



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO.84 OF 2013**

*(An Appeal arising out of the conviction and sentence of Hon. Linda C. Kosgei – RM delivered on 9<sup>th</sup> May 2013 in Makadara CMC. Cr. Case No.582 of 2011)*

**JOHN MUOKI KIOKO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The Appellant, John Muoki Kioko 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 2<sup>nd</sup> February 2011 at [particulars withheld], Starehe in Nairobi County, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of YN (the complainant) a child aged eight (8) 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 committed an indecent act with the complainant by touching her private parts (vagina). When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was found guilty of the main charge. He was sentenced to serve life imprisonment. He was aggrieved by his conviction and sentence. He has appealed to this court against the said conviction and sentence.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. The Appellant was aggrieved that the trial magistrate convicted him on the basis of uncorroborated evidence. He was of the view that the trial magistrate had taken into consideration extraneous and irrelevant matters in reaching her decision. The Appellant took issue with the fact that he had been convicted against the weight of evidence and after the trial court had put into emphasis irrelevant circumstances. The Appellant faulted the trial magistrate for convicting him on the basis of an incurably defective charge sheet and also by breaching his right to fair trial. The Appellant was aggrieved that he was convicted on the basis of the evidence of a child whose evidence was taken before *voire dire* was conducted. He faulted the trial magistrate for convicting him yet the ingredients to establish the charge were not proved to the required standard provided by the law. He was finally aggrieved that his defence had not been considered before the trial court reached its verdict to convict 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 upon him.

During the hearing of the appeal, the Appellant presented to court written submission in support of his appeal. He urged the court to allow his appeal. Ms. Sigei for the State opposed the appeal. She submitted that the prosecution had established all the necessary ingredients to prove the charge. She urged the court to dismiss the appeal. This court shall revert to the arguments made on this appeal after briefly setting out the facts of the case.

The complainant in this case was at the material time a girl aged eight (8) years. Although her birth certificate or any other document signifying her age were not produced into evidence, the complainant, her mother PW2 F N and PW7 Cpl. Virginia Kasimi, the investigating officer testified that the complainant was eight (8) years at the time of the incident having been born in the year 2002. The complainant testified that on 2<sup>nd</sup> February 2011 she was requested by the Appellant, who was a neighbour, to buy him paraffin. He gave her Kshs.10/- to buy the paraffin. The complainant bought the paraffin and took it to the Appellant's house. The Appellant lived alone at the time. The complainant testified that when she entered the house, the Appellant pulled her into the house, gagged her mouth, removed her clothes and then sexually assaulted her. After he was through, he gave her Kshs.10/- and warned her not to tell anyone. Meanwhile, two of the neighbours PW3 Monica Muthoni and PW4 Emily Wangari were alerted of a commotion outside the Appellant's house. From the evidence, it was apparent that when the complainant entered the house of the Appellant, and remained inside, some neighbours became suspicious and went to the house.

PW3 and PW4 testified that they saw the complainant emerge from the Appellant's house. She told them that she had been sexually assaulted by the Appellant. Meanwhile, the Appellant was arrested and escorted to Muthaiga Police Station where he was detained. PW3 and PW4 informed the Appellant's mother PW2 who escorted the complainant to MSF France Clinic at Mlango Kubwa. This was about two hours

after the incident. She was examined by PW5 Purity Kajuju who made the following observations:

***“There was a watery discharge. The vaginal entry was red and some blood was coming out. The hymen had been broken. Urine analysis showed blood red cells (with) pus. She was treated and counseled.”***

PW5 produced the medical report and the duly filled PRC form as exhibits in the case. Another medical report was prepared on 4<sup>th</sup> February 2011 by PW8 Dr. Zephania Kamau of the Police Surgery. He gave a different opinion from that of PW5. He stated that the complainant had not sustained any injuries in her vagina. He noted that the hymen was intact. The court shall address this contradiction in the medical evidence later in this judgment. The case was investigated by PW7. After concluding her investigations, she found that a case had been established for the Appellant to be charged with the offence that he was convicted.

When the Appellant was put on his defence he denied committing the offence. He gave an alibi defence. He told the court that he was in Ngara area when the incident is said to have taken place. When he returned home, he was shocked when he was confronted by a group of people who claimed that he had sexually assaulted a child. He was rescued by police who were on patrol and taken to Muthaiga Police Station. He attributed the decision to charge him to his failure to bribe the police who had arrested him. He was emphatic that he had nothing to do with the alleged sexual assault of the complainant.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced during trial so as to reach its own independent determination whether or not to uphold the conviction of the Appellant. 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)”.***

The issue for determination by this court is whether the prosecution established, to the required standard of proof beyond any reasonable doubt, the charge brought against the Appellant of **defilement** contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act**.

This court has carefully re-evaluated the evidence adduced before the trial court. It has also considered the submission made by the Appellant and the prosecution during the hearing of this appeal. There are several issues that came to the fore during the hearing of this appeal. The Appellant urged the court to find that the charge brought against him was defective. From his submission, it would appear that the Appellant interpreted the defect in the charge sheet as amounting to the contradictions that became apparent when the prosecution witnesses testified in court. This court has considered this ground of appeal and formed the firm view that the charge brought against the Appellant was not defective because the same cited the correct provisions of the **Sexual Offences Act** and provided sufficient particulars which enabled the Appellant to mount a proper defence.

The second ground of appeal that the Appellant raised was his complaint to the effect that his right to fair trial had been infringed since he was not provided with witnesses' statements prior to commencement of trial. The Appellant relied on **Article 50(2)(j)** of the **Constitution** that mandates the prosecution to provide in advance, to the accused, evidence that it intends to rely on during trial. On perusal of the proceedings before the trial court, it was apparent that the Appellant did not at any time complain that he had not been availed the witnesses' statements. Indeed, what clearly comes out from the record is that the Appellant was anxious for his case to be heard and concluded. For the Appellant to complain at this appellate stage that he was not availed witnesses' statements is, in the considered view of this court, an afterthought. The Appellant is raising the issue for the first time at this appellate stage. This court is not persuaded by the Appellant's argument that he was not availed witnesses' statements before the trial commenced. To the contrary, the record shows that the Appellant at no time expressed any reservations in the manner in which the trial was being conducted. That ground of appeal must fail.

On the merits of the appeal, the prosecution was required to establish three ingredients to prove the charge of defilement. These three ingredients are: penetration, the age of the victim and the identity of the perpetrator. Regarding whether penetration was established, as stated earlier in this judgment, the complainant was seen by a medical practitioner two hours after the sexual assault. The medic noted that there was a watery discharge emanating from the complainant's vagina. She was bleeding from the vagina. Her hymen had been broken. A later medical examination by the police surgeon two days after the incident gave a contrary opinion. The police surgeon stated that the complainant's vaginal area was normal and further that her hymen was intact. On re-evaluation of these medical evidence, this court holds that the medical report prepared two hours after the sexual assault gives the correct information regarding the complainant's medical condition at the time. The subsequent one written two days after the event is discounted by virtue of the fact that it was not sufficiently detailed as the one prepared when the complainant was first seen two hours after the incident. In the premises therefore, this court holds that the prosecution established to the required standard of proof that indeed the complainant was penetrated in the course of the sexual assault.

The second issue that the prosecution was supposed to prove is the age of the victim. As stated earlier in this judgment, no documentary evidence was produced to establish the age of the complainant. However, the trial court relying on the case of **Fappyton Mutuku Ngui vs Republic [2012] eKLR** held that she was satisfied that the complainant's apparent age was eight (8) years at the time of the sexual assault. This was upon observing the complainant in court. In that case, the court held thus:

***“I would be prepared to clarify that “conclusive” proof of age in cases under Sexual Offence Act does not necessarily mean that there has to be a formal age assessment report or the production of a birth certificate. Such formal documents might be necessary in borderline cases, but other modes of proof of age are available and can be used in other cases. In this particular case, am prepared to hold that available evidence shows that the victim was less than 11 years old, which is the threshold for triggering a charge under Section 8(2) of the Sexual Offences Act.”***

This court cannot disagree with the holding of the trial court which was to the effect that taking into consideration that the two doctors who saw the complainant noted her apparent age to be eight (8) years precluded the court from making an adverse finding as to the age of the complainant. This court therefore holds that the prosecution established to the required standard of proof the age of the complainant to be eight (8) years at the time of the sexual assault.

The third ingredient is the identity of the perpetrator. The complainant denied that he was at the scene of crime when the sexual assault took place. He gave an alibi defence. The prosecution however adduced evidence which established to the required standard of proof that the Appellant was a neighbour to the complainant's parents, the Appellant was known to the complainant and her parents and that the Appellant's identity was therefore not in doubt. Further, from the evidence adduced by PW3 and PW4, it was clear that the Appellant was apprehended by members of the public immediately after the act. The complainant was seen entering the house of the Appellant and thereafter seen coming out of the house. It was at this point that the complainant told PW3 and PW4 that she had been sexually assaulted. The Appellant was apprehended and taken to Muthaiga Police Station. The prosecution's evidence therefore places the Appellant at the scene of crime. Any contradictory evidence that became apparent during trial is minor and does not distract this court from reaching the finding that the Appellant was the perpetrator of the sexual assault.

The upshot of the above reasons is that the Appellant's appeal lacks merit and is hereby dismissed. His conviction is upheld. The sentence imposed upon him was legal. The appeal against sentence is similarly dismissed. It is so ordered.

**DATED AT NAIROBI THIS 24<sup>TH</sup> DAY OF MAY 2018**

**L. KIMARU**

**JUDGE**