



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.137 OF 2013

(An Appeal arising out of the conviction and sentence of Hon. Olando – RM delivered on 7th August 2013 in Kibera CM.CR. Case No.2010 of 2011)

CLAMUEL MWENESI NGAIIYA.....

APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Clamuel Mwenesi Ngaiya was charged with the offence of **defilement of a girl** contrary to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act**. The particulars of the offence were that on the 11th day of June 2011 at Kangemi, Westlands District within Nairobi County, the Appellant intentionally and unlawfully caused his male genital organ (penis) to penetrate the vagina of H S, a girl aged 12½ years. He 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 11th June 2011 at Kangemi, within Nairobi County, the Appellant intentionally and unlawfully committed an indecent act by penetrating his male genital organ (penis) on the surface of the female genital organ (vagina) of H S, a girl aged 12½ years. When he was arraigned in court, the Appellant pleaded not guilty to the charge. The prosecution called seven (7) witnesses to prove its case against the Appellant. After full trial, the Appellant was convicted of the main charge of **defilement**. He was sentenced to serve twenty (20) years imprisonment. Dissatisfied with the decision of the trial court, the Appellant appealed to this court against his conviction and sentence.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He took issue with the fact that the trial court had relied on the evidence of members of one family to convict him. He was of the view that their evidence was contradictory and not corroborated and could not form the basis for his conviction. He was aggrieved that the trial court did not consider his defence before reaching the decision to convict him. For the above reasons, the Appellant 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 court written submission in support of his appeal. Mr. Gichuki further made an oral submission on behalf of the Appellant. A response to the submission was made by Ms. Kimiri on behalf of the State. Mr. Gichuki submitted that the trial court relied on the prosecution’s evidence which was full of contradictions to convict the Appellant. According to learned counsel for the Appellant, there were contradictions in the medical evidence of PW3 and PW6.

He submitted that the trial court relied on the evidence of PW3 while ignoring that of PW6. According to counsel for the Appellant, the complainant's evidence during trial was that the Appellant attempted to rape her. He further submitted that there were contradictions in the prosecution's evidence regarding the time when the complainant was taken to the hospital and whether the complainant knew the Appellant prior to the incident. For these reasons, counsel for the Appellant urged the court to allow the appeal.

Ms. Kimiri for the State opposed the appeal. She submitted that the prosecution had adduced evidence which connected the Appellant with the offence of defilement. She submitted that the Appellant was caught red handed. According to Ms. Kimiri, the evidence of the complainant was corroborated by that of PW2 and PW5. She submitted that the complainant was examined at Nairobi Women Hospital. The report proved that she was defiled. The medical report was produced as **Prosecution's Exhibit No. 1**. It was Ms. Kimiri's submission that the failure by the prosecution to produce the report by the Government Chemist did not in any way prejudice the Appellant as the complainant's evidence was corroborated by the medical evidence of PW3. She therefore urged the court to dismiss the appeal.

The facts of the case as narrated by the prosecution witnesses are as follows: The complainant H S (PW1) was at the material time aged 12 ½ years old. Her age was confirmed by her father, PW4 F S who produced her dedication card. The dedication card was produced as **Prosecution's Exhibit No.4**. The dedication card indicated that the complainant was born on 18th October 1998. On the material day of 11th June 2011, the complainant had accompanied PW5 H M Y to Kangemi. The complainant recalled that at about 7.00 p.m, she was playing outside with her friends when the Appellant called her to his house. The Appellant told the complainant that he wanted to send her for a matchbox. When the complainant went to the Appellant's house, the Appellant pulled her inside the house. While inside the house, the Appellant asked her to remove her trouser and lie down on the sofa seat. When she refused to comply, the Appellant threatened to kill her. The complainant testified that the Appellant removed her underpants and sexually assaulted her. She screamed drawing the attention of neighbours who came to her rescue.

PW5 testified that she received a telephone call from one of her neighbours informing her that the complainant had been defiled by the Appellant. PW5 went to report the incident to PW2 A M, the complainant's mother. They then went to the Appellant's house. At the Appellant's house, they found the Appellant naked lying on the complainant. They examined the complainant and suspected she had been defiled. A report was made to the police resulting in the arrest of the Appellant. The complainant was taken to Nairobi Women's Hospital on 12th June 2011 where she was examined by PW3 Dr. Thuo. The medical report was produced into evidence by Demuke Tenneseg on behalf of Dr. Thuo as **Prosecution's Exhibit No. 1**. The medical report revealed that the complainant had a whitish discharge on her vagina. She had also sustained multiple tears on the hymen. Dr. Thuo formed the opinion that indeed the complainant had been defiled. She was put on medication. The complainant was also seen by PW6 Dr. Zephania Kamau based at the police surgery. This was on 14th June 2011. He noted that the complainant had old hymen tags and the hymen was broken. His report was produced as **Prosecution's Exhibit No. 2**.

PW7 PC Timothy Chege was assigned to investigate the case. PW7 testified that he obtained samples from both the complainant and the Appellant and sent them to the Government Chemist for analysis. After concluding his investigation, PW7 formed the opinion that a case had been made for the Appellant to be charged for the disclosed offence. When the Appellant was put on his defence, he denied committing the offence. He claimed that he had been framed with the offence.

This being a first appeal, it is the duty of this court to subject the evidence adduced before the trial court to a fresh evaluation with the objective of ascertaining whether the conviction of the Appellant ought to stand. In doing so, this court must take cognizance of the fact that it neither heard nor saw the witnesses as they testified and must therefore give due regard in that respect (see **Okeno –vs- Republic (1972) EA 32**). The issue for determination by this court is whether the prosecution adduced sufficient evidence to secure the conviction of the Appellant on the charge that was brought against him.

On re-evaluation of the evidence and the submission made on this appeal, it was clear to this 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 required 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, proof of penetration was established by medical evidence. The complainant was examined by Dr. Thuo at Nairobi Women's Hospital on 12th June 2011. He confirmed that the complainant had indeed been defiled. He noted that the Appellant had sustained multiple tears on the hymen an indication that the complainant had been sexually assaulted. **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 second issue that the prosecution was supposed to establish is the age of the victim. According to PW4, the complainant was born on 18th October 1998. He produced the complainant's dedication card as proof of her age. The complainant was about 12 years and 8 months old at the time of the incident. The 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 regards who perpetrated the penetration, the complainant testified that the Appellant pulled her inside his house and defiled her. She screamed drawing the attention of the neighbours who came to her rescue. When PW2 and PW5 found out that the complainant had been defiled by the Appellant, she rushed to the Appellant's house where he found the Appellant naked with the complainant. The prosecution therefore established to the required standard of proof beyond any reasonable doubt that the Appellant defiled the complainant. The prosecution therefore established every element of the charge.

The appeal on conviction lacks merit and is hereby dismissed. The appeal on sentence similarly fails. The sentence was legal. The Appellant placed no material facts before this court to impeach the custodial sentence that was imposed on him. It is so ordered.

DATED AT NAIROBI THIS 29TH DAY OF OCTOBER 2015

L. KIMARU

JUDGE