REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 57 OF 2013

(An Appeal arising out of the conviction and sentence of Hon. M. NJAGI – (SRM) delivered on 14th March 2013 in ELDORET CM CR. Case No.1040 of 2012)

BENJAMIN WAFULA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Benjamin Wafula was charged with **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 3rd September 2011 in Kakamega County, the Appellant intentionally and unlawfully caused his genital organ (penis) to penetrate into the genital organ (vagina) of SK (the complainant), a child aged eight (8) years. 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 intentionally and unlawfully caused his genital organ (penis) to come into contact with the genital organ (vagina) of the complainant. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charges. After full trial, he was convicted of the main count and sentenced to serve life imprisonment. The Appellant was aggrieved by his conviction and sentence. He has filed an appeal to this court challenging both conviction and sentence.

In his petition of appeal, the Appellant raised several grounds in support of his appeal. He was aggrieved that he had been convicted when the prosecution had failed to establish its case to the required standard of proof. In particular, he pointed out that the complainant had not identified him at the scene of crime nor were the prosecution witnesses called able to positively identify that he had committed the offence. He took issue with the manner in which the medical evidence was treated by the trial court. He was of the view that the medical report did not connect him to the crime and neither did it establish his guilt. He was of the view that the evidence adduced by the prosecution witnesses was inconsistent and contradictory. He was finally aggrieved that his defence was not taken into account before the trial court reached the impugned decision. 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 medical evidence that was adduced did not support the prosecution's case that there was penetration. In particular, he was of the view that the P3 form that was produced by the medical doctor was not the one that was filled when the complainant was taken to hospital. He was of the firm view that the manner in which the medical evidence was treated ruled out its admissibility to support the contention by the prosecution that the complainant had been defiled. As regard the evidence that was adduced, the Appellant submitted that the prosecution had not established the ingredient of the charge to the required standard of proof. He took issue with the fact that the age of the complainant was not established as required by the law. He was of the view that if the trial court had properly evaluated the evidence of the complainant, it would have reached the conclusion that the complainant was not telling the truth. He further explained that critical witnesses who were mentioned by the prosecution witnesses were not called to testify in the case. He urged the court to find in favour of the Appellant that if these witnesses had been called, they would have given testimony that is favourable to the Appellant. He finally urged the court to find that his constitutional rights to fair trial were infringed in that he was not given the prosecution witnesses' statements before commencement of trial. He was thus hampered in the preparation and presentation of his defence in the case.

Ms. Oduor for the State opposed the Appeal. She submitted that the prosecution had adduced sufficient evidence to establish the ingredients of the charge to the required standard of proof beyond any reasonable doubt. Learned counsel submitted that the prosecution had established the key ingredient of the charge i.e. that the Appellant was the perpetrator of the offence, that there was penetration and finally, the age of the victim. She urged the court to find that the Appellant's appeal lacked merit and should be dismissed.

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(2)** of the **Sexual Offences Act.**

For the prosecution to establish the charge of defilement, it is required to establish three (3) ingredients: penetration, the age of the victim and the identity of the perpetrator. As regards penetration, it was the complainant's testimony that the Appellant called her into a school compound when she saw her walking in the rain. The complainant told the court that the Appellant told her to shelter from the rain at the school. The Appellant worked as a security guard at the school. Being a Sunday, there was no one else at the school. The complainant narrated how the Appellant pushed her into a classroom, removed her trouser, bikers and pants before sexually assaulting her. She described graphically how the Appellant threatened her with a knife before sexually assaulting her. She could not raise alarm because the Appellant had blocked her mouth.

After he was through, the complainant managed to escape by jumping out of the window. She cried for help. She was assisted by a woman called Jane who called her mother, PW2 JAM. PW2 took the complainant to Moi Teaching and Referral Hospital, Eldoret where she was examined by Dr. Florence Jaguga and PW5 Dr. Cynthia Kibet. The P3 form produced in court indicated that the complainant's hymen had been broken. She had injuries and infection in her private parts. She was put on a course of antibiotics and pain killers. She had tenderness on the neck and both knees. On re-evaluation of this evidence, this court holds that the prosecution established to the required standard of proof beyond any reasonable doubt that the complainant was penetrated. The complainant's oral testimony coupled with the medical evidence established that there indeed was penetration.

As regard the age of the complainant, PW2 produced a copy of the clinic card which showed that the Appellant was born on 1st May 2003. The complainant was therefore aged eight (8) years at the time of the offence. This court is satisfied that the prosecution established the age of the complainant to the required standard of proof.

As regard the identity of the perpetrator, PW1 testified that he was sexually assaulted by the Appellant who was a security guard at a school near where she had gone to have her hair made. It was on a Sunday. There was nobody at the school other than the security guard. The Appellant was identified by the complainant and a woman by the name Jane who informed her mother PW2 of what the Appellant had done. When PW2 went to the scene she saw the Appellant. When the Appellant saw her, he escaped through the fence into a maize plantation. The Appellant was not seen again in the area until six months later when he was seen at Brigadier area, Kimilili in Bungoma County. The complainant's mother was informed of the Appellant's whereabout. She made a report to Brigadier Police Post where PW4 PC Tyrus Amadi arrested the Appellant and escorted him to Matunda Police Station where he was subsequently charged.

From the evidence adduced, it was clear that the Appellant was properly identified by the complainant and her mother at the scene of crime. The Appellant was the only person at the scene of crime at the time the complainant was sexually assaulted. The sexual assault took place in broad daylight. Although it had just rained, it was clear that there was sufficient light which enabled the complainant to be certain that it was the Appellant who sexually assaulted her. The testimony of the complainant as regard the actual sexual assault is that of a single witness. However, under the **Proviso** of **Section 124** of the **Evidence Act**, a court can convict an accused in a sexual offence if the court is convinced that the victim is telling the truth. In the present appeal, it was clear to the court that the complainant was telling the truth. She gave a blow by blow account of how she was lured into the school compound before she was sexually assaulted.

If there was any doubt as to the Appellant's identity as the perpetrator, that doubt was removed by the Appellant's behaviour subsequent to the sexual assault. The Appellant abandoned his employment and disappeared from the area. He did not return to the area until six months later when he was sighted at Brigadier area in Bungoma County. This court can draw the inference that the Appellant disappearance from the scene of crime, and relocation from the area, is a pointer to the fact that he was the one who committed the crime. In **Malowa –vs- Republic [1980] KLR 110**, the court held that where an accused disappears from the scene immediately after a crime has been committed, and without any reasonable explanation, an inference can be drawn that the accused disappeared from the scene because he was a fugitive from justice. (See also the decision of Makhandia J in **Republic –vs- Boniface Gathege Wacheke [2010] eKLR)** where the Learned Judge expressed similar sentiments.

The Appellant's protestation of innocence and denial that he committed the offence was displaced by the overwhelming evidence that was adduced against him by the prosecution witnesses. He was the perpetrator of the offence.

The upshot of the above reasons is that the appeal lodged by the Appellant lacks merit and is hereby dismissed. The sentence that was meted on the Appellant is a legal one. This court cannot interfere with it. The conviction and sentence of the trial magistrate is hereby upheld. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 19TH DAY OF SEPTEMBER 2018

L. KIMARU

JUDGE

DATED, SIGNED AND DELIVERED AT ELDORET THIS 26TH DAY OF SEPTEMBER 2018

HELLEN OMONDI

JUDGE