



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.151 OF 2014

(An Appeal arising out of the conviction and sentence of Hon. Juma – SPM delivered on 9th October 2014 in Kibera CM. CR. Case No.5 of 2013)

GODFREY

MUDULIA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

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JUDGMENT

The Appellant, Godfrey Mudulia 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 5th July 2013 at Kawangware [particulars withheld] within Nairobi County, the Appellant unlawfully and intentionally penetrated his male organ namely penis into the female genital organ namely vagina of A K, a girl aged eleven (11) years old. He was alternatively charged with **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 allowed his genital organ namely penis to get into contact with the female genital organ of A K , a girl aged eleven (11) years old. When the Appellant was arraigned before the trial court, he denied committing the offences. After a full trial, he was convicted on the main count of **defilement** and sentenced to 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 by the trial court. The Appellant was aggrieved that the trial court incorrectly accepted the prosecution’s evidence pertaining to his identification. He was further aggrieved by the fact that crucial witnesses had not been called to testify. He complained that no medical examination was carried out on him to link him with the offence. The Appellant also complained that the evidence presented by the prosecution could not sustain the conviction against him. He was aggrieved that the trial court ignored his defence. Lastly, the Appellant was of the view that the prosecution’s case had contradictions and inconsistencies and could not form the basis for his conviction. In his supplementary grounds of appeal filed without the leave of court (the court will however consider it), the Appellant was aggrieved that the trial court erred in finding that the prosecution proved that there was penetration despite there being two contradictory medical reports in that respect. He was aggrieved that the trial court failed to take into consideration the circumstances prevailing at the time to appreciate that there was a reasonable likelihood that he was framed with the offence. For these reasons, the Appellant urged the court to allow the appeal, quash the conviction and set aside the sentence that was imposed by the trial court.

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. A response to the Appellant's submission was made by the learned State Counsel, Ms. Nyauncho. The Appellant submitted that the prosecution failed to prove beyond any reasonable doubt that there was penetration. He submitted that there were material contradiction in the prosecution's medical evidence. According to the Appellant, the Post Rape Care form tendered into evidence by the prosecution as **P.Exh.2** showed that the complainant was examined at Nairobi Women's Hospital on 6th July 2013 and the following findings were made; tender genitalia, hyperemic vagina and the hymen was intact. It was concluded that the cause of injuries to the complainant's genitalia was a blunt object. Yet on 8th July 2013, she was examined at the Police Surgery and the medical report tendered into evidence as **P.Exh.3(a)** showing that she had normal external genitalia with no tears or lacerations, but that her hymen was broken with fresh margins. According to the Appellant, in so far as the contradiction in the medical reports is concerned it would make more sense for the court to rely on the first medical report. Nonetheless, it was the Appellant's submission that the absence of hymen *per se* is not proof of penetration. To support this assertion, the Appellant cited the case of **D –versus- East Berkshire Community Health NHS Trust (2005) 2 AC 373 (CA), (2005) 2AC 373 (HL)**. According to the Appellant, a torn hymen could be caused by physical activity.

The Appellant further submitted that the prosecution witnesses were not credible as their evidence had contradictions and inconsistencies. He submitted that whereas PW1 testified that the Appellant had previously defiled PW2, the evidence of PW2 was that it was the first time that the Appellant had defiled her. He further submitted that there were discrepancies on the evidence by the prosecution witnesses as regards the time when PW2 was said to have been in the Appellant's house. He also submitted that their inconsistencies in the description of how the alleged defilement occurred. According to the Appellant, while the complainant testified that the Appellant administered an injection on her before defiling her, implying that the injection was meant to inhibit her senses, it was not clear how then she was able to give an account of how she was defiled. He submitted further that the circumstances favouring his positive identification were absent as PW2 was said to have been accosted at a dark corner, gagged and blind folded by someone from behind. He further submitted that there was no way that whole incident would have gone unnoticed as there were people within the vicinity.

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 PW2 testified that the Appellant accosted her, grabbed her and carried her to his house where he undressed her before defiling her. She submitted that the Appellant was well known to PW2 as he was their neighbour. PW2 testified that the Appellant had pursued her severally when she had been sent to the shop by her mother. She reported the incident to her parents after which the incident was reported to the police. She was later taken to the hospital where it was established that she indeed had been defiled. She had injuries on her private parts and her hymen was broken. Ms. Nyauncho submitted that the contradiction in the two medical reports produced into evidence by the prosecution was resolved by the evidence of PW5. She further submitted that the prosecution established the age of PW2 at the time she was said to have been defiled. She therefore urged the court to dismiss the appeal as it lacked merit.

The facts of the case according to the prosecution are as follows. PW2, A K, the complainant was at the material time aged eleven (11) years. Her age was confirmed by her mother, PW1 A G who produced her birth certificate. The birth certificate was produced as **P.Exh.1**. The birth certificate indicated that the complainant was born on 4th September 2002. On the material day, PW1 sent the complainant sent to the shop in the afternoon. By around 7.00 p.m, the complainant had not returned. When the complainant's father, PW3, P K N returned home in the evening, he inquired about the whereabouts of his daughter. PW1 testified that she went out to look for the complainant but did not find her. The complainant returned home shortly thereafter while crying.

They asked her where she had been and she informed that that she had been at the Appellant's house. The complainant told them that the Appellant had defiled her. PW3 testified that he was in shock and therefore went outside to call two of his neighbours so that the complainant could repeat what she had

told them in their presence. When PW3 returned with the neighbours, the complainant repeated what she had told her parents in the presence of the said neighbours. The complainant testified that the Appellant accosted her from behind as she was coming for the toilet. She testified that he gagged her mouth with a cloth and carried her to his house where he blindfolded her using a piece of cloth. He then laid her on his bed, undressed himself and undressed her before having sexual intercourse with her. The complainant testified that she felt pain. When the Appellant finished, he went to urinate and when he came back he asked her to dress up and chased her out of the house. She testified that she had known the Appellant for a long time as she used to see him outside their house. She further testified that the Appellant had on several occasions pursued her when she was sent to the shop.

The complainant in the company of her parents then proceeded to the Appellant's house within the same compound. They confronted the Appellant at his house. They interrogated the Appellant but he denied defiling the complainant. By this time, a crowd had gathered baying for the Appellant's blood. They roughed the Appellant up before taking him to Muthangari Poice Station. The police advised the complainant's mother to take the complainant to Nairobi Women's Hospital. At the hospital, the complainant was examined by Dr. Sang E.K on 6th July 2013. PW4 Doctor Daniel Nguku produced a Post Rape Care Form (PRC) on behalf of Dr. Sang E.K as **P.Exh.2**. The report showed that the complainant's genitalia was hyperemic red and was sore. Her hymen was found to be intact. The doctor also obtained the complainants clothing for DNA testing. The complainant was also examined by PW5 Dr. Joseph Maundu based at the Police Surgery on 8th July 2013. PW5 testified that he examined the complainant and found that she had normal genitalia with no bruises or lacerations. Her hymen was broken with a fresh tear. He filled a P3 Form in respect of the complainant which he produced into evidence as **P.Exh.3(a)**. PW5 also examined the Appellant and found that he had a deep cut on his scalp. The Appellant also has injuries on his mouth, back and his upper and lower limbs. He also filled a P3 Form in respect of the Appellant which was produced into evidence as **P.Exh.3(b)**. On cross-examination, PW5 testified that he had seen the medical report by PW4 and noted the contradiction with his report with respect to the examination of the complainant. He explained that by the time he examined the complainant, her inflammation had subsided thus he was able to see the tear. PW6 PC Veronica was assigned to investigate the case. She interviewed the witnesses, recorded their statements and formed the opinion that a case of defilement had been made. She charged the Appellant with the offence.

When the Appellant was put on his defence, the Appellant denied committing the offence. He testified that on the day in question he left his place of work at around 4.00 p.m and returned home at about 8.00 p.m. He testified that he heard a knock on his door and when he opened he saw PW1 and the complainant. He testified that PW1 asked him what he had done to the complainant and he informed her that he had just arrived at the house. He testified that PW1 threatened to teach him a lesson before she left with the complainant. The Appellant testified that at around midnight, he heard a knock on the door. He hesitated in opening the door as he feared that there were thieves outside. He testified that when he opened the door, he was accosted by PW3 who was armed with a panga and a rungu and they assaulted him. They accused him of defiling the complainant. He was tied up and taken to the area chief and later to the police. The Appellant testified that he was later taken to Muthangari Police Station where he was detained.

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 the fact 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 Appellant of defilement contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act** to the required standard of proof beyond any reasonable doubt.

Upon re-evaluation of the facts of the case and the submission made by the parties to this appeal, this court is of the firm view that the prosecution did indeed prove its case to the required standard of proof beyond any reasonable doubt on the charge of defilement contrary to **Section 8 (1)** as read with **Section 8 (2)** of the **Sexual Offences Act**. To establish a case of defilement, 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 is 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 that she was accosted by the Appellant when she was returning home from the shop where she had been sent by her mother. The Appellant dragged her into his house before undressing and then sexually assaulting her. After the incident, the complainant was seen by Dr. Sang E.K. on 6th July 2013 at Nairobi Women’s Hospital. According to the Post Rape Care Form which was produced into evidence on examination of the complainant’s genitalia, the doctor saw that it was hyperemic, red and sore. Her hymen was intact. In a later examination by Dr. Maundu who testified as PW5, he noted that the complainant’s hymen was broken with a fresh tear. The Appellant argued that the two medical reports were contradictory and therefore did not establish penetration. When cross-examined, PW5 explained that it was possible that the doctor who first saw the complainant could not establish if the hymen was broken or not because there was inflammation in the genitalia. When he examined the complainant, the inflammation had subsided and therefore he was able to see the tears in the hymen. Upon evaluation of these medical evidences, this court is of the view that the contradiction between the two medical reports was explained by PW5 when he testified before court. What is without doubt is that the complainant’s vagina was bruised and sore and had a freshly broken hymen. These injuries were sustained at the contemporaneous period that the complainant claimed that she was defiled. This court therefore holds that penetration was established to the required standard of proof beyond any reasonable doubt.

The second element that the prosecution was required to establish is the identity of the perpetrator. The complainant testified that she knew the Appellant prior to the sexual assault. Indeed, the Appellant lived in the same compound where her parent’s house was situated. It was not the first time that the complainant interacted with the Appellant during the sexual assault. When she returned home, the complainant told her parents, and the neighbours who had been called by her parents, what had transpired. She described what the Appellant did to her. She repeated this evidence in court when she said that the Appellant dragged her into his house, undressed her, before sexually assaulting her. She then led her parents and the neighbours to the house of the Appellant. The Appellant was arrested and escorted to the police. This court is convinced beyond reasonable doubt that the complainant knew the Appellant prior to the sexual assault because they were neighbours. This court discerned no reason why the complainant would frame the Appellant for sexually assaulting her if in fact the Appellant was not the perpetrator. There was no evidence placed before the court of the existence of any grudge or animosity between the Appellant and the complainant or the complainant’s family.

The third element that the prosecution is required to prove is the age of the complainant. 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 age of the complainant was established by her birth certificate which was produced into evidence. It showed that the complainant was born on 4th September 2002. The complainant was about eleven (11) years old the time of the sexual assault. From the foregoing, the prosecution proved its case against the Appellant on the charge of **defilement** contrary to **Section 8(1)** of the **Sexual Offences Act** to the required standard of proof beyond any reasonable doubt. The Appellant’s appeal on conviction lacks merit and is hereby dismissed.

As regards sentence, **Section 8 (2)** of the **Sexual Offences Act** provides a sentence of life imprisonment for any person convicted of defiling a child of eleven (11) years. The complainant was eleven (11) years old at the time the offence was committed. The trial court sentenced the Appellant to serve life imprisonment. That sentence is legal. The appeal against sentence is similarly dismissed. It is so ordered.

DATED AT NAIROBI THIS 22ND DAY OF SEPTEMBER 2016

L. KIMARU

JUDGE