



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NO.4 OF 2015

(An Appeal arising out of the conviction and sentence of Hon. Olando – RM

delivered on 8th July 2013 in Limuru SPM. CR. Case No.47 of 2011)

ELIUD NGUGI KARANJA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Eliud Ngugi Karanja was charged with **defilement** contrary to **Section 8 (1) & (2)** of the **Sexual Offences of Act**. The particulars of the offence were that on 10th January 2011 at about 3.00pm **[Particulars Withheld]** within Kiambu County, the Appellant intentionally caused his penis to penetrate the vagina of T W K, a child aged 8 years. The Appellant was alternatively charged with the offence of **committing an indecent act with a child aged 8 years old** 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 breasts, buttocks and the vagina of T W K, a child aged 8 years. When the Appellant was arraigned before the trial court, he 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 duly filed his appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. The Appellant was aggrieved that the prosecution failed to adduce sufficient evidence upon which he could be convicted. He complained that no medical examination or DNA test was carried out to link him with the offence. He faulted the trial court for relying on the prosecution's inconsistent and contradictory evidence to convict him. He was of the view that the trial court erred in not calling the arresting officer and the investigating officer to testify during trial. He faulted the trial court for not establishing the complainant's age to the required standard of proof before convicting him. In the premises therefore, the Appellant urged the court to allow the appeal, quash his conviction and set aside the sentence that was imposed on him.

During the hearing of the appeal, this court heard oral submission made by Ms. Muhuhu on behalf of the Appellant. A response to the submission was made by Ms. Aluda on behalf of the state. Learned Counsel for the Appellant submitted that the trial court erred when it convicted the Appellant on a weak prosecution case. She submitted that the complainant failed to sufficiently demonstrate the nature or the experience of the sexual act. She submitted that the trial court therefore attempted to fill the gap by

suggesting that the complainant “*gave a sexual connotation to the act*” in describing the experience. Learned counsel for the Appellant further submitted that there were inconsistencies and contradictions in the prosecution’s evidence and as a result sexual intercourse was not proved to the required standard of proof beyond any reasonable doubt. She pointed out that the complainant’s testimony was that she was not injured during the alleged sexual assault.

According to Ms. Muhuhu, the fact that the complainant did not report the incident immediately makes her evidence unreliable. She submitted that the Appellant was not properly identified by the complainant as she had not met him prior to the alleged incident. She submitted that there was also no corroboration of the complainant’s evidence that she was sexually assaulted by the complainant. Learned counsel for the Appellant argued that the trial court erred in relying on the medical evidence as corroboration of the complainant’s evidence. She submitted that the complainant was medically examined three (3) days after the alleged sexual assault. The medical evidence was to the effect that the complainant had a healed hymen tear. She submitted that the evidence of PW3 did not also provide corroboration as she was not an eye witness. She also submitted that the prosecution also failed to provide documentary evidence regarding the age of the complainant. Learned counsel for the Appellant further submitted that the trial court failed to properly conduct *voire dire* examination of the complainant to determine whether she understood the nature of the oath. For the above reasons, Ms. Muhuhu submitted that the prosecution had failed to prove its case against the Appellant to the required standard of proof beyond any reasonable doubt. In response, Ms. Aluda opposed the appeal. She contended that the evidence adduced in court by the prosecution sufficiently proved the case beyond any reasonable doubt. She submitted that the trial court properly conducted *voire dire* examination on the complainant. She submitted that there was eye witness evidence and medical evidence. Ms. Aluda however conceded that the medical evidence adduced in court was however not clear as to when the sexual assault took place. She also conceded that there were gaps in the prosecution case. She was however of the view that the same was not fatal to the prosecution’s case. She therefore prayed for the dismissal of the Appellant’s appeal.

The facts of the case leading to the charge against the Appellant as presented by the prosecution are as follows. The complainant, PW1 T W K was said to be aged eight (8) years at the material time. However no documentary evidence was tendered in court during trial to confirm her age. The complainant in her testimony recalled that on 10th January 2011 she left school at about 1.00 p.m and went to her aunt’s house. The complainant testified that she met a friend, J W at her aunt’s place and they played together outside the house. She testified that as they were playing, the Appellant who was her aunt’s neighbour, called them to his house and asked them to wash his house. When they finished, the Appellant gave them money to buy sweets. The complainant testified that she went buy the sweets while her friend remained in the Appellant’s house. The complainant testified that when she returned, the Appellant was alone in his house. She testified that the Appellant asked her to remove her pant before he had sexual intercourse with her. When the Appellant finished, he asked her to leave. She did not report the incident to her aunt when she later went back home. When the complainant was cross-examined by the Appellant she stated that the Appellant held her waist and laid her on his bed. She stated that she was not injured during the sexual assault.

The complainant’s mother, PW2 W K, testified that on 11th January 2011, the complainant’s friends PW3 G W and one B told her that the Appellant had defiled them. They also told her that he had also defiled the complainant. PW2 testified that when she got back home, she inquired from the complainant what had transpired at the Appellant’s house. She testified that the complainant confirmed that the Appellant had indeed defiled her and had threatened her if she disclosed the incident to anyone. PW2 testified that she examined the complainant and found dirt in her genital organ. The evidence of PW3’s was that on 11th January 2011 at about 3.00 p.m. she met her friend B in school. She testified that B told her that he had found the complainant at the Appellant’s house. She testified that later, as she was standing outside their house, she saw the complainant leaving the Appellant’s house.

A report on the defilement was made at Spring Valley Police Station on 12th January 2011. The police referred the complainant to Nairobi Women’s hospital where she was treated and discharged on the same day. She was later referred to Tigoni District Hospital. At Tigoni District Hospital, the complainant was

seen Dr. Karete on 13th January 2011. When Dr. Karete examined the complainant and found that although her external genitalia was normal, she had healed hymen tears. He assessed the age of the injury to be three (3) days old. She concluded that the complainant had been sexually assaulted. Dr. Karete filled a P3 form in respect to the complainant. PW5 James Kabue, a Clinical Officer produced into evidence the P3 form on behalf of Dr. Karete as **Prosecution's exhibit no. 2**. PW6 Ag. Insp. Juliana Wanyama was assigned to investigate the case. PW6 testified that upon concluding her investigations, she concluded that a case had been established for the Appellant to be charged with the disclosed offence. When the Appellant was put on his defence, the Appellant chose not to adduce any evidence in his defence.

This being a first appeal, it is the duty of this court to re-evaluate and to reconsider the evidence adduced before the trial court before reaching its own independent determination whether or not to uphold the decision of the said court. In doing so, this court is required to always keep in mind that it neither saw nor heard the witnesses as they testified and therefore give due regard in that respect. (see Njoroge -vs- Republic [1987] KLR 19). The issue for determination by this court is whether the prosecution proved its case on the charge brought against the Appellants of **defilement** to the required standard of proof beyond any reasonable doubt.

This court has carefully re-evaluated the facts of this case. For the prosecution to establish its case, the prosecution is required to establish that the Appellant caused his sexual organ to penetrate the sexual organ of a child. 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. In the present appeal, the prosecution claimed that the complainant was aged eight (8) 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 present appeal, this court finds that the prosecution established the complainant's age through the P3 form produced into evidence as **Prosecution's Exhibit No. 2** by PW5.

As regards whether the prosecution proved penetration, the prosecution relied on the evidence of the complainant who testified that on 10th January 2011 the Appellant asked her to remove her pants before he had sexual intercourse with her. The prosecution's case is that the evidence of the complainant is corroborated by that of medical evidence produced by PW5 and the eye witness evidence of PW3 who testified that she saw the complainant as she left the Appellant's house. Indeed proof of penetration requires corroboration. The alleged defilement occurred on 10th January 2012. A report on the incident was made to PW2, the complainant's mother the following day. This suggests that it was reported almost immediately. If that is the case, it is unlikely that the complainant's hymen tear as a result of the sexual intercourse could have been completely healed by the time she was examined by Dr. Karete on 13th January 2011. PW2 in her testimony during trial stated that she examined the complainant and found that she had dirt in her vagina. However, Dr. Karete in the P3 form in respect of the complainant did not indicate that the complainant had any discharge from her vagina as PW2 had stated. This is further complicated by the fact that the trial magistrate was not clear in his judgement whether the complainant actually used the expression "**sexual intercourse**" to describe the incident as stated at page 4 thus;

"From the record of the initial trial magistrate PW1 had said that the accused had "sexual intercourse" with her. It is not clear in which language she spoke. However she gave a sexual connotation to the accused person's Act."

Unfortunately, there was no attempt to explore with the complainant what she understood by this or

whether the expression accurately reflected her description of the incident. The complainant being a child of tender years, it is unlikely that she understood what sexual intercourse entailed. The trial magistrate therefore ought to have applied caution in taking her evidence since the complainant is a child of tender years and a single witness.

As regards the evidence of PW3, her evidence was that she saw the complainant leaving the Appellant's house on 11th January 2011 in the evening. Dates and time in sexual offences are important. Since the complainant is said to have been sexually assaulted on 10th January 2011, the evidence of PW3 did not therefore offer eye witness corroboration as suggested. Weighing the prosecution's case in totality, this court finds that the trial magistrate did not properly evaluate evidence to corroborate the sexual assault. The whole prosecution evidence is riddled with gaps and inconsistencies thus this court finds it unsafe to uphold the conviction on such evidence. The inconsistency in the prosecution's case raises reasonable doubt that the appellant defiled the complainant. The doubts raised shall be resolved in favour of the Appellant.

Accordingly, the appellant's appeal is allowed and the conviction is quashed. His sentence is set aside. The Appellant is to be released from custody forthwith unless he is being held for other lawful reason. It is so ordered.

DATED AT NAIROBI THIS 16TH DAY OF MARCH 2016

L. KIMARU

JUDGE