



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO 73 OF 2015

(An Appeal arising out of the conviction and sentence of Hon. E.J. Osoro Ag.SPM delivered on 24th March 2015 in Kibera CM. CR. (SO) Case No.75 of 2014)

AGGREY SAVALA KAVARI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant was charged in the first count 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 diverse dates between 15th and 19th July, 2014 at Kawangware 56 area within Nairobi County, the Appellant unlawfully and intentionally caused his penis to penetrate the vagina of PLW, a girl aged three (3) 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 diverse dates between 15th and 19th July, 2014 at Kawangware 56 area within Nairobi County, the Appellant unlawfully and intentionally caused his penis to get into contact with the vagina of PLW, a girl aged three (3) years.

In the second count, the Appellant 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 diverse dates between 15th and 19th July, 2014 at Kawangware 56 area within Nairobi County, the Appellant unlawfully and intentionally caused his penis to penetrate the anus of AMN, a child aged three and a half (3½) years old against the order of nature.

In the third count, the Appellant 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 diverse dates between 15th and 19th July, 2014 at Kawangware 56 area within Nairobi County, the Appellant unlawfully and intentionally caused his penis to penetrate the vagina of RM, a girl aged five and a half (5½) 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 diverse dates between 15th and 19th July, 2014 at Kawangware 56 area within Nairobi County, the Appellant unlawfully and intentionally allowed his penis to get into contact with the vagina of RM, a girl aged five and a half (5½) years old.

When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to all the charges. After full trial, the Appellant was convicted as charged on the main charges on all three (3) counts, and sentenced to life imprisonment.

In his petition of Appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved by the trial court's failure to abide by the provisions of **Articles 25 (c)** and **50** of the **Constitution**. He asserted that the charge sheet was defective under the provisions of **Section 214** of the **Criminal Procedure Code**. He faulted the trial court for failing to point out that the prosecution's evidence of identification was not sufficient to warrant a conviction. He was of the view that his mode of arrest was blurred with inconsistencies. He complained that the documentary and circumstantial evidence adduced by the prosecution failed to corroborate the prosecution case. He faulted the trial magistrate for misapprehending the facts of the case. He was aggrieved that the trial magistrate failed to consider his defence. He took issue with the trial magistrate's decision to admit the medical examination report contrary to **Sections 33, 35 and 77** of the **Evidence Act**. He asserted that there was evidence of the existence of a grudge between the parties, which the trial court failed to consider. He faulted the trial court for failing to acknowledge the explicit contradictions apparent in the prosecution's case.

During hearing of the appeal, the Appellant presented to court written submissions in support of his appeal. The Appellant averred that the evidence of the complainants was tainted with irregularities and inconsistencies. He argued that the complainants were said to have been locked in the same room, but each of them gave a different version of events. He submitted that the trial court misapprehended the facts of the case in arriving at its decision. His right to a fair trial was violated. He maintained that the burden of proof in criminal cases lay with the

prosecution. It was the Appellant's view that the evidence of identification was insufficient. He averred that the element of penetration was not proved. This was due to lack of expert medical evidence. It was his view that the P3 form alone was not sufficient to prove penetration. He therefore urged this court to allow his Appeal.

Mr. Mureithi for the State opposed the appeal. He submitted that all the complainants testified as to how the Appellant sexually assaulted them. They stated that they were all playing outside the house. The Appellant called them to his house. He proceeded to defile each of them. He then threatened them against telling anyone about the incident. The complainants told their parents who testified in court. Learned State Counsel averred that penetration was proved. He stated that medical evidence adduced in court proved that penetration occurred. He asserted that the age of the complainants was established. Birth certificates for each complainant were produced in court. He argued that the Appellant's defence of being framed did not hold water. He maintained that the offence of defilement was established by evidence adduced by the prosecution. He therefore urged this court to dismiss the Appellant's appeal.

The facts of the case according to the prosecution are as follows: PW1, AWM, is the mother to one of the complainant (PW4). She stated that she lived in Kawangware. She testified that on 15th July 2014 at about 7.00pm, the complainants told her and L's aunt that Baba W had removed his 'dudu' (penis) and inserted it into their private parts. She told the court that she heard PW2 narrate to her aunt how the Appellant took her to his house. He gave her a sweet. He then inserted his 'dudu' (penis) into her vagina. She said that the Appellant had done the same thing to PW3. PW1 stated that she interrogated PW3 who told her that the Appellant had also inserted his penis into PW4's anus. PW1 testified that PW2 and PW3 told her that the Appellant had inserted his 'dudu' into their vaginas. The following day PW1 together with the other complainants' guardians reported the matter at Muthangari Police Station. They were referred to Nairobi Women's Hospital where the complainants were examined. She stated that her son, PW4, was three and a half (3½) years and old. PW1 testified that the Appellant was her neighbour. She had known him for many years. She explained that they lived in iron sheet houses. There were three rooms. PW1 and L's (PW3) mother lived in the same room together with their children. The Appellant lived in the room behind theirs. PW2 and her grandmother lived in the third room behind that of the accused. PW1 testified that her son complained of pain in his anus when he passed stool. She stated that police officers visited the scene of crime and arrested the Appellant.

PW2, R.D.M, was one of the complainants. She stated that on the material day, she was outside playing with PW3 and PW4. They went to Baba W's house. She stated that he did bad manners to her. He inserted his 'dudu' (penis) into her private parts. She testified that he also inserted his 'dudu' into PW3's vagina, as well as PW4's anus. She narrated how the Appellant first undressed her. He inserted his penis into her vagina. He then undressed PW3 and inserted his penis into her vagina. He lastly undressed PW4 and inserted his penis into his anus. PW2 stated that the Appellant was wearing a trouser which he removed. She testified that she experienced pain in her vagina when the Appellant inserted his penis. It was the first time the Appellant did that to her. She cried. The Appellant asked her not to cry. He threatened to beat her if she cried. The three of them then dressed up. The Appellant gave them fruits. PW1 stated that she knew the Appellant. She identified him in the dock.

PW3, P.L.W, was the second complainant. She testified that on the material day she was playing outside with PW2 and PW4. They all went to the Appellant's house. The Appellant removed her clothes. She said that the Appellant inserted his penis into her vagina. She cried. She experienced pain in her vagina (pointing). She stated that she did not see what the Appellant did PW2 and PW4. She testified that she knew the Appellant. She also knew his daughter W. She identified the Appellant in court.

PW4, A.M.N, was the third complainant. He stated that he knew PW2 and PW3. They went to the same school. They were his neighbours. He identified the Appellant in court. He stated that on the material day, he went to the Appellant's house. He went with PW2 and PW3. He stated that the Appellant undressed him. The Appellant inserted his penis into his anus. The Appellant also inserted his penis into PW2 and PW3's vaginas. The Appellant then opened the door and let them go home. PW4 told his mother what had happened. He stated that he knew the Appellant's daughter, W. He also knew W's mother. The Appellant's house was near their house.

PW5, SWG, is PW2's mother. She stated that PW2 was five (5) years old at the time. On 15th July 2014, PW2 told her that the Appellant did bad manners to PW3. She warned PW2 against lying. PW2 later confessed to her that the Appellant called her, PW3 and PW4 to his house. The Appellant inserted his penis into her vagina. He thereafter sexually assaulted PW3 and PW4. PW5 stated that they reported the matter at Muthangari Police Station. Her husband took PW2 to Nairobi Women's Hospital. She stated that the Appellant was her neighbour. She had known him over a period of one year.

PW6, ESA, is PW3's mother. She stated that PW3 was four (4) years of age. On 19th July 2014, she was called by a lady known as A. A was PW2's aunt. A asked her to go to PW2's house. She met her daughter (PW3) at the said house. PW3 narrated to her how the Appellant asked the three complainants to go to his house. PW3 told her that the Appellant undressed her and inserted his penis into her vagina. PW6 stated that herself, PW2's father and PW4's mother took the complainants to Nairobi Women's Hospital for medical examination. PW3 had earlier complained of pain and swelling in her vagina. Her vagina had a foul smell. They reported the matter at Muthangari Police Station. PW6 stated that the Appellant was her neighbour. She had known him over a period of two years.

PW7, Dr. Joseph Maundu, stated that on 22nd July 2014, he examined PW2, PW3 and PW4. The three had allegedly been sexually assaulted. PW4 was three and half (3½) years of age. PW7 stated that PW4 had no injuries on his penis. His anal region was normal but painful when touched. There was no discharge noted. He had earlier received treatment at Nairobi Women's Hospital. PW2 was five (5) years old. Her external genitalia were normal. She did not have any tear or bruises on her vagina. Her hymen was absent. There was no discharge noted. She had earlier received treatment at Nairobi Women's Hospital. PW3 was three (3) years of age. She had no physical injuries. She did not have tears or lacerations on her vagina. Her hymen was absent. No discharge was noted. She had earlier received treatment from Nairobi Women's Hospital. PW7 stated that he assessed all the complainants' ages. He indicated their ages in their respective P3 forms. He produced the three P3 forms in court. He testified that the three complainants had their respective Post Rape Care forms from Nairobi Women's Hospital when they were brought in for examination. He produced the Post Rape Care forms in court.

PW8, PC Veronica Thuo, stated that she was based at Muthangari Police Station. She produced the complainants' birth certificates in court on behalf of the investigating officer, CPL Sharon Reget. The investigating officer was not availed in court to adduce evidence.

The Appellant was put on his defence. He gave a sworn statement. He stated that he used to live in Kawangware. He had lived there for about four years. He was employed as a night guard at Yaya Centre. He stated that he was a neighbour to the complainants and their families. He testified that PW1 offered his wife a job. PW1 and other neighbours were in the business of brewing illicit alcohol. His wife was hired to wash utensils. The wife did not like the said job as she risked getting arrested. He stated that a grudge existed between his wife and PW1 and PW6. He stated that one day the complainants' fathers stormed his house. They roughed him up. A neighbour informed the police who came to his rescue. He was taken to hospital. On the way, the police pronounced him dead. He was taken to mortuary. Upon the staff at the mortuary realizing he was still alive, he was transferred to Kenyatta National Hospital for treatment. Afterwards, he was taken to the police station. He was later arraigned before the trial court.

This being a first appeal, it is the duty of this court to re-evaluate and reconsider the evidence adduced before the trial court before reaching its own independent determination, whether or not to uphold the decision of the trial court. In doing so, this court is required to bear in mind that it neither saw nor heard the witnesses as they testified and therefore give due regard in that respect (See **Njoroge vs Republic [1987] KLR 19**). In the present appeal, the issue for determination is whether the prosecution established the charges preferred against the Appellant to the required standard of proof beyond any reasonable doubt.

This court has re-evaluated the facts of this case.

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 critical ingredients forming the offence of defilement are; the age of the complainant, proof of penetration and positive identification of the assailant. With regards to the age of the complainants, Dr. Maundu (PW7) stated that he assessed all the complainants' ages. He indicated their ages in their respective P3 forms. He produced the same in court. According to his assessment PW2 was five (5) years old, PW3 was four (4) years old and PW4 was three and a half (3½) years old. The complainants' parents (PW2, PW5 and PW6) confirmed their respective ages as assessed by the doctor. PW8 produced three birth certificates in court belonging to the three complainants. The birth certificates also confirmed their respective ages as assessed by PW7. The court therefore holds that the prosecution did establish the ages of the complainants and that all the complainants were children within the meaning of Section 2(1) of the Children Act.

This court now turns to the ingredient of penetration. **Section 2(1)** of the **Sexual offences Act** defines penetration as:

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

PW7 examined the three complainants on 22nd July 2014. He stated that PW4 had no injuries on his penis. His anal region was normal but painful when touched. There was no discharge noted. PW2 did not have any tear or bruises on her vagina. Her hymen was absent. There was no discharge noted. PW3 had no tears or lacerations on her vagina. Her hymen was absent. No discharge was noted. PW7 produced their respective P3 forms in court. This court notes that the complainants were not examined immediately after the alleged sexual assault occurred. This could explain the apparent lack of visible injuries on the complainants' genitalia. However, from PW7's evidence, PW2 and PW3's hymens were absent. PW4's anus was tender and painful when touched. From this evidence, it can be inferred that the complainants were penetrated.

Even without medical evidence, what the court requires is proof of facts that penetration occurred. PW2, PW3 and PW4 narrated to the court how the Appellant sexually assaulted them. PW2 said that she was playing outside with PW3 and PW4. The Appellant called them to go to his house. PW2 stated the Appellant did bad manners to her. He undressed her. He inserted his 'dudu' (penis) into her vagina. He also inserted it into L's vagina and M's anus. She stated that she felt pain on her vagina when the Appellant inserted his penis. She cried. The Appellant threatened to beat her if she cried. PW3 stated that the Appellant undressed her. He inserted his 'dudu' into her vagina (pointing at her vagina). She cried. She stated that she felt pain on her vagina (pointing). PW4 reiterated how the Appellant invited them to his house. He was playing outside with PW2 and PW3. He stated that the Appellant undressed him. The Appellant inserted his 'dudu' (penis) into his anus (pointing). He stated that he did not cry but PW2 and PW3 cried. When PW1, PW5 and PW6 became aware of the incident, they interrogated the complainants who confirmed that they had been sexually assaulted.

This court is convinced that penetration was established by the prosecution. The prosecution managed to place sufficient corroboration from the undisputed medical evidence by PW7. The evidence of a broken hymen coupled with the complainants' testimonies is compelling evidence against the Appellant, in absence of any other evidence to the contrary. PW2, PW3 and PW4's testimonies that the Appellant inserted his penis into their genitalia gives credibility that the ruptured hymen and tender/painful anus must have been occasioned during the sexual assault incident. This court does not find any persuasive evidence from the Appellant to warrant interference with the findings of the trial court with regard to the element of penetration.

The third issue is whether the Appellant was positively identified as the perpetrator. PW2, PW3 and PW4 were asked to identify the Appellant in court. They all identified him by pointing at him. In their testimonies, the complainants referred to the Appellant as "Baba W". The Appellant was well known to the complainants and their families. He was their neighbour. The Appellant himself confirmed that he lived next to the complainant's homes. He stated that he knew the complainants and their families. He also stated that he was referred to as "Baba W". W was his daughter. The Appellant in his defence claimed that there existed a grudge between him and the complainant's families. However PW1, PW5 and PW6 all stated that they had lived peacefully with the Appellant thereby displacing the Appellant's defence. Accordingly, this court finds that the prosecution identified the Appellant as the perpetrator of the offence to the required standard of proof beyond any reasonable doubt. All the three ingredients of the offence were established. This court finds no reason why the complainants would implicate the Appellant in the crime, if he was not the one who perpetrated it.

The upshot of the above reasons is that the Appellant's appeal against conviction lacks merit. The same is hereby dismissed. The appeal on sentence similarly fails. The sentence is legal as provided under Section 8(2) of the Sexual Offences Act. It is so ordered.

DATED AT NAIROBI THIS 22ND DAY OF FEBRUARY 2019

L. KIMARU

JUDGE