



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.20 OF 2018

MICHAEL MWANGI MWANIKIAPPELLANT

VERSUS

REPUBLICRESPONDENT

(An Appeal arising out of the conviction and sentence of Hon. Juma SPM delivered on 16th January 2018 in Kibera CM Cr. Case (S/O) No.79 of 2014)

JUDGMENT

The Appellant, Michael Mwangi Mwaniki, was charged with the offence of **defilement** contrary to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act**. The particulars of the offence were that on 25th July 2014, in Nairobi County, the Appellant unlawfully and intentionally caused his penis to penetrate into the vagina of EW, a girl aged 14 years old. 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 25th July 2014, at Kawangware within Nairobi County, the Appellant unlawfully and intentionally caused his penis to get into contact with the vagina of EW, a girl aged 14 years old. 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 the main charge of defilement and sentenced to serve a custodial sentence of twenty (20) years.

In his petition of appeal, the Appellant raised several grounds of appeal, challenging his conviction and sentence. He was aggrieved by his conviction, stating that the elements of the offence of defilement were not established by the prosecution to the required standard of proof beyond any reasonable doubt. He faulted the trial court for failing to find that the evidence of identification was insufficient to sustain a conviction. He was of the view that the prosecution's case was inconsistent and full of contradictions. He took issue with the fact that the trial court failed to properly evaluate his defence in arriving at its decision. 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, this Court heard oral submission from Mr. Mabach for the Appellant and Mr. Mutuma for the State. Counsel for the Appellant submitted that the Appellant was not properly identified as the person who sexually assaulted the complainant. He stated that PW1, PW3 and PW5 testified that the complainant suffered from a mental illness. He opined that since the complainant was mentally challenged, her evidence of identification was not reliable. He maintained that the Appellant's identification was a case of mistaken identity. Counsel for the Appellant was of the view that the evidence of the complainant required corroboration. To this end, he cited the case of **Michael Mumo vs Republic [2019] eKLR**. He faulted the trial court for relying on the uncorroborated evidence of the complainant in convicting the Appellant. He opined that the trial court ignored the Appellant's defence which was cogent. He averred that there was no evidence linking the Appellant to the crime.

Counsel for the Appellant further submitted that the element of penetration was not established by the prosecution. He stated that the medical evidence adduced failed to prove that the complainant was penetrated as alleged. He submitted that the Appellant did not have legal representation before the trial court, and therefore failed to properly challenge the prosecution's evidence. He maintained that the burden of proof lay with the prosecution which they failed to discharge. In the premises, he urged this court to allow the Appellant's appeal.

Mr. Mutuma for the State opposed the appeal. He averred that the Appellant was properly identified as the person who sexually assaulted the complainant. He pointed out that the court relied on **Section 124** of the **Evidence Act** to convict the Appellant. He stated that the trial court observed that the complainant was telling the truth despite her mental disability. The complainant narrated to the court how the Appellant took her to his store at the market and sexually assaulted her. The Appellant sexually assaulted the complainant on several occasions. He lured her with treats and gifts. He was well known to the complainant. The complainant told PW1 and PW5 what the Appellant had done to her.

Learned State Counsel further submitted that the medical evidence established the element of penetration as narrated by the complainant. He

asserted that the complainant took the police to the Appellant's store at the market where the incident occurred. He stated that the complainant believed the Appellant was her friend. He dismissed the Appellant's assertion that the complainant's evidence of identification was unreliable due to her mental illness. He averred that the medical evidence adduced established that the complainant was of low intellect but not mentally retarded. He further submitted that the defence witnesses were the Appellant's business associates, and were not at the scene of crime when the offence was alleged to have occurred. He therefore urged this court to dismiss the Appellant's appeal.

The facts of the case according to the prosecution are as follows. PW1, RWN, is the complainant's grandmother. She lived with the complainant, as well as the complainant's mother who is mentally challenged. She testified that the complainant was born on 6th July 2000, and was 14 years of age at the time of the alleged sexual assault incident. She stated that the complainant attended a day school between the hours of 7.00 am and 2.00 pm. The complainant used to pass by her place of business at the market after leaving school. On 25th July 2014, the complainant failed to pass by her place of business after school. PW1 called her neighbour who informed her that the complainant was not at home.

PW1 closed her business at about 7.00 pm. On her way home, she met a crowd of women surrounding the complainant. They were asking her to identify someone. PW1 took the complainant to the side and inquired what was going on. The complainant informed her that a certain young man had defiled her. The complainant told her that she was able to identify the perpetrator. PW1 took the complainant to the Chief's Office where they reported the matter. The Chief referred them to Muthangari Police Station. She also took the complainant to Nairobi Women's Hospital for medical examination. The complainant identified the Appellant to the police officers as the man who sexually assaulted her. The Appellant was consequently arrested. PW1 stated that the Appellant was unknown to her prior to the incident.

PW2, E.W., is the complainant. She gave an unsworn statement. She testified that she was 13 years of age. She attended [Particulars Withheld] Primary School, Special Unit. She stated that she always passed by the market on her way from school. On 25th July 2014, she was walking from school when she met the Appellant. The complainant stated that the Appellant used to sell men's clothes at the market. The Appellant took her to his store which was located outside the market. She was wearing her school uniform. He undressed her and asked her to lie on the floor. The Appellant removed his clothes and lay on her. He then did "bad manners" to her. The complainant told the court that the Appellant had sexually assaulted her on several occasions at his store, prior to that material day. She however could not remember when the first sexual assault incident occurred. She stated that he bought her gifts such as sweets, chips and soda. She told her grandmother what the Appellant had done to her. Her grandmother took her to hospital for medical examination. They also reported the matter to the police. The complainant stated that she took the police officers to the Appellant's store at the market where he was arrested. She testified that she had known the Appellant for a long time and that he was her friend.

PW3, Edward Kimani Mbugua, was a clinical officer at Nairobi Women's Hospital. He gave evidence on behalf of his former colleague, Dr. Mbwalu, who examined the complainant at the said hospital. He stated that Dr. Mbwalu had since left the hospital for further studies and could therefore not be availed to adduce evidence before the trial court. He was however well acquainted with his handwriting and signature. PW3 stated that the complainant was examined on 26th July 2014. She was mentally challenged. She was alleged to have been sexually assaulted. He stated that the complainant's hymen was broken. He produced the complainant's Post Rape Care Form in evidence.

PW4, Dr. Kizzie Shako, was based at Nairobi Police Surgery. She examined the complainant on 30th July 2014, which was about five days after the alleged sexual assault incident occurred. She stated that the complainant's external genitalia was normal. Her hymen was pink and was broken with multiple old tears. PW4 also examined the Appellant on 5th August 2014. Upon examination, she stated that the Appellant's genital area was normal with no visible physical injuries. She produced the complainant's and the Appellant's P3 Forms into evidence.

PW5, PC Veronica Thuo, from Muthangari Police Station investigated this case. She was assigned the case on 26th July 2014. She interrogated the complainant. She informed her that she was on her way home from school on the material day of 25th July 2014, at about 2.00 pm. She passed by Kawangware Market where she met the Appellant. The Appellant was well known to her. The Appellant took the complainant to his store where he used to sell clothes. He undressed her and sexually assaulted her. He afterwards bought her chips and sweets. Her grandmother, PW1, met a crowd of people surrounding the complainant as she was leaving the market. PW1 took the complainant to the side. The complainant told her what the Appellant had done to her. She reported the incident to the police. The Appellant was subsequently arrested on 1st August 2014. He was well known to the complainant who identified him. PW4 stated that the complainant took her to the Appellant's store where the incident occurred. After concluding her investigations, she charged the Appellant with the present offences. PW5 produced in evidence the complainant's birth notification which indicated that she was born on 7th June 2000. She also produced in evidence a letter from the special needs school that the complainant attended.

The Appellant was put on his defence. In his sworn statement, he denied having sexually assaulted the complainant. He told the court that he earned a living by selling handbags at Kawangware Market. On 1st August 2014, at about 1.00 pm, he was at the market when he saw two men and the complainant walking towards him. The complainant identified him as the man who sexually assaulted her at the market. He was arrested and taken to Industrial Area Police Station. The Appellant stated that while at the police station, the complainant took the police to the scene of crime at the market and identified other men as the perpetrators. The Appellant admitted that the store the complainant identified belonged to him. He however stated that he did not know the complainant.

DW2, Peter Ndungu, stated that he was a clothes vendor from Kawangware. He told the court that before the Appellant was arrested, the complainant came to the market on two occasions and identified two men as the persons who sexually assaulted her. He further stated that after the Appellant was arrested, the complainant came to the market with her grandmother and identified another man as her perpetrator. DW3, Samuel Kamau Ndungu, was a pastor at Kawangware Market. The Appellant was his friend. He told the court that he believed that the Appellant was framed of the present charges. He stated that the complainant was not a reliable witness since she had implicated other people aside from the Appellant, as the perpetrators of the sexual assault. He testified that the complainant was mentally ill and had even implicated him at some point.

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 demeanour 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 charge of defilement contrary to **Section 8(1)** as read with **Section 8(3)** 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 made by the parties to this appeal. **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. The complainant lived with her grandmother, PW1. PW1 testified that the complainant was born 6th July 2000, and was 14 years of age, at the time of the alleged sexual assault. The complainant's birth notification produced into evidence confirmed that the complainant was indeed 14 years of age at the time of the alleged sexual assault. The Appellant did not challenge the evidence adduced with regards to the complainant's age. 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**. Her age was established to the required standard of proof beyond any reasonable doubt.

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 the complainant's testimony that on 25th July 2014, she met the Appellant on her way home from school. It was about 2.00 pm. She stated that the Appellant sold men's clothes at the market. The Appellant took her to his store which was located outside the market. He undressed her and asked her to lie on the floor. The Appellant then undressed himself and lay on her. She stated that he did “bad manners” to her. By this she meant that she had been sexually assaulted. She told the court that she did not feel pain. The complainant testified that the Appellant had sexually assaulted her on several occasions at his store, prior to that material day. She however could not recollect when the first sexual assault incident occurred. He bought her gifts such as sweets, chips and soda after every incident.

The medical evidence adduced by the prosecution corroborated the evidence of penetration as narrated by the complainant. The complainant was examined at Nairobi Women's Hospital on 26th July 2014. PW3 stated that the complainant's hymen was found to be broken. The complainant was also examined by PW4 on 30th July 2014. She stated that the complainant's external genitalia was normal. Her hymen was pink and was broken with multiple old tears.

The complainant's evidence was to the effect that the Appellant sexually assaulted her on multiple occasions prior to the material day of 25th July 2014. The complainant was a minor. She had no capacity to consent to sexual intercourse. The evidence of a broken hymen with multiple old tears was consistent with a history of continuous sexual abuse. Taking into consideration the P3 Form and the Post Rape Care Form produced in court, as well as the complainant's testimony, this court formed the opinion that the prosecution did establish the element of penetration to the required standard of proof beyond any reasonable doubt.

The third issue is whether the penetration was perpetrated by the Appellant. The Appellant in his submissions contended that he was not properly identified by the complainant, and that the complainant's testimony was unreliable since she suffered from a mental illness. The complainant gave a clear account of how the Appellant sexually assaulted her on the material day. The assault occurred at the Appellant's store at the market. The complainant testified that the Appellant sold men's clothes at the market. She told the court that the Appellant had sexually assaulted her on multiple occasions prior to that date. The Appellant lured the complainant with treats and gifts. She stated that the Appellant was her friend and was well known to her. Her testimony was clear and coherent.

The complainant told PW1 and PW5 what the Appellant had done to her. The investigating officer (PW5) told the court that the complainant led to the arrest of the Appellant. She led police officers to the market where she identified the Appellant as the perpetrator of the sexual assault. PW5 stated that the complainant took her to the Appellant's store where the incident occurred. The Appellant in his defence admitted that the store belonged to him, though he denied knowing the complainant.

The Appellant in his defence denied sexually assaulting the complainant. He told the court that on 1st August 2014, at about 1.00 pm, he was at the market when the complainant came, accompanied by two men. She pointed to him and identified him as the person who sexually assaulted her. The Appellant alleged that the complainant had implicated several other people aside from him. DW2 and DW3 worked with the Appellant at the market. They told the court that the complainant implicated several other people other than the Appellant.

This court is of the opinion that the complainant positively identified the Appellant as the perpetrator of the sexual assault. The incident occurred at about 2.00 pm, in broad daylight. As stated before in this judgment, the complainant's testimony was clear and coherent. She gave a clear account of events of how the Appellant sexually assaulted her. She stated that the Appellant sexually assaulted her on multiple occasions at his store. She said that he was well known to her and was her friend. He always bought her sweets or chips after every ordeal. The Appellant's identification was by recognition. The complainant narrated to PW1 and PW5 what the Appellant had done to her. Her story was consistent. She also identified the Appellant to the police as the perpetrator. PW5 stated that the complainant took her to the Appellant's store at the market. PW5 further stated that the complainant did not implicate any other persons other than the Appellant.

The trial court in convicting the Appellant observed that the complainant was a truthful witness and that her testimony was consistent and coherent. **Section 124** of the **Evidence Act** was applicable in this case. There was no evidence of existence of any grudge between the Appellant and the prosecution witnesses.

This court is of the view that the evidence of the prosecution witnesses taken into totality was corroborative and the Appellant was positively identified as the perpetrator of the sexual assault. The Appellant's defence was merely evasive and did not dent the otherwise strong culpatory evidence adduced by prosecution witnesses. This court, having re-evaluated the evidence adduced before the trial court, and the submission made on this appeal, cannot see any reason to disagree with the finding reached by the trial court. The Appellant's guilt was established to the required standard of proof beyond any reasonable doubt. The fact that the complainant was a person of reduced mental capacity, did not diminish the truthfulness of her testimony. The evidence established that the Appellant took advantage of the complainant by luring her with treats and promise of friendship before sexually assaulting her. The Appellant's appeal on conviction lacks merit. The same is hereby dismissed.

As regards the sentence, **Section 8(3)** of the **Sexual Offences Act** provides for a minimum sentence of twenty (20) years imprisonment for any person convicted of defiling a child aged between twelve (12) and fifteen (15) years. It is important to note that the issue of mandatory minimum sentences in the Sexual Offence Act has been outlawed by various decisions by superior courts following the Supreme Court decision in **Francis Karioko Muruatetu & another vs Republic [2017] eKLR** (See Court of Appeal decisions in **Christopher Ochieng vs R [2018] eKLR** and **Jared Koita Injiri vs R [2019] eKLR**). The Appellant was sentenced to serve a custodial sentence of 20 years.

The Appellant in his mitigation stated that he was a first offender. This court also notes that the Appellant has spent two and half years in custody after his conviction by the trial court. In the premises, this court sets aside the twenty (20) years imprisonment sentence meted by the trial court. The same is substituted with an order of this court sentencing the Appellant to serve fifteen (15) years imprisonment with effect from the date he was sentenced before the trial court *i.e.* 16th January 2018. It is so ordered.

DATED AT NAIROBI THIS 22ND DAY OF JULY 2020

L. KIMARU

JUDGE