



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.161 OF 2015

(An Appeal arising out of the conviction and sentence of Hon. E.K. Nyutu –PM delivered on 14th August 2015 in Kibera CMC. CR. Case No.2 of 2013)

CHARLES MATHENGE KARIUKI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Charles Mathenge Kariuki 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 30th December 2012 at Mwhiko Githurai 45 within Nairobi County, the Appellant, intentionally and unlawfully caused his penis to penetrate the vagina of SW, a child aged fifteen (15) years. In the alternative, the Appellant was 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 intentionally and unlawfully touched the vagina of SW, a child aged fifteen (15) years with his penis.

When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was convicted of the main charge of **defilement** and was sentenced to serve twenty (20) years imprisonment. The Appellant was aggrieved by his conviction and sentence and has filed for an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction. He was aggrieved that the trial magistrate in convicting him, failed to pronounce the sentence that he was bound to serve contrary to **Section 169(2)** of **Criminal Procedure Code**. He faulted the trial court for failing to appreciate that the prosecution failed to establish its case to the required standard of proof beyond any reasonable doubt. He was aggrieved that the trial court relied on contradictory and inconsistent evidence. He faulted the trial court for failing to observe that his rights under **Article 50(2)(c)(j)** of the **Constitution** were flouted. He was aggrieved that the medical officer (government analyst) who is alleged to have extracted the blood samples from the appellant did not testify during trial. He faulted the trial court for admitting PW4's and PW6's evidence whereas their evidence was inadmissible in law. He faulted the trial court for shifting the burden of proof from the prosecution to Appellant which is contrary to the law. He was aggrieved that the trial court failed take into account the Appellant's alibi defence. In conclusion, he submitted that the burden of proof was not discharged and that the trial court did not consider his defence. 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.

During the hearing of the appeal, the Appellant presented to the court written submission in support of his appeal. He also made oral submission in support of his appeal. In the said written and oral submission, the Appellant stated thus:

The Appellant submitted that he was subjected to an illegal trial and thus the sentence that was meted upon him was an illegal sentence. He explained that the trial court did not indicate the sentence that he was supposed to serve contrary to **Section 169(2)** of the **Criminal Procedure Code**. He averred that he should have been charged under **Section 8(3)** instead of **Section 8(2)** under the **Sexual Offences Act**. He submitted that the evidence was conflicting. According to him, the evidence of PW1 to PW3 was not consistent. He explained that the complainant alleged that she met the Appellant at 1:00 pm where she was abducted and led to a house where she spent the rest of hours locked inside a house until at night. He explained that whereas the complainant told the court that she had been dragged by the Appellant, he questioned why there were no injuries reported as a result thereof. He further submitted that the complainant told the court that she managed to persuade the Appellant to allow her go for a short call which she was allowed and it was this time that she got a chance to flee from the house to the place where she met her mother at the night. He averred that the complainant alleged that she screamed. He questioned why people did not come to her rescue. He was of the view that the complainant's evidence beggars belief. He submitted that when the people came to rescue the complainant they should have arrested him. He further submitted that in cross-examination, the complainant confessed that her mother had told her what to say in court. According to him, this raises serious doubts as to whether the alleged offence indeed took place.

The Appellant submitted that the prosecution did not prove its case beyond reasonable doubt that he had indeed defiled the complainant. He explained that the blood stains allegedly received by PW4, the government analyst, from PW6 PC Taalam were profiled in the DNA. He further submitted that no arresting police officer or those who recovered the items from the Administration Police camp nor the laboratory technician who generated the DNA and the medical officer from Siloam Hospital who is alleged to have extracted the Appellant's blood and saliva were called by the prosecution. According to the Appellant, this was in clear violation of **Section 150** of the **Criminal Procedure Code**. He submitted that it was not clear how the alleged blood stained clothing moved from the Appellant's house to PW6's hands and whether the belongings of the Appellant and the complainant mixed. He further submitted that prosecution witness **Exhibit No.10** was not properly produced in court and thus was inadmissible by dint of the **Evidence Act**. He submitted that his rights under **Article 50(2)(j)** of the **Constitution** was violated as no prosecution witnesses' statement were availed to him prior to commencement of the trial. He explained that under the said article, the prosecution was obligated to disclose evidence that they were going to rely on, that was not done which resulted in violation of his right. The Appellant further submitted that PW2 knew him prior to the incident. He was of the strong view that the charge laid against him was a frame up. He submitted that the burden of proof was not discharged to the required standard of proof beyond any reasonable doubt. He submitted that this was a case of mistaken identity. He was aggrieved that the trial court failed to consider his defence. In the premises therefore, he urged the court to allow his appeal, quash his conviction and set aside the sentence that was imposed upon him.

Ms. Sigei for the State opposed the appeal. She submitted that the Appellant was charged with defilement, found guilty and was sentenced to serve 20 years imprisonment. She submitted that the prosecution called six (6) witnesses. It was her submission that the age of the complainant was proved via a birth certificate which indicated that she was born on 27th August 1997. She submitted that the complainant was abducted while on her way home from church. The Appellant forced her into his house and defiled her. She submitted that the complainant was held against her will until late in the evening and when she found an opportunity to escape to the road side where she was later found crying. The complainant told her mother what had transpired and that's when she led the public to the Appellant's house where they found the Appellant having locked himself inside. She submitted that a report was made to Githurai Police Station. The Appellant was arrested. The complainant was taken to Nairobi Women's Hospital for examination. She was examined by Dr. Maundu on 31st January 2013. The doctor noted that the hymen was missing. There was also a white discharge from the vagina. She submitted that PW6 obtained items from the Appellant's house including the complainant's clothing which were taken for analysis by the government chemist. She submitted that the bed sheets had semen that belonged to the Appellant and the swab sample that was taken from the Appellant confirmed that the blood and the semen were the Appellant's. She submitted that the complainant positively identified the Appellant. There was no doubt as the offence was committed during daytime. She averred that the prosecution witnesses were consistent in their testimonies. The conviction was therefore safe. She further submitted that the prosecution was at liberty to call any witness to testify in the case. She explained that the Appellant did not object to PW6 testifying on behalf of the Administration Police. There was no miscarriage of justice. She further submitted that there was no profiling of DNA and that although the charge sheet was not amended, it was not fatal to the prosecution's case. She urged the court to dismiss the appeal.

This being a first appeal, it is the duty of this court to reconsider and re-evaluate the evidence adduced by the prosecution witnesses and by the defence before the trial court, so as to arrive at its independent determination on whether or not to uphold the conviction of the Appellant. In so doing, the court is mindful of the fact that it never saw nor heard the witnesses as they testified and therefore cannot give an opinion as regarding the demeanor of said witnesses (see **Okeno –vs.- Republic [1972] EA 32**). In the present appeal, the issue for determination by the court is whether the prosecution established a case for this court to convict the Appellant on the main **charge of defilement** to the required standard of proof beyond any reasonable doubt.

The facts of the case are as discerned by the court are as follows. The complainant in this case is, PW1, SW. At the material time, she was a child aged 15 years. The complainant's age was confirmed by a birth certificate which indicated that she was born on 20th August 1997. The birth certificate was produced by PW6 as **Prosecutions Exhibit No.10**. The complainant gave her unsworn evidence after a *voir dire* examination was conducted and the court determined that she was indeed a competent witness. According to her testimony, she stated that she lived with her parents at Mwhiko and used to attend the nearby PEFA Church. She told the court that on 30th December 2012, as she was going back home from church, she met with Mathenge (the Appellant). She reckoned that the Appellant used to reside behind the PEFA church. She narrated that on the material day, the Appellant greeted her and then asked her to go with him to his house. She declined the invitation. The Appellant forced her to accompany him by pushing her. She fell down but the Appellant was insistent. The Appellant dragged her to his house. She told the court that when she was still down, the Appellant removed his trouser and then removed the complainant's underwear and forcefully inserted his penis into her vagina. She screamed in pain telling the Appellant to stop. In the process, the Appellant told the complainant that he did not have a wife and he wanted her to be his wife so that they could have children together. She told him that she was a young girl who was not ready for marriage.

The complainant testified that the Appellant offered her alcohol but she declined. She told the court that her efforts to scream and ask for help proved futile as nobody came to her rescue. She was forced to stay in the house until night fell. She narrated that she was forced to stay in the house locked from the inside with a padlock and so there was no way she could escape. The Appellant could not even allow her to go to the toilet but instead asked her to relieve herself inside the house. She told the court that afterwards she asked for permission to go to the shop to buy something to eat. The Appellant allowed her. She found an opportunity to escape. She told her mother what had transpired and she was taken to hospital. Later the matter was reported to the police station. She further told the court that the Appellant was not known to her prior to the incident.

PW2, LW testified that the complainant is her daughter. She was 15 years at the time of the incident. She testified that the complainant had a mental disability but she could talk and express herself. On the material day, on 30th December 2012, she recalled that it was on a Sunday. She was not feeling well. She did not go to church but the complainant wanted to go to church. She prepared her and accompanied her to church. She told the court that sometimes the complainant could walk home alone. She narrated that on the material day PW3 called her and asked her to go fetch the complainant. On the way she did not meet the complainant but she met with her friend PW3 who helped look for her. They met with one Jennifer who told them that she had seen the complainant in the company of a man. When their efforts to look for the complainant turned futile, they reported the matter to a police station. Later she received a call that her daughter had been seen near [Particulars Withheld] Primary School. She proceeded together with her friend PW3. They found the complainant in the Appellant's house.

The Police were called to the scene. The Appellant was arrested while the complainant was taken to Nairobi Women's Hospital for examination. Later they were issued with a P3 form and a medical report. She testified that Appellant was not known to her prior to the

incident. PW3, RK testified that PW2 was her friend. She told the court that they both had disabled children but the complainant could speak. She narrated on the material day, she went to church. After church, she saw the complainant and inquired where her mother was, she asked her if she could go home alone and the answer was positive. When she learnt that PW2 had not gone to church, she called her immediately and asked her to pick the complainant. She followed the route that the complainant had taken but could not find her. She met the complainant's mother on the way and they started looking for her. They found the complainant at about 5.00 pm near a school. She was crying. She narrated what happened to her and what the Appellant did to her. When the Appellant saw them, he locked himself inside the house. They screamed and the members of the public gathered, the police were called and the Appellant was arrested. PW4, AWN testified that she used to work at the government chemist in Nairobi as a Government Analyst. She had worked there for fifteen (15) years. She testified that on 2nd January 2013 she received the following items from PW6 of Githurai;

- a. Saliva of Charles Mathenge
- b. Blood samples of Charles Mathenge
- c. Bed sheets of Charles Mathenge
- d. Inner wear of Charles Mathenge
- e. Pants of SWC
- f. Dress of SWC

She further told the court that on 4th October 2013, the following items were received at the laboratory.

- g) Buccal/swab sample of SWC

They were required to determine the presence and source of the semen and blood stains. After analysis, the following were the findings;

1. The areas item (f) was not stained with semen.
2. The pant (e) was moderately stained with semen
3. The dress (f) and pants (r) were lightly stained with human blood
4. The bed sheet (c) was lightly and heavily stained with semen respectively.
5. The inner wear (d) was not stained with semen and blood.

She told the court that they also carried out DNA analysis on stains on bed sheet, pant, blood sample (b) and mucal swab (g). She added that the following were the findings;

1. The DNA profile generated from the semen stain obtained from the bed sheets (item c) indicated as of the Appellant marked the DNA profile generated from blood sample (item d) indicated as of the Appellant.
2. The DNA profile generated from the blood sample obtained from the bed sheets (item c) indicated as of the Appellant marked the DNA profile generated from the mucal swab sample (g) indicated as of the complainant.
3. The stain (blood and semen) obtained from the pants (item e) indicated as of the complainant generated a mixed DNA profile where one marked the DNA profile generated from the blood sample indicated as of Appellant and the other marked the DNA profile from the mucal swab sample (item g) obtained from complainant.

She told the court that she prepared the report on 25th October 2013. She produced the same as **Prosecution Exhibits No.3** and **5** respectively.

PW5, Dr. Joseph Maundu attached at the Nairobi area police surgery. He examined the complainant on 3rd January 2013. He noted that the hymen was missing and that there was a whitish discharge from her vagina. He prepared the P3 form and produced the same as **Prosecution Exhibit No. 2**. He also produced P3 form of the Appellant as **Prosecution Exhibit No.3**. PW6, PC Gilbert Taalam was attached at Githurai Kimbo Police Station. He told the court that the complainant was arrested by the Administration Police officers and members of the public. He interrogated the complainant and recorded her statement. He took the underwear of the complainant, a bed sheet and a dress as exhibits. He produced all the blood exhibits and the government chemist for analysis. He produced the clothes of items as exhibits and produced them as **Prosecution Exhibit No.6 - 9**. He produced the birth certificate of the complainant as **Prosecution Exhibit No. 10**.

When the Appellant was put on his defence, he denied committing the offence. He told the court that on 30th December 2012, he had gone for a meeting at Mwioko Shopping Centre. The meeting had been called by the MP for Kasarani. He told the court that he was not at the house and thus did not sexually assault the complainant. He insisted that the charge brought against him was a frame up.

For prosecution to establish the charge of **defilement** contrary to **Section 8(1)** of the **Sexual Offences Act**, it must prove three elements of the charge: that there was penetration, the identity of the perpetrator and finally the age of the victim. In this appeal, the prosecution proved that the complainant was indeed sexually assaulted. The complainant testified that the Appellant penetrated her by inserting his penis into her vagina. Her evidence was corroborated by PW4, the government analyst from the Government Chemist. PW4 received the following items from PW6;

- a. Saliva of Charles Mathenge
- b. Blood samples of Charles Mathenge
- c. Bed sheets of Charles Mathenge
- d. Inner wear of Charles Mathenge
- e. Pants of SWC
- f. Dress of SWC
- g. Mucal/swab sample of SWC

After analysis the above items were found to contain semen and human blood. They carried out DNA analysis on the above items and came to the following conclusion. She found that DNA profile generated from the semen stain obtained from the bed sheets (item c) indicated as of the Appellant marked the DNA profile generated from the blood sample (item d) indicated as of the Appellant. She also found that the DNA profile generated from the blood sample obtained from the bed sheets (item c) indicated as of the Appellant marked the DNA profile generated from the mucal swab sample (g) indicated as of the complainant. She further found that the stain (blood and semen) obtained from the pants (item e) indicated as of the complainant generated a mixed DNA profile where one marked the DNA profile generated from the blood sample indicated as of Appellant and the other marked the DNA profile from the mucal swab sample (item g) obtained from complainant. Dr. Maundu, PW5, further corroborated the evidence of the complainant as he found that the complainant's hymen was missing and there was a thick whitish discharge coming from her vagina. This court is satisfied that the prosecution proved that indeed the victim was penetrated.

The second issue for determination is the age of the child. The prosecution produced the complainant's birth certificate which indicated that the complainant was born on 20th August 1997. She was fifteen (15) years at the time of the incident.

The third issue for determination by this court is the identity of the perpetrator. The complainant was not known to the Appellant prior to incidence but the evidence from the government analyst indicates that the complainant indeed identified the Appellant positively as the mixed DNA obtained from the pants of the complainant belonged to the complainant and the Appellant. This court finds that the Appellant assertion that he was framed by the complainant's mother to be devoid of credibility and finds that the prosecution established the identity of the Appellant as the perpetrator of the sexual assault to the required standard of proof beyond any reasonable doubt.

In the premises therefore, this court finds that the Appellant was properly convicted by the trial court. The sentence that was imposed by the trial court is legal as provided under **Section 8(3)** of the **Sexual Offences Act**. This court notes that the Appellant was charged under **Section 8(2)** of the same **Act** but this court finds that the error was not prejudicial to the Appellant. The Appellant's appeal against conviction and sentence lacks merit and is hereby dismissed. The verdict of the trial court is hereby upheld. It is so ordered.

DATED AT NAIROBI THIS 23RD DAY OF MAY 2018

L. KIMARU

JUDGE