IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: VISRAM, KARANJA & KOOME, JJ.A)

CRIMINAL APPEAL NO. 44 OF 2016

BETWEEN

SAHALI OMAR …… APPELLANT

AND

REPUBLIC ……..... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Malindi (Chitembwe, J.) dated 23rd July, 2015 ***in H.C. Cr. A. No. 12 of 2012*****)**

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JUDGMENT OF THE COURT

Sahali Omar ("appellant") was arraigned before the Chief Magistrates' Court at Malindi, charged in two separate but identical cases, being Malindi Cr. case No.s 8 & 9 of 2010. In each case, he faced two charges, namely defilement of a girl contrary to **section 8(3)** of the Sexual Offences Act No. 3 of 2006 and alternately, indecent act contrary to **section 11(1)** of the Sexual Offences Act No. 3 of 2006.

The charges and particulars in Malindi Cr. case No. 8 of 2010 read as follows:-

> *"**Defilement of a girl contrary to section 8(3) of the Sexual Offences Act No. 3 of 2006:** On diverse dates between the month of August, 2009 and 12th March, 2010 at [Particulars withheld] within Malindi District of the Coast Province, intentionally and unlawfully committed an act which causes (sic) the penetration of your genital organ into the genital organ of A W, a girl aged 12 years old'*

In the alternative;

> *'**Indecent act contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006**: On diverse dates between the month of August, 2009 and 12th March, 2010 at [Particulars withheld] area within Malindi District of the Coast Province, intentionally and unlawfully indecently touched the private parts of A W a girl aged 12 years old."*

The appellant pleaded not guilty on all counts on both files, though separately and the matters were fixed for hearing. On 26th October, 2010, when the matters came up for hearing, the prosecutor applied to have them consolidated as the witnesses were the same in both files. Mr. Muoko, learned counsel, then on

record for the appellant is recorded as saying that he had no objection to the consolidation. The matter proceeded for hearing without fresh plea being taken.

A total of five witnesses testified for the prosecution, with the appellant making an unsworn statement in his defence.

After considering the evidence before her, the learned magistrate was satisfied the prosecution evidence had met the threshold required to sustain the defilement charges. She accordingly convicted the appellant and sentenced him to 20 years' imprisonment in Cr. Case No 8 of 2010 and to life imprisonment in Cr Case No. 9 of 2010.

As would be expected, the appellant felt aggrieved by both conviction and sentence in both matters and moved to the High Court on appeal. That appeal was unsuccessful, as the first appellate court upheld the trial court's findings and sentence, hence this appeal.

Before this Court, the appellant was represented by learned counsel, Mr. Nabwana, who relied on the appellant's homegrown grounds of appeal as well as the supplementary grounds he filed on 8th May, 2016. In a nutshell, he faults both the conviction and sentence on two main grounds. Firstly, that both courts below made concurrent findings of fact without a proper analysis of the evidence in relation to the charges, thereby failing to find that there were material contradictions in the prosecution's evidence and to resolve the same in the appellant's favour. Secondly, that the courts erred in law by failing to hold that since the minors' evidence was never corroborated as required under **section 109** of the Evidence Act ,the same was unreliable within the meaning of **section 34** of the Sexual Offences Act No. 3 of 2006; that given this failure by the prosecution to call material witnesses to corroborate the evidence, the required threshold of proof beyond reasonable doubt was not met and instead of so finding, the first appellate Judge fell into further error by misapplying **section 124** of the Evidence Act to sustain the appellant's conviction.

In his oral submissions before us, learned Counsel expounded on these grounds and urged us to allow the appeal. He contended the evidence adduced was highly contradictory and should not have been relied upon to support a conviction. To illustrate this, he submitted that though the appellant was convicted of defilement, the testimony of A W (PW2) never alluded to defilement by use of fingers. That while J K (PW1) alleged that the appellant had inserted his fingers in both girls' private parts, PW2 never supported that assertion and to that extent, the testimony of the two girls was contradictory. The other contradiction he pointed out was that the medical report not only failed to disclose the age of the injuries, but was also at variance with the P3 report, for it mentioned a whitish discharge which never featured in the P3 report. In addition, the evidence of the minors was never corroborated and that the court misapplied the provisions of **section 124** of the Evidence Act, in convicting the appellant.

Counsel also contended that though all the witnesses spoke of matters which arose in 2009, the medical evidence pertained to 15th March, 2010. Accordingly, he faulted the learned judge for allowing on board, evidence of previous sexual experience which was adduced without leave of court as required under **section 34** of the Sexual Offences Act, thus creating doubt as to the propriety of the conviction. This doubt he said, ought to be resolved in the appellant's favour. Another anomaly pointed out by **Mr. Nabwana** was the prosecution's failure to call key witnesses, namely the mothers of the minors and the investigating officer; whose exclusion he urged this court to find, was prejudicial to the prosecution's case. Lastly, that though the appellant was charged before court in two separate matters, the same were later consolidated and the matter proceeded without an amended charge sheet, which resulted in a miscarriage of justice. On that note, he urged the appeal be allowed, conviction quashed and the sentence set aside.

Opposing the appeal, was **Mr. Yamina,** Principal Prosecution Counsel, who began by saying that consolidation of matters is meant to enhance judicious hearing without prejudice to any party. That whilst before the trial court, the appellant was represented by counsel and there was no objection to the consolidation and even though an amended charge sheet was never done, any defects thereto are curable under **section 382** of the Criminal Procedure Code, which caters for such a situation and coupled with the

fact that the appellant was convicted separately on each charge, there was no miscarriage of justice. With regard to corroboration, counsel contended that under **section 124** of the Evidence Act, the minors' testimony was credible especially given the evidence of PW3 and PW4. That according to PW1, the appellant inserted his penis into both the complainants, a fact corroborated by the doctor and that in any event, under **section 5** of the Sexual Offences Act, it is immaterial whether it was a penis or any other object or organ which caused the penetration.

In conclusion, counsel for prosecution stated that even without the testimony of the minors' mothers and the investigation officer, the evidence on record was sufficient to sustain a conviction. With this, he urged the court to dismiss the appeal.

This being a second appeal, only issues of law fall for consideration by this court (see. **section 361 (1)** of the Criminal Procedure Code). In considering such an appeal, the guiding principle is that the Court will normally not interfere with the decision of the first appellate court unless it is apparent from the evidence on record, that no reasonable tribunal could have reached that conclusion. Additionally, this court is beholden to accept the findings of fact of the two courts below, provided they are based on acceptable and clear evidence which was adduced at the trial. (See. **M'Riungu v. Republic [1983] KLR 455**)

This Court in the case of **Thiaka v Republic [2006] 2 EA 326** reiterated this principle and expressed itself in the following terms:-

> ***"… [this Court] will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings."***

In order to determine whether the two courts below undertook a proper evaluation and analysis of the evidence, a brief recap of the testimony is in order. According to the record, PW1 and PW2, were two little girls aged 9 and 12 years old respectively, living in the same neighbourhood as the appellant. In October 2009, the appellant who lived alone, summoned the two girls and asked them to fetch water for him, which they did. However, upon their return, he grabbed the duo, locked them up in his house took off their underwear and proceeded to defile them. When PW1 attempted to unlock the door, she was threatened with dire consequences and both were told never to speak of the incident to anyone. Unfortunately, for PW2, this was neither the first nor last time she would face such tribulations at the hands of the appellant, who on three other different occasions defiled her and warned her against telling anyone about it, which she never did, and instead continued to suffer in silence.

Nonetheless, PW1 became privy to one of the other instances when PW2 was being so defiled, for the appellant had on that day locked himself together with PW2 in his house and had ordered PW1 to stand outside. Unbeknown to him, PW1 instead rushed home and alerted her two older brothers A K and L K. aged 12 and 13 years respectively, who went to the appellant's window, peeped and saw him fondling PW2's breasts while urging her to lie down. From the record, the appellant's day of reckoning came through PW1, who thereafter reported the incidents to her mother, as a result of which the appellant was arrested and charged.

According to PW5 (Ibrahim Abdulahi) a registered medical practitioner, a medical examination of both girls revealed that both had indeed been defiled. On his part, the appellant, in his unsworn statement of defence simply stated that on 12th February, 2010, he was arrested and charged at the instance of one Kahindi Ngombo over offences he knew nothing about.

Turning to the subject matter of this appeal, the main issues for determination appear to be two; whether the two courts below made errors of law and secondly, whether the two courts below failed to appreciate the contradictory nature of the evidence tendered.

On the first issue, the appellant took issue with lack of corroboration of the complainants' evidence, which he said ran afoul of **section 124** of the Evidence Act. The said section, provides for corroboration in criminal cases on these terms:

"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth." (Emphasis added)

The import of that provision is that ideally, the evidence of a child of tender years in criminal proceedings should always be corroborated; notwithstanding the *voir dire* examination of the child under **section 19** of the Oaths and Statutory Declarations Act. In short, that even though the court is satisfied that the child is competent to tell the truth, their testimony should nonetheless be corroborated by independent evidence. However, the section also allows for an exception. Under the proviso thereto, the court is allowed to solely rely on the evidence of a child of tender years if the child is the victim, provided the court first satisfies itself on reasons to be recorded, that the child is being truthful.

Were all the children herein of tender years? The definition of a child of 'tender years' differs; for under **section 2** of the Children Act No. 8 of 2001, a child of tender years is defined as a child under the age of 10 years. However, for purposes of criminal trial and practice, a child of tender years is a matter determined on a case by case basis, the essential element being that the trial court must satisfy itself that the child understands the meaning of oath. If not, *voir dire* must be conducted regardless of whether the child is as young as 10 years old or as old as 14 years (see. In **Kibangeny Arap Kolil v. Republic [1959] EA 92 where** this Court held that the term 'tender years' could include a child as old as 14 years. See also **Patrick Kathurima v Republic [2015] eKLR)** where the term 'tender years was also given a wide berth and not limited to the 10 years stipulated under the Children Act).

That said, four children testified in the present case, two of whom were aged 12 and 13 years and who gave sworn testimony. Only PW1 and PW2 (the complainants) were adjudged too young to understand the meaning of oath and following their *voir dire* examination, gave evidence under affirmation.

The appellant contends that in order to be reliable, their testimony had to be corroborated. It is a well established rule of law that the unsworn testimony of a child of tender years must be corroborated. However, where a child of tender years gives sworn testimony or is affirmed, corroboration is unnecessary. (See. **Patrick Kathurima v. R** *(supra)* and **Johnson Muiruri v. Republic**, **(1983) KLR 445** and also **John Otieno Oloo v. Republic [2009] eKLR)**.

In addition, the proviso to **section 124** of the Evidence Act affords an exception to this general rule in cases of sexual assault where the child in question is not only the sole witness but also the alleged victim. So that as far as PW1 was concerned, even though neither PWs 2, 3, 4 or even 5 (the medical practitioner) could directly support her testimony, the court could nonetheless rely on it provided it recorded its reasons. In this case, the trial court is seen to have addressed itself thus:

"…The complainant did not mention anyone else. The offences were committed during the day. The accused was well known to PW1, PW2, PW3 and PW4."

The appellant has not taken any issue with the reasons recorded by the trial court. This, in addition to the fact that PW1 and PW2 gave evidence under affirmation, the ground on corroboration should fail.

The second issue of law raised by the appellant was the failure by the prosecution to call some of its crucial witnesses, namely the investigating officer and the complainants' mothers. **Section 143 of 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 principle used to determine the consequences of failure to call witnesses was succinctly stated in **Bukenya & Others v Uganda [1972] EA 549;** where the Court held that:-

> ***"(i) The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.***
>
> ***(ii) That Court has the right and duty to call witnesses whose evidence appears essential to the just decision of the case.***
>
> ***(iii) Where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution."***

The prosecution reserves the right to decide which witness to call. Should it fail to call witnesses otherwise crucial to the case, then the court has the mandate to summon those witnesses. But should the said witnesses fail to testify and the hitherto adduced evidence turn out to be insufficient, only then shall the court draw an adverse inference against the prosecution. T*his is because the prosecution is not obliged to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt (see.* **Keter v Republic [2007] 1 EA 135).**

In this case, the testimony and evidence adduced by the five prosecution witnesses was sufficient to prove that the complainants had been defiled by the appellant. As such, the situation hardly called for the drawing of an adverse inference with regard to the 'missing' witnesses.

The other issue of law raised by the appellant was with regard to the evidence of the appellant's previous sexual experiences. According to Mr. Nabwana, the witness' testimony pertained to acts perpetrated in 2009 while the medical reports adduced in evidence bore dates in March, 2010. In view of that, he said, the court ought not have relied on the oral testimony of the witnesses, for it pertained to evidence on the appellant's sexual history, which evidence was adduced without leave of court as required under section 34 of the Sexual offences Act.

The said provision, provides that;

> ***"No evidence as to any previous sexual experience or conduct of any person against or in connection with whom any offence of a sexual nature is alleged to have been committed, other than evidence relating to sexual experience or conduct in respect of the offence which is being tried, shall be adduced, and no question regarding such sexual conduct shall be put to such person, the accused or any other witness at the proceedings pending before a court unless the court has, on application by any party to the proceedings, granted leave to adduce such evidence or to put such questions."*** (Emphasis added)

Our understanding of this provision is that where a party wishes to advert to a complainant's sexual history, leave of court must first be sought and granted. Nevertheless, such leave is only required in cases where the previous sexual experience under reference does not relate to the present offence for which a person is being tried. In other words, leave is not necessary if the evidence in question relates to the same transaction and offence being tried**. As stated by this Court in S.J v. Republic [2016] eKLR; the '***section deals with the evidence of character and previous sexual exploits of the complainant*.' In this case the previous conduct or character of the complainants was not an issue whatsoever.

In this case, no leave of court was required prior to the reception of the witness' oral testimony, for both the oral testimony and the medical reports pertained to one transaction- the defilement or indecent acts against PW1 and PW2. As a result, that contention has no basis at all and it too must fail.

The last issue of law raised was the alleged failure by the prosecution to amend the charge sheet upon consolidation of the cases. Counsel for the appellant termed this as a fatal defect. But looking at Section

382 of the Criminal Procedure Code, it is provided that;

> ***"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, 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."*** (Emphasis added)

In this case, no objection was raised concerning the necessity for amendment of the charge sheet. In addition, the appellant has not shown the prejudice he suffered (if any) on account of the failure to amend. As noted from the record, counsel appearing for the appellant explicitly told the court that he had no objections to the consolidation and the matter proceeding as was. The appellant cannot at this stage complain that the charge sheet ought to have been amended. We agree that the procedure adopted by the learned magistrate was irregular, but we note that plea had been taken in both files and no evidence had been called before the consolidation. We reiterate that there was no prejudice occasioned to the appellant whatsoever by the non amendment of the charge sheet as the appellant all along understood the charges he was facing. Consequently, that ground too fails.

On the second issue, counsel submitted at length on what he termed as contradictions between PW1 and PW2's testimony on penetration and defilement. He submitted that the testimony of PW1 was self contradictory and that neither PW1 nor PW2 ever spoke of defilement by the use of fingers. Further, that PW2 never attested to having been defiled while she was with PW1. As such, that the convictions cannot stand. We note from the record that, in her examination in chief, PW1 recounted two incidences where she fell victim to the appellant.

We note that there may have been a few contradictions between the complainants on whether fingers were used or not. We hold the view however that those contradictions were very minor and did not negate the proven fact that indeed there was penetration into the complainant's private parts. Moreover, penetration whether by use of fingers, penis any other gadget is still penetration as provided for under the Sexual Offences Act. There are concurrent findings from the two courts below, to the effect that the complainants were indeed defiled. We have not been given any reasons whatsoever as to why we would depart from those findings. They are well founded and grounded on the law and evidence. The only question that remained was whether the appellant was the perpetrator.

Of note is that the appellant was a person well known to the four children. Cumulatively, these facts serve to create the inevitable conclusion that the appellant was the sole author of the girls' defilement. As a result, the courts below cannot be faulted for finding as much and the contention by learned counsel that neither of the witnesses had attested to defilement by the appellant is misplaced and that ground of appeal should of necessity, fail.

With regard to contradictions between the P3 form and the medical report, that too is once again outweighed by the witness testimony aforesaid. While neither the P3 form nor the subsequent medical report pointed to the appellant as the person who defiled the two minors, both reports were unanimous on the finding that the minors had been defiled. As stated earlier, this finding, coupled with the eye witness and complainants' accounts, were sufficient to support the finding that the appellant was culpable for the defilement of PW1 and PW2, a fact well appreciated by the two courts below.

We have said enough to show that this appeal is devoid of merit. We dismiss it and uphold the findings of the two courts below.

Dated and delivered at Mombasa this 22nd day of June, 2017.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR