REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.46 OF 2017

(An Appeal arising out of the conviction and sentence of Hon. E.S. Olwande - SPM delivered on 21st April 2017 in Makadara CMC. CR. Case No.605 of 2008)

GIDI ONYANGO ODEMBA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Gidi Onyango Odemba was charged with the offence of defilement contrary to **Section 8(1)** as read **Section 8(3)** of the **Sexual Offences Act.** The particulars of the offence were that on 15th February 2008, at Kayole Estate in Nairobi County, the Appellant unlawfully and intentionally committed an act which caused penetration with his male genital organ into the female genital organ of R N S (complainant), a child aged 7 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 unlawfully and intentionally committed an indecent 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, He was convicted as charged and sentenced to serve life 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 raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted on insufficient evidence that did not support the charge. In particular, he stated that he was convicted on the basis of a defective charge sheet; on medical evidence that was not produced; on contradictory and unproven evidence. The Appellant took issue with the fact that the trial court did not take into consideration his defence before arriving at the decision to convict him. He was of the view that the trial court took into consideration extraneous factors to convict him. He challenged the verdict of guilty that was entered, which, in his view, was entered against the weight of the available evidence. He was finally aggrieved that he had been sentenced to serve a custodial sentence that was harsh and excessive in the circumstances. In the premises therefore, the Appellant urged the court to allow the appeal, quash the conviction and set aside the sentence that was imposed upon him.

Prior to the hearing of the appeal, the Appellant filed written submission in support of this appeal. The State too filed written submission in opposition to the appeal lodged by the Appellant. During the hearing of the appeal, this court heard oral submission made by Mr. Rakoro for the Appellant. He submitted that the evidence adduced by the prosecution witnesses was littered with material contradictions that touched on the credibility of the witnesses. He pointed out the contradictions in his submission. He stated that the evidence that the complainant and PW2 adduced in court contradicted the statements that they had recorded with the police. It was not clear from the evidence what time the incident took place. This is because two of the critical witnesses testified that the incident took place, respectively, at 1.00 p.m. and at 4.00 p.m. He explained that one of the critical witnesses, one Nzula was not called to testify in the case. Her evidence was therefore not tested for veracity on cross-examination. He reiterated that the evidence adduced by the prosecution witnesses was so contradictory that it could not stand up the credibility test. As regard medical evidence, whereas it was stated that spermatozoa was seen on examination of the complainant, it was not stated whose spermatozoa it was. There was a possibility that it could have been someone else's because the Appellant had testified in his defence that he worked with another person in the barber shop on the material day. Learned counsel took issue with the fact that the trial court did not take into consideration the Appellant's defence which clearly established the existence of a grudge between the Appellant and the father of the complainant over a business issue. In the premises therefore, he was of the view that, taking into consideration the totality of the evidence adduced, the prosecution failed to establish the charge to the required standard of proof. He urged the court to allow the appeal.

Ms. Nyauncho for the State opposed the appeal. She submitted that the prosecution adduced sufficient culpatory evidence to connect the Appellant with the offence. She was of the view that the evidence of the complainant, though not requiring corroboration, was sufficiently corroborated to connect the Appellant with the commission of the offence. Any contradictions that became apparent during trial were minor and did not affect the thrust of the evidence adduced by the prosecution witnesses which pointed to the Appellant, and no one else, as the perpetrator of the offence. The ingredient to establish the charge of defilement was established. Medical evidence adduced by prosecution

witnesses indeed established that the complainant had been sexually assaulted. As regard the identity of the perpetrator, the Appellant was well known to the complainant prior to the sexual assault. The age of the complainant was established. She explained that taking into consideration the totality of the evidence adduced by prosecution witnesses, it was evident that the prosecution established its case against the Appellant to the required standard of proof. The Appellant's defence was considered by the trial court which found that it did not have merit. She urged the court to dismiss the appeal.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced so as to reach its own independent determination whether or not to uphold the conviction of the Appellants. 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 guilt of 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 by the prosecution witnesses in light of the submission, both written and oral that was made before this court. For the prosecution to establish the charge that was brought against the Appellant, it was required to establish three ingredients: that there was penetration, the identity of the perpetrator and the age of the victim. The age of the victim is material in determining the sentence that shall be meted out to the accused in the event that the accused is convicted. In **Dominic Kibet Mwareng –vs- Republic [2013] eKLR** Ndolo J held thus:

> ***"The critical ingredients forming the offence of defilement are: the age of the complainant, proof of penetration and positive identification of the assailant. Mr. Chebii, Counsel for the Appellant submitted that none of these ingredients was established. On the age of the Complainant, he submitted that failure to conduct an age assessment on the Complainant was fatal to the Complainant's case. He referred the Court to the case of Hilary Nyongesa Vs Republic (Eldoret Criminal Appeal No.123 of 2009) where Mwilu J (as she then was) stated that:***
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> ***"Age is such a critical aspect in Sexual Offences that it has to be conclusively proved…And this becomes more important because punishment (sentence) under the Sexual Offences Act is determined by the age of the victim."***
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> ***I agree and add that while the Court may in certain circumstances rely on evidence other than an age assessment report, the onus of proving the age of the victim resides with the Prosecution and a simple statement by the Complainant as to their age does not in my view, constitute such proof.""***

In the present appeal, the complainant testified that on the material day she went to the Appellant's place of business. The Appellant was a barber within the neighbourhood where the complainant lived. It was not the first time that the Appellant had shaved the complainant. The complainant regularly went to the Appellant's barber shop to be shaved. On this particular day, the complainant testified that after the Appellant had shaved her, he closed the door to the barber shop and then started touching her vagina. He removed her trousers and panties and then sexually assaulted her. In her testimony, the complainant referred to the Appellant as "Cudi". According to the complainant, while the Appellant was in the act, N, who was then their househelp came to the premises and peeped through the widow and asked the Appellant what he was doing. The Appellant hastily denied that he was doing anything and opened the door. He tried to drag N into the shop. She resisted and left and ran away leaving behind her sweater.

The complainant testified that the Appellant then released her and warned her not to tell anyone. She went home and did not tell anyone. On the following day, PW2 T K, the mother of the complainant realized that the child was not walking properly. Upon making inquiry from the complainant and N, she was informed that the complainant had been sexually assaulted. She took the complainant to Nairobi Women Hospital where she was examined by Dr. Muhombe who prepared a report. This report was produced as *Prosecution Exhibit No.1* by PW4 Kinuthia Mbugua, a registered Clinical Officer. At the time the medical report was produced, Dr. Muhombe had died. The report showed that the complainant had indeed been sexually assaulted. The vaginal swab revealed presence of spermatozoa. She had vaginal tears. A further examination by PW3 Dr. Kamau of Police Surgery confirmed that indeed the complainant had been defiled. In the premises therefore, this court holds that the prosecution did establish to the required standard of proof beyond any reasonable doubt that indeed the complainant had been penetrated.

As regard the identity of the perpetrator, it was clear from the evidence adduced by the complainant that she was well known to the Appellant prior to the sexual assault. She referred to the Appellant by his nickname "Cudi". She had, on several previous occasions, been shaved by the Appellant. On the material day of the incident, after she had been shaved, she told the court that the Appellant closed the door of the barber shop, removed her trousers and panties before forcefully having sexual intercourse with her. While he was in the act, she was accosted by one N, a househelp employed by the Complainant's parents. Although N did not testify, the statement that she recorded with the police was produced as an exhibit by the prosecution. The Appellant denied that he sexually assaulted the complainant. He attributed his troubles to a dispute that he had with the father of the complainant. He denied the allegation that the complainant paid a visit to his barber shop on the 15th February 2008.

This court has carefully considered the evidence that was adduced in regard to the identity of the complainant. It was clear from the evidence that the evidence that was adduced to secure the conviction of the Appellant was that of the complainant. This is the evidence of a child of young and tender years. According to the evidence, the complainant was 7 years old at the time of the incident. The proviso of **Section 124**

of the **Evidence Act** allows this court to convict an accused person in a sexual offence if it forms the opinion that the victim was telling the truth. In the present appeal, it was clear from the evidence that the complainant was not dealing with a stranger. She was known to the Appellant prior to the sexual assault.

The Appellant in his defence does not deny that he knew the complainant. On re-evaluation of the complainant's evidence, it was clear to this court that she was telling the truth. In deference to what she had been warned by the Appellant not to tell anyone about the incident, she did not even tell her mother on the particular day the ordeal that she had gone through. It was on the following day that her mother realized that she was not well. That was the time that she was taken to hospital to be medically attended to. This court had no doubt that it was the Appellant who sexually assaulted the complainant. His defence to the effect that he was not present on the material day that the incident took place does not dent the otherwise strong culpatory evidence that was adduced against him by the prosecution witnesses.

As regards the age of the victim, PW2 the mother of the complainant testified that at the time of the sexual assault, the complainant was aged seven (7) years. At the time the complainant testified, the mother told the court that she was aged 8 years. Although the birth certificate of the complainant was not produced, it was apparent from the testimony of the mother of the complainant and the medical documents which were produced in court that the age of the complainant was indeed established to be 7 years at the time of the sexual assault. This court holds that the prosecution established the age of the complainant to the required standard of proof beyond any reasonable doubt.

The upshot of the above reasons is that the appeal lodged by the Appellant against conviction lacks merit and is hereby dismissed. On sentence, **Section 8(3)** of the **Sexual Offences Act** prescribes the sentence that should be meted out to an accused upon conviction where the age of the victim is established to be between twelve (12) and fifteen (15) years. It is clear from the evidence that the Appellant should have been charged under **Section 8(2**) of the **Sexual Offences Act** and not **Section 8(3)** of the **Sexual Offences Act**. The trial court correctly sentenced the Appellant to the sentence as provided under **Section 8(2)** of the **Sexual Offences Act**. This court will not interfere with that sentence.

The Appellant's appeal against sentence is therefore dismissed as a result of which the conviction and sentence of the Appellant by the trial court is hereby upheld. It is so ordered.

DATED AT NAIROBI THIS 13TH DAY OF FEBRUARY 2018

L. KIMARU

JUDGE