REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.135 OF 2013

(An Appeal arising out of the conviction and sentence of Hon. NYANGENA - SRM delivered on 27th June 2012 in Gatundu SRM. CR. Case No.475 of 2006)

JOSEPH MWANGI GACHURI…….…….....…… APPELLANT

VERSUS

REPUBLIC…….....RESPONDENT

JUDGMENT

The Appellant, Joseph Mwangi Gichuri 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 13th August 2006 at [particulars withheld] Village in Thika, the Appellant intentionally and unlawfully committed an act which caused penetration to F W K, a girl then aged 7 years. He was alternatively charged with **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 intentionally and unlawfully committed an indecent act to F W K, a girl aged 7 years. After full trial, the Appellant was convicted as charged and sentenced to 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 of prosecution witnesses that did not establish his guilt to the required standard of proof. In particular, he faulted the trial court for failing to properly evaluate the evidence of identification, which in his view was shaky and not free from error. He was aggrieved that he had been convicted on the basis of evidence of identification of the complainant, which evidence was not corroborated. He took issue with the fact that the trial court had not taken into account his defence before reaching the verdict to convict him. In the premises therefore, the Appellant urged the court to allow his 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 in support of his appeal. He also made oral submission urging the court to allow his appeal. Ms. Nyauncho for the State opposed the appeal. She submitted that the prosecution had adduced sufficient cogent evidence which established the charge of **defilement** to the required standard of proof. The sentence meted on the Appellant was legal. She urged the court to dismiss the appeal.

The facts of this case according to prosecution witnesses are as follows: the complainant in this case, F W K testified as PW1. She stated that on 13th August 2006 at about 6.00 p.m. she was sent to fetch water from a nearby river. The complainant was then aged about 7 years. She was accompanied by his cousin PW2 J K W who was 6 years old at the time. The complainant testified that when she reached the river, she found the Appellant at the river. Crucially, both the complainant and PW2 testified that they did not know the Appellant prior to the incident. The complainant testified that the Appellant enticed her with Kshs.5/- then pushed her into a maize plantation near the river. He then removed her underwear, made her lie on her back before he removed his trousers and then sexually assaulted her. PW2 also testified that she saw the Appellant sexually assault the complainant. Although she did not bleed, she felt pain. After the incident, the Appellant walked away. The complainant accompanied by PW2, managed to walk with difficulty to her home where she informed PW4 M W what had transpired. She gave the description to PW4 of the person that had sexually assaulted her. From the description of the clothes that the perpetrator wore, PW4 testified that she immediately knew it was the Appellant. This was because she had seen the Appellant wear the same clothes earlier on that day. The complainant told her that her assailant wore a black jacket and a red cap. It was instructive that in their respective testimonies, neither the complainant nor PW2 described the clothes that the assailant was wearing on the particular day. On her part, the complainant testified that the Appellant was identified to her as the assailant by her uncle. This was long after the event. PW2 testified that the Appellant was wearing a red beret. There was material discrepancy in regard to the identification of the Appellant as the perpetrator of the sexual assault in the testimonies of PW1 and PW2. PW5 B M T, the uncle of the complainant testified that he learnt of the complainant's defilement on the same day when he was requested to accompany the complainant to Ngorongo Health Centre. According to PW5, the complainant told her that it was the Appellant who had defiled her. This evidence is contradicted by the evidence of the complainant who testified that it was PW5 who told her that it was the Appellant who had defiled her.

At Ngorongo Health Centre, the complainant was treated before being referred to

Gatundu District Hospital for further treatment. PW6 Dr. Francis Ngugi produced the P3 form which he filled on the basis of the initial medical treatment notes that had been prepared when the complainant was first treated. It is instructive that the P3 form was filled four (4) years after the sexual assault. According to PW6, medical examination revealed that the complainant's hymen had been broken. This was proof that the complainant had indeed been sexually assaulted. The case was investigated by PW7 PC Stephen Njihia, then attached to Kanjeria Police Post. After the conclusion of his investigation, he formed the opinion that 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 attributed his travails to the existence of a grudge between him and PW5 over the love of a woman by the name Gathoni. He denied that he was in the vicinity of the area where that the complainant was sexually assaulted. He gave an alibi defence. He pleaded his innocence and urged the court to acquit him of the charge.

This being a first appeal, it is the duty of this court to re-consider and to re-evaluate the evidence adduced by the prosecution witnesses and by the defence so as to reach its own independent determination whether or not to uphold the conviction of the Appellant. In re-evaluating the evidence, this court is required to always have in mind the fact that it neither saw nor heard the witnesses as they testified and therefore cannot made any comment regarding their demeanour (**see Okeno –vs- Republic [1972] EA 32).** In the present appeal, the issue for determination by this court is whether the prosecution proved the charge of **defilement** to the required standard of proof beyond any reasonable doubt.

For the prosecution to establish the charge of **defilement** contrary to **Section 8(1)** of the **Sexual Offences Act**, it was required to prove three elements to the charge: that there was penetration, the identity of the perpetrator and finally the age of the victim. In the present appeal, the prosecution proved that indeed the complainant was defiled. The medical evidence adduced by the doctor established that indeed the complainant had been defiled. Her hymen was broken. Taking into consideration her age, it was not possible that the complainant had prior sexual experience at the time. The prosecution also proved the age of the victim. The complainant testified that she was born on 10th March 1999. This fact was not disputed

by the Appellant when he cross-examined the complainant. At the time of the sexual assault, the complainant was 7 years old.

As regard identification of the perpetrator, it was clear to this court that the prosecution failed to establish that it was the Appellant who had sexually assaulted the complainant. In her testimony, the complainant told the court that she had not met with the Appellant prior to the sexual assault. She did not know the Appellant. PW2, then aged 6 years told the court that the perpetrator of the sexual offence was wearing a red beret. PW4 the complainant's aunt testified that from the description that she was given by the complainant, she concluded that it was the Appellant who had sexually assaulted the complainant. She reached this conclusion on the basis of the description of the clothes that the assailant was alleged to have worn during the sexual assault. The complainant did not, in her testimony, give the description of the clothes that her assailant wore. Instead she testified that it was PW5, her uncle, who later told her that it was the Appellant who had sexually assaulted her.

It was evident to this court that the conviction of the Appellant turns on the evidence of identification. The identification was made by children of young and tender years. This made it even more difficult for the trial court to reach the conclusion that indeed the two children had identified the Appellant as the perpetrator of the offence taking into consideration that they had not known him prior to the sexual assault. As was held in **Maitanyi –Vs- Republic [1986] KLR 198 at P.200**:

> ***"Although the lower courts did not refer to the well-known authorities Abdulla Bin Wendo & Another vs Reg (1953) 20 EACA 166 followed in Roria vs Rep (1967) EA 583, it may be that the trial court at least did have them in mind. It is important to reflect upon the words so often repeated and yet bear repetition:-***
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> > ***"Subject to well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error".***

It was clear that the trial court did not warn itself of the danger of relying on the sole evidence of identification of the children to convict the Appellant in circumstances where the identification was made by children. In the circumstance of this case, there was a requirement for corroboration of the complainant's testimony of identification. There was no such corroboration or other evidence which pointed to the guilt of the Appellant. From the testimony of PW4 and PW5, it was apparent that the two witnesses made an assumption that it was the Appellant who had committed the offence from the scanty description that they had been given by the complainant and PW2. It may be possible, as alleged by the Appellant in his defence, that the identification by PW5 was motivated by a grudge that existed between them.

In the premises therefore, this court holds that the prosecution failed to establish, to the required standard of proof beyond any reasonable doubt, that it was the Appellant who had sexually assaulted the complainant. The evidence of identification did not meet the threshold established by the law. The Appellant is acquitted of the charge of **defilement**. His appeal is allowed. His conviction is quashed. He is ordered set at liberty forthwith unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 28TH DAY OF JULY 2015

L. KIMARU

JUDGE