



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.266 OF 2019

SIMEON MUGA OPIYO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal arising out of the conviction and sentence of Hon. Boko SPM delivered on 6th December 2019 in Kibera CM CR. Case (S/O) No.98 of 2014)

JUDGMENT

The Appellant, Simeon Muga Opiyo, was charged in count I with the offence of **defilement** contrary to **Section 8(1)** as read with **8(4)** of the **Sexual Offences Act**. The particulars of the offence were that on 20th September 2014 at Kibera Fort Jesus in Langata within Nairobi County, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of MB, a child aged 16 years. In the alternative charge, the Appellant was charged with the offence of **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 20th September 2014 at Kibera Fort Jesus in Langata within Nairobi County, the Appellant intentionally and unlawfully touched with his penis the vagina of M.B., a child aged 16 years.

The Appellant was charged in count II with the offence of **assault causing actual bodily harm** contrary to **Section 251** of the **Penal Code**. The particulars of the offence were that on 20th September 2014 at Kibera Fort Jesus in Langata within Nairobi County, the Appellant unlawfully assaulted MB, thereby occasioning her actual bodily harm. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charges. After full trial, the Appellant was convicted as charged on both counts. He was sentenced to serve fifteen (15) years imprisonment in respect of count I and one (1) year imprisonment in count II. The sentences were to run concurrently.

The Appellant was aggrieved by his conviction and sentence. In his petition of Appeal, the Appellant raised several grounds of appeal, challenging his conviction and sentence. He was of the view that the prosecution failed to establish its case to the required standard of proof beyond any reasonable doubt. He was aggrieved by his conviction stating that the prosecution failed to establish the element of penetration and identification beyond any reasonable doubt. He faulted the trial court for improperly shifting the burden of proof to the Appellant by requiring him to explain why the complainant would be motivated to make a malicious complainant against him.

The Appellant took issue with his conviction stating that the medical evidence adduced by the prosecution failed to corroborate the complainant's assertion that she had been sexually assaulted. He asserted that the evidence on record failed to establish that the injury to the complainant's head was caused by the Appellant. He was of the view that given the densely populated environment where the offence was alleged to have been committed, the prosecution ought to have availed independent witnesses to testify, in addition to the complainant's kin. In the premises, the Appellant urged this court to allow his appeal, quash his conviction and set aside the sentence that was imposed on him.

During the hearing of the Appeal, the Appellant filed written submission in support of his appeal. This Court also heard oral submission from Mr. Olaha for the Appellant and Ms. Akunja for the State. Counsel for the Appellant averred that the prosecution failed to establish the element of penetration to the required standard of proof beyond any reasonable doubt. He stated that the Post Rape Care Form indicated that the complainant was not penetrated. It also failed to corroborate the complainant's assertion that she bled but had taken a bath prior to the medical examination. He further submitted that the doctor's testimony established that the complainant's hair had been plucked a day after the incident was alleged to have happened. He stated that the Appellant was already in custody and could therefore not have assaulted the complainant. He added that the first medical examination conducted on the complainant did not indicate any injuries on the complainant's head. He averred that the evidence by PW5 established that the complainant's hymen may have broken way before the date the incident was alleged to have occurred.

Counsel for the Appellant further submitted that the Appellant's conviction was based on the uncorroborated evidence of the complainant. This evidence was inconsistent and unreliable. He opined that the complainant was an untruthful witness and that the trial court improperly applied the **Proviso to Section 124** of the Evidence Act. He asserted that the trial court failed to conduct a *voire dire* examination prior to

taking down the evidence of PW3, who was a child of 12 years. He averred that the age of the complainant was not established by the prosecution to the required standard of proof beyond any reasonable doubt. He pointed out that the uncertified copy of the complainant's birth certificate was not admissible into evidence.

Counsel for the Appellant averred that Fort Jesus Kibera was a densely populated area and that other people would have witnessed the incident if indeed it happened. He asserted that the complainant stated that she screamed but no one came to her rescue. He submitted that the evidence by the prosecution witnesses was inconsistent and full of contradictions. He was of the view that the trial court ought to have given the Appellant the benefit of doubt. He stated that DNA evidence which was requested by the Appellant was not adduced in evidence. He faulted the prosecution for failing to avail crucial witnesses to give evidence before the trial court. He opined that the trial court failed to properly evaluate the Appellant's alibi defence. In the premises, he urged this court to allow the Appellant's appeal.

Ms. Akunja for the State conceded to the appeal. She submitted that the complainant's evidence with regard to the Appellant's identification was inconsistent and unreliable. She averred that the evidence by the prosecution witnesses in relation to how the incident occurred was full of contradictions. She was of the view that the Appellant was convicted solely based on the uncorroborated evidence of the complainant. She added that the prosecution failed to avail crucial witnesses to establish its case against the Appellant. She therefore urged this court to allow the Appellant's Appeal.

The facts of the case according to the prosecution are as follows. PW1, M.B., is the complainant. She was 16 years of age at the time of the alleged incident. It was her testimony that on 20th September 2014, at about 6.00 p.m., she was at home plucking vegetables from a shamba. The Appellant, who was her tutor, came to the house and asked her to accompany him to his house to check out some books. After she was done with her chores, she went to the Appellant's house. She found him at the gate talking to a lady. She informed him that she would be back later. She went back to the house, and on the way met her cousin, S.

Moments later, the Appellant called her and told her to go to his house. When the complainant got to his house, she sat on the arm of a sofa set that was close to the door. The Appellant asked her to sit on the sofa and close the door but she refused. The Appellant became angry and forcibly closed the door. He told her that the books were in the bedroom. The complainant stood at the bedroom door as the Appellant was getting the books. Suddenly the Appellant grabbed her and pushed her to his bed. He pulled down her skirt and underwear. He then inserted his penis in her vagina. During the struggle, the Appellant pulled her hair. She screamed but no one came to her rescue. After he was done, he apologized and told her that he did not mean to hurt her. She left his house and went home. She took a shower since she felt some substance oozing from her vagina. She was also bleeding.

The complainant called her uncle J and her father and told them what had happened. Her father asked her for the Appellant's phone contact which she sent him. That evening, the Appellant came to her house with some pills which he asked her to take. She refused. He left with the medication. She went to sleep. The Appellant came to the house again and asked her why she had informed her father about the incident. After sometime, her mother, uncle and the Appellant came to the house. Her uncle slapped the Appellant. They reported the incident at Kilimani Police Station. Her mother later took her to Nairobi Women's Hospital for medical examination.

The complainant told the court that the Appellant had tutored her for about a year. He used to tutor her at the house, and sometime she would go to his house. He however had never sexually assaulted her prior to the incident in the present case. The Appellant was known by the nickname 'Jaboda'. She stated that she met the Appellant's brother at his house on several occasions when she went for tuition. However on the material day, the Appellant was alone at his house.

PW2, AJ, is the complainant's mother. On 20th September 2014, she was at Kawangware when she received a call from her cousin. He asked her to go home as the complainant had been sexually assaulted. On her way, she stated that she received a call from the Appellant who told her that what had happened was not his wish, and that he had been possessed by Satan. As she approached her house, she met with the Appellant. Some neighbours emerged and started beating him up. When she got home, she found the complainant crying. They took the Appellant to Kilimani Police Station where they reported the incident. She thereafter took the complainant to Nairobi Women's Hospital for medical examination. PW2 told the court that she had requested the Appellant to tutor her daughter, and he had agreed to do the same. On cross-examination, PW2 testified that the Appellant had not yet started tutoring her daughter by the time the incident occurred. However, she used to see him at her house.

PW3, AR, is the complainant's younger brother. He stated that he was 12 years of age. On the material day, he was outside playing when the Appellant approached him. He asked him where the complainant was. He took the Appellant to the garden where the complainant was plucking vegetables. The Appellant asked the complainant to go to his house to check some books. Later that day, the complainant came back to the house crying. She asked him to call their cousin S. PW3 heard the complainant tell S that the Appellant had raped her. She also called their father and uncle and informed them what had happened. PW3 stated that the Appellant came to the house with some medicine for the complainant which she refused to take. PW2 arrived later with their uncle and took the complainant to hospital.

PW4, Simon Zamba, was a clinical officer from Nairobi Women's Hospital. He adduced evidence on behalf of his colleague Kevin Limo, who examined the complainant. The said Kevin Limo was no longer working at the hospital and was therefore unavailable to adduce evidence before the court. PW4 produced in evidence the complainant's Post Rape Care Form into evidence. He stated that the complainant was examined at Nairobi Women's Hospital on 20th September 2014 at about 10.20 p.m. Upon examination, she had no visible physical injuries. Her external genitalia was normal. Her hymen was absent. There was a whitish discharge coming from her vagina. Upon cross-examination, PW4 told the court that there was no presence of spermatozoa noted. The complainant did not have any injuries on her head. The Post Rape Care Form also indicated that the complainant had not taken a bath at the time of the medical examination.

PW5, Dr. Joseph Maundu, was based at Nairobi Police Surgeon. He examined the complainant on 22nd September 2014. He noted that hair had been plucked off the complainant's scalp. He stated that the injury was caused by a blunt object. Upon examining her genitalia, he noted that the complainant's hymen was missing. PW5 also examined the Appellant. He stated that the Appellant had some tenderness and swelling on his scalp and right eye. The injuries were approximately a day old. His genital area was normal. PW5 produced into evidence the complainant's and the Appellant's P3 forms. Upon cross-examination, PW5 stated that there were no tears on the complainant's vaginal

walls and that her hymen might have been broken prior to the occurrence of the incident.

PW5, PC Robina Oiyee, based at Kilimani Police Station investigated this case. He stated that PW2 came to the police station on 20th September 2014 and reported that her daughter had been sexually assaulted by the Appellant. The complainant stated that the Appellant called her to his house to pick some books. When she went to his house, he pushed her inside his bedroom, undressed her and sexually assaulted her. The Appellant was brought to the station by members of the public. After his investigations, PW5 preferred the present charges against the Appellant. He produced in evidence a photocopy of the complainant's birth certificate which indicated that she was born on 27th February 1998.

The Appellant was put on his defence. In his sworn statement, he denied having sexually assaulted the complainant. He worked as a tutor for a living. On 20th September 2014, he went to watch a football match at a nearby hall. He left at about 6.00 p.m. and went to sit at a spot outside his house where people usually passed time. At about 7.00 p.m., he received a call from the complainant's mother, PW2. She asked him to go to his house. When he got there, PW2 told him that the complainant had accused him of sexually assaulting her. He denied the allegations but before he could explain himself, people started beating him up. They took him to the Chief's office and later to Kilimani Police Station. He was later treated at Mbagathi Hospital. He told the court that he did not tutor the complainant. He only knew the complainant and her mother as his neighbours. PW2 had asked him to tutor her, but he could not do so since she was already in high school, and he did not teach curriculum in the 8.4.4 system. He further stated that he was not known as 'Jaboda'. Jaboda was his brother. He maintained that the complainant did not come to his house on the material day.

DW2, SA, is the complainant's cousin. She told the court that at the material time she was residing at Fort Jesus, Kibera. She was the Appellant's neighbour. It was her testimony that on 20th September 2014, at about 7.00 p.m., the complainant's brother came to her house. He told her that the complainant was asking to see her. DW2 went to the complainant's house. The complainant informed her that the Appellant had sexually assaulted her. She advised the complainant to inform her mother. DW2 denied meeting the complainant earlier on that day. She stated that she only saw the complainant at her house, when she went there after her brother informed her that the complainant wanted to see her.

DW3, John Odera, is the Appellant's brother. He told the court that at the material time he was living with the Appellant at Fort Jesus Kibera. He testified that on 20th September 2014, he and the Appellant were at the house until 4.00 p.m., when they left to watch a football match. They were done watching the match by 6.00 p.m., after which they went to sit outside and chatted. The Appellant received a call and was asked to go to the complainant's house. A few moments later, he heard a commotion. He went to the scene where he found members of the public beating the Appellant. They were accusing him of having sexually assaulted the complainant. He further told the court that the nickname 'Jaboda' referred to him and not the Appellant.

As the first appellate court, it is the duty of this court to subject the evidence adduced before the trial court to fresh scrutiny and re-evaluation, before reaching its own independent determination whether or not to uphold the conviction and sentence of the Appellant. In doing so, this court is required to bear in mind that it neither saw nor heard the witnesses as they testified and cannot therefore make comment regarding the demeanor of the witnesses (See **Okeno vs Republic [1972] EA 32**). In the present appeal, the issue for determination by this Court is whether the prosecution established the charges of **defilement** contrary to **Section 8(1)** as read with **Section 8(4)** of the **Sexual Offences Act**, to the required standard of proof beyond any reasonable doubt.

This court has re-evaluated the facts of this case as well rival submission by the parties. Section 8(1) of the Sexual Offences Act provides that:-

“A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.”

The prosecution is required to establish three elements forming the offence of defilement namely; the age of the complainant, proof of penetration and positive identification of the perpetrator. In the present case, the Appellant complained that the prosecution failed to produce the complainant's original birth certificate, and instead produced an uncertified copy of the same, which indicated that the complainant was born on 27th February 1998. The complainant told the court that she was 16 years of age. The same was not challenged by the Appellant on cross-examination. The P3 form produced in evidence also indicated that the estimated age of PW1 was 16 years of age. The trial magistrate, who had the benefit of seeing PW1 testify, assessed the complainant's age to be that of a child of tender years. This is evident since the trial magistrate deemed it necessary to conduct a *voire dire* examination on the complainant before proceeding to take her evidence. This court therefore holds that the prosecution did establish that the complainant was a child within the meaning of Section 2(1) of the Children Act.

With regards to penetration, Section 2(1) of the Sexual Offences Act defines the same as:

“the partial or complete insertion of the genital organ of a person into the genital organs of another person.”

It was clear from the evidence on record that the prosecution solely relied on the evidence of the complainant to secure a conviction against the Appellant. It was the complainant's testimony that the Appellant was her private tutor. She told the court that she was at home picking vegetables from a garden when the Appellant approached her. He asked her to accompany him to his house to check out some books that he had. After she was done with her chores, she went to the Appellant's house. She found him at the gate talking to a lady. She informed him that she would be back later. She went back to the house, and on the way met her cousin, S (DW2).

After sometime, the Appellant called her and told her that she could now go to his house. When she got to the Appellant's house, he asked her to close the door but she refused. The Appellant got angry and forcefully closed the door. He told her that the books were in the bedroom. The complainant stood at the bedroom door as the Appellant was getting the books. Suddenly the Appellant grabbed her and pushed her to his bed. She tried to fight him off. He pulled her hair and overpowered her. He pulled down her skirt and underwear. He then inserted his penis in her vagina. She screamed but no one came to her rescue. After he was done, he apologized and told her that he did not mean to hurt

her. She left his house and went home where she took a shower since felt some discharge oozing from her vagina. She was also bleeding.

The medical evidence adduced by the prosecution was inconclusive with regard to the element of penetration. The complainant was examined at Nairobi Women's Hospital on 20th September 2014 at about 10.20 pm. This was a few hours after the incident had allegedly occurred. Upon examination, she had no visible physical injuries. Her external genitalia was normal. Her hymen was absent. There was a whitish discharge from her vagina. However, there was no presence of spermatozoa noted. The complainant did not have any injuries on her head.

The complainant was examined again two days later, on 22nd September 2014, by PW5. He noted that hair had been plucked off the complainant's scalp. Upon examining her genitalia, he noted that there were no visible tears, bruises or lacerations on her vaginal wall. Her hymen was missing. Upon cross examination, PW5 stated that there were no tears on the complainant's vaginal walls and that her hymen might have been broken prior to the alleged sexual assault incident.

The complainant's testimony seemed to be inconsistent with the medical evidence adduced before trial court. She testified that she was bleeding after the incident occurred. However the medical evidence adduced failed to corroborate her testimony since there were no tears, lacerations or bruises noted by the two doctors on vaginal examination. PW5 also noted that the complainant's hymen was not freshly torn. He stated that her hymen could have been broken prior to the date of the alleged sexual assault. Therefore the absence of the complainant's hymen was not attributable to the alleged sexual incident in the present case. The Post Rape Care Form also indicated that the complainant had not taken a bath at the time of the medical examination. However according to the complainant's testimony, she took a shower when she got home after the alleged incident.

It is clear that the complainant's evidence of penetration was not corroborated by the medical evidence adduced, which spoke to the credibility of the complainant as a truthful witness. Further, in her testimony, she told the court that she met her cousin, S (DW2), on her way from the Appellant's house. She stated that DW2 saw her talking to the Appellant at his gate. However, DW2 denied the same. She testified that she only saw the complainant when she went to her house, after the complainant sent her brother to call her. This goes to show that the complainant was not a truthful witness.

Aside from the complainant's testimony, PW3 who is the complainant's younger brother told the court that indeed the Appellant came to the house looking for the complainant on the material day. PW3 stated that he asked her to go to his house to check out some books. Later, the complainant came back home crying. She asked him to call her cousin, S. He then overheard her tell S that the Appellant had sexually assaulted her. This court notes that PW3's recorded his statement one year after the alleged incident was said to have occurred. PW3 was a minor aged 12 years. He gave sworn evidence. The trial court failed to conduct a *voire dire* examination prior to taking down his testimony, to establish whether he understood the nature of an oath and the importance of telling the truth. In the case of **Oloo s/o Gai vs. R [1960] EA 86**, the Court of Appeal stated thus;

“... It would have been better for the trial judge to record in items that he had satisfied that a child understands the nature of oath... It should be drawn once again that judicial officers are required by evidence laws to ascertain the validity and viability of evidence from children of tender age.”

In the present case, the trial court failed to assess the intelligence and competence of the witness who was a child of tender age, to ascertain whether she understood the nature of an oath before giving sworn evidence. This was especially necessary since PW3's statement was recorded a year after the incident occurred.

No other evidence that was led by the prosecution to establish the element of penetration. **Section 124** of the **Evidence Act** allows the court to admit a victim's evidence without corroboration in sexual offences. However, the court should be cautious in considering such evidence because the section requires that the court **“is satisfied that the alleged victim is telling the truth”**. As earlier stated in this judgment, this court is not convinced that the complainant was a truthful witness. Her testimony to the effect that she was bleeding after the Appellant allegedly sexually assaulted her was not corroborated by the medical evidence on record. The complainant was examined a few hours after the alleged sexual assault. The medical evidence established that she had no tears, lacerations or bruises on her vaginal wall to prove her assertion that she was bleeding.

Further, the complainant told the court that her cousin, DW2, saw her talking to the Appellant on the material day, a fact which was denied by DW2. She also testified that she took a shower after the Appellant allegedly sexually assaulted her. However, the Post Rape Care Form indicated that she had not taken a shower as at the time of the medical examination. The complainant also told the court that the Appellant had tutored her for about one year prior to the incident occurring, a fact which was denied by the Appellant. Her mother, PW2, told the court that she had requested the Appellant to tutor her and that he had agreed to do the same. He however had not yet started tutoring her when the incident occurred. The evidence by the complainant was again inconsistent with that of PW2.

This court is not convinced that the complainant was telling the truth due to the stated gaps in the prosecution's case. The prosecution failed to establish the element of penetration to the required standard of proof beyond any reasonable doubt. There is simply no evidence to support the charges. The Appellant in his defence denied sexually assaulting the complainant. He stated that on the material day he went to watch a football match at a nearby hall. He left at about 6.00 p.m. and went to sit at a spot outside his house where people usually passed time. At about 7.00 p.m., he received a call from the complainant's mother, PW2. She asked him to go to his house. When he got there, PW2 told him that the complainant had accused him of sexually assaulting her. He denied the allegations but before he could explain himself, people started beating him. He was taken to Kilimani Police Station. His testimony was corroborated by his brother, DW3, who lived in the same house as the Appellant, and was with him on the material day.

Taking into consideration the totality of the evidence adduced by the prosecution witnesses, this court is of the considered opinion that the evidence that was adduced by the prosecution witnesses failed to establish the charges brought against the Appellant to the required standard of proof beyond any reasonable doubt. It may well be that the alibi defence given by the Appellant is true. The prosecution, correctly in the view of this court, conceded to the appeal. In the premises therefore, the Appellant's appeal has merit and is hereby allowed. The Appellant's

conviction in count I and count II is hereby quashed. The custodial sentences imposed on him in both counts are set aside. The Appellant is acquitted of both counts. The Appellant is ordered set at liberty forthwith and released from prison unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 27TH DAY OF MAY 2020

L. KIMARU

JUDGE