



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.82 OF 2013

(An Appeal arising out of the conviction and sentence of C. Oluoch - SRM delivered on 29th July 2011 in Kiambu CMC. CR. Case No.1349 of 2010)

GABRIEL MUYA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Gabriel Muya was charged with two of counts of the offence of **defilement of a child under the age of eleven (11) years** contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act**. The Particulars of the first count was that on the 15th August 2010 at about 9.30 p.m in Kiambu District, within Central Province, the Appellant unlawfully and intentionally committed an act which caused penetration of his genital organ (penis) into the genital organ (vagina) of A N B, a child aged eleven (11) years. The particulars of the second count were that on the same day and in the same place, the Appellant unlawfully and intentionally committed an act which caused penetration of his genital organ (penis) into the genital organ (vagina) of F W K, a child aged eight (8) years. The Appellant was in the alternative charged with two counts of the offence of **committing an indecent act with a child under the age of eleven (11) years** contrary to **Section 11(1)** of the same **Act**. The particulars of the first count were that on the same day and in the same place, the Appellant committed an indecent act to A N K, a child aged eleven (11) years by touching her private parts. The particulars of the second count were that on the same day and in the same place the Appellant committed an indecent act to F W K, a child aged eight (8) years by touching her private parts. When the Appellant was arraigned before the trial court, he pleaded not guilty to both the charges. After full trial, he was convicted on both counts of defilement and 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. The Appellant was aggrieved that the trial court reached the decision to convict him yet the prosecution had not established its case to the required standard of proof. He faulted the trial court for relying on the prosecution's inconsistent and contradictory evidence to convict him. He further faulted the trial court for failing to make the determination that the prosecution failed to adduce medical evidence linking him to the offence. He was finally aggrieved that the trial court failed to provide reasons for its decision to convict 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, the Appellant presented to court written submission in support of his appeal. This court further heard oral submission made by Learned Counsel, Ms. Auka on behalf of the Appellant. A response to the submission was made by Learned State Counsel, Ms. Atina. It was the Learned Counsel for the Appellant's submission that the prosecution's case was not proved to the required standard of proof beyond any reasonable doubt. She submitted that the Appellant was not properly identified. She criticized PW1's evidence during trial that they were not able to trace the house where they were defiled when they took their father, PW3 to see the house. This, according to counsel for the Appellant, undermined the credibility of PW1's identification of the Appellant. She further submitted that there was a possibility of mistaken identity as the complainants had not met the Appellant before. She further submitted that the identification of the Appellant by PW3 was based on hearsay as it was what he obtained from the complainant's brother who was not called to testify. Counsel for the Appellant submitted that the failure by the trial court to call crucial witnesses particularly the complainants' brother and the owner of the house where the complainants were said to have been defiled to testify prejudiced the prosecution's case. She submitted that the Appellant was not medically examined to link him to the offence he was charged with. She further submitted that the Appellant raised the defence of alibi which was not rebutted. To buttress her submissions, counsel for the Appellant relied on the cases of Matianyu –versus- Republic, [1986] KLR 198, Bukenya & Others –vs- Uganda [1972] E.A 549, Woolmington –versus- Director of Public Prosecutions [1935] AC 462 (HL) and Mwendwa Mulinge –versus Republic (2014) eKLR. In submitting on the issue of sentence, counsel for the Appellant urged with the court to consider the best interests of the Appellant's young children when considering his appeal on sentence.

Ms. Atina 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. It was the prosecution's case that the ages of the complainants were established through their birth certificates produced into evidence during trial. It was submitted that complainants corroborated each other's evidence and further that their evidence was corroborated by medical evidence of PW4. According to the prosecution, the Appellant was properly identified by the complainants. It was submitted that the house was well lit and the complainants spent sufficient time with the Appellant for them to positively identify him. For the above reasons, the State urged the court to find the appeal without merit and dismiss it. In a rejoinder, counsel for the Appellant reiterated that the identification of the Appellant as the perpetrator of the offence was not established to the required standard of proof.

The facts of the case as narrated by the prosecution are as follows. The complainants in this case are two siblings namely A N and F W. They testified as PW1 and PW2 respectively. At that time of the incident, PW1 was said to have been aged eleven (11) years while PW2 was aged eight (8) years. Their age was confirmed by their father PW3, J K N who produced their birth certificates into evidence as ***Prosecution's Exhibits Nos. 1 and 2***. The birth certificates indicated that PW1 was born on 22nd February 1999 while PW2 was born on 27th January 2002. The prosecution's case is that on 15th August 2010, PW1, PW2 and their brother D M left their home in Githurai 45 on a mission to visit their grandmother at her home in Muchatha. They boarded a vehicle which dropped them off at KK Promote, past their destination at around 7.00 p.m.

The complainants testified that when they alighted from the vehicle, they saw that it was dark. They realized that they were lost and began to cry. They testified that a man wearing a uniform resembling that of a watchman approached them to check on them and they told him that they were lost. However, he could not assist them as he told them that he was going to work. The complainants testified that the Appellant joined them as they were talking to the man and offered to accommodate them in his house for the night and take them home the following day. They testified that they followed the Appellant to his house where they had supper. When they finished, the Appellant asked them to take a shower. He threatened to throw them to the dogs if they refused. When they finished showering, the Appellant took them to a room with three beds. He asked PW2 to sleep with her brother on one bed and told PW1 to sleep with him on another bed.

PW1 testified that while PW2 went to sleep with her brother, she refused to sleep with the Appellant and went to sit on a chair. She testified that the Appellant picked her up from the chair, placed her on a bed.

He removed her underpant and inserted his finger into her vagina and licked it. He then removed his clothes and had sexual intercourse with her. PW1 testified that the Appellant threatened to throw her to the dogs if she cried. After he finished defiling the Appellant, he also took PW2 to his bed and undressed her before having sexual intercourse with her. Both PW1 and PW2 testified that the experience was painful. They testified that the Appellant continued having sex with both of them in turns. They got to sleep after the Appellant stopped having sexual intercourse with them. The following day, the Appellant escorted them to the road and asked them to follow a certain path. They walked to a place called Kawaida. The complainants testified that they were approached by a certain lady at Kawaida after she saw their brother playing on the road. They told her that they had gotten lost as they were going to visit their grandmother who is a trader at Marigiti. The said lady took them to the home of another lady who also a trader at Marigiti. Their grandmother was informed that they were at the said trader's house and she sent someone to pick them up.

PW3, complainants' father testified when the children did not return home on 15th August 2010, he made a report to the police. He testified that received a telephone call from the children's grandmother the following day informing them that the children had been found. He therefore travelled to Muchatha to see the children. He testified that when he met the children, he observed that they were not walking properly and looked sad. He testified that the complainants' brother told him that they had slept in a white man's house with fierce dogs. He testified that the complainants also told him that they had been defiled and were experiencing pain in their genital organs. The children later took PW3 to the house where they alleged to have been defiled. Thereafter, they made a report to Karuri Police Station. The police accompanied them to the house where they met the owner of the house. As they were going back, the Appellant arrived at the house driving a van. He stopped after he saw the police. The complainants identified him as the person who defiled them. When the Appellant was asked whether he knew the children and he confirmed that he did.

The complainants were taken to Karuri Health Centre where they were examined by PW4, Richard Munene, a Clinical Officer on 16th August 2010. On observing the PW1's genitalia, PW4 noted that she had bruises on the labia and introitus. Her hymen was torn. He also noted that she had a foul smelling white discharge which according to him was an indication of a mild vaginal infection. He concluded that the PW1 had been sexually assaulted. He filed a P3 form in respect of PW1 which were produced into evidence **as Prosecution's Exhibit No. 3**. On observing PW2's genitalia, PW4 noted that she also had a bruised labia and introitus and her hymen was also torn. He concluded that the PW2 had also been sexually assaulted. He filed a P3 form in respect of PW2 which was produced into evidence **as Prosecution's Exhibit No. 4**. The case was investigated by PW5 PC Grace Opiyo of Karuri Police Station. She testified that she recorded the statements from the complainants. After concluding her investigations, PW5 formed the opinion that a case had been made for the Appellant to be charged with the present offences. When the Appellant was put in his defence, he denied committing the offence and put up a defence of alibi. He testified that on the day in question he closed his transport business at about 9.30 p.m. He stated that he was at his house by 10.00 p.m and remained in the house with his family until he left for work the following day.

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 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, it is required to first 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 complainants, PW1 and PW2 were aged eleven (11) years and eight (8) years respectively at the time the sexual assault was said to have been committed. This was confirmed

through their birth certificates produced into evidence as ***Prosecution's Exhibits Nos. 1 and 2*** respectively. This court therefore finds that the prosecution established that the complainants were children satisfying the first ingredient of the offence.

The second ingredient that the prosecution is required to establish is that there 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 this regard, the prosecution relied on the evidence of the complainants who testified that the Appellant defiled them. PW 1 testified that the Appellant inserted his finger into her vagina. She further testified that he inserted his penis into her vagina. On her part, PW2 testified that the Appellant also inserted his penis into her vagina. Both PW1 and PW2 testified that the experience was painful. The prosecution's case is that the evidence of the complainant is corroborated by the medical evidence of PW4 who examined the complainants on 16th August 2010. PW4 noted that both PW1 and PW2 had bruises on their labia and introitus. Their hymen was also torn. PW4 concluded that the complainants had been defiled. This court therefore finds that the prosecution proved the second ingredient of penetration 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 complainants who testified that it was the Appellant who sexually assaulted them. From a careful examination of the evidence on record, this court finds the complainants as reliable witnesses. Their evidence was not shaken when they were cross examined by the Appellant. They both corroborated each other in their identification of the Appellant. Further, the complainants had stayed with the Appellant throughout the night and therefore had sufficient time to properly identify the Appellant as the person who defiled them. This court therefore finds that the prosecution disproved the alibi defence put forward by the Appellant. Accordingly, this court finds that the prosecution identified the Appellant as 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 18TH DAY OF MAY 2016

L. KIMARU

JUDGE