

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.105 OF 2016

(An Appeal arising out of the conviction and sentence of Hon. L. Onyina – SPM delivered on 26th June 2016 in Kibera CMC. (S.O) Cr. Case No.1221 of 2010)

W O S.....PPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, W O S was charged with **defilement** contrary to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act**. The particulars of the offence were that on diverse dates between 1st November 2009 and 30th November 2009 in Nairobi County, the Appellant committed an unlawful act by inserting his male genital organ (penis) into the female genital organ (vagina) of S S, a child aged 13 years which caused penetration. 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 between the same dates and in the same place, the Appellant committed an indecent act by placing his male genital organ (penis) on the female genital organ (vagina) of S S and touched her private parts. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was convicted as charged on the main count. He was sentenced to serve twenty (20) years imprisonment. The Appellant was aggrieved by his conviction and sentence. He has appealed to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction. He was aggrieved that he had been convicted on the basis of medical evidence that did not support the charge. In particular, he stated that the medical evidence that was adduced did not support the prosecution's case that there was penetration. The Appellant faulted the trial magistrate for convicting him on the basis of inconsistent, uncorroborated, incredible and contradictory evidence of prosecution witnesses. The Appellant was aggrieved that the trial court failed to properly evaluate and analyze the evidence and thereby reached the erroneous determination that the prosecution had established its case to the required standard of proof beyond any reasonable doubt. The Appellant was of the view that the police had conducted shoddy investigations which was essentially based on hearsay evidence and which ought not to have formed a basis for his conviction. The Appellant took issue with the fact that the trial court believed the evidence of the complainant and relied on circumstantial evidence when the facts of the case dictated otherwise. He faulted the trial magistrate for failing to take into consideration his defence before reaching the impugned decision finding him 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. In summary, it was the Appellant's case that the medical evidence which was adduced by the prosecution did not establish penetration or the fact that he had defiled the complainant. The Appellant stated that it was not clear from the medical evidence the exact dates when it is alleged that the defilement took place. The medical evidence was essentially based on what the complainant had told the medics. The Appellant was of the view that the medical evidence established that the complainant was sexually active and was five (5) months pregnant at the time of the examination thus ruling out the assertion by the complainant that he had defiled her three (3) months prior thereto. On penetration, the Appellant stated that the complainant had old hymen tears which were consistent with the complainant's sexual experience which could not be attributed or connected to him. The Appellant submitted that the complainant's evidence was not worthy of credit because it was full of contradictions and inconsistencies. The evidence adduced by the complainant did not connect him to the charge. In essence, the Appellant was saying that it could not be ruled out that the complainant had sexual intercourse with another person. The Appellant further submitted that taken in totality, the evidence adduced by the prosecution witnesses could not sustain a charge against him because it was based on contradictory and manipulated evidence. He was aggrieved that his defence was not taken into consideration by the trial court thereby rendering the judgment unsustainable. In the premises therefore, the Appellant urged the court to allow the appeal.

Ms. Aluda for the State opposed the appeal. She submitted that the prosecution had established its case to the required standard of proof. She submitted that the Appellant lured the complainant to his house after which he sexually assaulted her. He did this on two occasions. Medical evidence adduced established penetration. The Appellant was well known to the complainant prior to the sexual assault. His identity was therefore not in doubt. As regard the age of the complainant, the same was established by production of a birth certificate which indicated that the complainant was thirteen (13) years old at the time of the sexual assault. Ms. Aluda submitted that the prosecution had established its case to the required standard of proof and therefore the appeal lacked merit and should be dismissed.

This being a first appeal, it is the duty of this court to reconsider and 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. In reaching its determination, this court is required to always keep in mind the fact that it neither saw nor heard the witnesses as they testified and therefore give due regard in that respect. (See **Njoroge –vs- Republic [1987] KLR 19**). In the present appeal, the issue for determination by this court is whether the prosecution adduced sufficient evidence to secure the conviction of the Appellant on the charge of **defilement** contrary to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act**.

This court has carefully re-evaluated the evidence adduced before the trial court. It has also had the benefit of considering the submission made before this court on this appeal. It is now settled law that where the prosecution seeks to secure a conviction of an accused on the charge of defilement, it must establish three ingredients: penetration, the age of the victim and finally the identity of the perpetrator. In the present appeal, the prosecution called two doctors who testified that on physical examination of the complainant, they confirmed that her hymen was broken. The complainant was pregnant at the time of examination at the Nairobi Women Hospital. This court takes note that the complainant was examined approximately three months after the alleged incident. The doctors testified that it could not be ruled out that the complainant was sexually active. This court was convinced to the required standard of proof that indeed penetration was established. The medical report prepared at Nairobi Women Hospital and the P3 form filled at the Police Surgery were produced into evidence.

As regard the age of the victim, PW2 P N, the mother of the complainant testified that the complainant was born on 15th February 1997. She produced her birth certificate as an exhibit. The age of the complainant was therefore established to the required standard of proof. The complainant was 13 years old at the time of the sexual assault.

As regard the identity of the perpetrator, the complainant, who testified as PW1 stated that the Appellant sometimes in November 2009 sent her to go and buy him *mandazi*. The Appellant was well known to the complainant because the Appellant was a relative to the complainant's father. He was further a neighbour to her family at [particulars withheld] Estate. When she returned to the Appellant's house, the Appellant dragged her into the house, removed her panties and then sexually assaulted her. She told the court that she felt pain. After he was through, the Appellant let her go after threatening her with dire consequences if she revealed to anyone what had transpired. The complainant testified that due to the threats, she did not tell anyone. A few weeks later, the Appellant again called her to his house. This time he asked her to suck his penis. She was distressed. Again she was warned not to tell anyone. She did not tell anyone. This fact psychologically affected the complainant. From the evidence adduced, it is apparent that the complainant was depressed. Her parents PW2 and PW3 J O realized that the complainant was not okay. They sought medical assistance. It was then that they learnt that the complainant had been sexually assaulted by the Appellant. The Appellant denied the assertion by the complainant that he had sexually assaulted her.

On re-evaluation of this evidence, this court is persuaded to the required standard of proof beyond any reasonable doubt that it was the Appellant who sexually assaulted the complainant. The evidence adduced by the complainant was credible and consistent in terms of the narration of events that took place in the month of November 2009 that led to her sexual assault that resulted in the pregnancy. The Appellant was known to the complainant. The family of the complainant and the Appellant were related. This court could not discern any reason why the complainant would implicate the Appellant, a relative, in the sexual assault if he was not the one who did it. Although the testimony of the complainant was that of a single witness, the **Proviso to Section 124 of the Evidence Act** permits the court to convict an accused on the basis of a single witness in a sexual offence provided that the court is convinced that the victim is telling the truth. In the present appeal, it was clear to this court that the complainant was telling the truth when she narrated the events leading to the sexual assault. The Appellant's narration of the version of events that took place as contained in his defence is incredible. It did not address the salient points that the complainant adduced in her evidence that implicated the Appellant in the sexual assault.

From the foregoing, it is evident that the Appellant's appeal against conviction lacks merit and is for dismissal. It is hereby dismissed. As regard sentence, the Appellant was sentenced to serve the minimum custodial sentence provided by the law. This court cannot interfere with that sentence. The Appellant's appeal against sentence is hereby equally dismissed. It is so ordered.

DATED AT NAIROBI THIS 20TH DAY OF JUNE 2018

L. KIMARU

JUDGE