



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.90 OF 2016

(An Appeal arising out of the conviction and sentence of Hon. M. Mutuku – SPM delivered on 30th May 2016 in Nairobi CMC. Cr. Case No.557 of 2015)

JOSEPH NDETO KIMUNYU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Joseph Ndeto Kimunyuu was charged with two (2) counts of **defilement of a child** contrary to **Section 8(1)** as read with **Section 8(2) of the Sexual Offences Act**. The particulars of the offence were that on 15th March 2015 within Nairobi County, the Appellant unlawfully and intentionally caused his penis to penetrate the anus of GM, a child aged ten (10) years and DM, a child aged (9) years. He was alternatively charged with two (2) counts of **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 indecently assaulted GM, a child aged ten (10) years and DM, a child aged (9) years by touching their private parts, namely their anuses. 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 of the two main counts of **defilement**. He was sentenced to serve life imprisonment. The Appellant was aggrieved by his conviction and sentence. He has filed an appeal to this court.

The Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted on the basis of insufficient prosecution evidence that did not establish his guilt to the required standard of proof. He was aggrieved that he was found guilty yet crucial witnesses were not called by the prosecution to testify in the case. He was of the view that the evidence adduced by the prosecution witnesses was marred by irreconcilable contradictions that should have led to the Appellant's acquittal. He accused the trial magistrate of failing to consider his defence before reaching the impugned decision. He was particularly irked by the trial court upholding the evidence of the complainants yet they did not satisfy the requirements of **Section 124 of the Evidence Act**. He was finally aggrieved that he had been sentenced to serve a term 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, Prof. Nandwa, the Advocate for the Appellant filed written submission in support of the Appellant's case. He also made oral submission urging the court to find that the evidence adduced by the prosecution witnesses did not establish the Appellant's guilt to the required standard of proof. He urged the court to allow the appeal. Ms. Atina, on her part opposed the appeal. She submitted that the prosecution had adduced sufficient culpatory evidence that implicated the Appellant in the offences that he was charged with to the required standard of proof beyond any reasonable doubt. 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 complainants in this case, GM (PW1) and DM (PW2) testified that they were, respectively, Standard Four and Standard Three primary school pupils. They testified that the Appellant, who was residing in a flat near where they lived with their parents, befriended them. They used to go to his house. The Appellant sent them on errands after which he gave them gifts. They both testified that on different occasions in the month of March 2015 (they could not recall the specific dates), the Appellant invited them separately to his house, after which he showed them pornography from his phone, after which he asked them to replicate with him what they had seen. The complainants were reluctant to participate in the deeds that they had been shown. The Appellant proceeded to ask them to undress before he lubricated his penis with vaseline and then inserted it in their respective anuses. PW2 testified that the Appellant also asked him to suck his penis. He complied. Both complainants testified that the Appellant secured their cooperation in the deed after he had threatened them. He further threatened them with dire consequences, including being bewitched, if they ever disclosed the sexual assault to anyone.

A few days later, a laundry man known by the nickname "Dobi" told PW5 Edwin Mwangi Gathii, a Caretaker of the building where the Appellant resided that the Appellant was sodomizing children. The said Dobi, who used to wash cloths for residents within the locality, informed PW5 that PW2 had told them that the Appellant had forced him to engage in sexual activity. PW5 passed this information to PW4

PW, the mother of PW2. On questioning PW2, PW4 was informed that PW1 had also been sexually assaulted. PW4 passed this information to PW3 BN, the mother of PW1. PW1, after a lot of reluctance (he said he feared to be bewitched) confirmed the information that the mother had been told by PW4. A report was made to Huruma Police Station. The parents of PW1 and PW2 were advised to take them to be seen by a doctor.

They were seen by Irene Nyangwache, a clinical officer working for MSF France. This was on 22nd March 2015. On examination of both complainants, PW6 saw nothing remarkable. Specifically, she stated that she did not see any abnormality. The Post Rape Care forms were produced into evidence. The complainants were further seen by PW7, Dr. Joseph Maundu based at the Police Surgery. This was on 24th March 2015. He noted nothing remarkable. He produced the P3 forms in respect of the complainants as prosecution's exhibits in the case. PW8, PC Stacy Kwanza was assigned to investigate the case. After concluding her investigations, she formed the opinion that a case had been made for the Appellant to be charged with the offences that he was convicted of.

When the Appellant was put on his defence, he attributed his travails to the differences that he had with a woman residing within the same flat who had an intimate relationship with Dobi. He testified that the woman, whose name he could not recall, borrowed from him Kshs.5,000/- on the promise that she was going to repay the same within two days. She did not repay the money. When he confronted her, she told him to get the refund from Dobi. Dobi confirmed to him that he would pay the money. Unfortunately, he did not do so. That, and the fact that Dobi lost some of his clothes that he had given him to wash, led to a disagreement between the Appellant and the said Dobi. Dobi told him that he would teach him a lesson. He did not take this threat seriously. He further testified that on the material day that he was alleged to have sexually molested the complainants, he had travelled upcountry to Matuu in Machakos County to attend to his sick mother. He later attended the funeral of his cousin. He returned a week later. The Appellant was in effect giving an alibi defence. He denied committing the offence.

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 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)”.

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

It is now settled that for the prosecution to establish the charge of defilement, it must prove, to the required standard of proof beyond any reasonable doubt, three critical elements of the charge: penetration, the age of the victim and the perpetrator of the offence. In the present appeal, it was the prosecution's case that the Appellant, who lived in the same neighbourhood with the complainants, befriended the complainants, before he lured them to his house, showed them pornographic material and then sodomized them. In support of this element of penetration, the prosecution relied on the evidence of the complainants and the medical evidence adduced by PW6 and PW7. The complainants testified that the Appellant befriended them before inviting them to his house after which he sodomized them. He threatened them with dire consequences if they dared report the incidents to anyone. He told them that he would bewitch them if they disclosed what he had done to them.

The complainants however disclosed this information to one Dobi. For some inexplicable reason this Dobi was not called to testify as a prosecution witness. PW5 told the court that he got information from Dobi that the Appellant was sodomizing children. He acted on the information and informed the parents of the complainants. It is not clear from the evidence how Dobi was able to get the information from the complainants noting that the complainants were reluctant to give the information to their parents. It was expected that medical evidence would corroborate the testimony of the complainants. That was not the case. The complainants were seen by two medical practitioners who formed the opinion that nothing remarkable was notable. Medical examination did not confirm the complainants' claim that they had been sodomized.

On re-evaluation of the evidence adduced by the prosecution to establish penetration, this court formed the view that the prosecution failed to establish to the required standard of proof that indeed the complainants were sodomized. Penetration being a key plank in a case for defilement, and the same having not been established, this court cannot proceed to re-evaluate any other evidence adduced by the prosecution witnesses. The medical evidence that was adduced did not corroborate the evidence that the complainants adduced to the effect that they were sodomized.

This court is aware that it can convict an accused on the basis of uncorroborated testimony of a victim of sexual violence if it is convinced that the victim is telling the truth.

In the present appeal, the complainants were children of young and tender age. They are impressionable. They are susceptible to influence by adults who have authority over them. The close reading of the testimonies of the complainants reveal uncanny semblance in the manner in which the two complainants narrated the events that are alleged to have taken place. Such uncanny likeness in the complainants' evidence leads this court to the conclusion that the complainants may have been coached to give their testimony before court in the manner that they did. This court is not persuaded that the complainants were telling the truth to entitle this court to convict the Appellant on the basis of uncorroborated evidence of the complainants. Further, the Appellant's assertion that he had differences with the originator (Dobi) of the information that eventually led to his arrest and arraignment before court, is something that should have been investigated by the police. The fact that the said Dobi was not called upon to record a statement or to testify on behalf of the prosecution, raises doubt in this court's mind that the information that he gave to PW5 was based on the truth.

In the premises therefore, this court finds merit in the Appellant's appeal. The same is allowed. The Appellant's conviction is quashed. He is acquitted of the charges that were brought against him. He is ordered set at liberty forthwith and released from prison unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 26TH DAY OF JUNE 2018

L. KIMARU

JUDGE