



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO. 20 OF 2016**

*(An Appeal arising out of the conviction and sentence of Hon. L.O. Onyina – SPM*

*delivered on 30<sup>th</sup> November 2015 in Kibera CMC. S.O. Case No.66 of 2013)*

**H K A.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The Appellant, H K A was charged with the offence of **defilement** contrary to **Section 8(1)** as read with **Section 8(4)** of the **Sexual Offences Act**. The particulars of the offence were that on 14<sup>th</sup> December 2013 at about 6.45 a.m. at [particulars withheld] in Nairobi County, the Appellant defiled M E, a girl aged fifteen (15) years old by causing his penis to penetrate her vagina. The Appellant 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 caused his penis to come into contact with the vagina of M E (the complainant), a child aged fifteen (15) years. 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 as charged. He was sentenced to serve twenty (20) years imprisonment. The Appellant was aggrieved by his conviction and sentence. He has filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal, challenging his conviction and sentence. He was aggrieved that his constitutional rights to fair trial had been violated thereby vitiating the trial. He faulted the trial magistrate for relying on the evidence of the mother of the complainant to convict him in the absence of any cogent basis to do so. The Appellant emphasized that the prosecution did not establish penetration to the required standard of proof. He faulted the trial magistrate for failing to weigh the evidence adduced, and further failing to evaluate the entire evidence adduced and thereby reached the erroneous verdict convicting him. He was aggrieved that his defence had not been taken into account before the trial magistrate reached the finding that he was guilty as charged. 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 also made oral submission urging the court to find that the prosecution had not established the charge brought against him to the required standard of proof. Ms. Akunja for the State opposed the appeal. She submitted that the prosecution had adduced evidence which established that the Appellant had sexual intercourse with his step-daughter, who is a child with disability. She urged the court to disallow the appeal. This court shall revert to the arguments made on this appeal after briefly setting out the facts of this case.

The Appellant in this case was married to PW1 E M. PW1 had a child from another relationship prior to getting married to the Appellant. This child, M E was a special needs child. PW1 testified that the complainant was born in 1997. She could not walk or talk. She had cerebral palsy. She had cerebral palsy. She therefore remained at home all the time. PW1 recalled that on 14<sup>th</sup> December 2013, she left their home at [particulars withheld] to go to work. On the way, she remembered that she had forgotten something at home. She returned to the house and found the door of the house locked from the inside. She peeped through a gap in the door and saw the Appellant had removed his underwear and was on top of the complainant. The Appellant had removed the complainant's pants and bikers. PW1 saw the Appellant having sexual intercourse with the child. She was able to gain access to the house after the Appellant

opened for her the door. The Appellant was in his underwear. The complainant had clothes on her upper part of her body while she was naked on the lower part of the body. PW1 inquired from the Appellant what he had done to the child. The Appellant kept quiet. On checking the complainant's genitalia, PW1 noticed that she was not okay. She took the child, with the assistance of the Appellant, to Nairobi Women Hospital where she was treated and discharged. They were advised to report the incident to the police. She reported the incident to Golf Course Administration Police Post. PW2 Purity Kawira Kubai, a volunteer Children Officer and Community Counsellor was called by the police and requested to assist PW1. She testified that after confirming that the medical reports had been prepared, she assisted PW1 to report the incident at Capital Hill Police Station. After the report was made, the Appellant was arrested and later charged.

PW3 Dr. Kizie Shako based at the Police Surgery testified that on 16<sup>th</sup> December 2013 she examined the complainant. She found that the complainant had indeed been defiled. During examination, she noted that the complainant was terrified and appeared afraid. She produced the P3 form into evidence. PW4 Dr. Daniel Nguku produced a Post Rape Care (PRC) form prepared by Dr. S.M. Kisa. According to the report, the complainant had cerebral palsy. She was seen on 14<sup>th</sup> December 2013. She was bleeding from her vagina. Her hymen was torn and distended. She was given medication to prevent any infection. The Post Rape Care form was produced as an exhibit. After the case was reported to the police, PW5 PC Jane Chepchumba was assigned to investigate the case. After concluding her investigation, she reached the decision to charge the Appellant with the offence that he was convicted.

When the Appellant was put on his defence, he denied committing the offence. He attributed the lodging of the complaint by PW1 with the police to a domestic disagreement. He testified that PW1 had informed him that she wished to go back to her former husband. The disagreement escalated to the extent that he slapped PW1. It was then that PW1 told him that she would teach him a lesson. It was his evidence that he was framed with the charge. He denied having sexual intercourse with the complainant.

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 charge of defilement contrary to **Section 8(1)** as read with **Section 8(4)** of the **Sexual Offences Act** to the required standard of proof beyond any reasonable doubt.

This court has carefully re-evaluated the evidence adduced before the trial magistrate's court. It has also had the benefit of considering the submission made before this court, both oral and written. For the prosecution to establish the charge of defilement, there are three essential elements that must be proved. The first element is penetration. In this appeal, PW1, the mother of the complainant, testified that she found the Appellant having sex with the complainant. The complainant was at the material time aged fifteen (15) years. She is a special needs child. She has cerebral palsy. She cannot talk and had difficulty in walking. Due to her condition, she stayed home most of the times. On the material day of 14<sup>th</sup> December 2013, PW1 unexpectedly returned home to collect something she had forgotten. She found the door to their house locked. She peeped through a gap on the door and saw the Appellant having sexual intercourse with the complainant. The Appellant was undressed. She had undressed the complainant. When PW1 gained access to the house and examined the complainant's genitalia, she saw that indeed the complainant had been sexually assaulted. She took the complainant to Nairobi Women Hospital where she was examined by Dr. Kisa. The doctor noted that the complainant's hymen was broken. The complainant was bleeding from her vagina. The complainant was further seen by Dr. Kizie Shako. She confirmed that the complainant had indeed been sexually assaulted. The P3 form and the Post Rape Care form were produced into evidence. On re-evaluation of this evidence, this court is satisfied to the required standard of proof beyond any reasonable doubt that the prosecution established that the complainant had indeed been penetrated. The first element of the charge was established.

The second element of the charge that the prosecution was required to establish is the age of the complainant. According to PW1, the complainant was born in 1997. It was not clear from PW1 the exact date that the complainant was born. What is not in dispute is that at the time the incident occurred, the complainant was between the age of 15 and 16 years. The doctors who saw the complainant confirmed that the complainant's apparent age was fifteen (15) years. There are a plethora of authorities that state that the best evidence when the prosecution is called upon to prove the age of the victim of sexual assault in defilement cases is documentary evidence. The documentary evidence may be a birth certificate, a birth notification, a baptismal card or any other acceptable documentary evidence that proves the age of the victim. However, in certain circumstances, the court may call for the assessment of the age of the victim to be done by the doctor or may consider the apparent age of the victim from the evidence that is adduced by the prosecution witnesses. In the present appeal, this court formed the opinion from the evidence adduced by PW1 and the medical doctors who saw the complainant that she was indeed aged between 15 and 16 years at the time of the sexual assault.

As regard the identity of the perpetrator, PW1, the wife of the Appellant testified that she found the Appellant having sexual intercourse with the complainant when she unexpectedly returned to their home. The Appellant disputes this claim. He testified that he was framed by PW1 due to a domestic disagreement that he had with her. The Appellant testified that PW1 had indicated to him that she wished to return to her former husband. He lost his cool and slapped PW1. PW1 was not happy. She promised to deal with him. Having re-evaluated the evidence

adduced by PW1 and the Appellant, this court formed the view that PW1 was telling the truth when she said that she found the Appellant having sexual intercourse with the complainant. There was no reason for PW1 to implicate the Appellant in the sexual assault of the complainant if indeed the Appellant did not do it. Prior to unexpectedly finding the Appellant having sexual intercourse with the complainant, there was no evidence to suggest that the Appellant and PW1 had any disagreement.

The evidence adduced by PW1 was corroborated by medical evidence which established that indeed the complainant had been sexually assaulted. There was no other man who could have had access to the complainant other than the Appellant. There is no other man who had access to their house other than the Appellant. This court holds that the prosecution did establish to the required standard of proof beyond any reasonable doubt that the Appellant was the perpetrator of the sexual assault of the complainant. In that regard therefore, the Appellant's appeal against conviction lacks merit and is hereby dismissed.

On sentence, the Appellant is on a firmer ground. **Section 8(4)** of the **Sexual Offences Act** specifies the sentence that shall be meted out where the victim of the sexual assault is between the ages of 16 and 18 years. In the present appeal, the victim was aged between 15 and 16 years. She was therefore older than the threshold of 15 years specified for sentences under **Section 8(3)** of the **Sexual Offences Act**. The Appellant was sentenced to serve twenty (20) years imprisonment instead of fifteen (15) years imprisonment that he ought to have been sentenced to serve. There was no justification for the trial court to sentence the Appellant to serve a harsher sentence than that stipulated by the law. In the premises therefore, the sentence of twenty (20) years imprisonment imposed by the trial court is set aside and substituted by a sentence of this court sentencing the Appellant to serve fifteen (15) years imprisonment with effect from 30<sup>th</sup> November 2015 when he was sentenced to serve the custodial sentence by the trial court. It is so ordered.

**DATED AT NAIROBI THIS 21<sup>ST</sup> DAY OF JUNE 2018**

**L. KIMARU**

**JUDGE**