REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.100 OF 2012

(An Appeal arising out of the conviction and sentence of Hon. Mrs. Nyakundi - PM delivered on 16th December 2011 in Kibera CM. CR. Case No.1223 of 2009)

HENRY WANYONYI……...…….…….APPELLANT

VERSUS

REPUBLIC…….....RESPONDENT

JUDGMENT

The Appellant, Henry Wanyonyi was charged with **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 1st March 2009 in Nairobi, the Appellant intentionally and unlawfully committed an act by inserting his male genital organ (penis) into the female genital organ (vagina) JN, a girl aged 8 years. The Appellant was alternatively charged with **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 intentionally committed an indecent act by touching his male genital organ (penis) on the surface of the female genital organ (vagina) of JN, a girl aged 8 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 on the main charge of **defilement**. 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 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 the ingredients of the charge to the required standard of proof. It was his view that the prosecution had not adduced sufficient evidence to establish his guilt to the required standard of proof. He faulted the trial magistrate for not taking into account the fact that the evidence presented in court was at variance with the particulars provided in the charge sheet. He took issue with the fact that the trial magistrate had relied on hearsay evidence to convict the Appellant. He stated that the evidence adduced by the prosecution witnesses was inconsistent and therefore incredible. He faulted the trial magistrate for relying on extraneous consideration, other than the evidence adduced to convict him. He was finally aggrieved that the trial magistrate had failed to take into consideration the fact that the evidence adduced by the prosecution witnesses did not meet the threshold of proving the case to the required standard of proof beyond any reasonable doubt. In the premises therefore, the Appellant urged the court to allow the appeal, quash the conviction and set aside the sentence that was imposed upon him.

Prior to the hearing of the appeal, counsel for the Appellant and the Director of Public Prosecutions

agreed to file written submission in support of their respective cases. They said submissions were duly filed. The submissions were highlighted before this court by Mr. Swaka for the Appellant and by Ms. Kimiri for the State. Mr. Swaka submitted that the prosecution had not established the ingredients to prove the charge of defilement. He submitted that the evidence adduced by the prosecution witnesses, if anything, established attempted defilement and not actual defilement. The documentary evidence adduced was at variance with oral evidence. He took issue with the fact that the medical evidence adduced in court was not signed by the doctor who is alleged to have prepared it. In any event, by the time the medical report was produced in court, the doctor had died. He urged the court to rely on the medical evidence of Dr. Kamau which is contained in the P3 form. This evidence confirmed that there was no defilement. He further submitted that a key witness by the name Erasto who was referred to by the two of the witnesses was not called to testify in the case. He was of the view that the failure to call this critical witness prejudiced the prosecution's case and meant that there was no direct evidence to connect the Appellant with the alleged offence. He submitted that the trial court erred in relying on hearsay evidence to convict the Appellant. He was of the view that the prosecution had not established the identity of the perpetrator, if at all, of the offence. He explained that the evidence adduced to the effect that there was semen-like discharge found in the inner clothes of the complainant was dubious since no forensic analysis was done to confirm that indeed the substance was semen. He submitted that the investigating officer did not testify in the case. He was of the opinion that there were many gaping holes in the prosecution's case that raised reasonable doubt as to whether the Appellant committed the offence. He urged the court to allow the appeal.

Ms. Kimiri for the State opposed the appeal. She submitted that the prosecution had established the three ingredients necessary to secure the conviction of the Appellant: there was identification, there was penetration, and finally the victim of the offence was a child. She explained that the prosecution established to the required standard of proof that on the material day of the complaint, the Appellant enticed the complainant into a bathroom where he undressed her before defiling her. Medical evidence had established that there was semen like discharge at the entrance of the vagina. There were fresh laceration and bruises at the vagina. Although the hymen was not broken, it was widened. It was the prosecution's case that penetration had been established. As regard the age of the victim, she submitted that the mother of the complainant and the complainant herself testified that the victim was 8 years old at the time of the sexual assault. The identity of the Appellant was not in doubt. The Appellant was a neighbour and was known to the complainant prior to the incident. Ms. Kimiri submitted that the fact that not all witnesses were called by the prosecution did not prejudice its case. This was because the witnesses called were able to establish the prosecution's case to the required standard of proof beyond any reasonable doubt. She urged the court to disallow the appeal.

This being a first appeal, it is the duty of this court to re-evaluate and to re-consider the evidence adduced before the trial magistrate's court so as to reach its own independent determination whether or not to uphold the conviction of the Appellant. In doing so, this court is conscious of the fact that it neither saw nor heard the witnesses as they testified and will therefore give due regard in that respect **(See Njoroge – vs- Republic [1987] KLR 19).** In the present appeal, the issue for determination by this court is whether the prosecution adduced sufficient evidence to support the charge of **defilement** that was brought against the Appellant.

Both counsels appreciated the fact that to prove the charge of defilement, the prosecution was required to lay evidence to establish penetration, the identity of the perpetrator and finally the age of the victim. In the present appeal, it was the prosecution's case that the Appellant lured the complainant, who was a girl then aged 8 years, into a bathroom, after which he undressed her before he defiled her. The complainant testified that the Appellant, who was known to her as Wanyonyi, requested her to accompany him to a place where he took her into a room after which he undressed her before the Appellant himself undressed her. The complainant testified that the Appellant sexually assaulted her. She screamed. A man by the name Erasto rescued her from the room. Erasto took her to the pharmacy of PW3 Dr. Charles Kigotho Wahome. After hearing her story, he advised that a report be made to the police.

A report was duly made to the police after which the complainant was taken to Nairobi Women Hospital. At the hospital, she was examined by Dr. Muhombe. She noted that there was semen-like discharge at the

introitus (entrance of the vagina), there was fresh laceration and bruises at the introitus. The hymen had widened but had not been broken. She formed the opinion that indeed the complainant had been sexually assaulted. The clothes that the complainant wore on the material day including her white pantie, white bikers, red blouse and maroon skirt were produced into evidence. The P3 form filled by Dr. Kamau was also produced into evidence. The P3 form indicated that the hymen of the complainant was intact.

Section 2(1) of the **Sexual Offences Act** defines penetration to mean: "***the partial or complete insertion of the genital organ of a person into the genital organ of another person."*** In the present appeal, it was clear to the court that the prosecution did not establish penetration. Although the complainant testified that she had been sexually assaulted, the medical evidence adduced by the two doctors clearly established that there was no penetration. However, the medical evidence of Dr. Muhombe clearly points to the fact that an attempt had been made to penetrate the complainant. There were bruises at the entrance of the inner vagina of the complainant. There was semen-like substance in the vagina and the clothes of the complainant. Although no test was done to confirm that the semen-like substance was indeed semen, this court has no doubt that the evidence adduced by the prosecution, taken in totality, established to the required standard of proof beyond any reasonable doubt the attempted penetration of the complainant.

As regard the identity of the perpetrator, the complainant testified that she knew the Appellant prior to the incident. Her mother, PW1 Mwajama Makhoha testified that the Appellant was her neighbour. The complainant referred to the Appellant by the name **"Wanyonyi"**. She narrated how the Appellant lured her into the bathroom where he sexually assaulted her. On re-evaluation of the evidence adduced in regard to the identity of the perpetrator, this court has no doubt that it was the Appellant who sexually assaulted the complainant. He was interrupted from completing the sexual assault when the complainant's screams alerted a security guard in the building who rescued her. PW3, the pharmacist who was informed of the incident immediately after it had occurred, spoke to the Appellant. The Appellant told him that the complainant was his daughter. He was attempting to wash her at the time. The truth of the matter was that the Appellant was not the complainant's father. It was then that PW3 advised a report be made to the police.

The evidence of PW3 placed the Appellant at the scene of crime. The testimony of PW3 and the medical evidence corroborated the complainant's testimony in regard to what transpired on the material day. Although **Section 124** of the **Evidence Act** does not require the evidence of a victim in a sexual offence to be corroborated, where the court is convinced of the truth of the testimony of such witness, in the present appeal, although the complainant was a child of young and tender years, her evidence regarding the sexual assault was corroborated in all material respect by the two pieces of evidence, namely the evidence of PW3 and the medical evidence. This court therefore holds that the prosecution proved to the required standard of proof beyond any reasonable doubt that the Appellant was the perpetrator of the sexual assault. This court agrees with the submission made on behalf of the Appellant that it would have been ideal for Erasto to testify in the case. However, the fact that he did not testify in the case does not in any way lessen the strength of the prosecution's case. This position applies to the evidence of the investigating officer. The failure by the prosecution to call Erasto and the investigating officer to testify in the case cannot, in the circumstances of this case, be said to have prejudiced the prosecution's case.

As regard the age of the victim, while it was true that no documentary evidence was adduced in court to support the assertion by the prosecution that the complainant was aged 8 years at the time of the sexual assault, this court holds that the trial court was not precluded in applying common sense in assessing the claim made by the prosecution witnesses as to the age of the complainant. In any event, since this court has found that no penetration actually occurred, it is immaterial, for the purpose of sentencing for the lesser but cognate charge of **attempting defilement**, for the prosecution to establish the age of the complainant. What the prosecution was supposed to establish was the fact that the complainant was a child within the meaning ascribed to the term under **Section 2** of the **Children Act**.

In the premises therefore, this court holds that the prosecution did establish, to the required standard of proof beyond any reasonable doubt, the lesser but cognate offence of **attempted defilement** contrary to **Section 9(1)** as read with **Section 9(2)** of the **Sexual Offences Act**. The Appellant is therefore acquitted of the charge of **defilement** contrary to **Section 8(1)** of the **Sexual Offences Act** but is convicted of

attempted defilement contrary to **Section 9(1)** of the **Sexual Offences Act**. The sentence of life imprisonment that was imposed by the trial magistrate is set aside and substituted by an appropriate sentence of this court sentencing the Appellant to serve ten (10) years imprisonment in accordance with **Section 9(2)** of the **Sexual Offences Act**. The sentence shall take effect from 16th December 2011 when the Appellant was sentenced by the trial court. It is so ordered.

DATED AT NAIROBI THIS 28TH DAY OF JULY 2015

L. KIMARU

JUDGE