he was 17 years old in the P3 (Pexh 1). He submitted that the sentence breached his rights as provided in section 189, 190 and 191 of the Children's Act.

14. In addition, the Appellant submitted that he had not been provided with the witness statements which failure violated his rights to a fair hearing as guaranteed under Article 50(2) (j) of the Constitution. It was his submission that the prosecution failed to prove its case beyond reasonable doubt as the victim was unreliable and that he could not have defiled the victim in his house as he lived there with his parents. He further argued that the medical evidence indicated that the victim's hymen was missing. In this regard, the Appellant reasoned that there were many causes of penetration other than defilement.

15. The Respondent opposed the appeal in its entirety through its submissions dated 14th May 2019 and, which it relied on during the hearing. The submissions were to the effect that all the elements of defilement had been proved to the required standard during trial. That the age of the victim was established through the age assessment report whereas penetration was proved by medical evidence in form of the P3. On identity of the Appellant, the Respondent urged that the victim positively identified the Appellant and there was no chance of a mistaken identity.

16. On the age of the Appellant, the Respondent submitted that there was no proof that the Appellant was a minor at the time of the trial and that the age assessment showed he was an adult. Finally, it was submitted that the Appellant's defence was considered and it did not shake the prosecution's case. The Respondent urged that the conviction was safe and asked the court to uphold the conviction and enhance the sentence to life imprisonment as provided by the S.O.A.

17. This being a first appeal, this court has a duty to revisit the evidence that was before the trial court, re-evaluate and analyse it and come to its own conclusions. Further, the court has to bear in mind that unlike the trial court, It did not have the benefit of

seeing the demeanour of the witnesses and the Appellant during the trial and can therefore only rely on the evidence that is on record. See **Okeno v R (1972) EA 32, Eric Onyango Odeng' v R [2014] eKLR.**

18. I have considered the grounds of appeal, the record and the respective submissions. The only issues for determination which subsumes all the other grounds of appeal is whether the Appellant was supplied with witness statements and whether the prosecution proved its case beyond reasonable doubt.

19. I will begin with the appellant's contention that he was not supplied with witness statements. His submission was that this contravened Article 50(2)(j) of the Constitution which provides that:-

"50. (2) Every accused person has the right to a fair trial, which includes the right: -

(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence."

20. I have perused the trial court's proceedings. The record shows that on 7th March, 2016 when the Appellant took plea the court ordered that the Appellant be issued with witness statements. On the 18th April, 2016 when the matter came up for hearing the Appellant informed the court he was not ready to proceed, as he had not been supplied with witness statements. The trial magistrate again ordered that the Appellant be supplied with witness statements and directed that the matter be mentioned on 9th June, 2016 to confirm the same. When the case came up for mention on 9th June, 2016, the Appellant did not raise the issue of witness statements and the record is silent on whether or not he had been supplied. During the hearing on the 23rd June, 2016 the Appellant did not object to the case proceeding for hearing and did not raise the issue. Throughout the hearing he was able to cross-examine the prosecution witnesses without any difficulty.

21. In **Francis Kanyi Kirunda v Republic [2019] eKLR** where the court was faced with similar circumstances, Wendo J, had this to say:-

"The appellant also complained that his fundamental rights under Article 50(2)(j) and (k) were breached. The appellant alleged that he was not supplied with witness statements. Article 50(2)(c) provides that an accused has right to have adequate time and facilities to prepare his defence while (j) provides that an accused has a right to be informed in advance of the evidence that the prosecution will rely upon.

I have perused the court record. On 27/10/2014 when the appellant appeared before the trial court for plea, the prosecution indicated that there were 5 witnesses to be called of 7 pages and the court directed that the appellant be supplied with witness statements at the court's cost. Thereafter, there was no mention of witness statements. The appellant never complained that the court had not supplied him with witness statements. I believe the appellant was supplied with statements because he would have complained during the hearing. He cannot be heard to complain now when he would have done so in the trial court."

22. I am persuaded by the above decision to find that the Appellant in this case either did not make any attempt to get the witness statements despite the trial court making the orders for their supply, or actually obtained the statements. His silence and willingness to proceed with the trial suggests that he was supplied with the statements. Under the circumstances, I am not persuaded that that Article 50(2)(j) of the Constitution was violated. The appellant has not demonstrated that he was not supplied witness statements and neither has he shown that he was prejudiced in anyway in the trial. As I have stated, the record shows that he cross-examined the witnesses.

23. On whether the prosecution proved the case beyond reasonable doubt, it cannot be gainsaid that the prosecution must prove all the three elements of defilement being the age of the complainant, proof of penetration and the positive identification of the perpetrator. **See Charles Wamukoya Karani vs. Republic, Criminal Appeal No. 72 of 2013.**

24. It is trite that in sexual offences the age of the complainant is relevant for two purposes. Firstly, it is meant to prove that the complainant was below 18 years establishing the offence of defilement, and; secondly it establishes the age of the complainant for purposes of sentencing. See **Moses Nato Raphael v Republic Criminal Appeal No. 169 OF 2014 [2015] eKLR**.

25. During the trial, PW3, the Investigating Officer produced the age assessment report (Pexh1) dated 23rd March, 2016 and prepared by one Lucas M. Chome. The age assessment report indicated that PW1 was 8 years old at the time of the incident.

26. It is a well established principle of law that only an expert can tender an expert report in evidence. **Section 48** of the Evidence Act provides that:-

"When the court has to form an opinion upon a point of foreign law, or of science or art, or as to identity or genuineness of handwriting or finger or other impressions, opinions upon that point are admissible if made by persons specially skilled in such foreign law, science or art, or in questions as to identity, or genuineness of handwriting or fingerprint or other impressions."

27. In the case of **Joseph Makau Katana v Republic Criminal Appeal No. 47 of 2015 [2018]** Odunga J held that:-

"59. In this case the age assessment report was similarly produced by a police officer without any reason being afforded for not calling the maker or even another medical officer to do so. In the premises, I am unable to rely on the said document as evidence of the age of the appellant."

28. I am persuaded by the foregoing decision, to find that the age assessment report produced by PW3, who was not a medical officer, and without a basis being laid for not calling the maker of the document, is not admissible.

29. However, where the actual age of the victim is not proved, it has been held that the apparent age of the victim shall suffice. The Court of Appeal in **Jackson Mwanzia Musembi v Republic [2017] eKLR** quoted with approval its earlier decision in ***Evans Wamalwa Simiyu vs. R* [2016] eKLR** and held that:-

"Consequently, where actual age of a minor is not known, proof of his/her apparent age is sufficient under the Sexual Offences Act. Faced with a similar situation, as in this case, this Court in Evans Wamalwa Simiyu vs. R [2016] eKLR, observed that –

"As to whether the appellant's age fell within 12 and 15 years of age, the evidence was rather obscure. Although the complainant testified that her age was twelve years, she did not explain the source of this information. The Complainant's mother did not offer any useful evidence in this regard as she did not say anything about the complainant's age. This leaves only the evidence of Dr. Mayende who indicated at Part C of the P3 form that the estimated age of the complainant was 12 years. We have anxiously considered the purport of this evidence since the Doctor does not appear to have carried out a specific scientific age assessment. Nevertheless we do note that under part C of the P3 form the age required is estimated age and under the Children's Act "age" where actual age is not known means apparent age. This means that in the Doctors opinion the apparent age of the complainant from his observation was 12 years. Thus, although the actual age of the minor complainant was not established, the apparent age was established as 12 years."

Having taken the foregoing in mind, it is our considered view, that the minor's apparent age was proved by the P3 form."

30. Further, in **Thomas Mwambu Wenyi v Republic Criminal Appeal NO. 21 OF 2015 [2017] eKLR** the Court of Appeal cited with approval **Francis Omuromi Vs. Uganda, Court of Appeal Criminal Appeal No.2 of 2000** which held 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 be proved by birth certificate, the victim's parents or guardian and by observation and common sense…."* (Emphasis mine).**

31. In this case, PW6 Stephen Ewoi, the clinical officer produced P3 Form (Pexh 2) which indicated that PW1's estimated to be 8 years old at the time she was examined. Additionally, the next statutory category of age in the SOA is for defilement of a child aged between 12 and 15 years old. The trial court by observation would have noted if PW1 was older than 11 years considering that the age difference between a child aged 8 years and one aged 12 years is 4 years. Guided by the aforementioned cases and by the evidence on record I find that the apparent the age of the victim was proved by way of the P3 form and that the child's apparent age was 8 years.

32. On the issue of penetration, it is trite that courts mainly rely on the evidence of the complainant which is corroborated by medical evidence as was held in **Dominic Kibet Mwareng vs. Republic Criminal Appeal No 155 OF 2011 [2013] eKLR** where the court stated that:-

"…In cases of defilement, the Court will rely mainly on the evidence of the Complainant which must be corroborated by medical

evidence....”

33. In this case, the victim (PW1) gave evidence how the Appellant picked her as she was heading home from school, took her to his house and defiled her. The clinical officer, PW6, corroborated her testimony. He produced a P3 (Pexh 2) which indicated that the victim’s hymen was missing and that there was presence of pus cells. It was his finding that the missing hymen and presence of pus cells was conclusive proof of penetration. Based on the above I find that penetration was conclusively proved.

34. On the issue of identification, it is trite that the best evidence of identification is that of recognition. In **Francis Muchiri Joseph – V- Republic [2014] eKLR** Court of Appeal where it stated that:-

“In LESARAU – v-R, 1988 KLR 783, this court emphasized that where identification is based on recognition by reason of long acquaintance, there is no better mode of identification than by name….”

35. In the present case, it was the victim’s evidence that she knew the Appellant before the incident happened. When her mother (PW2) asked her why she was walking with difficulty, she gave the name of the Appellant (Karisa) as the person who had picked her on her way from school, taken her to his house, placed her on his bed and “did bad manners” to her. Furthermore, the offence happened during the day and there was no possibility of mistaken identity. This was a clear case of identification by way of recognition. I find that the Appellant was positively identified and that there was no risk of mistaken identity.

36. The Appellant contended that his defence was considered. In his judgment however, the trial magistrate considered the Appellant’s defence and found that the defence was not convincing and disregarded it. I have looked at the evidence on record and I agree with the trial magistrate. Indeed the Appellant’s defence did not cast doubt in the prosecution’s case. The Appellant merely stated how he was arrested and stated that the complainant and her mother were not known to him.

37. On sentence, the Appellant contended that the sentence meted out was illegal and in contravention of his rights as a child. He argued that he was a minor at the time of the offence and ought to have been sentenced in accordance with the Children Act. He faulted his age assessment stating that there was a contradiction between the evidence of PW6, the clinical officer who stated that the estimated age of the victim was 17 years and the age assessment report produced by the prosecution.

38. Section 143 (1) of the Children Act provides that:-

(1) Where a person, whether charged with an offence or not, is brought before any court otherwise than for the purpose of giving evidence, and it appears to the court that such person is under eighteen years of age, the Court shall make due inquiry as to the age of that person and for that purpose shall take such evidence, including medical evidence, as it may require, but an order or judgment of the court shall not be invalidated by any subsequent proof that the age of that person has not been correctly stated to the court, and the age presumed or declared by the court to be the age of the person so brought before it shall, for the purposes of this Act and of all proceedings thereunder, be deemed to be the true age of the person.

39. It is trite that where there are is no documentary proof of age the court will rely on the medical evidence of a doctor as was held in **Thomas Mwambu Wenyi v Republic (*supra*).**

40. In the present case, the trial magistrate made an inquiry on the age of the Appellant on the 7th April, 2016 when the case came up for hearing. The Appellant informed the court that he was 17 years but the trial magistrate ordered that he be taken for age assessment. On the 14th April, 2016 the prosecution presented the age assessment dated 9th April 2016 which indicated that the Appellant was above 18 years old. The trial magistrate rejected the report on the basis that there was no medical proof to support the report and ordered a fresh age assessment to be carried out.

41. On 18/4/2016, the prosecution presented to court another age assessment report dated the 18/4/2016 indicating that the Appellant was 19 years old. There was no objection from the Appellant and the trial magistrate proceeded to set the matter for hearing. The Appellant has not provided any documentary evidence rebutting the age assessment report. He never challenged the production of the age assessment report in the lower court. In the premise, I find that the Appellant was an adult at the time of the offence.

42. In the final analysis, I have found no reason to upset the conviction.

43. As earlier stated, the Respondent gave notice to the Appellant that it would seek enhancement of the sentence. The Appellant was informed of the notice and he confirmed that he understood the notice of enhancement of the sentence and he opted to proceed with the appeal on both conviction and sentence.

44. **Section 354(3)(ii)** of the CPC provides that:-

"(3) The court may then, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may -

(ii) alter the finding, maintaining the sentence, or, with or without altering the finding, reduce or increase the sentence;"

45. The Appellant was charged under section 8(1) as read with section 8(2) of the SOA which provides that:-

(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.

46. It is clear that the sentence of 30 years meted out by the trial magistrate was below the mandatory minimum sentence of life imprisonment and the same could be enhanced.

47. In **Evans Wanjala Wanyonyi v Republic Criminal Appeal No. 312 Of 2018 [2019] eKLR** the Court of Appeal dealt with a matter before it where the High Court had enhanced the sentence of Appellant issued by the lower court from 15 years to the mandatory sentence of 20 years as prescribed in section 8(1)(3) of the SOA. In setting aside the enhanced sentence the court relied on its earlier holding in **Christopher Ochieng – v- R [2018] eKLR Kisumu Criminal Appeal No. 202 of 2011** and pronounced itself thus:-

"In this appeal, guided by the merits of the Supreme Court decision in Francis Karioko Muruatetu & another – v- Republic (supra) and persuaded by the decisions of this Court in Christopher Ochieng – v- R (supra) and Jared Koita Injiri – v- R, Kisumu Criminal Appeal NO. 93 of 2014 in relation to sentencing, we are convinced and satisfied that the enhanced mandatory 20 year term of imprisonment meted upon the appellant by the learned judge cannot stand. We are inclined to intervene. We hereby set aside the 20 year term of imprisonment meted upon the appellant. We substitute the 20 year term of imprisonment with one of imprisonment for a term of ten (10) years with effect from the date of sentence by the trial court on 18th September 2015."

48. Guided by the above decision I shall not enhance the sentence meted out by the trial court. I must observe however, that the defilement of an 8 year old by the Appellant was heinous and that the sentence was lenient in the circumstances. The appeal is therefore without merit and is dismissed.

49. Orders accordingly.

Judgment delivered, dated and signed at Garsen this 13th day of November, 2019.

R. LAGAT KORIR

JUDGE

In the presence of:

S. Pacho Court Assistant

The Appellant in person

Mr. Mwangi for the Respondent