



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.102 OF 2015

(An Appeal arising out of the conviction and sentence of Hon. E.Juma - SPM

delivered on 15th September 2015 in Kibera CM. CR. Case No.71 of 2014)

CLEDAS MWEKA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Cledas Mweka was charged with **defilement** contrary to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offence Act**. The particulars of the offence were that on diverse dates between May and June 15th 2014 at Ole in Kajiado County, the Appellant intentionally and unlawfully caused his male genital organ (penis) to penetrate the female genital organ (vagina) of S A (the complainant), a child aged twelve (12) years. The Appellant was alternatively charged with the offence 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 dates and in the same place, the Appellant intentionally and unlawfully caused his male genital organ (penis) to touch the female genital organ (vagina) of the complainant, a child aged 12 years. 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 main count. 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 he had been convicted on the basis of insufficient, inconsistent and contradictory evidence of prosecution witnesses. He faulted the trial magistrate for relying on the evidence of a single witness, without corroboration, to convict him. He faulted the trial magistrate for dismissing his defence without considering its merit in light of the evidence that was adduced by the prosecution witnesses. The Appellant faulted the trial magistrate for failing to appreciate that crucial witnesses were not called to testify in the case and thereby leaving gaps in the prosecution case which raised reasonable doubt that he had committed the offence. He was finally aggrieved that the evidence adduced by the prosecution was not proved to the required standard that could lead to his conviction as provided by the law. In the premises therefore, the Appellant urged the court to allow his appeal, quash his 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 the written submission, the Appellant argued that he was convicted on the basis of a defective charge that could not sustain a conviction. He complained that the dates that he was alleged to have committed the offence were not clear from the charge sheet and therefore, presumably, he was embarrassed in preparation of his defence as he was uncertain on what to defend. The Appellant complained that his rights to fair trial were infringed in that he was not provided adequate facilities to prepare for his defence. In particular, he complained that he was not availed the witnesses' statements prior to commencement of the trial.

As regard the evidence, the Appellant stated that crucial witnesses were not called to testify in the case. In particular, he referred to the arresting officer, the mother of the complainant and one Maxwell and his wife Emily. The Appellant stated that the testimony of these witnesses would have been debunked the prosecution's case and lead to his acquittal. He urged the court to draw an inference that the reason why the said witnesses were not called to testify in the case was because they would have adduced evidence that would have discredited the prosecution's case. The Appellant relied on the case of **Bukenya -vs- Uganda [1972] EA 549**. On the evidence that was adduced by the complainant, the Appellant testified that the same was inconsistent and contradictory and lacked in material particulars that connected him with the crime. He was of the view that the evidence of the complainant was such that it was incapable of belief. He was aggrieved that his defence had not been considered before the trial court reached the impugned decision finding him guilty as charged. The Appellant urged the court to re-evaluate the evidence and reach the appropriate conclusion finding that the prosecution had failed to establish its case to the

required standard of proof and thereby acquit him.

Ms. Aluda for the State opposed the appeal. He submitted that the complainant, who at the time was aged 12 years, lived with the Appellant and his wife, who was the complainant's cousin. The complainant was employed by the couple as a house help. She submitted that the complainant testified that the Appellant defiled her on at least three (3) occasions and in the course of defiling her, assaulted her. When she reported the incidents to the wife, she did not take any action. When she was defiled for the third time, she was beaten by the Appellant. She decided to run away from the home. She made a report to the police. She was referred to Nairobi Women Hospital where she was admitted for a week. At the hospital, it was established that she had been defiled. She had a whitish discharge from her vagina. It was established that she had been infected with a sexually transmitted disease. She also had injuries on her back consistent with being hit with a blunt object. The required medical reports were filled. The complainant was taken to Fatuma Children's Home at Ongata Rongai. Learned state counsel submitted that the prosecution had established to the required standard of proof beyond any reasonable doubt that the Appellant committed the offence that he was convicted. She urged the court to dismiss the appeal.

This being a first appeal, it is the duty of this court to re-consider and to re-evaluate the evidence adduced before the trial court so as to arrive at its independent decision whether or not to uphold the conviction of the Appellant. In doing so, this court is required to always give allowance on the question of demeanour of witnesses as it did not have the opportunity of seeing or hearing the witnesses as they testified. (See **Okeno -vs- Republic [1972] EA 32**). In the present appeal, the issue for determination by this court is whether the prosecution adduced evidence that established the Appellant's guilt to the required standard of proof 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 considered the grounds of appeal put forward by the Appellant and the rival submission made by the parties to this appeal. For the prosecution to establish the charge of **defilement**, it is required to establish three ingredients: whether there was penetration, the age of the victim, and finally the identity of the perpetrator. In this appeal, the complainant testified that she is a cousin to L K who is the wife of the Appellant. She recalled that sometime in early 2014, her cousin requested her grandmother to allow her to stay with the complainant in Nairobi. L promised to take the complainant to school. She did not. Instead, she made the complainant to be her house help. L had just given birth to a child. The complainant assisted her to take care of the child while she went to work. The complainant testified that while L was at work, the Appellant came home during daytime and forcefully had sexual intercourse with her. She narrated three instances where the Appellant sexually assaulted her including a particular time where the Appellant sneaked from his bedroom and came to the sitting room where she was sleeping and sexually assaulted her.

During these instances, the complainant told L what had transpired but she did not take any action. She told the Appellant's brother by the name Maxwell and his wife Emily what had happened. They took no action. On the third day that she was sexually assaulted, she decided to run away. This was after she was also beaten by the Appellant using a cane. She reported the incident to the police. She was taken to Nairobi Women Hospital where she was admitted for a week before she was discharged and her custody handed over to Fatuma Children's Home at Ongata Rongai.

The complainant's medical report that was filled while she was admitted at Nairobi Women Hospital was produced by PW3 Dr. Daniel Ngui. He observed healing scars on the complainant's back. He noted that they were inflicted by a blunt object. On examining her female genitalia, he noted that the complainant's hymen was missing. He produced the medical report as an exhibit in the case. He also produced a post rape care form that was produced by his colleague, a clinical officer by the name Wambui. The complainant was later on 25th June 2014 seen by Dr. Joseph Kamau based at the Police Surgery. He noted scars on the upper part of the back which were healing. On examination, he noted that the complainant's hymen was missing and she had a whitish discharge. He noted that the discharge was as a result of infection. He also observed that the complainant had been treated at the Nairobi Women Hospital. He produced the P3 form into evidence. The case was investigated by PW4 Cpl Alice Wairimu. After concluding her investigations, and assisting the complainant to be relocated to the Children's Home, she was of the opinion that a case had been made for the Appellant to be charged with the present offence that he was convicted.

When the Appellant was placed on his defence, he denied committing the offence. He explained that the complainant used to stay with them but disappeared from their home on 10th June 2014. He was shocked on 7th July 2014 when the police from Ongata Rongai Police Station came to his house and arrested him on allegation that he had defiled the complainant. He told the court that the complainant was older than 12 years that she claimed was her age.

As regard the first ingredient of the charge, this court holds that the prosecution established to the required standard of proof beyond any reasonable doubt that the Appellant had penetrated the complainant. Although the evidence of the complainant was that of a child, and was not corroborated, under the proviso to **Section 124 of the Evidence Act**, the court can convict an accused on the basis of uncorroborated evidence of a victim of sexual offence where the court forms the opinion that the victim is telling the truth. In the present appeal, it was clear from the complainant's narratives of the events that took place between the time she started living with the Appellant and his wife to the time that she ran away from their house that she was telling the truth when she said that she was sexually assaulted by the Appellant. Whenever she was sexually assaulted, she did not conceal the incident. She told the Appellant's wife, who happens to be a cousin, and the Appellant's brother and his wife about the incident. No action was taken by them. This necessitated the complainant to lodge a complaint with the police. The medical evidence that was adduced by PW2 and PW3 corroborated the complainant's testimony that she had been sexually assaulted. Her hymen was broken. She had injuries that were consistent with sexual assault. She had injuries on her back that corroborated her testimony that she had been beaten by the Appellant. This court therefore holds that the prosecution proved to the required standard of proof the ingredients of penetration.

As regard the age of the Appellant, both doctors testified that the Appellant was twelve (12) years old at the time of the sexual assault. Although no documentary evidence was produced to support the prosecution's assertion that the Appellant was twelve (12) years of age at the time of the sexual assault, this court accepts the doctors' opinion as regard the apparent age of the complainant. The trial court saw the complainant and was satisfied that she was twelve (12) years old at the time of the sexual assault. The Court of Appeal in **Kaingu Elias Kasomo -vs- Republic Malindi CA Criminal Appeal No.504 of 2010**, held that it was imperative that the age of a victim of a sexual assault who is a child be established by documentary evidence or by other credible evidence which will enable the court sentence the convict. In the present appeal, this court is satisfied that the complainant's age was established by the evidence of the victim herself and by medical evidence which was adduced before court which confirmed the complainant's apparent age at the time of sexual assault.

As regard the identity of the perpetrator, the Appellant was known to the complainant. They lived together in the same house at the time of the sexual assault. This court is satisfied that the complainant positively identified the Appellant as the perpetrator of the sexual assault as he was well known to her prior to the sexual assault.

The Appellant complained that critical and vital witnesses were not called to testify in the case. In particular, he pointed out the fact that his wife, his brother and his brother's wife were not called by the prosecution to testify in the case although they were mentioned by the complainant in her testimony. On re-evaluation of the evidence, this court formed the considered view that the prosecution is under no legal obligation to call more witnesses than it is necessary for the prosecution to establish its case to the required standard of proof. In the present appeal, the prosecution called all the necessary witnesses that were sufficient to enable the prosecution to establish its case. There is nothing in law that prevented the Appellant from calling the said witnesses as his defence witnesses if he was of the view that they were necessary to disapprove the prosecution's case. This is more so considering the fact that the said witnesses are his close relatives. This court found no merit with this ground of appeal.

As regards the Appellant's complaint that he was not availed witnesses' statements prior to commencement of trial, on perusal of the trial court's proceedings, this court noted that the Appellant was represented by counsel. The witnesses' statements were availed to his counsel prior to commencement of trial. At no time during the trial did the Appellant complain that he did not have the prosecution's witnesses' statements and therefore was incapacitated from mounting his defence.

From the foregoing, it is clear that the appeal lodged by the Appellant against conviction and sentence lacks merit. The sentence that was imposed by the trial court was legal. The appeal is hereby dismissed on its entirety. It is so ordered.

DATED AT NAIROBI THIS 18TH DAY OF JUNE 2018

L. KIMARU

JUDGE