



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO.175 OF 2015**

*(An Appeal arising out of the conviction and sentence of Hon. V. Wakumile – PM delivered on 25<sup>th</sup> September 2013 in Makadara CMC. CR. Case No.336 of 2013)*

**JUSTUS MUSYOKA MUTHENYA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The Appellant, Justus Musyoka Muthenya was charged with the offence of **defilement of a girl** contrary to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act**. The particulars of the offence were that on 11<sup>th</sup> January 2013 at Huruma in Nairobi within Nairobi Province, the Appellant unlawfully and intentionally caused his penis to penetrate the vagina of DDA, a girl aged ten (10) years. He was alternatively charged with committing an **indecent act with a child** contrary to **Section 11(1)** of the same **Act**. The particulars of the offence were that on the same day and in the same place, the Appellant unlawfully and indecently assaulted DDA by touching and inserting fingers in her private parts, namely vagina. When the Appellant was arraigned before the trial court, he pleaded not guilty to the charges. After a full trial, he was convicted on the main charge of **defilement** and was sentenced to serve life imprisonment. The Appellant was aggrieved by his conviction and sentence and duly 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 concerned that the prosecution's medical evidence was unreliable as the complainant was medically examined three (3) days after the alleged incident. He faulted the trial magistrate for failing to find that the charges brought against him were inspired by a personal grudge that the complainant's mother held against him. He also faulted the trial magistrate for convicting him yet the prosecution had not proved its case to the required standard of proof beyond any reasonable doubt. The Appellant raised an issue regarding the lapse of time from the time incident is alleged to have occurred to the time he was arrested. He complained that his defence had been ignored. In his amended grounds of appeal filed without leave of court (the court will however consider them), the Appellant was aggrieved that the trial magistrate failed to comply with the requirements of **Articles 25(c)** and **50(2)** of the **Constitution**. He faulted the trial magistrate for reaching a finding that he was positively identified by the complainant. Finally, the Appellant criticized the evidence by the prosecution witnesses regarding the circumstances of his arrest, which, according to him, had inconsistencies and contradictions. On the strength of the above grounds, the Appellant urged the court to allow his appeal, quash his conviction and set aside the sentence that was imposed on him.

The facts of the case as presented by the prosecution witnesses during trial were as follows. PW1, DDA, the complainant was aged ten (10) years when she gave evidence. She was a class three (3) pupil at [particulars withheld] Primary School. No documentary evidence was however produced in court to confirm her age. She testified under oath that on the day of the incident, she was at the house of her aunt, PW2 KK. She left the house to go to an outside toilet. On her way there, she saw the Appellant smoking a cigarette. She knew the Appellant as she had seen him collect garbage from PW2's house. She also knew that he sold maize. She testified that when she entered the toilet, the Appellant followed her inside and locked the door. He got hold of her and gagged her mouth with his hands. He then removed her clothes and inserted his penis inside her vagina. She could not raise alarm as the Appellant had gagged her mouth. The Appellant later left her inside the toilet. She testified that she felt pain when she passed urine.

Her mother, PW3 RA testified that she took the complainant to Alliance hospital in Huruma on 14<sup>th</sup> January 2013. The complainant had complained of pains in her private parts. She also did not have control of her bowel movement. She testified that they had to go back to the house before she could be examined at the hospital because the complainant soiled her clothes. They passed by PW2's house. She requested PW2 to inquire from her if anything untoward had happened. The complainant revealed that she had been sexually assault by the Appellant. PW2 testified that the complainant knew the Appellant very well as he collected rubbish from her house. She testified that although there were several other men who collected rubbish there, the complainant insisted that it was the Appellant who assaulted her. They took the complainant back to Alliance Hospital where she received first aid. She was then referred to the Nairobi Women's Hospital for further medical attention.

At the hospital the complainant was seen by Dr. Kariuki. This was on 14<sup>th</sup> January 2013. PW5 Dr. Murathi produced a medical report prepared by Dr. Kariuki in respect to the complainant as **prosecution's exhibit no. 3b**. The report showed that the Appellant presented herself at the hospital with a history of having been sexually assaulted by a person known to her. An examination of her genitalia revealed that the hymen was not intact. The doctor noted that the injuries were consistent with the sexual assault reported. The complainant was admitted at the hospital for treatment until 17<sup>th</sup> January 2013 when she was discharged. A discharge summary from the hospital was produced as **prosecution exhibit no. 3a**.

The complainant was also medically examined by PW4 Dr. Maundu based at the Police surgery. This was on 21<sup>st</sup> January 2013. PW4 observed that the complainant had a tear on the posterior vaginal wall up to the anal area. He also observed that the surrounding tissues were swollen and tender and the hymen was torn. He filled his findings in a P3 form which he produced into evidence as **prosecution's exhibit no.1**. PW4 also examined the Appellant on the same day. In his report, PW4 noted that he found nothing remarkable on him. He filled his observations in a P3 form which he produced into evidence as **prosecution exhibits no. 2**. PW6 PCW Janet Chepkorir was assigned to investigate the case. After concluding her investigations, she formed the view that indeed a case had been established for the Appellant to be charged with the present offences. When the Appellant was put on his defence, he essentially denied committing the offence.

At the hearing of the appeal, the Appellant presented to the court written submissions in support of his appeal. He also made oral submissions in support of his case. A response to the Appellant's submissions was made by the Learned State Counsel, Ms. Sigei. In his submissions, the Appellant submitted that the prosecution did not prove the case against him beyond any reasonable doubt. He criticized the complainant's identification evidence as being unsatisfactory in several respects. The Appellant argued that it was improbable that he could sexually assault the complainant outside public toilet in broad daylight without drawing anyone's attention. He submitted that the trial court erred by not applying its mind to the prevailing circumstances under which the complainant allegedly identified him. He stated that the evidence of the complainant to the effect that someone followed her into the toilet and immediately blocked her mouth meant that she did not get a chance to look behind to identify the person.

According to the Appellant, there was also a possibility that the complainant might have been mistaken about his identification. He stated that there were many garbage collectors at PW2's residence who wore the same uniform. Therefore, the possibility of his mistaken identity exists more so when the complainant merely says that she recognized him without giving further information. It was his submission that it was highly improbable that it would take eight (8) days to have him arrested if indeed the complainant was certain that he was the one who committed the offence. This is more so that they knew where to find him. He explained that he sold vegetables and not maize as claimed by the complainant. He was of the view that the presence of independent witnesses not related to the complainant would have lent more credence to the prosecution's evidence. Ultimately it was the Appellant's submission that the prosecution's case was a fabrication by PW2 meant to falsely implicate him with the offence because he refused to marry her. He relied on the following cases support his submissions; **Woolmington –versus- Director of Public Prosecutions [1935] AC 462**, **R –versus- Turnbull 1977 QB 224**, **Mark Oiruri Mose – versus- Republic [2013] eKLR** and **Mohamed Elibite Hibuya & Another –versus- Republic Criminal Appeal No. 22 of 1996 (unreported)**.

Learned Counsel for the State, Ms. Sigei opposed the Appellant's appeal. She made submissions to the effect that the prosecution proved its case against the Appellant to the required standard of proof beyond any reasonable doubt. According to learned State Counsel, all the essential elements requiring proof beyond reasonable doubt in the offence were proved. She submitted that the prosecution led evidence during trial to show how the Appellant sexually assaulted the complainant. She submitted that the medical examination carried on the complainant by PW4 and PW5 corroborated her evidence. She submitted that although no documentary evidence was adduced to prove the complainant's age, the prosecution relied on the oral evidence of the complainant that she was aged ten (10) years. It also relied on the medical reports of PW4 and PW5 to confirm that the complainant was aged ten (10) years when the incident occurred. According to the Learned State Counsel the Appellant's defence was mere denial. She therefore urged the court to disallow his appeal.

This court has carefully evaluated the evidence adduced by the prosecution witnesses before the trial court. It has also considered the defence that was put forward by the Appellant. The court has also considered the grounds of appeal that the Appellant relies on in support of his appeal and the submissions made by both the Appellant and the State. This being a first appeal, it is the duty of this court to subject the evidence adduced before the trial court to fresh evaluation with the objective of ascertaining whether the conviction of the Appellant ought to stand. In doing so, this court must take cognizance of the fact that it neither heard nor saw the witnesses as they testified and must therefore give due regard in that respect (see **Okeno –vs- Republic (1972) EA 32**). The issue for determination by this court is whether the prosecution adduced sufficient evidence to secure the conviction of the Appellants on the charge **defilement** contrary to **Section 8 (1) as read with Section 8 (3)** of the **Sexual Offences Act** to the required standard of proof beyond any reasonable doubt.

The Appellant was charged with the offence of **defilement** contrary to **Section 8(1)** as read with **Section 8 (3)** of the **Sexual Offences Act**. Under **Section 8(1)** of the **Act**, the prosecution was required to establish that there was penetration, the penetration was perpetrated on a child and finally, the identity of the perpetrator. Penetration is defined under **Section 2(1)(d)** of the **Sexual Offences Act** as **"the partial or complete insertion of the genital organs of one person into the genital organs of another person"**. In the present appeal, the complainant testified that she stepped out of PW2's house to go to a toilet that was outside the house. She testified that on her way there, she saw the Appellant smoking a cigarette. She entered the toilet and he followed her inside. The complainant testified that the Appellant locked the toilet and gagged her mouth with his hands. He then proceeded to undress her. The Appellant then inserted his penis inside her vagina. She could not raise alarm as the Appellant had gagged her mouth. After a while, he left her inside the toilet. She testified that she felt pain when she passed urine. The complainant's testimony of sexual assault was corroborated by the evidence of PW5 Dr. Murathi and PW4 Dr. Maundu. The evidence of PW5 was that the complainant presented herself at the Nairobi Women's Hospital with a history of having been sexually assaulted by a person known to her. She was examined by Dr. Kariuki on 14<sup>th</sup> January 2013. The doctor noted that her hymen was not intact. He admitted her at the hospital for three (3) days to undergo treatment.

The doctor found that the injuries sustained by the complainant were consistent with the sexual assault reported. He prepared his report in respect of his examination of the complainant which was produced into evidence as **prosecution's exhibit no. 3a**. A discharge summary form from the hospital was produced into evidence as **prosecution's exhibit no. 3b**. PW4 based at the police surgery also examined the complainant on 21<sup>st</sup> January 2013. He also stated that the complainant presented herself at the hospital with a history of having been defiled by a person known to her. He examined her genitalia and observed that she had a tear on the posterior vaginal wall up to the anal area. The

surrounding tissues were also swollen and tender. PW4 formed the opinion that the injuries sustained by the complainant were consistent with the history of sexual assault reported by the complainant. He filled his findings in a P3 form which he produced into evidence as **Prosecution's Exhibit No. 1**. The prosecution therefore established to the required standard of proof that indeed the complainant was penetrated. This fact was not disputed by the Appellant. This court therefore finds that the prosecution proved the first ingredient of penetration to the required standard of proof beyond any reasonable doubt.

The second element that the prosecution was required to prove is the age of the complainant. Under **Section 2 (1)** of the **Sexual Offences Act**, the definition of a child is the one assigned thereto in the **Children Act**. This means any human being of less than eighteen (18) years. The prosecution relied on the evidence of the complainant who testified that she was aged ten (10) years during trial. However, no documentary evidence was produced in court in support of this assertion. In determining the age of the complainant, it is imperative that the prosecution establishes the age of the complainant with the best possible evidence which is a birth certificate, birth notification, an immunization card or in some instances a baptismal card issued shortly after the birth of the child.

However, where this best evidence is not available, the prosecution can rely on other documentary evidence such as the medical report and the P3 form. The prosecution can also rely on the testimony of the parents of the complainant and also by the court visually satisfying itself as to the apparent age of the complainant. This position was upheld by **the Court of Appeal in Nyeri C.A Criminal Appeal No. 61 of 2014, Richard Wahome Chege –versus- Republic** (unreported) and **Nyeri C.A Criminal Appeal No. 100 of 2013 J.W.A -versus- Republic** (unreported). In the present appeal, the P3 form produced into evidence as **prosecution's exhibit no. 1** by PW4 noted that the complainant as aged ten (10) years when he examined her on 21<sup>st</sup> January 2013. The medical report produced into evidence by PW5 as **prosecution's exhibit no. 3a** noted that she was born in the year 2002. This court is therefore satisfied that the prosecution established that the complainant was a child at the time of the sexual assault.

The third element that the prosecution was required to establish is the identity of the perpetrator. The complainant identified the Appellant as the person who sexually assaulted her. She testified that she saw him outside their house when she got out to go to the toilet. The complainant testified that he followed her inside the toilet and locked the door before he sexually assaulted her. She testified that she knew him very well. She stated that he collected garbage from PW2's house and that he sold maize. The Appellant has denied committing the offence. He claims that it was impossible to defile the Appellant in an outside public toilet in broad daylight without anyone noticing. He also claims that his identification could have been mistaken. He contended that he sells vegetables and not maize as claimed by the complainant.

The complainant's evidence was corroborated by medical evidence of both PW4 and PW5. The complainant was clear that it was the Appellant who sexually assaulted her. Her evidence was not shaken during cross examination. The Appellant's defence during the hearing of the Appeal that he was framed with the offence by PW2 is an afterthought as he did not raise the same defence during trial. Be it as it may, the defence does not displace the otherwise strong evidence by the prosecution. Accordingly, this court finds that the prosecution established that the Appellant was the perpetrator of the offence to the required standard of proof beyond any reasonable doubt, thus satisfying the final ingredient of the offence.

The upshot of the above reasons is that the Appellant's appeal on conviction lacks merit and is hereby dismissed. The appeal on sentence similarly fails. The sentence was legal. The Appellant placed no material before this court to impeach the custodial sentence that was imposed on him. His appeal on sentence is similarly dismissed. It is so ordered.

**DATED AT NAIROBI THIS 19<sup>TH</sup> DAY OF DECEMBER 2017**

**L. KIMARU**

**JUDGE**