



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.19 OF 2018

*(An Appeal arising out of the conviction and sentence of Hon. B. Ojoo - PM*

*delivered on 16<sup>th</sup> January 2015 in Kibera CMC. CR. Case No.70 of 2015)*

STEVE RAPARI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

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 13<sup>th</sup> November 2015 at around 3.00 p.m in Ongata Rongai Township, within Kajiado County, the Appellant intentionally and unlawfully caused his male genital organ (penis) to penetrate the female genital organ (vagina) of EA, a child aged nine (9) years. In the alternative, 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 13<sup>th</sup> November 2015 at around 3.00 p.m. in Ongata Rongai Township, within Kajiado County, the Appellant intentionally and unlawfully caused his male genital organ (penis) to touch the female genital organ (vagina) of EA (the complainant), a child aged nine (9) years.

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 contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act** and sentenced to twenty five (25) 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 key ingredients of the charge of defilement were not established by the prosecution. He was aggrieved that the trial court failed to appreciate that vital prosecution witnesses were not availed to adduce evidence contrary to **Section 150** of the **Criminal Procedure Code** and Section 14 of the **Evidence Act**. He was of the view that the trial court erred in failing to take into account material inconsistencies in the prosecution's case. He took issue with the trial court's decision to convict him yet the prosecution failed to discharge the burden of proof to the required standard of proof beyond any reasonable doubt. Finally, he was aggrieved that the trial court failed to take into account his defence in arriving at its decision.

During the hearing of the Appeal, counsel for the Appellant submitted that the trial court failed to observe the provisions of **Section 200** of the **Criminal Procedure Code**. He stated that the matter was previously heard by a different magistrate. When Hon. Ojoo took over conduct of the matter, the Appellant requested for PW1 and PW2 to be recalled. However the said witnesses were never recalled. He asserted that failure to recall the said witnesses was prejudicial to the Appellant since the trial court relied on their testimonies to sustain the Appellant's conviction. Counsel for the Appellant further averred that the DNA results were negative. In addition, no semen was detected by the Government Analyst. The trial court failed to consider these factors in arriving at its decision. He prayed that the Appeal be allowed.

Mr. Momanyi for the State opposed the appeal. Learned State Counsel stated that the trial court complied with **Section 200** of the **Criminal Procedure Code**. He asserted that the Appellant failed to advance compelling reasons as to why the witnesses were to be recalled. It was his view that the prosecution established the charge of defilement against the Appellant. He submitted that the complainant was nine (9) years of age at the time of the sexual assault. The complainant testified under oath. He therefore urged this court to dismiss the Appellant's Appeal.

The facts of the case according to the prosecution are as follows: PW1, EAO. is the complainant herein. The complainant was nine (9) years old when the alleged sexual assault occurred. She attended [Particulars Withheld] Academy in Ongata Rongai. On 13<sup>th</sup> November 2015, after

the day's classes, she went out to the field for games with her classmates. As she was going to the field, the Appellant called her. He sent her to his house to get a sack. His house was within the school compound. The Appellant followed behind her as she went to his house. The Appellant walked in after she arrived at his house. He locked the door. He removed PW1's underwear. He also removed his clothes. He lifted her dress, put her on the bed and lay on her. PW1 stated that he did 'bad manners' to her. The Appellant used his hand to cover her mouth to prevent her from screaming. She stated that she felt pain. She bled slightly. She afterwards took her bag and left. The Appellant warned her not to tell anyone about the incident. PW1 testified that she knew the Appellant prior to the incident. He worked at the school. She saw him every day. When she got home she told her mother what had happened. She was taken to hospital for treatment. Her parents reported the matter to the police.

PW2, AKK is the complainant's mother. She stated that on the material day she had gone to work. After work, she went to pick her youngest child from school. When she got back home, she found PW1 crying. PW1 informed her that Steve had removed her clothes and did bad manners to her. PW1 told her that the Appellant lay on her and inserted his penis into her vagina. She was experiencing abdominal pains. PW2 proceeded to Ongata Rongai Police Station and reported the matter. She afterwards took PW1 to Nairobi Women's Hospital for examination and treatment. She was admitted for three (3) days.

PW3, Dr. Joseph Maundu examined the complainant on 18<sup>th</sup> November 2015. Her labia majora was normal. Her labia minora was red and irritated. Her hymen was recently broken. PW3 stated that from his assessment, the complainant had been defiled. On the same day he examined the Appellant. The Appellant had no visible injuries on his sexual organs.

PW4, Edward Kinuthia stated that he was a clinical officer at Nairobi Women's Hospital. He was adducing evidence on behalf of his colleague, Ngatia Wamae. PW1 was attended to at the said hospital on 13<sup>th</sup> November 2015. She was limping. Her underwear had bloodstains. She had bruises on her vagina. She was bleeding from her vagina. Her hymen was freshly broken. Her vaginal opening was enlarged. The discharge from her vagina was found to contain semen. PW4 produced a Post Rape Care form.

PW5, Henry Kiptoo Sang was a Government Analyst based at the Government Laboratory in Nairobi. On 15<sup>th</sup> November 2015, he received the blood samples and a buccal swab belonging to the Appellant. On 25<sup>th</sup> November 2015 he received a vaginal swab, a buccal swab and pink underwear belonging to PW1. He was instructed to determine whether the Appellant's DNA matched to any of the samples obtained from PW1. After analysis, DNA profile from the bloodstains on the underwear matched the DNA profile from the buccal swabs obtained from the PW1.

PW6, Cpl. Alice Wairimu, investigated the present case. She stated that she was based at Ongata Rongai Police Station. She questioned PW1. PW1 narrated to PW6 how a man named Steve sexually assaulted her as outlined in PW1's testimony before court. PW6 recorded a statement from PW1 and PW2. She afterwards took PW1's underwear, buccal swab and blood samples to the Government Chemist for analysis. She accompanied PW1 and PW2 to [Particulars Withheld] Academy where she arrested the Appellant. The Appellant was identified by PW1. She took the Appellant's blood samples and buccal swab to the Government Chemist for analysis.

The Appellant was put on his defence. In his unsworn statement, the Appellant denied sexually assaulting the complainant. He stated that he worked [Particulars Withheld] Academy in Rongai. He worked in the kitchen. He also accompanied the school bus driver and assisted in dropping off students at home after school. He testified that police came to his house and arrested him on 13<sup>th</sup> November, 2015. He was later arraigned before court and charged with defilement. He alleged that he was framed by PW2, the complainant's mother. He stated that she wanted to have an affair with him.

This being a first appeal, this Court is mandated to re-evaluate the evidence afresh. The Court of Appeal in the case of **Gabriel Kamau Njoroge –vs- Republic [1982 – 88] 1 KAR 1134** stated this on the duty of the 1<sup>st</sup> Appellate court:

***“It is the duty of the first Appellate court to remember that parties are entitled to demand of the court of first appeal a decision on both questions of fact and of law and the court is required to weigh conflicting evidence and draw its own inferences and conclusions, bearing in mind always that it has neither seen or heard the witnesses and make due allowance for this.”***

In the present appeal, the issue for determination is whether the prosecution established 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.

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

This court will first address itself to the legal issue raised by the Appellant that the trial court failed to comply with **Section 200** of the **Criminal Procedure Code**.

**Section 200** of the **Criminal Procedure Code** provides in pertinent areas that:

***“ (1) Subject to sub-section (3), where a magistrate, after having heard and recorded the whole or part of the evidence in a trial, ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and exercises that jurisdiction, the succeeding magistrate may:-***

***(a) deliver a judgment that has been written and signed but not delivered by his predecessor; or***

***(b) where judgment has not been written and signed by his predecessor, act on the evidence recorded by that predecessor, or re-summon the witnesses and recommence the trial.***

(2) .....

**(3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be re-summoned and re-heard and the succeeding magistrate shall inform the accused person of that right.**

(4) ....."

In the present appeal, Hon. B. Ojoo (SPM) took over the conduct of the matter from Hon. L. Onyina (SPM) on 4<sup>th</sup> July, 2016. The case was part-heard. PW1 and PW2 had already testified on 8<sup>th</sup> April, 2016. The Appellant was informed of his right under **Section 200** of the **Criminal Procedure Code**. The Appellant applied for PW1 and PW2 to be recalled. No reasons were advanced by the Appellant as to why he wanted the witnesses to be recalled. The prosecution opposed the application. The prosecution stated that PW1 was a nine (9) year old child. Subjecting her through the trial process again would be traumatizing since she was of tender age. Prosecution stated that PW1 had to undergo counselling to enable her overcome the ordeal. They asserted that the Appellant had not given any valid reasons as to why he wanted the case to start *de novo*.

The trial court in making its ruling stated that the Appellant failed to provide compelling reasons why he wanted the case to start *de novo*. The trial magistrate stated that the Appellant was given the opportunity to cross-examine the two witnesses. He averred that the record was clear and he would have no problem comprehending his predecessor's handwritten record. He directed that the case proceeded from where it had reached.

The Court of Appeal in **Abdi Adan Mohammed v Republic [2017] eKLR** in addressing the extent to which an accused can demand for prosecution witnesses who had already testified to be recalled, set out the principles which the court ought to take into account. These principles include whether the witnesses sought to be recalled will be available and whether it would be convenient to commence the trial *de novo* and whether it would serve the interest of justice for such prosecution witnesses to be recalled.

In **Silvester Njagi Ngugi v Republic [2018] eKLR**, W Korir J held thus:

**“The demand by an accused person for resummoning and rehearing of witnesses who testified before another magistrate should be made in good faith and ought to be reasonable where there is impracticability in resummoning the witnesses, the new magistrate is entitled to adopt and rely on the record of the previous magistrate.”**

In the present appeal, the convicting magistrate upheld the prosecution's objection to the Appellant's request to recall the complainant who was a child of young and tender years. In the re-evaluation of this court, the request made by the Appellant to recall the complainant was unreasonable taking into consideration that he had been given sufficient opportunity to cross-examine the complainant. This court does not agree with the Appellant's contention that his right to fair trial was infringed by the convicting magistrate's decision to proceed with the case from where it had reached with the previous magistrate.

It is mandatory for the succeeding court to inform the accused person of his right under **Section 200** of the **Criminal Procedure Code**. What is not mandatory is that a case will automatically start *de novo* when the accused person so demands. The right to recall witnesses is not absolute. It depends on the reasons given and circumstances arising in a case. The court may or may not accede to the request made by the accused person. This is a position that is apparent in a number of decisions. In the case of **Ndegwa -vs- Republic (1985) eKLR 534**, the Court of Appeal made the following observations;

**“The provisions of Section 200 of the Criminal Procedure Code ought to be used very sparingly; and only in cases where the exigencies of the circumstances are likely to defeat the ends of justice if the succeeding magistrate is not allowed to adopt or continue a criminal trial started by a predecessor “.**

The Appellant in the present appeal, in this court's view, did not advance sufficient reasons to warrant the trial magistrate to exercise his discretion in favour of the Appellant's application for the case to start *de novo*. The Appellant actually gave no reasons at all. He was given two chances to address the court. Even after the prosecution opposed his application, he still did not give the trial court any reasons why he wanted the witnesses recalled. This court is of the view that no prejudice was occasioned to the Appellant by failure to start the matter *de novo*. He had the opportunity to cross-examine PW1 and PW2. The trial magistrate stated that the record was clear, and he would have no problem comprehending his predecessor's handwritten record. The best interest of the child was paramount. The trial magistrate was therefore not misdirected in exercising his judicial discretion in dismissing the Appellant's application.

**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. On the age of the complainant, PW2 testified that the complainant was nine (9) years old at the time of the sexual assault. Her clinic card was produced in court which confirmed the same. The Appellant did not challenge the evidence adduced with regards to the complainant's age. The 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**.

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.”**

PW1 was examined at Nairobi Women’s Hospital on 13<sup>th</sup> November 2018. Her Post Rape Care form indicated that she had bruises on her vaginal wall. She was oozing blood from her vagina. Her hymen was freshly broken. Her vaginal opening was enlarged. The discharge from her vagina was found to contain semen. PW3 stated that he examined the complainant on 18<sup>th</sup> November 2015. Her labia majora was normal. Her labia minora was red and irritated. Her hymen had recently been broken. PW3 stated that from his medical assessment, the complainant had been defiled. PW1 narrated to the court how the Appellant sexually assaulted her in his house. She stated that he removed her underwear. He also removed his clothes. He lifted her dress and put her on his bed. She stated that he laid on top of her and did ‘**bad manners**’ to her. She felt pain in her vagina. The complainant testified that the Appellant took his penis and inserted it into her vagina. Taking into consideration the P3 form and Post Rape Care form produced in court, as well as the complainant’s testimony, this court is of the view 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 done by the Appellant. The complainant testified that she knew the Appellant. She saw him every day at school. He worked in the school’s kitchen. He also dropped the students off at home every day after school in the school bus. She referred to him by his name, “Steve”. Her mother, PW2 stated that the complainant told her that **Steve** had inserted his ‘**dudu**’ (penis) into her vagina. She narrated in detail how the Appellant sexually assaulted her. There was no doubt that the complainant properly identified the Appellant as the perpetrator of the sexual assault. The Appellant confirmed in his testimony that he worked at [Particulars Withheld] Academy in Ongata Rongai. He worked in the Kitchen. He also was in the vehicle that dropped off the children to their homes after school. This is consistent with the complainant’s testimony. The Appellant’s defence that he was framed by PW2 does not hold. No sufficient evidence was adduced by the Appellant to show that he had any sort of relationship with PW2.

In this court’s assessment, the complainant was telling the truth. She gave evidence under oath. In the case of **J.W.A. v Republic [2014] eKLR**, the Court of Appeal observed:-

**“We note that the appellant was charged with a sexual offence and the proviso to section 124 of the Evidence Act, clearly states that corroboration is not mandatory. The trial court having conducted a voire dire examination of PW1 and being satisfied that the complainant was a truthful witness, we see no error in law on the part of the High Court in concurring with the findings of the trial magistrate.”**

This court is of the view that the defence put forward by the Appellant does not dent the otherwise strong evidence adduced by the prosecution connecting him with the offence. His guilt was established to the required standard of proof beyond any reasonable doubt. The Appellant’s appeal on conviction lacks merit and the same is hereby dismissed.

As regards the sentence, **Section 8(2)** of the **Sexual Offences Act** provides a sentence of life imprisonment for any person convicted of defiling a child of less than eleven (11) years. The complainant was assessed to be nine (9) years old at the time the offence was committed. The trial court sentenced the Appellant to twenty five (25) years imprisonment. The Appellant should ride his luck. His appeal against sentence is similarly dismissed. It is so ordered.

**DATED AT NAIROBI THIS 26<sup>TH</sup> DAY OF MARCH 2019**

**L. KIMARU**

**JUDGE**