



HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.177 OF 2015

(An Appeal arising out of the conviction and sentence of Hon. Victor Wakumile - PM delivered on 29th September 2015 in Makadara CM.C. CR. Case No.3629 of 2008)

PATRICK OWINO OKUMU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Patrick Owino Okumu was charged with the offence of **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 4th December 2008 at Babadogo Estate, within Nairobi area, the Appellant unlawfully and intentionally committed an act which caused penetration with his genital organ namely penis into the female genital organ namely vagina of D M G, a child aged nine (9) years. He was alternatively charged with **committing an indecent act** 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 committed an indecent act with D M G , a girl aged nine (9) years by touching her private parts namely vagina. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charges. After a full trial, he was convicted of the main charge of **defilement** and was sentenced to serve life imprisonment. The Appellant 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 the trial court disregarded the provisions of **Section 124** of the **Evidence Act** and **Sections 198** and **200(3)** of the **Criminal Procedure Code** before reaching the decision to convict him. He faulted the trial court for relying on circumstantial evidence that was not proved to arrive at the erroneous determination. The Appellant was of the view that the trial court erred when it failed to find that the prosecution had failed to prove its case for failure to subject him to medical examination. He was aggrieved that he was convicted yet the prosecution had failed to prove its case to the required standard of proof beyond any reasonable doubt. Finally, the Appellant was aggrieved that the trial court ignored his defence without giving reasons thus violated **Section 169** of the **Criminal Procedure Code**. In his supplementary grounds of appeal, the Appellant was of the view that his conviction was not supported due the contradictions and inconsistencies in the prosecution's case. He also faulted the trial court for failing to find that the injuries sustained by the complainant were not conclusive evidence of sexual assault. 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.

At the hearing of the appeal, the Appellant was represented by Mr. Makau while the State was represented by Ms. Kimiri. Counsel for the Appellant submitted that the prosecution failed to prove its

case against the Appellant beyond any reasonable doubt. He submitted that the essential ingredients of the offence were not established. In particular, counsel for the Appellant submitted that the age of the complainant had not been satisfactorily established. He did not accept the trial court's production of the P3 form and a medical report as admissible evidence to prove the complainant's age. He was of the view that the documents could not be considered reliable. In this regard, he cited the case of **Kenneth Kiplangat Rono –versus-Republic [2010] eKLR** in support of his submission. On the issue of penetration, counsel for the Appellant submitted that there were material contradictions in the prosecution's medical evidence adduced during trial. He submitted that whereas PW1, Dr. Ketra Muhombe carried out a medical examination of the complainant on 11th September 2008 and found a torn hymen, the complainant was again examined by PW3 Dr. Zephania Kamau on 11th December 2008 who found that the hymen was intact. He submitted that because the prosecution failed to lead evidence to explain the contradictions in the two medical reports, the evidence concerning the ingredient of penetration was therefore not established.

He further submitted further that the prosecution's evidence on identification of the Appellant was unsatisfactory in several aspects. Counsel for the Appellant submitted that while the complainant stated that the incident occurred during daytime, she could not immediately point out the Appellant's house to the police. He submitted further that the complainant testified that her assailant was named "**John**". That the complainant gave a description of her assailant to the police describing the assailant as having had ringworms on his head which the Appellant did not have. Finally, he submitted that the complainant had initially denied that it was the Appellant who defiled her. For these reasons, learned counsel was of the view that the evidence of identification was not also proved to the required standard of proof. He further submitted that the contradictions and inconsistencies in the prosecution case cast a doubt on the truthfulness of the evidence adduced. He submitted that the trial was flawed for failure to comply with the provisions of **Section 200** of the **Criminal Procedure Code**. In concluding his submission, counsel for the Appellant submitted that the prosecution failed to adduce medical evidence to link the Appellant to the offence. He therefore urged the court to allow the appeal.

In response to the Appellant's submission, the learned State Counsel opposed the Appellant's appeal. She submitted that the prosecution established its case against the Appellant to the required standard of proof beyond any reasonable doubt. She stated that the complainant's age was satisfactorily established by the medical evidence tendered as evidence during trial. She stated that the trial court did not doubt that the complainant was a child. She relied on the case of **J.W.A –versus-Republic [2014] eKLR** to support her submission. In addressing the issue of penetration, Ms. Kimiri submitted that the complainant's testimony was corroborated by the medical evidence of PW1 Dr. Ketra Muhombe. She nonetheless submitted that under **Section 124** of the **Evidence Act**, corroboration is not necessary with regard to the evidence of minors in sexual offences. She urged the court to rely on the medical evidence of PW1 who was first to examine the complainant. She relied on the case of **Fappyton Mutuku Ngui –versus-Republic, High Court at Machakos, Criminal Appeal No. 296 of 2010** to explain that there was room for contradictions in subsequent medical examination. As regards the identification of the Appellant, the learned State Counsel submitted that the Appellant was known to the complainant prior to the incident. He had defiled the complainant severally before the incident was reported. She further stated that the complainant had positively identified the Appellant as the person who defiled her. She stated that the complainant gave a description of the Appellant which was confirmed by the trial court. According to her, a medical examination of the Appellant was not mandatory. She submitted that the complainant's evidence was not shaken. She further submitted that the prosecution witnesses were credible, consistent and truthful. She therefore urged the court to dismiss the appeal.

The facts of the case as presented by the prosecution are as follows: PW1 D M G was the complainant in this case. She was said to have been aged nine (9) years at the time of the incident although no documentary evidence was tendered in evidence as proof of her age. At the material time, the complainant was a pupil at Precious Star School. The school was not in session at the time but the complainant was registered to attend holiday tuition at the school. The complainant recalled that on 4th September 2008, her friend C took her to the Appellant's house. Her evidence was that she knew the Appellant as a man who repaired shoes outside his house. She testified that they found the Appellant and his wife inside the house. They were offered a cup of tea. They were at the Appellant's house for a while

and when they were ready to leave, the Appellant gave them some sweets. She testified that the Appellant asked her not to go to school the following day and instead she should go back to his house.

The following morning the complainant left their home to go to Appellant's house. She found the Appellant alone in his house. She testified that while inside the house, the Appellant asked her to lie on a couch and she complied. He undressed himself and asked her to also undress herself. He then removed his penis and lay on top of her. He inserted his penis into her vagina and had sexual intercourse with her. She testified that she felt pain and wanted to cry but the Appellant asked her not to. She testified that he had sexual intercourse with her for a long time and when he finished he wiped her vagina using a handkerchief. He then dressed himself up and asked her to also put on her clothes. She testified that she remained in the house until a visitor arrived and the Appellant asked her to leave. By then, it was lunch time and she went back to her home. She found her mother at home but she did not tell her what had transpired. The complainant testified that she went back to the Appellant's house the second and the third day. The Appellant continued to have sexual intercourse with her on both days. On the fourth day, the Appellant asked her to wait for him at the gate. She testified that while she was standing at the gate, she saw her teacher, PW4 Grace Wambui. She ran away to hide from her.

PW4 recalled that on 10th September 2009 at about noon, she was at the school when she received a telephone call from a certain lady informing her that she had seen the complainant playing outside the school. She testified that she went to look for the complainant and saw her. The complainant however ran away when she saw her. PW4 returned back to school and sent one of the parents to the complainant's home. The complainant's sister was at home at the time. She received the message from PW4 and proceeded to the school. She was informed that complainant had not been attending school and that she had been seen playing outside the school. The complainant's sister therefore went to look for her. She later returned with the complainant. When the complainant was interrogated she told them that she had been attending classes in another school.

PW5, F G N, the complainant's mother testified that on 10th September 2008 while she was at work, she received a call from PW4 asking her to go to the school. She testified that when she returned home from work in the evening, her older daughter informed her that the complainant had not been attending school. She testified that she interrogated the complainant who told her that someone had told her not to go to school and instead go to his house. The complainant told her that she had gone to that person's house severally and that the said person had sexual intercourse with her. PW5 testified that the complainant took her to the said house but they found the house had been locked. They then proceeded to Ruaraka Police Post where they reported the incident.

The police advised PW5 to take the complainant to Nairobi Women's Hospital for medical examination. At the Hospital, the complainant was examined by PW2 Dr. Ketra Muhombe. This was on 11th September 2008. He testified that he was informed that the complainant was born in the year 1999. He examined her genitalia and noted that her vagina was hyperemic (reddish) and her hymen was torn. He carried out a vaginal swab on the complainant which did not reveal presence of spermatozoa nor infection. He prepared a medical report which he produced into evidence as **Prosecution's Exhibit No. 1**. The complainant was also examined by PW3 Dr. Zephania Kamau based at Police Surgery on 11th December 2008. He testified that he examined her external genitalia and found it to be normal and her hymen was intact. He however noted that there was haemartoma around the urethra which he explained could have resulted from some trauma on the area. He filled a P3 on his findings which he produced into evidence as **Prosecution's Exhibit No.2**.

PW5 PC James Kilemi was present when the Appellant was arrested. He testified that the complainant led him and her mother to the Appellant's house. They found the Appellant in his house and the complainant pointed him out as the person who had been defiling her. They therefore arrested and detained the Appellant who was then charged with the present offence. PW6 PC Bernard Murunga was the investigating officer in the case. He testified that he took over the investigations from PC Cherobon who had since been transferred from the station. He testified that PC Cherobon handed him a pant that had been recovered from the complainant which he produced into evidence as **Prosecution's Exhibit No. B**.

When the Appellant was put on his defence, he stated that he was arrested at his home after the complainant identified him to the police. He testified that he requested that the complainant be brought to the police cells where he had been detained so that she could identify him once more but his request had been ignored. He denied knowledge of the charges laid against him. The evidence of DW2, V O, the Appellant's wife was that the complainant was unable to identify the complainant twice when she was asked to identify him.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced before the trial court so as to arrive at its own independent determination whether or not to uphold the conviction of the Appellant. In doing so, this court is required to be mindful of the fact that it neither saw nor heard the witnesses as they testified and therefore cannot make any comment regarding their demeanor (See **Njoroge –vs- Republic (1987) KLR 19**). The issue for determination by this court is whether the prosecution established the charge of **defilement** contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act** against the Appellant to the required standard of proof 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. **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 respect of the first ingredient, the prosecution relied on the evidence of the complainant to the effect that the Appellant inserted his penis into her vagina. That she felt pain and wanted to cry but he asked her not to. The complainant testified that the Appellant had sexual intercourse with her on several occasions thereafter. The prosecution relied on the medical evidence of PW2 Dr. Ketra Muhombe to corroborate the complainant's evidence. PW2 examined the complainant on 11th September 2008 and noted that her vagina was hyperemic (reddish) and her hymen was torn. He prepared a medical report which he produced into evidence as **Prosecution's Exhibit No. 1**. The prosecution further relied on the medical evidence of PW3 Dr. Zephania Kamau who examined the complainant on 11th December 2008. Although PW3 found her external genitalia to be normal and her hymen intact, he also noted that there was hematoma around the urethra which he explained could have resulted from some form of trauma on the area. A P3 on his findings was produced into evidence as **Prosecution's Exhibit No.2**. The Appellant has challenged the prosecution's evidence on the ingredient of penetration which according to him is contradictory. This court has carefully examined the two reports and finds the report prepared by PW3 Dr. Zephania Kamau to be unreliable having been prepared about three (3) months after the incident. Going by the medical report of PW2 Dr. Ketra Muhombe, the court finds that the prosecution indeed proved the first ingredient of penetration to the required standard of proof beyond reasonable doubt.

As to whether the prosecution established that the complainant was a child at the time 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 relied on the evidence of the complainant's mother, PW5 Faith Gaaji Ndunga who testified that the complainant was born on 8th December 1999 and that she was in class two at the time of the incident. No documentary evidence was produced in court 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 is satisfied with the evidence of the complainant's mother as pertains the complainant's age at the time of the alleged sexual assault.

The third issue for determination is the identity of the perpetrator. According to the complainant, the

Appellant lured her into his house on three occasions between 4th and 10th September 2008 and sexually assaulted her. It was her evidence that the first time she went to the house of the Appellant, was when she was taken there by her friend called C. She met the Appellant with his wife. They were offered a cup of tea which they took. As they left the house, the Appellant gave them some sweets. The complainant testified that she knew the Appellant because he used to repair shoes within the neighbourhood. The complainant testified that on the material day, the Appellant requested her to return to his house on the following day. It was on that following day that she was sexually assaulted. She was told to return back on the second and third day. On both occasions, the Appellant is alleged to have had sexual intercourse with her. The Appellant told no one what had transpired. From her testimony, she neither threatened nor was she induced not to disclose to anyone what had transpired. Her mother, PW5 told the court that she was informed by the complainant's older sister that the complainant had failed to attend school for about a week. When she was confronted, she told her mother that she had been sexually assaulted by the Appellant. During the entire period, none of the members of the family of the complainant noted any discomfort on the part of the complainant. The Appellant denied sexually assaulting the complainant.

This court has carefully evaluated this evidence on identification. There are gaps in the complainant's evidence that raises reasonable doubt that the Appellant committed the sexual assault. The only evidence that connects the Appellant to the crime is that of the complainant. There is no other evidence to corroborate her evidence. **Section 124** of the **Evidence Act** provides that where a child testifies in a sexual offence, the court can convict an accused without the necessity of corroboration. The only caveat is that the court must be satisfied that the complainant is telling the truth. In the present appeal, it was clear to this court that the complainant may not have been telling the truth. In the first place, the Appellant lived in his house with his wife. No explanation was put forward by the prosecution to explain the absence of the Appellant's wife during the time it was alleged that the Appellant lured the complainant to his house and had sexual intercourse with her. Secondly, the complainant's behaviour during the entire period was not consistent with a victim of sexual assault. She did not tell anyone that she had been sexually assaulted. She was not threatened nor was she induced by the Appellant to refrain from revealing the information to her parents and siblings. Her story to the effect that she went to the house of the Appellant two more times after the initial sexual assault is incredible. This is because, if she was traumatized by the first encounter, she would not, on her own volition gone back to the Appellant's house. Further, C was an important witness who should have been called to give testimony in the case. Her absence from the prosecution's list of witnesses rendered the complainant's testimony less believable. It was possible that the complainant was sexually assaulted by someone else whom she was afraid to disclose. She could also have implicated the Appellant to explain away her truancy and failure to attend school.

The upshot of the above reasons is that the prosecution failed to establish that the Appellant was the perpetrator of the sexual assault. Reasonable doubt was raised by the evidence of the complainant that it was the Appellant who sexually assaulted her. That doubt, of necessity, will be resolved in the Appellant's favour. The appeal is allowed. The conviction is quashed. The sentence imposed on the Appellant is set aside. The Appellant is ordered set at liberty and released from prison forthwith unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 29TH DAY OF SEPTEMBER 2016

L. KIMARU

JUDGE