



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.15 OF 2013

(An Appeal arising out of the conviction and sentence of Hon T. OKELO - SPM delivered on 7th February 2013 in Nairobi CM. CR. Case No. 513 of 2011)

ABDIKADIR MUSA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Abdikadir Musa was charged with **defilement** contrary to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act**. The particulars of the offence were that on 25th January 2011 at *[particulars withheld]* Estate in Nairobi, the Appellant unlawfully and intentionally committed an act which caused penetration with his penis into the vagina of Z H M, a child aged 14 years. He was alternatively charged with the offence of **committing an indecent act with a child** 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 unlawfully and intentionally committed an indecent act with Z H M, a child aged 14 years by touching her private parts. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was convicted as charged on the main count of **defilement**. He was sentenced to serve twenty (20) years 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. He was aggrieved that he had been convicted on the basis of evidence that did not establish his guilt to the required standard of proof beyond any reasonable doubt. He took issue with the fact that the trial court had relied on evidence of members of one family to convict him. He was of the view that their evidence was contradictory and inconsistent and could not form a basis for his conviction. He faulted the trial magistrate for reaching a finding that he was HIV positive yet medical evidence had established that the complainant had not been infected with the virus. In his supplementary petition of appeal, the Appellant reiterated that the evidence adduced by the prosecution witnesses was uncorroborated by independent evidence and was bereft of persuasive medical evidence. For the above reasons, the Appellant urged the court to allow the appeal, quash the 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. He made oral submission in further support of his appeal. He urged the court to reach a finding that the prosecution had failed to adduce sufficient evidence to link him to the offence. Ms. Ndombi for

the State opposed the appeal. She urged the court to disallow the appeal since the prosecution had established its case on the charge of defilement to the required standard of proof beyond any reasonable doubt.

This being a first appeal, it is the duty of this court to re-look afresh the evidence adduced before the trial court and thereafter reach its own independent determination whether or not to uphold the conviction of the Appellant. In doing so, this court is required by law to be mindful of the fact that it neither saw nor heard the witnesses as they testified and therefore give due allowance in that regard. (See **Okeno –vs- Republic [1972] EA 32**). In the present appeal, the issue for determination by this court is whether the prosecution adduced sufficient evidence to support the charge of defilement brought against the Appellant.

Before giving reasons for its decision, this court is required to set out the facts of the case. The complainant in this case Z H M (PW1) is the daughter of PW3 H M. PW1 is the brother of PW2 A B. At the material time, the family resided in a two-roomed house at **[particulars withheld]** Estate in Kayole. On the material day of 25th January 2011, PW3 was not at their residence. She had gone to their rural home to attend a funeral of her grandmother. She left her two (2) children PW1 then aged 14 and PW2 then aged 17 to take care of their house. The complainant testified that, prior to the incident, she knew the Appellant. In her testimony before court, she referred to the Appellant by his name. She recalled that on the material day of 25th January 2011 at about midday, the Appellant went to her house and requested her to be his friend. She was alone at home at the time. She rebuffed his overtures.

The Appellant returned to their home at 7.00 p.m. in the company of her brother PW3. They took tea after which PW2 went to sleep in a nearby house. The complainant was left to sleep alone in the house. At about 2.00 a.m. the complainant went out to answer a call of nature. When she returned to the house, she found the Appellant had entered in the house and was seated. The Appellant was naked. He was also armed with a rungu and a knife. The Appellant got hold of the complainant, removed her clothes before forcefully having sexual intercourse with her. Because it was the first time for the complainant to have sex, she bled. In the course of the struggle, the complainant screamed. Nobody responded to her call of distress. After the Appellant was through, he ordered the complainant to go to the toilet. It was then that the complainant took the opportunity to go to the house where his brother was sleeping to seek help. His brother (PW2) returned to the house and found the Appellant seated in the house. He ordered the Appellant to leave the house. The Appellant was at first reluctant to leave the house. PW2 recalled that he was armed with a rungu and a knife. The Appellant only left after the complainant's uncle called Ali threatened that he would call for help.

On the following day (26th January 2011), the complainant reported the incident to her teacher called Mrs. Macharia. She advised her to report the matter to the police. She reported the matter to Kayole Police Station where she was advised to seek medical attention at Nairobi Women Hospital. At the said hospital, the complainant was seen by Dr. Gakure Wangeci. The medical report was produced on her behalf by PW4 Dr. David Thuo. The doctor noted that the victim had a bloodstained pant. The vagina was normal. The external genitalia had a whitish vaginal discharge. The hymen was freshly broken. The complainant was put on treatment immediately to prevent sexually transmitted diseases and pregnancy.

Upon receipt of the medical report, the case was assigned to PW5 PC(w) Ruth Maithya to investigate the case. Upon concluding the investigation, she formed the opinion that a case had been made for the Appellant to be charged for committing the offence of defilement. The Appellant was arrested and charged with the present offence. The pant that the complainant wore on the material night was produced as an exhibit. The complainant's birth certificate which indicated that she was born on 21st May 1996 was also produced into evidence. After the close of the prosecution's case, the Appellant was put on his defence. He chose to say nothing on his defence.

For the prosecution to establish its case on the charge of defilement, it is required to establish the following three (3) elements: The first element is penetration. In the present case, it was the complainant's testimony that the Appellant gained entry into the house she was sleeping alone when she went out to answer a call of nature. According to the complainant, the Appellant was armed with a rungu

and a knife. He forcefully removed her clothes before sexually assaulting her. To use the complainant's words:

“He came and forced me into the house and forced me to lie down. I screamed and cried for help and no one came to help me. He took me to my bed removed my clothes my pant and my sleeping pajama and did bad manners. He inserted his thing inside my vagina and I felt pain. He poured something warm inside me and I screamed.”

It is obvious from the above description that the prosecution indeed established that the Appellant penetrated the complainant. The complainant's testimony in that regard was corroborated by the doctor's testimony. The complainant testified that after the sexual assault she bled. It was her first time to have sexual intercourse. When the doctor examined her, she noted that the complainant had a freshly broken hymen which was still bleeding. This confirmed the complainant's testimony that she had been indeed defiled.

The second element that the prosecution was required to establish is the identity of the perpetrator. The Appellant was known to the complainant prior to the incident. The Appellant had even attempted to seduce the complainant earlier in the day. The complainant rebuffed his unwanted approach. The Appellant was also a friend of the complainant's brother. PW2 described how he found the Appellant in their house after the complainant had informed him of the sexual assault. This court holds that the prosecution did indeed establish that it was the Appellant who was the perpetrator of the crime.

The third element is the age of the complainant. In defilement cases, the age of the complainant is critical for the purpose of sentence. The age of the complainant determines the sentence that will be meted out to the person convicted. Since the **Sexual Offence Act** creates minimum sentences for sexual offences, it is imperative that the age of the complainant be established. In the present appeal, the age of the complainant was established by the birth certificate that was produced. The complainant was indeed aged fourteen (14) years at the time of the sexual assault. The prosecution established the age of the complainant to the required standard of proof beyond any reasonable doubt.

The Appellant's complaint to the effect that the trial magistrate had not properly evaluated the evidence adduced before him does not hold. This is because the evidence adduced by the prosecution witnesses established all the elements of the charge. The fact that the majority of prosecution witnesses were relatives does not reduce the credibility of their testimony. Their evidence was tested on cross-examination. The Appellant did not suggest in his cross-examination of the existence of a grudge that would have motivated the complainant to lodge a false charge against him. The testimony of the complainant and her brother were cogent, consistent and corroborated each other in all material respects. Furthermore, in such cases of sexual assault, it is not strange or uncommon that close relatives would testify in such cases.

The upshot of the above reasons is that the appeal lodged by the Appellant lacks merit and is hereby dismissed. The conviction of the trial court is upheld. The sentence imposed on the Appellant was lawful. It is similarly upheld. It is so ordered.

DATED AT NAIROBI THIS 19TH DAY OF MAY 2015

L. KIMARU

JUDGE