



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.19 OF 2013

(An Appeal arising out of the conviction and sentence of T. MWANGI - SRM delivered on 23rd November 2011 in Makadara CM. CR. Case No.2425 of 2009)

IDD MOHAMMED.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Idd Mohammed was charged with the offence of **defilement of a child** contrary to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act**. The particulars of the offence were that on 16th June 2009 in Nairobi, the Appellant unlawfully and intentionally committed an act which caused penetration with his male genital organ (penis) into the female genital organ (vagina) of G N M, a child aged 15 years. 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. He was sentenced to serve twenty (20) years imprisonment. He 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 he had been convicted on the basis of insufficient and untrustworthy testimony of the prosecution witnesses. He was of the opinion that the prosecution had not proved its case to the required standard of proof beyond any reasonable doubt. He took issue with the fact that his defence had not been considered before he was convicted. In a supplementary petition of appeal, the Appellant stated that the medical report relied upon was unprocedurally obtained. He faulted the trial magistrate for not establishing the age of the victim before convicting him. He was aggrieved that the trial magistrate had not taken into consideration the fact that the complainant and himself were arrested at the same time. He was of the view that the court should have made further inquiry as to the circumstances of his arrest. For the above reasons, the Appellant urged the court to allow the appeal, quash his conviction and set aside the sentence that was imposed upon him.

During the hearing of the appeal, the Appellant presented to the court written submission in support of his appeal. He urged the court to allow his appeal. Mr. Kabaka for the State opposed the appeal. He submitted that the prosecution had established, to the required standard of proof that indeed the Appellant had defiled the complainant. He was of the view that the appeal lacked merit and should be dismissed.

The facts of this case raises troubling issues. The complainant, G N (PW2) was said to be aged fifteen (15) years at the time of the incident. During the hearing of the case, the prosecution did not produce any documentary proof that the complainant was indeed aged fifteen (15) years at the time of the incident. Although the complainant testified that she was a Standard Seven pupil at *[particulars withheld]* Primary School, in her testimony she stated that she worked for one Mama Patience as a househelp. These contradictions in the testimony of the complainant will come in sharp focus when the entire evidence adduced by the prosecution witnesses is re-evaluated. According to the complainant, she was lured by her employer called Mama Patience to have a relationship with the Appellant. On the material day of 16th June 2009, the complainant had not gone to school. On the evening of the same day, Mama Patience took her to the house of the Appellant where she left her. According to the complainant, after Mama Patience left her, the Appellant locked her in the house. She asked her to remain silent. At about 10.00 p.m., her mother and her sister came looking for her. The complainant's mother, I W (PW3) testified that on the material day, when the complainant did not return home, she inquired from Mama Patience the whereabouts of the complainant. Mama Patience directed her to the Appellant's house. She knocked at the house and inquired from the Appellant where the complainant was. The Appellant told her that the complainant was not in the house. PW3 recalled that the Appellant told her that the complainant was not a child and could as well get married. He was willing to negotiate with PW3 for the complainant's hand in marriage. The complainant admitted that when her mother and siblings went looking for her, she heard them talk to the Appellant while inside his house. She did not raise any alarm. The complainant stayed in the Appellant's house for three (3) days until when she was arrested together with the Appellant. During day time, she stayed with the Appellant's sister at her house. In her initial statement recorded with the police, the complainant denied that she had been detained against her will in the Appellant's house. She however changed her story when she testified in court. It was her testimony that what she recorded in the statement was what she was told to say by the Appellant.

The complainant was taken to Nairobi Women Hospital on 22nd June 2009. The history recorded by the doctor from the complainant was as follows:

“The above mentioned was seen at our facility on 22/6/09. Mother of the victim chased her from home and she went to Mohammed's house. He managed to seduce her and they had consensual unprotected penovaginal sex. This occurred on 16/6/09 at 1.00 p.m.”

On examination, the doctor confirmed that indeed the complainant had sexual intercourse. However, she had no injuries. The broken hymen was old. This was proof that the complainant had prior sexual experience to the material day. The medical report was produced as ***Prosecution's Exhibit No.2*** by PW7 Dr. David Thuo on behalf of the doctor who examined the complainant Dr. Muhombe who was by then deceased. The complainant was also seen by PW1 Dr. Zephaniah Kamau on 17th August 2009 who noted that the complainant had no bodily injuries. Although her hymen was broken, it was not fresh.

The case was investigated by PW5 Corporal Ruth Aidah of Muthaiga Police Station. She concluded that a case had been made for the Appellant to be charged with defilement. When the Appellant was put on his defence, he denied committing the offence. He did not give any evidence in regard to the circumstances under which the complainant was found in his house. He insisted that he was framed in the charge.

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 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 the demeanour of the witnesses (See ***Njoroge –vs- Republic [1987] KLR 19***). The issue for determination by this court is whether the prosecution established the charge of defilement against the Appellant to the required standard of proof beyond any reasonable doubt.

As stated earlier in this judgment, it was apparent from the contradictory nature in which the complainant adduced her evidence before the trial court that she was not telling the whole story regarding the circumstances under which she was found in the Appellant's house. It was the complainant's case that she was lured by one Mama Patience to go to the house of the Appellant. She stayed in the house of the

Appellant for three (3) days and nights. During the day, she stayed with the Appellant's sister at her house. In the history she gave the doctor, she told the doctor that she had been chased from her home by her mother. She voluntarily went to the Appellant's house where she stayed for three days. During this period, she had sexual intercourse with the Appellant. The intercourse was "**consensual**". From medical evidence, it was clear that it was not the first time that the complainant had sexual intercourse when she had it with the Appellant.

From the re-evaluation of the evidence adduced by the prosecution witnesses, it was clear to this court that the complainant had a "**relationship**" with the Appellant. This relationship was apparently not approved by the complainant's parents. They made the decision to report the incident to the police. In the initial statement recorded by the complainant, she denied that she had been detained against her will by the Appellant. Her story that she was lured by a lady by the name Mama Patience to go to the Appellant's house is not credible. If that indeed was the case, then Mama Patience could not have gone out of her way to direct the complainant's mother to the Appellant's house. Although it was alleged that the complainant was 15 years at the time of the incident, no documentary evidence was produced to support this claim.

The Appellant was unrepresented both before the trial court and on this appeal. If he was, he would have called in his defence the defence of the fact that he was not aware that the complainant was below the age of eighteen (18) years i.e. the complainant was not a child. From the evidence adduced, it was clear that due to the socio- economic circumstances of the complainant, she could have seen the opportunity of getting out her then circumstances by getting married to the Appellant. However, her parents did not approve of the move hence the criminalization of her stay with the Appellant. Since the prosecution did not adduce any evidence to support the age of the complainant, this court cannot convict the Appellant for defilement. The other evidence adduced by the prosecution did not support the charge that the Appellant intentionally and unlawfully had sexual intercourse with the complainant. There are too many gaps left in the prosecution's case. Reasonable doubt was raised in this court's mind regarding the circumstances under which the offence is said to have occurred.

For the above reasons, the appeal lodged by the Appellant has merit and is hereby allowed. His conviction on the charge of defilement is hereby quashed. He is acquitted of the charge. He ordered released from prison and set at liberty forthwith unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 19TH DAY OF MAY 2015

L. KIMARU

JUDGE