



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.178 OF 2012

(An Appeal arising out of the conviction and sentence of Hon. L. Onyina - SRM delivered on 18th May, 2012 in Kibera CM. CR. Case No.1133 of 2010)

RICHARD MOGAKA KIBIO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Richard Mogara Kibio was charged with **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 the 20th day of February 2010 in Nairobi County, the Appellant committed an unlawful act by inserting a male genital organ (penis) into the female genital organ (vagina) of J K M, a child aged 14 years which caused penetration. He was alternatively charged with the offence of **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 committed an act by placing the male genital organ (penis) on the female genital organ (vagina) of J K M and touched her private parts (vagina). 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 of **defilement**. He was sentenced to serve twenty (20) years imprisonment. The Appellant was aggrieved by his conviction and sentence and 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 took issue with the fact that the trial court had failed to take into consideration the fact that his constitutional right had been breached when he was detained by the police beyond the constitutional period before he was arraigned in court. He complained that he was prejudiced by the failure by the prosecution to avail him the witnesses' statements in advance before the trial commenced. He further complained he was denied an opportunity to recall and cross examine the prosecution witnesses. He was also aggrieved that his mitigation was not considered when the trial court sentenced him to serve a custodial sentence. For the above reasons, the Appellant urged the court to allow his appeal, quash his conviction and set aside the sentence that was imposed on him.

During the hearing of the appeal, the Appellant presented to the court written submission in support of his appeal. He urged the court to acquit him. Ms. Ngetich for the State opposed the appeal. She made submissions to the effect that the prosecution had established its case on the charge of **defilement** to the required standard of proof. She stated that the complainant identified the Appellant as the person who defiled her. According to Ms. Ngetich, the complainant's testimony was corroborated by the medical

evidence of PW2 Dr. Zephania Kamau and PW5 Dr. David Thuo. She further submitted that the complainant's age was established by her birth certificate which was produced into evidence by the prosecution. For these reasons, Ms. Ngetich was of the view that the appeal lacked merit and should therefore be dismissed.

The facts of the case according to the prosecution are as follows. The complainant was at the material time aged fourteen (14) years. Her age was confirmed by her birth certificate which was produced into evidence as **Prosecution's Exhibit No. 8**. The birth certificate indicated that the complainant was born on 2nd June 1996. At the material time, the complainant lived with her father PW3 R M O in a single roomed house. The Appellant was also staying with them as a guest in the complainant's brother's house which was nearby. Within the same compound were several other houses. According to the complainant, on the night in question, she prepared a meal and took it to her brother's house. She testified that she got to know that her brother was not in the house when she found the Appellant watching television alone in his house. She testified that she left the food on the table and went back to her father's house. The complainant testified that when she later went back to collect the utensils, the Appellant grabbed her and locked the door. He made her lie on the bed and removed her clothes and underwear. He then removed his pants and lay on top of her. He inserted his penis in her vagina and had sexual intercourse with her. The complainant testified that she felt pain and she began to bleed. She reacted by screaming but the Appellant increased the television's volume so that nobody could hear her. When the Appellant finished, she managed to open the door and ran out of the house leaving her clothes behind. She went back to her father's house where she wore other clothes and slept.

The evidence of PW3 was that when he arrived home from work the following morning, he found the complainant crying. He testified that the complainant told him that the Appellant had sexually assaulted her the previous night. He testified that he saw blood at the back of the complainant's legs and observed that the complainant was trembling. He went to confront the Appellant about the incident but the Appellant denied having sexually assaulted the complainant. A report on the incident was made at Kilimani Police Station. The police advised PW3 to take the complainant to Nairobi Women's Hospital for medical examination. At the said hospital, the complainant was examined by Dr. Muhombe on 21st February 2010. The medical report prepared by Dr. Muhombe was produced as **Prosecution's Exhibit No. 2**. At the time of the hearing of the case, Dr. Muhombe had died. The medical report was produced on her behalf by PW5 Dr. David Thuo.

From the medical report, the doctor recorded that the complainant appeared distraught. She was oozing blood from the vagina. She also noted that her hymen was absent. She formed the opinion that the complainant had been sexually assaulted. The complainant was also seen by PW2 Dr. Zephania Kamau based at the police surgery. This was on 23rd February 2010. He noted that the complainant's hymen was torn. He also observed that her posterior vaginal wall was also torn and was oozing blood. She had a blood stained petticoat. He obtained a blood sample from the complainant for analysis. The P3 form was produced as **Prosecution's Exhibit No. 3**. PW2 also saw the Appellant on 24th February 2010. He noted that the Appellant had injuries around his left eye and he complained of chest pains. PW2 also obtained blood and saliva samples from the Appellant and his innerwear for analysis. His P3 form was produced as **Prosecution's Exhibit No.4**. The samples obtained by PW2 from both the complainant and the Appellant were sent to the Government Chemist for scientific analysis. A report thereto was made by PW4 Albert Kathuri Mwaniki, a government analyst. His findings were that the bloodstains on the complainant's petticoat were not linked to the Appellant.

PW6 PC Jackline Muthuli was assigned to investigate the case. After concluding her investigations, she formed the opinion that a case had been made for the Appellant to be charged with the disclosed offence. PW6 produced the complainant's bloodstained petticoat and the Appellant's pants as exhibits during trial. When the Appellant was put on his defence, the Appellant denied committing the offence. He stated that on the night in question he was alone in the house watching television when the complainant went and told him that she wanted to join him and study from the his house. He stated that since he knew that the complainant's father would not be comfortable having them alone in the same room, he asked her to go and study in her father's house. The Appellant testified that the complainant insisted on staying but he managed to chase her away. He testified that the following day he was accosted by PW3 accusing him of

defiling the complainant. In essence, it was the Appellant's defence that he was implicated in the offence by the complainant because he did not let her remain in the house with him.

This being a first appeal, it is the duty of this court to subject the evidence adduced before the trial court to fresh scrutiny and evaluation before reaching its own independent determination whether or not to uphold the conviction of the Appellant. In doing so, this court is required to bear in mind that it neither heard nor saw the witnesses as they testified and cannot therefore make a comment regarding the demeanor of the witnesses (See **Okeno –vs- Republic [1972] EA 32**). In the present appeal, the issue for determination by this court is whether the prosecution established to the required standard of proof the charge of defilement beyond any reasonable doubt.

This court has re-evaluated the facts of this case. In a case of defilement, the onus is on the prosecution to establish that there was penetration, that the victim of the sexual assault was a child and finally, the identity of the perpetrator. In respect of the first ingredient, the prosecution relied on the evidence of the complainant that the Appellant inserted his penis into her vagina. The evidence of the complainant was corroborated by medical evidence of PW2 and PW5. The evidence of PW5 was that the complainant was examined by Dr. Muhombe on 21st February 2010. In her report which was produced as exhibit during trial, Dr. Muhombe confirmed that indeed the complainant had been sexually assaulted. Her hymen was absent. She was oozing blood from her vagina. The complainant was also examined by PW2 on 23rd February 2010. In his report which was produced as an exhibit, PW2 observed that the complainant's hymen was torn. He further noted that her posterior vaginal wall was also torn and it oozed blood. **Section 2(1) of the Sexual Offences Act** defines penetration as ***“the partial or complete insertion of the genital organ of a person into the genital organs of another person”***. In the present case, the prosecution established to the required standard of proof that indeed the complainant was penetrated. This fact is 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.

As to whether the prosecution established that the complainant was a child at the time of the offence was committed, **Section 2(1) of the Sexual Offences Act**, the meaning assigned to ***“a child”*** is that provided under the **Children Act**. Under **Section 2 of the Children Act**, a child is defined ***“as any human being under the age of eighteen years”***. The prosecution produced the complainant's birth certificate which established that indeed the complainant was born on 2nd June 1996. She was about fourteen (14) years at the time of the sexual assault. This court therefore finds that the age of the complainant at the time the offence was committed was also proved to the required standard of proof beyond any reasonable doubt.

In the present appeal, as regards the identity of the perpetrator, the prosecution basically relied on the evidence of the complainant who testified that it was the Appellant who sexually assaulted her. In his defence, the Appellant claimed that the complainant implicated him in the offence for reason that he did not allow her to remain in his room. It is the duty of this court to closely examine the surrounding circumstances of the case in order to determine whether the witnesses were honest. From the evidence on record, it is clear that the Appellant was placed at the scene. The issue for determination therefore would be who between the complainant and the Appellant is telling the truth regarding the events of the night in question. This court has examined the proceedings during trial. It is clear that the complainant was consistent in her evidence. This was not shaken during cross examination. It was clear that the Appellant sexually assaulted her. The accounts given by PW3, PW5 and PW6 are consistent in the fact that the complainant appeared distraught. From a careful examination of the surrounding circumstances of the case, this court is satisfied that the complainant was truthful in her evidence. On the other hand, the Appellant's claim that he was implicated in the offence by the complainant for reason that he did not allow her to remain in his house is not credible. Accordingly, this court finds that the prosecution identified the perpetrator of the offence to the required standard of proof 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. As regards sentence, **Section 8(3) of the Sexual Offences Act** provides for a minimum sentence of twenty (20) years for any person convicted of defiling a child of between twelve (12) and fifteen (15) years at the time the offence was committed. The trial court sentenced the Appellant to serve

twenty (20) years imprisonment. That sentence is legal. The appeal on sentence is similarly dismissed. It is so ordered.

DATED AT NAIROBI THIS 24TH DAY OF FEBRUARY 2016

L. KIMARU

JUDGE