

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.19 OF 2014

(An Appeal arising out of the conviction and sentence of A.W. MWANGI - SPM delivered on 18th October 2013 in Kikuyu SPM. CR. Case No.430 of 2012)

DAVID KAMAU NJERI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, David Kamau Njeri 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 the 20th day of May 2012 at [particulars withheld] Village of Kiambu County, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of M W K, a girl aged 6 years. 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 intentionally and unlawfully touched the vagina of M W K, a girl child aged 6 years. The Appellant pleaded not guilty to the charge. After full trial, he was convicted on the main count of defilement. He was sentenced to serve life 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 faulted the trial magistrate for convicting him yet the prosecution had not established its case to the required standard of proof beyond any reasonable doubt. He was aggrieved that he had been convicted on a charge that was defective. He complained that he was convicted on the basis of evidence that was at variance with the charge brought against him. He stated that he ought to have been charged with the offence of **incest** contrary to **Section 20 (1)** of the **Sexual Offences Act** instead of the charge he was convicted of under the same **Act**. He was aggrieved that the trial magistrate failed to properly weigh the competence of the complainant to testify during trial. He took issue with the fact that the trial magistrate relied on the sole evidence of the complainant to secure his conviction. He faulted the trial magistrate for relying to the prosecution's inconsistent, contradictory and uncorroborated evidence to convict him. The Appellant faulted the trial magistrate for relying on medical evidence which in his view was unsatisfactory and was not sufficient to establish his guilt. He was aggrieved that the trial magistrate failed to consider that there was no medical evidence linking him to the commission of the offence. He faulted the trial magistrate for failing to make a finding that the case had not been properly investigated and therefore he could not have been convicted on the basis of the evidence that was adduced in court. He was aggrieved that an essential witness who first medically examined the complainant had not been called to testify in the case thereby prejudicing his case. He took issue with the fact that the trial court failed to take into consideration his defence before arriving at the decision to convict him. The Appellant faulted the trial magistrate for sentencing him to serve a custodial sentence that was harsh and excessive in the circumstances without considering the option of a non-custodial sentence. 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.

At the hearing of the Appeal, the Appellant presented to the court written submission in support of his appeal. He further made oral submission urging the court to allow his appeal. He attributed his tribulations to a family dispute between him and PW4, the complainant's mother upon him finding out

that PW4 had other children whom she had not disclosed to him prior to their marriage. He stated that this discovery caused him to be bitter with the complainant's mother and therefore refused to maintain the said children. As a result, the Appellant stated that PW4 threatened him with dire consequences. He claimed that PW4 in cahoots with PW2, the complainant's teacher hatched a plan to frame him with the present offence. He claimed that they coached the complainant to give false testimony against him. He stated that the investigating officer failed to conduct thorough investigations on the allegation of defilement prior to his arrest. He claimed that the fact that the medical report disclosed that the complainant's hymen was broken did not necessarily mean that it was broken through sexual intercourse. He claimed that other factors such as vigorous exercises through bicycle riding or tree climbing could have caused the complainant's hymen to break. He was of the view that the trial magistrate failed to take into consideration the fact that complainant's brothers could also have sexually assaulted her. He reiterated that he was innocent.

Ms. Maina for the State opposed the appeal. She submitted that the prosecution had established its case on the charge of defilement to the required standard of proof. It was the prosecution's case that the complainant had reported to PW2, her teacher that the Appellant had defiled her. PW4, the complainant's mother was also informed of the incident. When she examined the complainant, she observed that she had injuries in her genital organ. The complainant was examined by PW5, a clinical officer at Wangige Health Centre. PW5 noted that the complainant's hymen was broken. He concluded that the complainant had indeed been sexually assaulted. Ms. Maina submitted that the defence raised by the Appellant that he was framed with the offence charged is an afterthought. She therefore urged the court to dismiss the Appellant's appeal.

The facts of the case according to the prosecution are as follows. The complainant is the step daughter of the Appellant. According to the evidence adduced before the trial court, at the material time, the complainant was a girl aged six (6) years. No documentary evidence was however adduced in court to confirm her age. According to the complainant's testimony, the Appellant had made her lie on a seat before he removed his clothes and inserted his finger into her vagina. She testified that the Appellant then produced his penis and also inserted it into her vagina. She reported the incident to her teacher PW2, J N K. PW2 recalled that on 22nd May 2012, the complainant came to school together with her younger sister having been away from school for over a month. PW2 testified that as she chatted with the complainant during tea break, the complainant disclosed to her that the Appellant had on several occasions inserted his fingers into her vagina.

PW2 testified that when the Appellant came to pick up the children during lunch hour, she asked him to ask the children's mother, PW4 L N to come for them. When PW4 came to the school she was informed of the complainant's claims. PW4 testified that she examined the complainant and found that she had injuries in her genital organ. A report was made to the area assistant chief who notified PW3 Esther Wairimu Mbugua, a children's officer of the complainant's claims. The testimony of PW3 was that she found the complainant at the chief's office and inquired from her what the Appellant had done to her. She testified that complainant told her that the Appellant had on several occasions inserted his fingers into her vagina. She also told her that he had also inserted his penis into her vagina. The report was further made to Kikuyu Police Station. The police referred the complainant to Nairobi Women Hospital where she was treated and discharged. The complainant was also seen by PW5 Shadrack Ngatia, a Clinical Officer at Wangige Health Centre. He examined her on 11th June 2012. On examination, PW5 found that the complainant's hymen was broken. He concluded that the complainant had been sexually assaulted. He filled a P3 form in respect of the complainant which he produced as **Prosecution's Exhibit No. 2**. The case was investigated by PW6 PC Linet Chonyi who formed the opinion that a case had been made to have the Appellant charged with the offence for which he was convicted. When the Appellant was put on his defence, he denied committing the offence. He told the court that the complainant had been coached to give false testimony against him. He insisted that he had been framed.

This being a first appeal, it is the duty of this court to subject the evidence adduced before the trial court to a 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 beyond any reasonable doubt the charge of defilement.

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 had on several occasions penetrated her vagina using his fingers and his penis. The evidence of the complainant was corroborated by medical evidence of PW5. The evidence of PW5 was that he examined the complainant and found that her hymen was broken. In a P3 Form filled in respect of the complainant which was produced as exhibit during trial, PW5 confirmed that indeed the complainant had been sexually assaulted. **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 the offence was committed, under **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”***. In the present appeal, the prosecution claimed that the complainant was aged six (6) years old at the time the sexual assault was said to have been committed. However, the prosecution did not adduce any documentary evidence 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 instant case, the complainant testimony during trial was that she was aged six (6) years during trial. Her age was confirmed by her mother PW4 when she testified during trial. The complainant’s age was further confirmed by a P3 form produced into evidence during trial. 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.

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 he had been framed with the offence by PW4 following his refusal to pay school fees for PW4’s children. He told the court that the complainant had been coached to give false testimony against him. 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, this court finds that the Appellant’s claim that he was implicated in the offence by the complainant for his refusal to maintain PW4’s children from a previous relationship is an afterthought since the claim was not raised during trial. The complainant was medically examined and found to have been defiled. 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 is that the Appellant’s appeal on conviction lacks merit and is hereby dismissed. The conviction of the Appellant is upheld. The sentence meted on the Appellant is legal. It is upheld. It is so ordered.

DATED AT NAIROBI THIS 16TH DAY OF MARCH 2016

L. KIMARU

JUDGE