



**Ondari; Republic (Respondent) (Criminal Appeal 79 of 2018)
[2022] KEHC 12481 (KLR) (25 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 12481 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CRIMINAL APPEAL 79 OF 2018
LK KIMARU, J
JULY 25, 2022**

**IN THE MATTER OF
ZEDEKIA ORUTA ONDARI APPELLANT
AND
REPUBLIC RESPONDENT**

*((Appeal arising out of conviction and sentence of Hon. M.N. Osoro
(Resident Magistrate) in Kitale Chief Magistrate's Court Criminal
Case (S.O) No. 119 of 2016 delivered on 10th September 2018))*

JUDGMENT

1. The appellant, Zedekia Oruta Ondari was charged with defilement contrary to section 8 (1) as read with section 8 (2) of the *Sexual Offences Act*. The particulars of the offence were that on August 18, 2016 at [particulars withheld] area in Trans Nzoia county, the appellant intentionally caused his penis to penetrate into the vagina of MS, a child aged 15 years. The appellant was alternatively charged with committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act*. The particulars of the offence were that on the same day and in the same place, the appellant intentionally caused his penis to touch the vagina of MS, a child aged 15 years old. When the appellant was arraigned before the trial court, he pleaded not guilty to the charge. After a full trial, the appellant was convicted as charged on the main charge and sentenced to serve twenty (20) years imprisonment.
2. Aggrieved by his conviction and sentence, the appellant has filed an appeal to this court. He has raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted in circumstances that he had not been accorded a fair trial. He faulted the trial court for relying on contradictory evidence to convict him. He took issue with the fact that he was convicted despite the fact that the complainant had not been examined to prove the case. He accused the trial court for rejecting his defence before reaching the impugned verdict. In his supplementary grounds of appeal, the appellant stated that the age of the complainant was not established to the required standard



of proof; crucial witnesses were not called to testify in the case. In the premises therefore, the appellant urged the court to allow the appeal, quash the conviction and set aside the sentence that was imposed on him.

3. During the hearing of the appeal, both the appellant and the prosecution presented to court written submissions in support of their respective opposition positions. The appellant submitted that the evidence of the complainant was irregularly and unprocedurally taken in that no proper *voir dire* was conducted. The appellant urged the court to discount the appellant's testimony in that respect. The appellant asserted that the complainant's age was not established as required by the law. He submitted that it was not clear from the evidence what age the complainant was at the time of the alleged sexual assault is said to have occurred. The appellant insisted that it was important for the age of the complainant to be established as it ultimately affects the sentence that will be imposed on him if this court were to uphold his conviction. The appellant submitted that crucial witnesses were not called to testify in the case. He was of the view that failure to call one Kipsang' who was mentioned by the witnesses but was not called to testify in the case was fatal to the prosecution's case. He explained that lack of corroboration of the said witness' evidence by the said Kipsang' rendered the evidence incredible. He also pointed out that neither the investigating officer nor the doctor who assessed the complainant's age was called to testify in the case. In the absence of these critical witnesses, the charge brought against him was rendered unproven.
4. The appellant further submitted that he was not accorded a fair trial. He complained that his application to recall the complainant for further cross examination was not honoured despite the prosecution being given time to do so. He submitted that this failure compromised his case as he was not able to further cross-examine the complainant to establish the circumstances of the alleged sexual assault. He further noted that the trial court breached procedural requirements by closing and then re-opening the prosecution's case. This, according to the appellant, prejudiced his right to fair trial. He urged the court to allow the appeal on this ground alone. The appellant further submitted that the medical evidence adduced was full of conjectures and suppositions and did not actually support the complainant's testimony that she had been defiled. He stated that the entire evidence, taken in context, proved that the charge against him was a fabrication and should be found to be without credibility. The appellant urged this court to allow his appeal.
5. The prosecution opposed the appeal. They submitted that they had established the three essential ingredients to establish the charge of defilement namely the age of the victim (complainant), the aspect of penetration and the identity of the perpetrator. The prosecution submitted that it had established to the required standard of proof that the complainant MS, aged fourteen (14) years at that time, testified that the appellant strangled her, removed her pant before sexually assaulting her. The appellant then took off after the act. That the complainant was sexually assaulted was corroborated by the testimony of PW2, her mother and medical evidence which established that the complainant had a freshly torn hymen. The appellant was arrested by members of the public immediately after the act. The prosecution therefore urged the court to dismiss the appeal and confirm the conviction and sentence of the appellant.
6. This being a first appeal, it's the duty of this court to re-consider and to re-evaluate the evidence adduced before the trial court in light of the submissions made before the court, before reaching its own independent determination whether or not to uphold this appeal. In doing so, this court is required to take cognizance of the fact that it neither saw nor heard the witnesses as they testified and therefore give due regard in that respect. (See *Okeno vs Republic* [1972] EA 32). The issue for determination by this court is whether the prosecution proved the charge brought against the appellant to the required standard of proof beyond any reasonable doubt.



7. For the prosecution to establish the charge of defilement, it is required to prove three essential elements; the age of the victim (complainant), the aspect of penetration and finally the identity of the perpetrator. In the present appeal, MS, the complainant testified that she was fourteen (14) years old at the time of the alleged sexual assault. When she was recalled to testify in the case, she testified that she was fifteen (15) years at the time. Her mother, PW2 CNS testified that the complainant was born in the year 2003 although she did not produce any documentary evidence to support this fact. An age assessment was done according to the prosecution. However, for some reason, the age assessment report was not produced into evidence. The appellant argued that the prosecution totally failed to establish the age of the complainant and therefore the sentence that was meted upon him was based on guess work and should not be upheld. While conceding to the fact that indeed no documentary evidence had been adduced to support the prosecution's case regarding the age of the complainant, nevertheless the prosecution relied on the case of *PMM vs Republic* [2013] eKLR in urging the court to find that the apparent age of the complainant was between 12 and 14 years.
9. The trial court in evaluating the evidence of the complainant's age held thus:
 12. As regards the age, the charge sheet indicated the survivor was 15 years old. Incident occurred on August 18, 2016 and the survivor testified on November 8, 2016, roughly two and a half months after the incident and stated that she is 12 years old. On her part, PW2, the survivor's mother, stated that the minor was born in 2003 but she was not sure of the date and month, which would make the survivor 13 years old. The P3 form and treatment notes both indicated that the survivor was 12 years old and although the age assessment report was marked for identification, the same was never produced.
 13. Section 8 (3) of the *Sexual Offences Act* provides for punishment for defilement of a child between 12 – 15 years old, the age bracket which the survivor herein falls and the section with which the accused is charged and hence I hold that indeed the age of the survivor was proved to fall within the age bracket provided by subsection 3 of section 8 of the *Sexual Offences Act*. My reasoning is supported by the Court of Appeal in *Denis Kinyua Njeru vs Republic* [2017] eKLR.”
10. This court agrees entirely with the holding by the trial court. Although the age of the complainant was not proved by documentary evidence, nevertheless, the trial court was convinced, upon evaluation of the evidence adduced that the prosecution had established to the required standard of proof that the complainant's age fell within the age bracket envisaged under section 8 (3) of the *Sexual Offences Act*. The complainant's age was thus proved to the required standard of proof beyond any reasonable doubt. This court cannot disturb the holding of the trial court in that regard.
11. The second and third issues for determination were whether penetration and identity of the perpetrator were established by the prosecution. The complainant testified that on the material day, she was at home alone with her younger sister and brother. The appellant, a person she had not known before, went to their home and inquired if her mother was around. When she answered in the negative, the appellant gave Kshs 10 to her younger sister to go and buy sweets. The younger sister left with the brother. The complainant was left alone in the house with the appellant.
12. The appellant, who at the time said he was hawking toothpaste and soap, offered to give some to the complainant. She declined. It was then that the appellant pounced on her, held her by the neck, and forcefully removed her biker before placing her on the floor and then sexually assaulted her. The complainant testified that she struggled while screaming leading to the appellant to let go of her and thereafter make good her escape. The complainant testified that she ran after the appellant while



screaming for help. Her cries for help caught the attention of one Kipsang' who apprehended the appellant and took him to the police.

13. PW2, the complainant's mother, was told of the incident and took the complainant to hospital about three (3) hours after the incident. PW3 John Koima, a clinical officer based at Kitale County Referral Hospital testified that upon examination of the complainant's private parts, he noted that "her hymen was torn fresh vulva and labia had injuries but no discharge ... pus cells were noted." The initial medical treatment papers and the dully filled P3 form were produced as prosecution exhibits No 1 and 2 respectively.
14. This court's re-evaluation of the evidence of both penetration and identity of the perpetrator leads it to the irresistible conclusion that the prosecution established these elements of the charge to the required standard of proof beyond any reasonable doubt. The complainant's oral testimony that she was sexually assaulted was corroborated by medical evidence which proved that indeed she was sexually assaulted. The clinical officer confirmed that the complainant had sustained injuries in her vagina that were consistent with being penetrated. The complainant had fresh injuries which was consistent with the complainant's testimony that she had been sexually assaulted about three (3) hours before she was medically examined by PW3, John Koima.
15. On whether the appellant was the perpetrator, the complainant testified that after the appellant was through, he ran away from their homestead. She screamed while seeking help from her neighbours. She did not lose sight of the appellant who was apprehended by members of the public and taken into police custody. The appellant's defence to the effect that he was a victim of mistaken identity does not carry weight with this court. Although it was the first time for the complainant to meet with the appellant, her testimony clearly set out the sequence of events from her sexual assault to the apprehension of the appellant. This court assessed the complainant's testimony to be truthful and therefore needing no corroboration as provided under the proviso to section 124 of the *Evidence Act*. The appellant's defence did not dent the otherwise strong culpatory evidence adduced by the prosecution witnesses.
16. In the premises therefore, this court holds that the prosecution did establish to the required standard of proof beyond any reasonable doubt that the appellant defiled the complainant in the circumstances narrated by the complainant. His appeal lacks merit. It is hereby dismissed. The conviction and sentence of the trial court is hereby confirmed.
17. It is so ordered.

DATED AT KITALE THIS 25TH DAY OF JULY 2022.

L KIMARU

JUDGE

