

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.96 OF 2012

(An Appeal arising out of the conviction and sentence of Hon. Ms. Nyangena - SRM delivered on 19th March 2012 in Gatundu SRM. CR. Case No.248 of 2011)

I M M.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

I M M, the Appellant herein was charged with the offence of **defilement of a child** contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act**. The particulars of the offence were that on 17th March 2011 at *[particulars withheld]* Village in Gatundu North, the Appellant intentionally and unlawfully committed an act which caused penetration to L N M, a girl aged seven (7) years. He was alternatively charge with the **offence of committing an indecent act with a female** contrary to **Section 11(1)** of the **Sexual Offences Act**. The particulars of the offence were that on the same day and in the same place, the Appellant committed an indecent act on L N M, a girl aged seven (7) years by touching her private parts. The Appellant pleaded not guilty to the charge. After full trial, the Appellant was convicted as charged on the main count 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 faulted the decision of the trial court on several grounds. He stated that the trial magistrate had erred both in law and in fact by failing to consider the fact that the allegations advanced against him were framed due to a prior grudge existing between the Appellant and PW2. The Appellant was aggrieved that the trial magistrate had failed to consider the fact that there was no medical evidence linking him to the commission of the offence. He faulted the trial magistrate for failing to consider the totality of the evidence adduced which, in his view, exonerated him from the crime. The Appellant took issue with the decision of the trial court which in his opinion failed to take into account the fact that the prosecution had not established its case to the required standard of proof beyond any reasonable doubt. 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 in further support of his appeal. In both instances, the Appellant was firm in his belief that he was framed up with the charge due to an existing grudge with the parents of the complainant. He stated that there existed a land dispute between him and the parents of the complainant. This, according to him, was the motivation for the parents of the complainant to fabricate evidence against him. He denied committing the crime. On her part, Ms. Njuguna for the State opposed the appeal. She submitted that the prosecution established its case to the required standard of proof beyond any reasonable doubt. She stated that the Appellant was literally found red-handed defiling the complainant. She urged the court to dismiss the claim by the Appellant that the prosecution of the sexual assault was motivated by a land dispute.

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 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) of the Sexual Offences Act** to the required standard of proof beyond any reasonable doubt.

The facts of this case are rather straight forward. The Appellant is the grandfather of the complainant. The complainant was at the material time a girl aged seven (7) years. According to her testimony on 17th March 2011, the Appellant took her to a bush, removed his trousers, applied saliva on his penis and then inserted it in her vagina. She felt pain. The Appellant threatened to kill her if she ever disclosed what had transpired. At that time, PW2 T N W, a neighbour, was passing by. She saw the Appellant exposing his penis to the complainant in the bush. She recalled that when the Appellant saw her, he covered his penis with a shirt. He saw that the Appellant was lying next to the complainant. The complainant's trouser was drawn half way down. She rushed to the nearby home of PW3 J N and told her what had transpired. J N is the sister in-law of the Appellant. She rushed to the scene and found the Appellant still with the complainant. Both were however dressed.

PW3 took the complainant aside and inquired from her what had transpired. The complainant told her what had taken place. On examining the complainant's private parts, she saw what appeared to be semen. She informed PW4 J M M, the father of the complainant. A report was made to the Area Assistant Chief. The complainant was referred to Ngorongo Health Centre and later to Gatundu Hospital where she was treated and discharged. PW5 Dr. Patrick Oponga, then based at Gatundu District Hospital produced a P3 report which had been filled by his colleague one Dr. Ng'ang'a. According to the said medical report, it was established that indeed the complainant had been defiled. Her hymen was broken and she had bruises on her labia. PW4 produced the complainant's immunization card which established that she was born on 10th May 2004. The Appellant was arrested and taken to Gatundu Police Station. The case was investigated by PW6 PC Martha Nthenya who formed the opinion that a case had been made to have the Appellant charged with the offence for which he was convicted. When he was put on his defence, the Appellant denied committing the offence. He told the court that the complainant had been coached to give false testimony against him. He insisted that he had been framed.

Upon re-evaluating the facts of this 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) of the Sexual Offences Act**. To establish a case of defilement, the prosecution was required to prove that the Appellant caused his sexual organ to penetrate the sexual organ of the 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 of age. In the present appeal, the prosecution established that the Appellant lured the complainant, who was then aged seven (7) years, into a bush where he defiled her. The age of the complainant was established by the immunization card which was produced into evidence. It showed that the complainant was born on 10th May 2004. The prosecution further adduced evidence which established that the Appellant indeed caused penetration of his sexual organ into the sexual organ of the complainant. PW2 and PW3 testified that they found the Appellant with the complainant in a bush. The Appellant had removed his trousers. He had also removed the trousers of the complainant.

On physical examination of the complainant, PW2 and PW3 saw what appeared to be male semen in the private parts of the complainant. The complainant was rushed to hospital by PW4. She was examined by a doctor who confirmed that indeed the complainant had been sexually assaulted. Her hymen was broken. Her labia was bruised. This was clear evidence that indeed the Appellant had penetrated the complainant. The evidence adduced by the prosecution witnesses was cogent, consistent and corroborated each other on all material respects. The Appellant's assertion that the parents of the complainant had framed him up simply does not hold. The Appellant's claim that there existed a grudge between him and the parents of the complainant because of a land dispute is simply a red-herring: it was raised as an afterthought during the hearing of the appeal. The Appellant did not raise this issue during the hearing before the trial court. The Appellant's defence therefore does not dent the otherwise strong evidence adduced against him by the prosecution witnesses.

In the premises therefore, the appeal lacks merit and is hereby dismissed. The conviction of the Appellant is upheld. The sentence of the Appellant was lawful. It is similarly upheld. It is so ordered.

DATED AT NAIROBI THIS 29TH DAY OF JANUARY, 2015

L. KIMARU

JUDGE