



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.197 OF 2013

(An Appeal arising out of the conviction and sentence of Hon. Mwangi (Mrs.) – Ag. SRM delivered on 4th October 2013 in Kibera CM. CR. Case No.662 of 2013)

S N M.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, S N M was charged with the offence of **defilement** contrary to **Section 8(1)(3)** of the **Sexual Offences Act**. The particulars of the offence were that on diverse dates between the month of April 2012 and June 2012 in Kajiado North County, the Appellant intentionally caused his penis to penetrate the vagina of A W, a child aged fifteen (15) years. He 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 within the same period, and in the same place, the Appellant intentionally touched using his penis the buttocks, breasts and vagina of A W, a child aged fifteen (15) years. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After a full trial, he was convicted as charged on the main count of defilement. He was sentenced to serve twenty five (25) years imprisonment. He 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 aggrieved that he was convicted on the basis of evidence that was not sufficient and credible to sustain his conviction. 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 complained that no medical examination was carried out on him to link him with the offence. The Appellant was also aggrieved that his defence had not been considered when the trial magistrate reached the decision to convict him. In a supplementary grounds of appeal filed without leave of the court (the court will however consider it) the Appellant faulted the trial magistrate for convicting him on the basis of a defective charge sheet. He 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 had not taken into consideration the fact that the medical evidence relied upon by the prosecution revealed that the complainant was examined about five (5) months after the alleged incident. He complained that the sentence imposed by the trial court was harsh and excessive. In the premises therefore, he 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 further made oral submission urging the court to allow his appeal. He stated that he was framed with the offence following a disagreement with his wife, PW2 over a phone which the complainant was said to have stolen. Ms. Akunja for the State opposed the appeal. She submitted that the prosecution had adduced sufficient evidence which established the Appellant's guilt to the required standard of proof beyond any reasonable doubt. She stated that the complainant was able to give a vivid account of the incidents of sexual assault. She submitted that the medical evidence established that indeed the complainant had been sexually assaulted. She submitted that the complainant identified the Appellant as the person who had sexually assaulted her. He was well known to the complainant. Medical evidence established that the complainant had been sexually assaulted. She submitted that the fact that the Appellant was not medically examined was not fatal to the prosecution's case. According to the learned state counsel, the prosecution had adduced cogent, credible and consistence evidence which connected the Appellant with the offence. It is on the basis of the above facts that the State urged the court to find the appeal without merit and dismiss it.

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 charges brought against the Appellant of **defilement** to the required standard of proof beyond any reasonable doubt.

The facts of the case according as presented by the prosecution are as follows. The Appellant is a stepfather of the complainant, A W. The complainant was at the material time aged fifteen (15) years. An Immunization card for the complainant was produced in court as **Prosecution's Exhibit 3**. The immunization card indicated that the complainant was born on 27th October 1997. At the material times, the complainant was living in Kariobangi with the Appellant together with her mother PW2, A W and her siblings. The complainant recalled of an incident whereby the Appellant had sexual intercourse with her. She testified that the Appellant called her to his bedroom. She testified that when she reached the Appellant's bedroom, the Appellant removed his vest and asked her to remove her pant. He then asked her get on the bed and sleep. She testified that the Appellant joined her in the bed and removed his trouser. He then asked her to sleep on top of him. She testified that the Appellant later got on top of her. She testified that the Appellant produced his penis and inserted it into her vagina. He asked her whether she felt pain and she told him that she was not sure. She testified that she touched his penis and he touched her vagina. The complainant testified that the Appellant did that to her several times thereafter. She testified that the Appellant would at times ask her not to go to school and sleep with her after PW2 had gone to work. She recalled of another incident where the Appellant sexually assaulted her when PW2 had gone to visit their grandmother and left her and the other children.

The complainant testified that the Appellant asked her siblings to go to sleep while she remained with him in the sitting room. She testified that the Appellant asked her to remove the cushions on the seat and place them on the floor so that she would sleep there. She testified that she got a blanket and slept on the floor. She testified that the Appellant came to sleep with her and he had sexual intercourse with her in a similar manner as the previous one. She testified that the Appellant had put a panga under table. She testified that they had several sexual relations with the Appellant thereafter when PW2 was away. He threatened her not to disclose what he had been doing to her to anyone.

The evidence of PW4, A W, the complainant's grandmother was that in June 2012, the complainant came to visit her. She testified that she noticed that the complainant appeared withdrawn. She testified that she noticed that the complainant did not play with other children as she would normally do. She therefore asked her to come and stay with her. PW4 testified that she took the complainant to see PW3, Prisca Waitiri Murigi who is a counsellor. The evidence of PW3 was that the complainant was brought to her by PW3 who reported that the complainant seemed troubled. PW3 testified that she enrolled the complainant at a school and followed up on counselling the complainant. PW3 testified that in the course of counselling the complainant, the complainant disclosed to her that the Appellant had been sexually

assaulting her. She testified that the complainant had told her that the Appellant had threatened to cut her with a panga if she told anyone. PW3 shared the information with PW4 who reported the same to PW2. The matter was reported to Ngong Police Station.

The complainant was medically examined by PW5 Dr. Joseph Maundu based at the Police surgery. This was on 5th February 2013. PW5 observed that the complainant's hymen was torn. He also saw that she had a white vaginal discharge which according to him was an indication that she had an infection. He concluded that she had been defiled. PW5 filed a P3 form in respect of the complainant which he produced as **Prosecution's Exhibit No. 2**. PW6 Cpl. Henry Ireri was assigned to investigate the case. After concluding his investigations, he formed the view that indeed a case had been established for the Appellant to be charged with the present offence.

When the Appellant was put on his defence, he essentially denied committing the offence. DW2 Lucy Mwangi testimony was that she had employed the complainant's elder sister as a househelp. She testified that the complainant's sister had told her that she did not think that the Appellant defiled the complainant. She testified that the complainant sister had told her that PW4 had been bringing men to have sex with them for money.

This court has re-evaluated the evidence adduced before the trial court, the grounds of appeal and the submission made during the hearing of the appeal. It was clear to the court that indeed the prosecution had established its case on the charge of defilement contrary to **Section 8 (1)** as read with **Section 8 (3)** of the **Sexual Offences Act**. The prosecution was required to prove three elements in order to secure the conviction of the Appellant on the charge of defilement. The first element was penetration. 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 of an incident where the Appellant called her to his bedroom and asked her to remove her pant. She testified that the Appellant also removed his trouser and slept on top of her. She testified that he produced his penis and inserted it into her vagina. She testified that he asked her whether she felt pain. She testified that the Appellant had sexual intercourse with her severally in a similar manner especially when PW2, her mother was away.

The evidence of the complainant was corroborated by the medical evidence of PW 5, Dr. Joseph Maundu who examined the complainant on 5th February 2013. PW5 testified that he observed the complainant and found that her hymen was broken. He also noted that the complainant had a white discharge, an indication that she had an infection. In the P3 form produced into evidence, PW5 concluded that the complainant had been defiled. The fact that the Appellant was not medically examined did not displace the otherwise strong case of the prosecution. For these reasons, this court holds that the prosecution proved penetration to the required standard of proof.

The second element that the prosecution was required to establish is the identity of the perpetrator. The Appellant was known to the complainant. He was the complainant's stepfather. This court therefore finds that the prosecution established that the Appellant sexually assaulted the complainant to the required standard of proof beyond any reasonable doubt. The third element that the prosecution was supposed to establish is that the complainant is a child. 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 produced the complainant's immunization card which established that indeed the complainant was born on 27th October 1997. She was about fifteen (15) years old at the time of the sexual assault. The defence of the Appellant to the effect that he was framed does not hold since the prosecution established every element of the charge. The Appellant's defence was self-serving. It was justly dismissed as not sufficient to displace the prosecution case.

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

DATED AT NAIROBI THIS 19TH DAY OF APRIL 2016

L. KIMARU

JUDGE