



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.63 OF 2016

*(An Appeal arising out of the conviction and sentence of Hon Stephen Jalang'o - SRM delivered on 4th March 2016 in Makadara CM.
CR. Case No. 6158 of 2011)*

EDWARD MURIUKI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Edward Muriuki was charged with **defilement** contrary to **Section 8(1)(3)** of the **Sexual Offences Act**. The particulars of the offence were that on diverse dates between 11th and 15th December 2011 at Zimmerman Estate, Nairobi County, the Appellant unlawfully and intentionally caused his penis to penetrate the vagina of J B K (the complainant), a child aged 14 years. He was alternatively charged with **committing indecent assault** contrary to **Section 11(1)** of the **Sexual Offences Act**. The particulars of the offence were that between the same dates, and in the same place, the Appellant unlawfully and intentionally committed an indecent act with the complainant, a child aged 14 years 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, the Appellant was convicted as charged on the main count. He was sentenced to serve 20 years imprisonment. The Appellant was aggrieved by his conviction and sentence. He has filed an appeal challenging the said conviction and sentence to this court.

In his petition of appeal, the Appellant stated that he was convicted on the basis of inconsistent, contradictory and weak evidence that was adduced by prosecution witnesses. He faulted the trial magistrate for convicting him on the basis of doubtful and unreliable evidence that did not establish his guilt to the required standard of proof. He was aggrieved that his rights to fair trial was contravened by the trial court in the course of the trial. He faulted the trial magistrate for failing to reach a finding that the medical evidence relied on by the prosecution actually exonerated him from the crime. He was finally aggrieved that his defence had not been taken into consideration before the trial court convicted him. In the premises therefore, the Appellant urged the court to allow the appeal, quash the conviction and set aside the sentence that was imposed on him.

During the hearing of the appeal, the Appellant presented to the court written submission in support of his appeal. In the written submission, it was the Appellant's case that his right to fair trial as guaranteed by **Article 50(2)(e) & (j)** of the **Constitution** were infringed when he was not given adequate time and facilities to prepare for his defence, and further, when he was denied reasonable access to evidence before the commencement of his trial. In that regard, he stated that he was not given prosecution witnesses' statements before the commencement of the trial. He was further aggrieved that he was not given an opportunity to have an advocate of his choice to defend him during trial. The Appellant stated that the trial court impatiently ordered the trial to proceed when he had indicated to the court that he wished to be represented by an advocate who was not present before court at the time trial commenced.

As regard the evidence that was adduced, the Appellant submitted that the medical evidence did not establish the claim by the complainant that he had sexually assaulted her during the period in question. He was of the firm view that the case was brought against him at the instigation of an aunt of the complainant who sought to punish him in revenge for unrequited love. He submitted that had his defence been considered by the trial court, it would have reached a different verdict. He explained that his defence established malice on the part of the prosecution witnesses which ought to have convinced the court that he had not committed the offence. He finally took issue with the fact that a crucial witness, being the father of the complainant, was not called to testify in the case. He was of the view that failure by the prosecution to call this witness meant that a critical witness who would have shed light regarding the circumstances of his relationship with the complainant was left out. In the premises therefore, the Appellant faulted the trial court for failing to properly evaluate the totality of the evidence that was adduced and therefore reached the erroneous verdict that he was guilty as charged. He urged the court to reconsider the evidence, in light of his submission, and allow the appeal.

Ms. Atina for the State opposed the appeal. She denied the allegation made by the Appellant to the effect that his constitutional rights to fair trial were infringed during the course of trial. She explained that the Appellant was reluctant to have the case proceed by giving various

excuses with a view to having the trial severally adjourned. In that regard, the Appellant's request that he be allowed to be represented by an advocate of his choice during trial was one of the many tactics that the Appellant used to delay trial until the trial court saw through his conduct. As regard the merits of the appeal, learned State Counsel submitted that the prosecution had adduced strong, consistent and credible culpatory evidence which established to the required standard of proof the ingredients of penetration, the age of the complainant and the identity of the perpetrator, who is the Appellant. She submitted that the medical evidence adduced clearly established penetration. The Appellant was well known to the complainant prior to the sexual assault. The Appellant's identity was not therefore in doubt. As regard the age of the complainant, her birth certificate was produced as an exhibit in court. This established that the Appellant was 14 years of age at the time of the sexual assault. She therefore urged the court to uphold the conviction and the sentence that was meted out on the Appellant.

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 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, Ruwala v R [1957] EA 570)”.

The issue for determination by this court is whether the prosecution established, to the required standard of proof, the charge of **defilement** contrary to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act** that was brought against the Appellant.

In the present appeal, the Appellant has raised two broad areas of complaint regarding his conviction. The first broad area is his complaint that his right to fair trial was infringed by the trial court, firstly, when he was not availed witnesses' statements before the commencement of the trial. Secondly, he complained that he was denied an opportunity to be represented by an advocate of his choice during trial. The court has perused the record of the trial magistrate's court. It was clear from the said record that when the Appellant requested to be availed witnesses' statements, the trial court granted his application. Indeed, on 13th August 2014, when the case came up for trial, the Appellant told the court that the witnesses' statements that he had been given to him by the prosecution were with his advocate. It was therefore clear that the Appellant's claim that he was not availed witness statements is not supported by the record of the trial court. The Appellant's right to be availed witness statements by the prosecution as provided under **Article 50(2)(j)** of the **Constitution** was not therefore infringed.

As regard the Appellant's claim that he was denied the right to be represented by an advocate of his choice, it was clear from the record that the advocate who the Appellant instructed to act on his behalf appeared in court only once. Other than on one occasion when the Appellant sought adjournment so that his advocate may be present in court, there is no other time that the Appellant raised any complaint with the trial magistrate's court in regard to the availability or the presence of his advocate during trial. It was therefore clear to this court that the Appellant's right to fair trial by having an advocate of his choice present in court as provided under **Article 50(2)(g)** of the **Constitution** was not violated. The broad grounds of appeal by the Appellant challenging the manner in which his trial was conducted lacks merit and is dismissed.

As regard the substance of the appeal, i.e. which was to the effect that the prosecution had not established to the required standard of proof that the Appellant had sexually assaulted the complainant, the prosecution relied on the testimony of the complainant who told the court that on 11th December 2011, the Appellant lured her to his house when she came to Nairobi to visit her aunt PW2 B M. The complainant testified that she knew the Appellant prior to the particular date. They came from the same village in Meru County. She testified that the Appellant locked her in his house for three days in which period he forcefully had sexual intercourse with her. After three days, she managed to escape and sought the help of PW2 to have the incident reported to the police. The complainant was medically examined by PW3 Dr. Zephania Kamau who confirmed that although there were no vaginal injuries, the complainant had old hymenal tears. It should be noted that the complainant was first seen at the Nairobi Women Hospital after she reported the ordeal to the police. The Appellant challenged this evidence. He submitted that it did not establish that he had indeed sexually assaulted the complainant.

Upon re-evaluation of this evidence, it was clear to this court that the complainant was telling the truth when she told the court that the Appellant lured her to his house after which he sexually assaulted her for three days. Her testimony was corroborated by PW2 who told the court how she frantically looked for the complainant when she did not return home on 11th December 2011. This was after she had attended church. PW2 also corroborated the complainant's testimony when she testified that the complainant called her after she had escaped from the Appellant's house on the third day of her detention. It was obvious to the court that the testimony of the complainant was credible and consistent. She was telling the truth. The proviso of **Section 124** of the **Evidence Act** in regard to how the court should treat the evidence of a victim of sexual offence clearly applies in her case. This court holds that the prosecution established to the required standard of proof that the Appellant penetrated the complainant. The complainant knew the Appellant prior to the sexual assault and therefore the issue of identity of the perpetrator was not in doubt. Indeed, the Appellant confirmed that he knew the complainant and members of her family, including PW2 and her father.

This court has re-evaluated the evidence that the Appellant adduced in his defence. The Appellant claimed that the charge brought against him was instigated by PW2 as a result of a love relationship gone sour. It was the Appellant's case that PW2, who is the aunt of the complainant, was his former girlfriend. She was not happy with the manner in which the relationship broke up. She therefore instigated the complaint to hit back at him. PW2 denied that he ever had a romantic relationship with the Appellant. Indeed, at the time she testified before court, she was happily married. This court re-evaluation of the evidence that the Appellant adduced in his defence leads it to the irresistible conclusion that the Appellant's defence is a fabrication and has no connection with reality. It was foisted by the Appellant in an obvious attempt to escape criminal culpability. The trial magistrate's court, and this court, properly and justifiably dismissed that defence as offering no panacea to the Appellant's culpability for the charge that was brought against him.

As regard the age of the complainant, a birth certificate was produced in court which established that the complainant was born on 15th December 1996. She was therefore 15 years at the time of the sexual assault. The age of the complainant is important in defilement cases

because it determines the sentence that shall be meted out on the convict. **Section 8(3)** of the **Sexual Offences Act** provides the term of imprisonment that shall be imposed in the event of a conviction were the victim is between the ages of 12 and 15 years. In the present appeal, the Appellant was sentenced to serve the minimum sentence of 20 years imprisonment.

In the premises therefore, this court holds that the appeal lodged by the Appellant lacks merit in his entirety and is hereby dismissed. The conviction and the sentence of the trial court is hereby upheld. It is so ordered.

DATED AT NAIROBI THIS 13TH DAY OF MARCH 2018

L. KIMARU

JUDGE