



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.9 OF 2017

(An Appeal arising out of the conviction and sentence of Hon. A. R. Kithinji – PM

delivered on 19th January 2017 in Makadara CMC. CR. Case No.4123 of 2011)

DENNIS MUNYASIA MWOSA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Dennis Munyasia Mwosa was charged with the offence of **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 30th August 2011 at [Particulars withheld] Estate in Nairobi County, the Appellant unlawfully and intentionally caused his penis to penetrate the vagina of LAJ (the complainant), a child aged five (5) years. He was alternatively charged with **indecent assault** 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 committed an indecent act with the complainant by touching her private parts namely vagina. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, the Appellant was convicted on the main charged and sentenced to serve fifteen (15) years imprisonment. The Appellant was aggrieved by his conviction and sentence. He has filed an appeal to this court.

In his petition of appeal, the Appellant faulted the decision of the trial magistrate on the following grounds. He was aggrieved that he had been convicted without the trial court having the benefit of the submission that he had made prior thereto. The Appellant faulted the trial magistrate for failing to take into account his alibi defence before the reaching the impugned decision. He was aggrieved that he had been convicted despite the fact that the prosecution had not established the essential ingredients to support the charge. The Appellant was finally aggrieved that he had been convicted despite the fact that the prosecution had not established the charge to the required standard of proof. 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.

During the hearing of the appeal, this court heard oral rival submission made by Mr. Murunga for the Appellant and by Ms. Aluda for the State. Mr. Murunga submitted that the complainant did not identify the perpetrator but rather stated that the person who had sexually assaulted her was one Denno. Learned counsel submitted that this was not sufficient identification because there were several people going by the same name. To assume that the Appellant was the Denno that the complainant was referring to was a grave error on the part of the trial court. He urged the court to consider the fact that the investigating officer had indicated that he had, prior to arresting the Appellant, arrested another person by the name Denno before releasing him. As regard medical evidence, it was the Appellant's submission that the Appellant should have also been medically examined as the same time as the complainant to determine the veracity of the complaint made by the complainant. Learned counsel reiterated that all the witnesses who testified did not properly identify the Appellant. The Appellant further stated that the evidence adduced by the prosecution witnesses were contradictory in the sense that it was not clear from their evidence whether the complainant was assaulted with a stick or with a penis. He further submitted that the government analyst report that was prepared, though marked for identification was not produced into evidence. He urged the court to draw inference that the failure by the prosecution to produce that evidence would have been adverse to the prosecution's case and therefore the Appellant ought to be exonerated from the charge.

Ms. Aluda for the State opposed the appeal. She submitted that the Appellant was a caretaker in the building where the family of the complainant lived. He was well known to the complainant and the family of the complainant. She submitted that this was a case of recognition rather than merely identification of a total stranger. She explained that the evidence adduced by the prosecution witnesses clearly established that the Appellant lured the complainant to his house before he inserted a stick into her vagina. When the complainant returned to

her home, she was bleeding from her vagina. She informed her parents. She was taken to hospital where it was confirmed that indeed she had been sexually assaulted. There was no doubt that the person who had sexually assaulted the complainant was the Appellant. This was because, he was the only one who was at the 5th floor flat where the complainant was sexually assaulted at the material time. Learned state counsel was of the view that the Appellant was properly convicted after the trial court had thoroughly evaluated the evidence. As regard failure by the prosecution to produce the government analyst report, she submitted that the evidence adduced by the prosecution witnesses, even without the report, was sufficient to secure the conviction of the Appellant. On sentence, she submitted that the court should exercise its discretion and sentence the Appellant to serve an appropriate custodial sentence as provided by the law.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced before the trial court so as to reach its own independent determination whether or not to uphold the conviction of the Appellant. As was held by the Court of Appeal in **Njoroge -Vs- Republic [1987] KLR 19 at P.22:**

“As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect (see Pandya v R [1957] EA 336, Ruwalla v R [1957] EA 570)”.

In the present appeal, the issue for determination by this court is whether the prosecution established the case against the Appellant on the charge of defilement contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act** to the required standard of proof beyond any reasonable doubt.

For the prosecution to establish the charge of defilement, it was required to prove three essential ingredients: penetration, the age of the victim and the identity of the perpetrator. In respect to penetration, the complainant testified that she was lured into a flat on the 5th floor of the building where her family resided. According to the prosecution witnesses, the complainant’s family resided on the 4th floor of the same building. At the material time, the Appellant was under the care of her aunt PW2 NKM. According to the complainant, while inside the house, one Denno whom she previously knew and identified as the accused inserted a stick into her vagina while in the flat. She went back to their house. PW2 saw that she was bleeding from her vagina. Her pants were bloodstained. She was rushed to Nairobi Women Hospital where she was examined by Dr. Thuo who noted that the complainant’s hymen had been broken. He examined the complainant after he had placed her under anesthesia. The medical report prepared by Dr. Thuo was produced on his behalf by PW6 Kinuthia Edward Mbugua. Dr. Thuo made the finding that indeed the complainant had indeed been sexually assaulted.

Section 2 of the **Sexual Offences Act** defines ‘**penetration**’ to mean **“the partial or complete insertion of the genital organs of a person into the genital organs of another person.”** If that was the only definition of penetration, then it would exclude penetration by a piece of stick. However, **Section 5(1)(a)(ii)** of the **Sexual Offences Act** expounds the definition of penetration in the context of sexual assault to include penetration by **“an object manipulated by another or that person except where such penetration is carried out for proper professional hygienic or medical purposes.”** In the above circumstances therefore, the prosecution was able to establish to the required standard of proof beyond any reasonable doubt that indeed the complainant was penetrated.

As regards the age of the complainant, the complainant’s mother PW3 RMM produced the complainant’s birth certificate which indicated that she was born on 12th April 2006. At the time of the sexual assault, she was 5^{1/2} years old. The prosecution was therefore able to establish to the required standard of proof beyond any reasonable doubt the age of the complainant.

As regard the identity of the perpetrator, this court agrees with the submission made by Ms. Aluda for the State that the Appellant was recognized by the complainant. The Appellant was known to the complainant prior to the sexual assault. The Appellant testified that he was not at the scene at the time of the sexual assault. Upon re-evaluation of the evidence adduced in that regard, this court holds that the prosecution indeed established to the required standard of proof the identity of the Appellant as the perpetrator of the sexual assault. The Appellant was not only known to the complainant, but to her family members who included PW2 and PW3. PW2 and PW3 had no doubt of the **“Denno”** that the complainant was referring to when she reported the sexual assault. The fact that the complainant mentioned the name **“Denno”** and pointed to the flat that he lived left no doubt in the mind of PW2 and PW3 that the complainant was referring to the Appellant and no one else. This court finds no merit with the thrust of the Appellant’s appeal that he was not properly identified.

In the premises therefore, the Appellant’s appeal on conviction is hereby dismissed. As regard sentence, the Appellant should ride on his luck. This court shall not interfere with the same because the prosecution did not apply for the Appellant’s sentence to be enhanced during the hearing of the appeal. The Appellant’s appeal on sentence is similarly dismissed. The upshot of the above reasons is that the Appellant’s appeal lacks merit and is hereby dismissed. The conviction and sentence of the trial court is hereby upheld. It is so ordered.

DATED AT NAIROBI THIS 29TH DAY OF JANUARY 2019

L. KIMARU

JUDGE