



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.178 OF 2017

(An Appeal arising out of the conviction and sentence of Hon. Stephen Jalang'o - SRM delivered on 13th October 2017 in Makadara CMC. CR. Case No.395 of 2013)

PATRICK MUTHIANI MUTILI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Patrick Muthiani Mutili 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 23rd January 2013 in Nairobi County, the Appellant intentionally caused his penis to penetrate the vagina of ZA (complainant), a child aged thirteen (13) years. He 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 touched the vagina of the complainant with his penis. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was found guilty as charged on the main count. He was sentenced to serve twenty (20) years imprisonment. The Appellant was aggrieved by his conviction and sentence. He filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted on the basis of evidence that did not establish his guilt to the required standard of proof. He faulted the trial magistrate for failing to take into consideration the fact that essential witnesses were not called to testify in the case. The Appellant was of the view that his conviction was based on contradictory evidence that was arrived at pursuant to shoddy investigations conducted by the investigating officer. The Appellant complained that the charge sheet upon which the conviction was based was defective. He questioned the medical evidence which was adduced, which in his view, did not establish that he had sexually assaulted the complainant. The Appellant was aggrieved that the trial court had relied on the hearsay evidence of the investigating officer to convict him. He was finally aggrieved that his defence had not been considered before the trial court reached the impugned verdict. In the premises therefore, the Appellant urged the court to allow the appeal, quash the conviction and set aside the custodial sentence that was imposed upon him.

During the hearing of the appeal, the Appellant presented to court written submission in support of his appeal. He also made oral submission in support of his appeal. It was the Appellant's submission that the prosecution failed to establish the essential ingredients of the charge and therefore the trial court erred when it convicted him. The Appellant submitted that the medical report adduced by the prosecution did not support the charge. He complained that key witnesses, including his wife were not called to testify in the case. Vital exhibits including the panties and the dress of the victim which were allegedly found in his house were not produced into evidence. He complained that he was convicted on the basis that the complainant was thirteen (13) years old yet the birth certificate that was produced indicated that the complainant was sixteen (16) years old at the time. He urged the court to interpret the prosecution's reluctance to produce the birth certificate in time to be on account of the fact that incorrect information was being entered in the birth certificate. The Appellant complained that the trial court failed to accord him fair trial in that he was not supplied with witnesses' statements during the trial. He was finally aggrieved that the trial court had admitted hearsay evidence from the investigating officers that was not supported by evidence. In the premises therefore, the Appellant urged the court to allow his appeal.

Ms. Akunja for the State opposed the appeal. She submitted that the prosecution had adduced sufficient culpatory evidence which established the Appellant's guilt to the required standard of proof beyond any reasonable doubt. The essential ingredients of the charge were established. The prosecution established that the complainant had been penetrated by the Appellant. The medical report produced established that indeed the complainant had been penetrated. The age of the complainant was established by the birth certificate that was produced as an exhibit during the hearing of the case. The prosecution established that the victim knew the complainant. The complainant testified that the Appellant had sexual intercourse with her on three occasions including the occasion that led to the arrest of the Appellant. Learned prosecutor denied the assertion by the Appellant which was to the effect that his constitutional right to fair trial had been infringed. All the procedures required by the law were followed. While conceding that the testimony of the investigating officer was hearsay, she submitted

that such a testimony cannot be regarded as direct evidence because the investigating officer was not at the scene of crime. She urged the court to find that the Appellant was properly convicted. The Appellant's appeal should therefore be dismissed.

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, Ruwala 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(3)** of the **Sexual Offences Act** to the required standard of proof beyond any reasonable doubt.

This court has carefully re-evaluated the evidence adduced before the trial magistrate. It has also considered the grounds of appeal put forward by the Appellant and the submission both written and oral presented to the court. The court will first address the complaint regarding the manner in which the trial was conducted. In essence, the Appellant was saying that his rights to fair trial as enshrined in **Article 50** of the **Constitution** were infringed. The Appellant complained that he was not availed witnesses' statements during the entire trial. On perusals of the proceedings, this court noted that the Appellant was represented by counsel. On 19th June 2013, she applied to be supplied with witnesses' statements. On 7th August 2013, the Appellant's counsel indicated to the court that she was ready to proceed with the case. Indeed the case proceeded for hearing on that day. The Appellant's counsel did not raise the issue of witnesses' statements again during the entire trial. It was therefore clear to the court that the Appellant's counsel had been supplied with the witnesses' statements hence her readiness to proceed with the hearing of the case. This court finds no merit with this complaint by the Appellant.

Another complaint raised by the Appellant is that **Section 200(3)** of the **Criminal Procedure Code** was not complied with allegedly since the convicting magistrate did not read him his rights before taking over the proceedings. On perusal of the trial court's proceedings, the court observed that the trial commenced before Hon. E. Nyongesa (SRM) before the proceedings were taken over by Hon. S. Jalang'o (SRM) on 4th May 2016. On that day, the court indicated that **Section 200(3)** of the **Criminal Procedure Code** had been complied with. There is no reason for this court to doubt that the trial court indeed complied with that section of the law. The Appellant's complaint in that regard is therefore without merit. It is dismissed.

On the merits of the appeal, the prosecution was required to establish the three essential ingredients in order to prove the charge of **defilement**. The three ingredients are: Penetration, the age of the complainant and the identity of the perpetrator. In the present appeal, the complainant testified that the Appellant did on three occasions entice her to his house where he had sexual intercourse with her. After having sexual intercourse with her, he gave her money to induce her not to disclose what had transpired. On 23rd January 2013, the Appellant invited the complainant to his house. He had sexual intercourse with her. This time vigilant neighbours became suspicious. They knocked at the Appellant's house and took the complainant away. She was questioned. She disclosed that to having had sexual intercourse with the Appellant. She was escorted to Eastleigh patrol base where the incident was reported.

She was referred to MSF International Clinic where she was examined by PW3 Purity Kajuju, a Clinical Officer based at that clinic. This is what she observed:

“On examination, the vital signs were normal. She was calm. The clothes were not torn and were clean. She said she had left her underpant, shoes and skirt in the man's house. She said that she could physically identify the perpetrator. On examination, she had no physical injuries. She however had a fresh bruise on the vulva and had blood spots on the vulva area. She had a watery vagina; whitish discharge. The hymen was pink and had old tears at 4 O'clock and 7 O'clock. The anus was okay. She was treated and given medicine to prevent HIV and STD and pregnancy. The vaginal swab was done which showed presents (sic) of sperms. There was also spermatozoa in the urine.”

She produced the medical report as an exhibit during trial. The complainant was first examined by PW5 Dr. Joseph Maundu based at the police surgery. This examination was done on 29th January 2013. He noted that the hymen was broken. The P3 form was produced into evidence. It was clear from the above evidence *i.e.* the testimony of the complainant and the medical evidence that indeed the prosecution established to the required standard of proof beyond any reasonable doubt that indeed the complainant had been penetrated.

As regard the age of the complainant, the complainant's birth certificate was produced. It indicated that the Appellant was born on 13th December 1997. At the time of the incident, the complainant was aged fifteen (15) years. She was a child within the meaning ascribed to the term under **Section 2** of the **Children Act**. The prosecution therefore established the age of the complainant to the required standard of proof beyond any reasonable doubt.

As regard the identity of the perpetrator, it was clear from the complainant's testimony that she had a sort of relationship with the Appellant. There was no evidence to suggest that the Appellant used force to have sexual intercourse with the complainant. Indeed, it was the complainant's testimony that she had on three previous occasions prior to the material day, had sexual intercourse with the Appellant. From her testimony, it was apparent that the Appellant used to entice her to his house when her parents were not at home. He had sexual intercourse with her after which he gave her money. He also told her that he loved her. On the material day, he gave her KShs.50/-. Were it not for the vigilant neighbours who saw the complainant enter the Appellant's house and became suspicious, most probably the affair would have gone on unabated.

The Appellant's defence to the effect that it was his difference with his estranged wife that caused the neighbours to intervene and thereafter report the incident to the police is rebutted by the consistent, plausible and cogent evidence that was adduced by the prosecution witnesses. The complainant was examined a few hours after she had sexual intercourse with the Appellant. Spermatozoa was found in her vagina. It was clear to this court that the Appellant's defence which was to the effect that the charge was motivated by the existence of a grudge with his wife is not supported by evidence. Indeed, during the proceedings, the Appellant admitted having had sexual intercourse with the complainant. That being the case, this court holds that the prosecution did establish to the required standard of prove beyond any reasonable doubt that it is the Appellant who had sexual intercourse with the complainant. The fact that the sexual intercourse was "**consensual**" is immaterial. This is on account of the fact that the complainant being a child had no capacity to consent to the sexual intercourse. In the premises therefore, this court dismisses the Appellant's appeal against conviction.

On sentence, the Appellant is on firmer ground. The birth certificate of the complainant established that she was over fifteen (15) years old at the time of the incident. The Appellant could not therefore be sentenced under **Section 8(3)** of the **Sexual Offences Act**. That section is reserved for those convicts where the victim of the Sexual assault is aged below fifteen (15) years but over twelve (12) years. **Section 8(4)** of the **Sexual Offences Act** is the more appropriate section upon which the Appellant should have been sentenced. In the premises therefore, this court sets aside the sentence of twenty (20) years imprisonment and substitutes it with a custodial sentence of fourteen (14) years imprisonment with effect from 13th October 2017 when the Appellant was convicted. The court has taken into account the period that the Appellant was in remand custody prior to his conviction. It is so ordered.

DATED AT NAIROBI THIS 22ND DAY OF FEBRUARY 2019

L. KIMARU

JUDGE