



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 43 OF 2014

(An Appeal arising out of the conviction and sentence of Hon. J. Wanjala – CM delivered on 19th February 2014 in Kibera CMC. SO. Case No.10 of 2013)

DISMAS SHAME KHAHORE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Dismas Shame Khahore, 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 4th July 2013 in Langata District within Nairobi County, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of C A, a child aged seven (7) years. He was in the alternative charged with **committing an indecent act with a child** contrary to **Section 11(1)** of the same **Act**. The particulars of the offence were that on the same day and in the same place, the Appellant intentionally and unlawfully touched the vagina of the said C A, a girl aged seven (7) years with his penis. When the Appellant was arraigned before the trial court, he pleaded not guilty to the charges. After full trial, he was convicted on the main offence of **defilement** and sentenced to serve twenty one (21) years imprisonment. The Applicant was aggrieved by his conviction and sentence and duly filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. The Appellant was aggrieved that the trial court convicted him on the basis of a weak case put forward by the prosecution. He faulted the trial court for failing to consider that there was no medical evidence linking him to the offence. In his amended grounds of appeal filed without leave of court (the court will however consider them), the Appellant complained that he was convicted on the basis of a defective charge sheet. He faulted the trial court for failing to observe the requirements of **Section 214** of the **Criminal Procedure Code** and **Articles 25(c), 49(f)(I) (ii), 50(2)(j)** and **(m)** of the **Constitution**; in sentencing him without regard that he was a child when he was alleged to have committed the offence, and further failing to find that the prosecution's evidence in relation to identification was insufficient to sustain his conviction. He was aggrieved that the prosecution failed to prove the case against him to the required standard of proof beyond any reasonable doubt. The Appellant was also aggrieved that his conviction was based on the prosecution's evidence which was tainted with contradictions and inconsistencies. He complained that the trial court shifted the burden of proof thereby finding him guilty. He also complained that the trial court misconstrued the prosecution witnesses' evidence and applied wrong principles of the law to arrive at the decision to convict him. Lastly, the Appellant faulted the trial court for disregarding his defence of alibi. In the premises therefore, he urged the court to allow his appeal, quash his conviction and set aside the sentence that was imposed on him.

Prior to the hearing of the appeal, the Appellant filed his written submissions in support of his appeal. He further made oral submission in support of his case. A response to the Appellant's submissions was made by the Learned State Counsel, Ms. Kimiri. The Appellant submitted that the charge sheet which formed the basis of his conviction was laid under the wrong provision of law. He submitted that it was framed under the provisions of **Section 8(3)** of the **Sexual Offences Act** while the evidence adduced supported an offence under the provisions of **Section 8(2)** of the **Act**. He submitted therefore that the charge sheet was incurably defective and incapable of supporting his conviction. He urged the court not to permit an amendment to the charge sheet at the appeal stage as it would prejudice him. Submitting on the question of whether the prosecution proved the case against him to the required standard of proof beyond any reasonable doubt, the Appellant averred that the prosecution failed to establish the ingredient of penetration in the offence. He averred that there were inconsistencies in the evidence of the prosecution witnesses regarding whether the complainant had been penetrated. The Appellant submitted that whereas the medical report of PW4 indicated that the complainant was examined and her hymen found to be intact, the medical report tendered by PW5 showed that she was examined two days later and her hymen found to have been absent. He pointed out that the evidence of the complainant was that her assailant only placed his genitals on her buttocks, meaning that there was no sexual intercourse. According to the Appellant therefore, there was no medical collaboration for the complainant's evidence.

The Appellant further contended that he did not receive a fair trial in terms of **Articles 50(2)(b)** and **(f)** of the **Constitution**. He submitted that he was entitled to be accorded the services of an interpreter throughout the trial. He submitted that there is no evidence on record to show

that the trial proceedings were undertaken in Kiswahili, the language that he was said to be conversant with during taking of plea. He also averred his rights were infringed when he was not supplied with witness statements made by the prosecution witnesses to enable him adequately prepare his defence. Pertaining to his identification, the Appellant submitted that the trial court misdirected itself in holding that he was identified by the complainant whereas her evidence was that her assailant was shorter than him. He also submitted that the trial court placed reliance on the identification evidence of the complainant and PW2 yet they did not give a physical description of the assailant in their first report that was made to the police. He submitted that the identification of the said assailant by the clothes he wore was inadequate and unreliable. The Appellant was of the view that the dock identification evidence of the complainant and PW2 could not be relied upon to safely convict him. To support his submissions, the Appellant relied on the cases of **Maitanyi –versus- Republic [1986] KLR 198**, **Norman Ambich Miero & Another –versus- Republic [2012] eKLR**, **Francis Kariuki Njiru & 2 Others –versus- Republic [2010] eKLR** and **Gabriel Kamau Njoroge –versus- Republic [1982-1988] 1KAR 134**.

According to the Appellant also, the trial court failed to evaluate the evidence of PW2 to establish that he indeed had a video shop that was said to be located near Pentagon bar. In this regard, he cited the case of **James Omondi Were –versus- Republic [2014] KLR** to support his submission. He also claimed that the birth certificate tendered by the prosecution tending to establish the complainant's age was inadmissible in evidence in the absence of the original document. According to the Appellant, the said birth certificate was inadmissible since it was not produced by the maker. Finally, the Appellant submitted that the trial court failed to address itself to the fact that he was a minor at the time he was said to have committed the offence. He submitted that no medical evidence was tendered to establish his age.

Ms. Kimiri for the State opposed the Appellant's appeal. On the issue of the defective charge sheet, the Learned State Counsel conceded that the particulars of the offence supported the charge under **Section 8(3)** of the Act. She however submitted that the error did not prejudice the Appellant and that it was curable under **Section 382** of the **Criminal Procedure Code**. According to the Learned State Counsel also, the prosecution filed and served the Appellant with a notice to enhance sentence. She clarified that the Appellant was arrested on the basis of a report made vide OB No.[Particulars withheld]. She explained that he was erroneously charged pursuant to OB No.[Particulars withheld] which related to his arrest. This omission according to the Learned State Counsel did not also prejudice him. Responding to the Appellant's concerns regarding his age, the Learned State Counsel was adamant that an age assessment was carried out on him and he was found to be aged approximately twenty five (25) years. She contended that the prosecution informed the court the same on 12th September 2013. The Appellant did not contest that assertion. She argued that in any event, the Appellant had been pro-active during the proceedings and would have raised the issue if that was the case.

Submitting on the question of whether the prosecution proved its case against the Appellant to the required standard of proof, the Learned State Counsel submitted that all the essential elements requiring proof beyond reasonable doubt in the offence were proved. She submitted that the prosecution led evidence during trial to show how the Appellant sexually assaulted the complainant. She submitted that the medical examination carried on the complainant by PW4 and PW5 corroborated her evidence. She also submitted that the complainant positively identified the Appellant as her assailant as he was well known to her. She therefore urged the court to disallow his appeal.

The facts of the case as presented by the prosecution witnesses are as follows. The complainant, PW1, C A was aged Seven (7) years during trial and was a class one (1) pupil at [Particulars withheld] Primary School. Her age was confirmed by her mother PW3, J M through a certified copy of her birth certificate produced into evidence as **Prosecution's Exhibit No.3**. On the evening of 4th July 2013, the complainant together with her brothers PW2, E O and F O returned from school at about 4.00p.m and went to their mother's café at [Particulars withheld]. They had tea there and thereafter went outside to play. As they played on the road, a certain man called the complainant and asked her to help him carry compact discs (CDs). The complainant stated that the man wore a black trouser and a black shirt. She stated that she did not know him but that he had been standing at a nearby video shop. The evidence of PW2 was that he looked behind for his sister as they played and saw the man holding her hand. He testified that he recognized him having seen him before at the video shop where they used to go to watch movies. PW2 and his brother followed the man and the complainant from behind. They asked him where he was taking the complainant and he told them that he was taking her to help him carry the discs. He did not however tell them where they were going.

PW2 testified that the man asked them to go and man the video shop and they went there. Meanwhile, the complainant accompanied the man while carrying the discs. PW2 testified that he asked his brother to follow them to see where they were headed to but he returned and told him that he had lost sight of them. PW2 and his brother remained at the video shop attending to customers. After a while, they decided to go out and look for the complainant. They did not find her and therefore decided to walk around looking for her. They finally found the complainant standing on the road. It was about 7.00p.m. The complainant told them that she was waiting for the man to bring her ten shillings (10/-). They waited for the man but he did not show up. The children returned home as it was getting dark.

The evidence of the complainant was that after she followed the man and helped him carry the discs, he led her to a house. She testified that she ran away when they reached the house and the man send some boys to bring her back. The said boys chased after her and called the man when they caught up with her. The said man came and took her inside the house while the boys remained outside. She testified that while inside the house, the man put her on top of a bed and undressed her. He then put his penis inside her buttocks and sexually assaulted her from behind. She testified that when he finished, he left her inside the house and told her to wait for him to bring her Kshs.10/-. She remained in the house but later decided to go outside to wait for him. Her brothers found her waiting for the man while standing outside. She testified that they waited for the man to return and when he did not show up they went to their home.

PW3 testified that the children returned late to the café to have supper. They told her that they had been playing outside. They took their supper and went to sleep. She testified that the following day, she was with the complainant at her café. She testified that she sent the complainant to buy vegetables at a nearby market and noticed that she was walking abnormally. When she asked the complainant about it, she told her that she would talk to her about it later. PW3 testified that she examined her legs and found that they were fine. Later that evening she examined the complainant's genitals and noticed some injuries. She testified that the complainant told her that she had been defiled. She testified that the complainant told her that she had been playing near the video shop when a certain man took her to a house where he sexually assaulted her. She testified that the complainant told her that he knew where the house was located but could not remember the exact house. PW3 testified that PW2 confirmed that the complainant went away with the said man. He told her that he could recognize the man if he saw him again. PW2 accompanied PW3 to the video shop that evening but they did not find the man and returned home.

The complainant was medically examined at MSF Beigum Oympic Center. At the hospital, she was seen by PW4 Valarie Chepchirchir Saina, a nursing officer at the medical centre. This was on 7th July 2013. PW3 testified that the complainant presented herself at the hospital with a history of having been sexually assaulted. She testified that she examined her genitalia and noted bruises on her labia majora which was reddish in colour. She also had a foul smelling whitish discharge from her vagina. Her hymen was present. She testified that the urethral meatus was also red and tender. The complainant was in pain during the examination and also complained of pain when passing urine. She was diagnosed with a sexually transmitted infection after a vaginal swab and urine test was done. PW4 concluded that the complainant had been defiled. She filled a Post Rape Care Form in respect of the complainant which was produced into evidence as **Prosecution's Exhibit No.3**. The complainant was also examined by PW5 Dr. Joseph Maundu based at the Police Surgery on 9th July 2013. PW5 testified that he examined the complainant and also found that she had bruises on her labia majora and that her hymen was broken with fresh margins. She also had a clear discharge coming from her vagina. He filled his findings in a P3 Form which he produced into evidence as **Prosecution's Exhibit No. 2**

The incident was later reported at Kilimani Police Station. The Appellant was arrested in connection with the incident. PW2 testified that he spotted the man several days following the incident going into a café. He went and informed PW3 They went for him. PW2 pointed out the Appellant to PW3 as the person who went with the complainant. PW3 testified that she examined the Appellant closely and noted that he was short with uncombed hair. He also had a mark on his head. She testified that she went back to Kilimani Police Station to report that she had seen the Appellant and was given a letter authorizing her to arrest him. She testified that they tracked the Appellant and found him at a house belonging to his sister. They arrested him and took him to the police station.

PW6 Cpl Ruth Kioko was assigned to investigate the case. After concluding her investigations, she formed the view that indeed a case had been established for the Appellant to be charged with the present offence. When the Appellant was put on his defence, he denied committing the offence. Other than explaining the circumstances of his arrest, the Appellant did not at all touch on the evidence that was adduced against him by the prosecution witnesses.

This being a first appeal, it is the duty of this court to re-evaluate and to reconsider the evidence adduced before the trial court before reaching its own independent determination whether or not to uphold the decision of the said court. In doing so, this court is required to always keep 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**). The issue for determination by this court is whether the prosecution proved its case on the charge brought against the Appellant 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 re-evaluated the evidence adduced before the trial court. It has also considered the grounds of appeal presented by the Appellant and the submissions made on behalf of the Appellant and the State. **Section 8** of the **Sexual Offences Act** reads as follows;

“(1) A person t commits an act which causes penetration with a child is guilty of an offence termed defilement.

(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.”

The particulars of the offence in the Appellant's charge sheet reads as follows;

“DISMAS SHAME KHAHORE:- on the 4th day of July 2013 in Lang'ata District within Nairobi County, intentionally and unlawfully caused his penis to penetrate the vagina of C A, a child aged 7 years.”

From the provisions of **Section 8 (3)** of the **Sexual Offences Act**, it is clear that the charge against the Appellant has been laid under the wrong provisions of law. It ought to have been framed under **Section 8 (2)** of the **Act** which read as follows;

“8 (2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.”

Although the trial court correctly convicted the Appellant for the offence under **Section 8(2)** of the **Act**, it went on to sentence him in accordance with **Section 8(3)** of the **Act** as charged. In determining the validity of the Appellant's conviction and sentence on the basis of the defective charge sheet, this court shall be guided by the provisions of **Section 382** of the **Criminal Procedure Code** which provides;

“Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this code, unless the error, omission or irregularity has occasioned a failure of justice.

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.”

This test is provided for under this section is whether the error occasioned a failure on miscarriage of justice upon the Appellant. At this point what is important is whether the Appellant understood the charge he was facing to properly defend himself. From the records, it is clear that the substance of the charge and every element thereof was read to the Appellant who upon being asked whether he admits or denied the truth of the charge responded **“not true”**. From the defence put forward by the Appellant, it is clear that he understood the charge that he was facing. The error did not therefore occasion any injustice on the Appellant and indeed the complainant has not demonstrated how the error prejudiced him.

From the record of proceedings of the trial court, this court has established that the Appellant was afforded the services of an interpreter throughout the trial. The Appellant also cross-examined the witnesses. He was able to follow the proceedings without any difficulty. The record also showed that he demanded for and was supplied with the prosecution witnesses' statements. Regarding the issue of his age, although the Appellant in his mitigation stated that he was aged seventeen (17) years, the record of proceedings show that an age assessment was done during trial. He was found to be aged approximately twenty five (25) years. This fact was not contested by the Appellant when it was presented to the trial court.

The next issue for determination by this court is whether, from the evidence adduced by the prosecution, the offence of defilement was proved to the required standard of proof beyond any reasonable doubt. For the prosecution to establish the charge of defilement, it must establish first, the age of the complainant, second, that there was penetration, third, the identity of the perpetrator. Under **Section 2(1)** of the **Sexual Offences Act**, the meaning assigned to "*a child*" is that provided under the **Children Act**. Under **Section 2** of the **Children Act** a child is defined as any human being under the age of eighteen (18) years. The complainant stated that she was a class one (1) pupil at [Particulars withheld] Primary School. PW3, the complainant's mother testified that she was aged seven (7) years during trial and produced into evidence as **Prosecution's Exhibit No.3** a certified copy of her birth certificate. This court finds that the prosecution established the complainant's age to the required standard of proof beyond any reasonable doubt.

As regards to whether the prosecution proved penetration, the complainant's evidence was that the Appellant put his penis inside her buttocks and sexually assaulted her. The medical evidence produced by PW4 and PW5 corroborated the complainant's testimony. PW4 testified that he examined the complainant on 6th July 2013 and noted that she had bruises on her labia majora which was also reddish in colour. She also observed that she had a foul smelling whitish discharge coming through her vagina and that the urethral meatus was red and tender. PW4 noted that her hymen was present. She testified that the complainant was in pain during the examination and also complained of pain when passing urine. She carried out vaginal swab and urine test on the complainant and established that she had contracted a sexually transmitted infection. PW4 concluded that the complainant had been defiled.

The evidence of PW5 was that he examined the complainant on 9th July 2013. PW5 testified that he also found that she had bruises on her labia majora. He testified that her hymen was broken with fresh margins. She also had a clear discharge coming from her vagina. This court agrees with the Appellant that there were inconsistencies in the medical reports of PW4 and PW5 in that PW4 found the complainant's hymen to be present whereas PW5 found that it was broken. However, the reports were to a large extent consistent in their findings. Both established that the complainant sustained injuries in her genitals. She had bruises in her labia majora. She also had a discharge from her vagina. Both PW4 and PW5 concluded that their observations were consistent with the history of sexual assault that was reported. The prosecution also proved the element of penetration to the required standard of proof beyond any reasonable doubt.

As to whether the Appellant was properly identified as the complainant's assailant, the complainant testified that the Appellant was the person who asked her to accompany him and assist him carry compact discs. She had seen him standing outside a video shop as they played with PW2 and her younger brother. She testified that he took her to a house where he put her on the bed and undressed her. He then put his penis inside her buttocks and sexually assaulted her. Her evidence was corroborated by the medical evidence of PW4 and PW5. PW2 testified that he saw the Appellant hold the complainant's hand as they played. His evidence was that the Appellant told them that he had requested the complainant to help him carry some discs. He testified that the Appellant left them to man the video shop. He went with the complainant. PW2 is the one who identified the Appellant to his mother PW3 when he spotted him several days following the incident.

Although PW3 at one point stated that her assailant was slightly taller than the Appellant, she also reiterated that he was her assailant. The Appellant cross-examined the complainant and her evidence of identification was not shaken. The complainant maintained that it was the Appellant who defiled her. The Appellant faulted the trial court for placing reliance on the evidence of identification by the complainant and PW2 yet they did not give a physical description of the assailant in their first report that they made to the police. This court has seen the first report made by PW3 vide OB No. [Particulars withheld]. Indeed no description of the complainant's assailant was given considering that it was the first time the complainant had seen him. The purpose of the first report made to the police would be to corroborate the complainant's evidence. Her evidence was corroborated by that of PW2. He saw the Appellant leave with the complainant. The Appellant did not dispute this evidence. This court has no doubt that the Appellant was positively identified by both the complainant and PW2. His culpability was established to the required standard of proof beyond any reasonable doubt. His appeal on conviction lacks merit and is hereby dismissed.

As regards sentence, this court will not disturb the custodial sentence imposed by the trial court. The prosecution conceded that the Appellant was charged under the wrong "**sentencing**" section of the law. The Appellant can only be sentenced in accordance with the charge that was brought against him. This court is not persuaded by the argument advanced by the prosecution for the custodial sentence imposed on the Appellant to be enhanced. In the premises therefore, the Appellant's appeal on sentence is similarly dismissed. He shall serve the sentence that was imposed by the trial magistrate's court. It is so ordered.

DATED AT NAIROBI THIS 28TH DAY OF MARCH 2018

L. KIMARU

JUDGE