IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, MUSINGA & OTIENO-ODEK, JJ.A.)

CRIMINAL APPEAL NO. 100 OF 2013

BETWEEN

J W A ..…….…….. APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the ruling of the High Court of Kenya at Nairobi (Mbogholi, J.) dated 28th November, 2012

in

H.C.CR. A. No. 188 of 2011)

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JUDGMENT OF THE COURT

1. J W A was charged with defilement of a child contrary to ***Section 8 (1) (2)*** of the ***Sexual Offences Act 2006.*** The charge is that on diverse dates between the 15th day of October, 2009, and 21st October, at Majengo Estate in Nairobi within Nairobi Area Province, the appellant intentionally caused his penis to penetrate the vagina of C. N. a child aged 10 years.

2. After conducting a *voir dire* examination of the complainant and upon hearing the prosecution and defence testimony, the trial magistrate convicted and sentenced the appellant to life imprisonment. His appeal to the High Court was dismissed.

3. PW1, C. N., a female child 10 years old, testified as follows after voire dire examination:

> ***"I am ten years old. I go to MK Primary School. I know the accused. I used to see him where my mother resides. He slept on top of me. My grandmother and my brother and I were in the village. We came to Nairobi. My grandmother went back to Machakos. I was left with my brother and mother and our small baby. At night, I was sleeping with my brother. My mother's house has two rooms. The accused was sleeping in my mother's bed. He came out of bed and came and slept on top of me. I was not asleep. He put his thing for urinating into my thing for urinating. My mother was asleep. I told my mother the following morning. The accused had left his house. I told my mother. She did nothing. She went to work. I did not go to school. I was in a lot of***

pain. When she came in the evening she did not look for us. She went straight to sleep. I told my neighbour. She is a lady. She called my grandmother. My grandmother came. I told her what had happened to me. My grandmother called neighbours. I was taken to hospital where I was given medicine. We then went to report the matter to the police. I later saw the accused at the police station. The man who defiled me is before court. It is the accused. He used to live with my mother".

4. PW5 Dr. Aden Rilwan from Nairobi Women's Hospital examined the complainant on 23rd October, 2009. On examination, she established that the complainant had a normal external vagina, an old hymenal tear at six o-clock position; the vaginal wall and cervix were normal; a swab taken showed pus cell which indicated an infection; she was sexually assaulted as there was evidence of penetration because her hymen had an old tear. A medical report was produced in evidence. PW3 Dr. Zephania Kamau, a police surgeon attached to Nairobi Area, testified that he examined the complainant *a girl 16 years*, and established that the external genitals were normal with injury to the vulva and vagina but the hymen was absent; that he completed the P3 Form.

5. PW2, A. K. M. testified that she is the grandmother to PW1, the complainant, and she received a message about her grandchild from her daughter's neighbours; that the neighbours said her granddaughter had been defiled; that she examined the complainant and found that her vagina was wide and there was a lot of discharge; that she interviewed the complainant who informed her that her stepfather, the appellant, used to defile her. That neighbours took the complainant to hospital for treatment.

6. The appellant in his unsworn testimony denied having defiled the complainant. He stated that a grudge existed between PW2, A. K. M., and himself since he refused to buy land for PW2 at Ksh. 40,000/= and that is why PW2 has implicated him with the offence.

7. The appellant's appeal to the High Court was dismissed and in his home-made memorandum of appeal to this Court has raised the following grounds:

i. That the learned Judge erred in law by failing to consider that the prosecution case was inconsistent and contradictory.

ii. That the learned Judge erred in law in failing to find that the prosecution did not prove its case to the required standard.

iii. That vital witnesses were not called to testify rendering the trial unfair.

iv. That the learned Judge erred in failing to find that the defence testimony was not considered and the trial magistrate did not give cogent reasons for rejecting the defence.

8. At the hearing of the appeal, the appellant appeared in person while the State was represented by the Senior Assistant Director of Public Prosecution, Ms G. N. Murungi.

9. In his written submissions, the appellant stated that the charge sheet was defective to the extent that the prosecution case did not indicate a specific date at which the defilement took place; that the charge sheet refers to diverse dates for the offence and it is not possible to prove conclusively on which date and time the offence took place; that the defence was prejudiced as the appellant was unable to prepare a defence due to non-disclosure of the specific period or duration when the offence was committed; and even the complainant did not state the date or time when the alleged offence was committed; and even the medical doctors who examined the complainant did not give dates for the offence. The appellant contend that the age of the complainant was not ascertained; that the charge sheet indicates the complainant was 10 years old yet PW3, Dr. Zephania Kamau, who examined the complainant stated that she was 16 years old. The appellant cited the case of ***Jon Cardon Wagner – v- R, [2010] eKLR,*** and submitted that in cases of defilement, it is essential to prove the age of the complainant either by way of medical evidence or through other evidence. It was submitted that due to variance of evidence relating to the age of the complainant, the evidence on record was contradictory and the learned Judge erred in confirming

conviction on contradictory evidence, that no birth certificate or medical evidence was tendered to prove the age of the complainant. The appellant further submitted that essential witnesses who arrested him were not called to testify, particularly the complainant's mother who could have revealed to court if the offence was committed since PW1 and PW2 never promptly reported the crime to the police.

10. The State in opposing the appeal submitted that there was overwhelming evidence linking the appellant to the crime; that a *voire dire* examination of PW1 was conducted and the trial magistrate was satisfied the complainant understood the nature of an oath and the need to tell the truth; that the appellant is a step-father to the complainant and there was no issue of mistaken identity; that the testimony of the complainant was corroborated by the evidence of two medical doctors, PW3 and PW4, who confirmed that the complainant's hymen was broken. On the alleged discrepancy as to whether the complainant was a girl of 10 or 16 years, the State submitted that the P3 Form issued to the complainant was clear that she was 10 years old. In addition, the complainant in her own testimony stated she was ten years old. It was further submitted that whatever the age of the complainant, ***Section 124*** of the ***Evidence Act*** provides that corroboration is not mandatory in sexual offences if the trial court is satisfied on the credibility of the complainant.

11. We have considered the submissions made in this appeal and analyzed the judgment of the High Court. This is a second appeal which must be confined to points of law (see ***Kavingo – v – R, (1982) KLR 214***, and ***David Njoroge Macharia – v- R ,[2011] e KLR*** **and** ***Section 361*** **of the** ***Criminal Procedure Act).***

12. **The gists of the appellant's appeal is that there is material contradiction in the age of the complainant and it is unclear whether she was 10 or 16 years old; that the prosecution did not produce a birth certificate or adduce medical or other cogent evidence to prove the age of the complainant; that the penalty for various offences under the *Sexual Offences Act, 2006,* is determined by the age of the complainant. It is our considered view that the age of an individual is a fact and the two courts below established the fact that the complainant was 10 years of age. The complainant testified that she was 10 years old; the medical report produced as Exhibit 1signed by Dr. K. Malumbe who examined the complainant indicates she was born in 1999 and was thus 10 years old in the year 2009, when the offence was committed; the P3 Form tendered in evidence as exhibit 2 shows that the complainant was 10 years old at the time of the offence. On our part, we see no reason to disturb the finding of fact made by the two courts below and we are satisfied that the evidence on record shows that the age of the complainant was proved to be 10 years.**

13. The other ground emphasized by the appellant in his defence is that a grudge existed between him and PW2, the grandmother to the complainant. In the appellant's defence, he stated that PW2 did not support the relationship he had with her daughter and that PW2 had asked him for Ksh. 40,000/= to buy land and when he declined, PW2 became enraged and fabricated the alleged offence. We have examined the judgment of the trial magistrate who considered the issue of grudge raised by the appellant and the trial court stated as follows:

> ***"The complainant impressed me as a truthful witness. I discredit the defence as a mere denial lacking in credibility. His defence that his mother-in-law implicated him with the offence for failing to give him Ksh. 40,000/= to buy a piece of land has no basis. He never established an existing grudge between them. The complainant positively identified him as the man who defiled her. He was not a stranger to her".***

14. The High Court agreed with the appraisal of the defence testimony by the trial magistrate and found that sufficient evidence had been adduced to justify conviction of the appellant. Before us, the appellant has not demonstrated that the two courts below erred in law in their evaluation of the defence testimony. We find that the defence testimony did not displace the prosecution case which had been proved to the required standard.

15. The appellant contend that the evidence of the complainant was not corroborated. We note that the appellant was charged with a sexual offence and the proviso to ***Section 124*** of the ***Evidence Act*** clearly

states that corroboration is not mandatory. The trial court having conducted a *voir dire* examination of PW1 and being satisfied that the complainant was a truthful witness, we see no error of law on the part of the High Court in concurring with the findings of the trial magistrate.

16. The appellant also raised the ground that crucial witnesses particularly the mother to the complainant was not called to testify. ***Section 143*** of the ***Evidence Act (Chapter 80 Laws of Kenya),*** provides that no particular number of witnesses shall, in the absence of any provision of the law to the contrary, be required for the proof of any fact. In ***Julius Kalewa Mutunga -vs- Republic, Criminal Appeal No. 31 of 2005 (Unreported),*** this Court held that:

> ***"As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive".***

17. The appellant was at liberty to call any witness in his defence and failure by the prosecution to call the mother of the complainant or any member of the public neither prejudiced the defence nor weakened the prosecution case which was proved to the required standard. Pertaining to the contention that the charge sheet was defective as it did not specify the exact dates on which the offence was committed, it is our considered view that failure to insert the year 2009, after 21st October, in the charge sheet is an omission that neither prejudiced the appellant nor prevented him from understanding the nature and particulars of the offence with which he was charged. The omission of the year 2009, after the date of 21st October, in the charge sheet is being raised before us for the first time and was neither raised nor canvassed before the two courts below.

18. For the foregoing reasons, we hold that this appeal has no merit and is hereby dismissed.

Dated and delivered at Nairobi this 4th day of July, 2014.

M. K. KOOME

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR