



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.197 OF 2012

P O O.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, P O O was charged with the offence of **defilement of a child** contrary to **Section 8(1) & (2)** of the **Sexual Offences Act**. The particulars of the offence were that on diverse dates between 1st September and 17th October 2011 at **[particulars withheld]** Estate Thika within Kiambu County, the Appellant intentionally caused his penis to penetrate the anus of S O O (the complainant) a male juvenile aged seven (7) years, while threatening to beat him if he disclosed the act. The Appellant was alternatively charged with **causing an indecent act** contrary to **Section 6(a)** of the **Sexual Offences Act**. The particulars of the offence were that on diverse dates between the said dates and in the same place, the Appellant intentionally and unlawfully touched the anus of the complainant with his penis with a view to defiling the said complainant, an act which was indecent. After full trial, the Appellant was convicted of the main charge. He 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 filed several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted on a charge that was defective. He stated that he ought to have been charged with the offence of **committing an unnatural offence** contrary to **Section 162** of the **Penal Code** instead of the charge he was convicted of under the **Sexual Offences Act**. The Appellant 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 he had been convicted on the charge of **defilement** where the age of the complainant had not been established. He took issue with the fact that the trial court had relied on the incredible evidence of the complainant to secure his conviction. He stated that the complainant had adduced contradictory evidence which could not stand up to legal scrutiny. The Appellant complained that he was prevented from properly defending himself because the charge sheet was vague as to the date he was alleged to have committed the offence. In the premises therefore, he 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 the court written submission. He further made oral submission urging the court to allow his appeal on the grounds that the prosecution witnesses had not adduced evidence to link him with the sexual assault on the complainant. On her part, Ms Wario for the State submitted that the prosecution had established to the required standard of proof beyond any reasonable doubt that the Appellant had defiled the complainant. She urged the court to disallow the appeal and confirm the conviction and sentence of the trial court.

The facts of this case according to the prosecution are as follows: the complainant is the son of the Appellant. According to the evidence adduced before court, at the material time, the Appellant and the complainant were living together alone in a rental house in Thika. The complainant's mother was not living with them at the time. According to the complainant, the Appellant had sexually assaulted him on several occasions. He testified that the Appellant asked him to remove his shorts at night and then insert his penis in his (the complainant's) anus. The Appellant warned him not tell anyone. Although the complainant felt pain during the ordeal, he was instructed to keep quiet. As a result of the sexual assault, the complainant testified that he lost control of his bowel movement. He passed stool without control. He was emphatic that no one else had assaulted him in such manner as the Appellant did to him.

The complainant was at the material time a Standard 2 pupil at **[particulars withheld]** Primary School. PW2 D W was his teacher. She recalled on 4th October 2011 being requested by the headmistress of the school to check on the complainant because he had loose bowel movement. PW2 talked to the complainant. After gaining his confidence, the complainant told him

that he had been sodomized by people from Kiganjo area. PW2 became concerned. She asked the complainant to request his father to come to school. For three days, the father (the Appellant) did not go to school. On further inquiry, the complainant disclosed to PW2 that indeed it was his father who had been sexually assaulting him. PW2 immediately reported the incident to PW3 Harrison Mwitii Kiruki, the Children's Officer, Thika District. A report was made to the police resulting in the arrest of the Appellant. The complainant was taken to Thika Level 5 District Hospital where he was examined by Dr. Wekesa. The medical treatment notes and the P3 form were produced into evidence on behalf of Dr. Wekesa by PW4 Dr. Benedict Macharia. The medical report revealed that indeed the complainant had been sodomized. He was put on treatment. The doctor also recommended that he be counseled. The case was investigated by PW5 Cpl. Shacton Davuda. After concluding his investigation, he reached the conclusion that indeed a case had been made for the Appellant to be charged with the offence for which he was convicted.

When the Appellant was put on his defence, he denied committing the offence. He told the court that he had a good relationship with his son and at no time had he sexually assaulted him. On the material day of his arrest, the complainant told him that he was sick with diarrhea. He stated that if the doctor's evidence confirmed that indeed the complainant was sodomized, he was not party to it. He urged the court not to believe the complainant because he had previously lied about an incident when he was found to have stolen some money. He recalled that the complainant had said that it was him (the Appellant) who had sent the complainant to steal the money. In essence, it was the Appellant's defence that the complainant's testimony was incredible and should not be believed.

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.

On re-evaluation of the evidence and the submission made on this appeal, it was clear to the court that the prosecution did indeed establish the guilt of the Appellant to the required standard of proof beyond any reasonable doubt. In a case of defilement, the prosecution is supposed to establish that there was penetration, that the victim of the sexual assault was a child and finally, the identity of the perpetrator. In the present appeal, that there was penetration was established by medical evidence. The complainant was examined by Dr. Wekesa at Thika Level 5 District Hospital on 18th October 2011. He indeed confirmed that the complainant had been sodomized. There was injury in the complainant's anus an indication that indeed he had been sodomized. **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.”

The Appellant did not contest the fact that the medical evidence had indeed confirmed that there was penetration. He however denied that he was the perpetrator of the penetration.

The second issue that the prosecution was supposed to establish is the age of the victim. According to PW2, the complainant was at the material time was a Standard 2 pupil at **[particulars withheld]** Primary School. The doctor, who examined the complainant, produced a P3 form which confirmed the age of the complainant as seven (7) years. Although the prosecution did not produce either birth certificate, baptismal card or post-natal card to establish the age of the complainant, in the present appeal that could not have been an issue because the Appellant acknowledged that the complainant was his child. The complainant was seven (7) years at the time the offence was committed. This court therefore holds that the prosecution did establish that the complainant was a child within the meaning of **Section 2(1)** of the **Children Act**.

As regard who perpetrated the penetration, the complainant testified that it was the Appellant, his father, who perpetrated the sexual assault. He testified that the Appellant severally sexually assaulted him at night when they were sleeping in their rental house. At the material time, the Appellant lived alone with the complainant. He had the opportunity. At the time, the mother of the complainant was not living with them. The complainant disclosed to his teacher (PW2) what the Appellant had done to him. This was after he developed a medical complication from the sexual assault. The complainant could not control his bowel movement. Although the Appellant challenged the credibility of the complainant, upon re-evaluation of the evidence adduced, it was clear to this court that the complainant had no reason to point the Appellant as the perpetrator of the sexual assault if indeed he was not the one. As the father of the complainant, the Appellant is the last person that the complainant would have accused for committing such an offence.

Both the teacher and the doctor observed that the complainant was indeed distressed when the issue of the father was discussed. The claim by the Appellant that other persons could have perpetrated the sexual assault is not supported by evidence. Further, if other persons had perpetrated the sexual assault, the complainant could have informed him. This court is of the view that taking into account the entire circumstances of this case, the evidence adduced by the complainant was cogent, consistent and credible. The fact that the Appellant was charged with **defilement** under the **Sexual Offences Act** and not **committing unnatural act** under the **Penal Code** does not in any way materially affect the veracity and the propriety of the charge brought against him. The prosecution had the option of preferring charges against the Appellant under either **Act**. The Appellant was not in any way prejudiced.

As regard the defence put forward by the Appellant, this court forms the view that the same is self-serving. It does not dent the otherwise strong evidence that was adduced by the prosecution witnesses. This evidence established his guilt to the required standard of proof beyond any reasonable doubt. The appeal 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 19TH DAY OF MARCH 2015

L. KIMARU

JUDGE