



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.131 OF 2017

JULIUS GITAU NDUNGU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal arising out of the conviction and sentence of Hon. J. Kamau RM delivered on 14th September 2017 in Kibera CM Cr. Case No. 52 of 2014)

JUDGMENT

The Appellant was charged with the offence of **sexual assault** contrary to **Section 5(1)(b)** as read with **Section 5(2)** of the **Sexual Offences Act**. The particulars of the offence were that on the 18th day of May 2014 at 10.40 a.m. in [particulars withheld] in Nairobi County, the Appellant unlawfully used his fingers to penetrate the vagina of KTM. 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 as charged and sentenced to serve ten (10) years imprisonment.

In his petition of Appeal, the Appellant raised several grounds of appeal, challenging his conviction and sentence. He faulted the trial magistrate for convicting him yet the prosecution failed to prove their case to the required standard of proof beyond any reasonable doubt. He was aggrieved that the trial court allowed into evidence documentary evidence in contravention with the provisions of the **Evidence Act**. He took issue with the trial court's failure to consider his defence in arriving at its decision. He was aggrieved that his conviction was based on a defective charge sheet.

During the hearing of the appeal, this court heard oral submission made by Ms. Koki for the Appellant and by Ms. Kimiri for the State. Ms. Koki submitted that the Appellant was wrongly convicted on the basis of a defective charge sheet. The particulars of the offence indicated that there was penetration. However, according to **Section 2** of the Sexual Offences Act, for penetration to be said to have occurred, it must be done by a person's genital organ. The evidence adduced was that the Appellant inserted his fingers into the complainant's vagina. Ms. Koki asserted that for this reason, the charge sheet was defective. She averred that the Post Rape Care form adduced into evidence was not authored by the doctor who produced it. She submitted that that was in contravention of Section 77 of the Evidence Act. She pointed out that the medical evidence presented by the doctor from Nairobi Women's Hospital was inconsistent with that of the police doctor. She was of the view that the same was therefore not reliable. Accordingly, she urged this court to allow the Appellant's appeal.

Ms. Kimiri for the State opposed the appeal. She stated that the charge sheet was not defective. The Appellant was charged under **Section 5(1)(b)** of the **Sexual Offences Act**. The particulars clearly show that he manipulated a part of his body (finger) so as to cause penetration in the complainant's vagina. She asserted that the charge was properly drafted. Learned State Counsel further submitted that the Post Rape Care form was properly adduced in evidence. **Section 77** of the Evidence Act allows for a document to be produced in evidence if the maker is not able to appear before the court upon certain conditions. Dr. Mbugua was familiar with Dr. Mwola's handwriting and signature. She maintained that the Post Rape Care form was therefore properly allowed in evidence. She stated that the prosecution had discharged its burden of proof to the required standard of proof beyond any reasonable doubt. The complainant narrated to the court how the Appellant sexually assaulted her. The incident occurred in broad daylight. The Appellant admitted to being in the house at the material time. Learned State Counsel averred that the Appellant's sentence was legal and the same ought to be upheld by this court. In the premises therefore, she urged this court to dismiss the Appellant's appeal.

The facts of the case according to the prosecution are as follows: The complainant was fourteen (14) years of age at the time of the alleged sexual assault. She stated that the Appellant was her masseur. He had been her masseur for about eight months prior to the material day of 18th May 2014. The complainant was an athlete (sprinter). She sustained a muscle strain the day before the alleged sexual assault occurred. Her mother booked for her an appointment with the Appellant. The Appellant came to their house the next day at about 10.00 a.m. Her father was in the house. The complainant accompanied the Appellant to a room upstairs. She lay on a mat on the floor. She was lying on her back. She was wearing a bra and underpants. She covered herself with a massage blanket.

The Appellant started massaging her feet and thighs. He then asked her to lie on her stomach. As he was massaging her thighs, he suddenly pulled her underwear and inserted his finger into her vagina. She was shocked. She quickly got up and ran downstairs to her father. She was too distressed to tell him what happened. She only managed to tell him that the Appellant hurt her. She locked herself up in the storage room. Her father asked the Appellant to leave the premises. After the Appellant left, she narrated to her father what had happened. She took a shower. Her father took her to Nairobi Women's Hospital for examination. They afterwards reported the matter to the police.

PW2, JM is the complainant's father. He stated that her daughter was an athlete and had sustained an injury on her thigh. His wife booked an appointment with the Appellant who was a masseur. When he arrived he went upstairs with PW1. PW2 went to check on them after a few minutes to make sure all was well. He came back downstairs. Shortly after, he heard PW1 screaming. He saw her running down the stairs. He asked her what was going on. She was however too distressed to explain. She ran past him and locked herself in the pantry. He ordered the Appellant to leave the house. Once the Appellant was gone, PW1 explained that the Appellant had inserted his finger into her vagina. He escorted her daughter to Nairobi Women's Hospital. He afterwards reported the matter to the police. He stated that the Appellant frequented their house for about a year before the incident occurred. He had previously provided physiotherapy treatment to both his wife and daughter. It was not the first time he was having a session with PW1. They therefore trusted him.

PW3, Dr. Mbugua appeared before court on behalf of Dr. Muola, who was no longer working at Nairobi Women's Hospital. He produced the complainant's Post Rape Care form in evidence. PW4 examined the complainant on 20th May 2014. He did not observe any injuries on her vagina. There was no discharge. Her hymen was broken. He produced her P3 form in evidence. PW5, Cpl. James Somme investigated the case. On the material day, PW2 reported that his daughter had been sexually assaulted. He interrogated PW1 and PW2 and recorded their statements. They had just come from Nairobi Women's Hospital where PW1 was examined. PW1 was examined by the police doctor on 23rd May 2014. On the same day, PW2 invited the Appellant to his house, where PW5 arrested him.

The Appellant was put on his defence. He stated that he was at PW2's house on the material day. He was called there to provide first aid treatment to PW1 who had been injured. He proceeded to a room upstairs and found PW1 lying on the floor. She was in pain. He started massaging her lower abdomen. PW2 was standing next to him. PW2 left the room after a few minutes. It was then that PW1 informed him that her injuries were inflicted by her step father (PW2). PW2 was at the door. He heard their conversation. PW2 scolded him for talking to his daughter instead of doing his job. PW1 was shocked. She jumped up and ran out of the room crying. He tried to talk to PW2 but he was chased out of the house. A week later, PW2 called him and informed him that PW1 was still in pain. He requested him to go to his house for another physiotherapy session. He found police officers at the house. He was arrested and taken to the police station.

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 any comments regarding the demeanour of the witnesses (See **Okeno v. Republic [1972] E.A. 32**). The issue for determination by this court is whether the prosecution adduced sufficient evidence to secure the conviction of the Appellant on the charge of sexual assault contrary to **Section 5(1)(b)** as read with **Section 5(2) Sexual Offences Act**.

This court has re-evaluated the facts of this case. It has also considered rival submission made by parties in the present appeal. The Appellant submitted that he was convicted on the basis of a defective charge sheet. He argued that the evidence adduced did not match particulars of the offence. Particulars of the offence indicated that the Appellant unlawfully used his finger to penetrate the vagina of the complainant. Section 5(1)(b) of the Sexual Offences Act provides, *inter alia*, as follows:

"Any person who unlawfully –

- a.
- b. *Manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ into or by any part of the other person's body is guilty of an offence termed sexual assault".*

The evidence presented by the prosecution is to the effect that the Appellant inserted his finger into the complainant's vagina. From the above quoted section, it follows that one is guilty of the offence of sexual assault if they manipulate any part of their body (in this case a finger) to cause penetration of the genital organ of another person. The particulars of the charge in the present appeal disclose the offence the Appellant was charged with. The evidence adduced also matched the particulars of the offence. This court therefore holds that the charge sheet was not defective.

The Appellant further submitted that the Post Rape Care form was illegally admitted into evidence. This was due to the fact that the doctor who presented the Post Rape Care form was not the author of the same. Section 77 as read with Section 33 of the **Evidence Act** allows the court to admit documentary evidence from a witness other than the author. Documents from a medical practitioner are among the qualified documents under Section 77 of the Evidence Act that may be admitted into evidence in the absence of the maker. In **Joseph Bakei Kaswili - vs- Republic [2017] eKLR** the Court of Appeal held as follows:-

"Section 33 of the Evidence Act Cap 80 Laws of Kenya deals with admission in evidence of statements made by persons whose attendance to court cannot be procured without an amount of undue delay or expense which in the circumstances of the case appears to the court to be unreasonable Section 77 of the Act on the other hand makes provision for the admission in evidence of medical evidence."

In the present appeal, PW3 explained that Dr. Muola who authored the Post Rape Care form had since left the hospital and could not be traced. This court notes that a number of adjournments were granted to the prosecution as they tried to avail Dr. Muola to adduce evidence. They were however unsuccessful. PW3 had worked with him for over a year. He was familiar with his handwriting and signature. The Appellant was asked if he objected to PW3 appearing on behalf of his colleague. He stated that he had no objection. This court is of the opinion that the Post Rape Care form was properly admitted into evidence. PW3 was also a medical practitioner. The prosecution established

that undue delay to the trial would have been caused since Dr. Muola could not be traced without considerable expense being incurred. This ground of appeal must therefore fail.

Did the prosecution establish the Appellant's guilt on the charges brought against him to the required standard of proof beyond any reasonable doubt? The prosecution was required to prove penetration of the complainant's vagina by the body part of the Appellant. PW1 gave a detailed narration of the occurrences of the material day. She was an athlete. The Appellant was her physiotherapist. He had been her physiotherapist for close to a year. She sustained a muscle strain on her thigh. The Appellant was called in for a therapy session. She was lying on her stomach. The Appellant was massaging her thighs. He suddenly pulled her underwear to the side and inserted his finger into her vagina. She was shocked. She ran downstairs to where her father (PW2) was. PW2 stated that she was crying and in distress. She could not explain what had happened. She ran and hid in the pantry. PW2 asked the Appellant to leave. Once he was out of the house, PW1 explained how the Appellant had sexually assaulted her. He took her to the hospital for medical examination. He later reported the matter to the police.

PW1 was examined at Nairobi Women's Hospital immediately after the incident occurred. According to the evidence adduced by PW3, the complainant had no injuries in her vagina. However, her clitoris and labia minora were tender and hyperemic. This corroborates PW1's claim that the Appellant inserted his finger into her vagina. Her vaginal wall was irritated meaning there was penetration. PW4 examined the complainant two days after the incident occurred. This may explain why he did not observe any irritation on the complainant's vagina.

The Appellant's version of events does not sound truthful. He stated that he found PW1 in so much pain that she could not stand. He however later contradicted himself and stated that she jumped up and ran out of the room. He did not bring up the fact that PW1 told him that PW2 assaulted her, as he was cross-examining the witnesses. This line of defence seems like an afterthought. This court is of the opinion that PW1 was telling the truth. The **Proviso to Section 124 of the Evidence Act** clearly applies. The medical evidence adduced corroborated her claim. The prosecution did establish that the Appellant manipulated his finger to penetrate the complainant's vagina. Consequently, this court finds that the prosecution established the Appellant's guilt on the charge of **Sexual Assault** contrary to **Section 5(1)(b) as read with Section 5(2) of the Sexual Offences Act** to the required standard of proof beyond any reasonable doubt.

For the above reasons, this court finds no merit with the appeal lodged by the Appellant against conviction. The appeal against conviction is dismissed. As regard sentence, this court holds that the sentence imposed on the Appellant is legal. The trial court's awarded the minimum sentence under the **Proviso to Section 5(2) of the Sexual Offences Act**. The appeal against sentence is similarly dismissed. It is so ordered.

DATED AT NAIROBI THIS 27TH DAY OF MARCH 2019

L. KIMARU

JUDGE