



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.181 OF 2014

*(An Appeal arising out of the conviction and sentence of J.D KWENA – SPM delivered on 5<sup>th</sup> December 2014 in Githunguri PM. CR. Case No.575 of 2013)*

STEPHEN MIRANGA

NJAU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Stephen Miranga Njau was charged with the offence of **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 diverse dates from February 2012 at *[particulars withheld]* Children’s Home in Githunguri District within Kiambu County, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of M N, a child aged fourteen (14) 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 diverse dates from February 2012 at *[particulars withheld]* Children’s Home in Githunguri District within Kiambu County, the Appellant did commit an indecent act with M N, a child aged fourteen (14) years by touching her private part (vagina) with his penis. When the Appellant was arraigned before the trial magistrate’s court, he pleaded not guilty to the charge. After full trial, the Appellant was convicted of the main charge. He was sentenced to serve sixteen (16) years 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 filed several grounds of appeal challenging his conviction and sentence. In summary, the Appellant was aggrieved that the trial magistrate relied on circumstantial evidence to convict him yet the evidence adduced was not corroborated. He complained that his defence had not been considered before the trial court reached the decision to convict him. He was aggrieved that he had been convicted on the charge of **defilement** when the age of the complainant had not been established. He faulted the trial magistrate for failing to observe the requirements of **Sections 200 (3)** and **214 (1)** of the **Criminal Procedure Code**. He was also aggrieved that his right to representation by a legal counsel had been infringed. Lastly, the Appellant complained that his mitigation had not been considered. For the above reasons, 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 urged the court to acquit him. Ms. Kimiri for the State opposed the appeal. She made oral submission to the effect that the prosecution had established its case on the charges brought against the Appellant to the required standard of proof. She stated that the complainant testified that she was lured by the Appellant into having a sexual relationship with him which resulted in pregnancy. The complainant subsequently delivered a child. According to Ms. Kimiri, the complainant’s testimony was corroborated by DNA report which was produced into evidence by the prosecution confirming that the Appellant was the biological father of the complainant’s child. She submitted that the prosecution established that the complainant was at the material time a minor as evidenced by her birth certificate which was produced

into evidence. In addressing the issue of the Appellant's right to legal representation during trial, Ms. Kimiri submitted that indeed the Appellant had engaged a legal counsel during trial who however on several occasions failed to represent the Appellant during trial. According to Ms. Kimiri, it was the Appellant's duty to ensure the attendance of his legal counsel during trial. On the issue of compliance with the requirements of **Sections 200 (3) and 214 (1) of the Criminal Procedure Code**, Ms. Kimiri maintained that the trial court complied with the said provisions of the law in totality. It is on the basis of the above facts that the State urged the court to find the appeal without merit and dismiss it.

This being a first appeal, it is the duty of this court to re-evaluate and to reconsider the evidence adduced before the trial court before reaching its own independent determination whether or not to uphold the decision of the said court. In doing so, this court is required to always keep in mind the fact that it neither saw nor heard the witnesses as they testified and therefore give due regard in that respect (see **Njoroge – vs- Republic (1987) KLR 19**). The issue for determination by this court is whether the prosecution proved its case on the charge brought against the Appellant of **defilement** contrary to **Section 8 (1)** as read with **Section 8 (3)** of the **Sexual Offences Act**.

The prosecution's case is that the Appellant was the proprietor of [*particulars withheld*] Children's Home. The complainant, M W (PW1) was born on 16<sup>th</sup> February 1996. Her age was confirmed by her birth notification and certificate which were produced into evidence as **Prosecution's Exhibits Nos. 1 and 2**. The complainant testified that she was admitted at the Appellant's children's home after she lost her parents while she was in class 3. She testified that while at the children's home, the Appellant used to lure her with sweets and cakes in order to have sexual relations with her. She recalled that the Appellant took her to the young children's bedroom, fondled her breasts and had sexual intercourse with her. That was the beginning of many sexual relations with the Appellant. According to the complainant, this happened during weekends when the Appellant's wife, who was a matron at the children's home, was away. As a result, the complainant became pregnant. The Appellant's wife discovered that the complainant was pregnant and inquired from the complainant about it. The complainant revealed that the Appellant was responsible for her pregnancy. She told her that she had had no sexual relationship with anyone else. In December 2012, the complainant was transferred from the children's home and was taken to live with one Mama Ciiku. In January 2013, the Appellant in the company of his wife and two other people took the complainant to Pumwani Hospital. They asked the personnel at the hospital to book the complainant as a destitute child found by the road side.

PW2 S N G, the complainant's aunt testified that she received a telephone call from the Appellant's wife on 8<sup>th</sup> February 2013 informing her that the complainant was pregnant and had been admitted at Pumwani Hospital. She was asked to accompany the Appellant's wife to the hospital as the complainant was due to be discharged. PW2 testified that while at the hospital, the complainant told her that the Appellant was responsible for the pregnancy. PW3 Jennifer Wangari, a District Children's Officer in Kiambu testified that on 12<sup>th</sup> February 2013, she received a report that the complainant had been abandoned at Pumwani Maternity Hospital. She rescued the complainant and secured her admission at Nest Children's Home where she was admitted. The matter was reported to Githunguri Police Station where they were advised to undertake a DNA test once the complainant delivered her baby. The complainant delivered a child, a boy, on 30<sup>th</sup> March 2013. A DNA test was carried out based on specimens derived from the Appellant, the complainant and the child. A DNA report was produced into evidence as **Prosecution's Exhibit No. 3** by PW4 Ann Wangechi Nderitu, a government chemist. The report stated that the Appellant was the biological father of the complainant's child. P5 Police Constable Alice Langat was the investigating officer in this case. Upon conclusion of the investigations, she formed the opinion that a case had indeed been made for the Appellant to be charged with the offences for which he was convicted. When he was put on his defence, the Appellant denied being responsible for the complainant's pregnancy. He attributed his tribulations to business rivalry with his competitors.

This court has re-evaluated the evidence adduced before the trial court, the grounds of appeal and the submission made during the hearing of the appeal. It was clear to the court that indeed the prosecution had established its case on the charge of **defilement** contrary to **Section 8 (1)** as read with **Section 8 (3)** of the **Sexual Offences Act**. The prosecution was required to prove three elements in order to secure the conviction of the Appellant on the charge of **defilement**. The first element was penetration. Penetration is

defined under **Section 2 (1) (d)** of the **Sexual Offences Act** as *“the partial or complete insertion of the genital organs of one person into the genital organs of another person”*. In the present appeal, the complainant testified that the Appellant lured her with sweets and cakes into the children’s room where he had sexual intercourse with her. She testified that the Appellant had sexual intercourse with her severally while she was at the children’s home. As a result, she became pregnant and subsequently delivered a baby boy. For the complainant to have become pregnant, this court holds that the prosecution proved to the required standard of proof that the complainant had been penetrated.

The second element that the prosecution was required to establish is the identity of the perpetrator. The Appellant was known to the complainant. He was the proprietor of the children’s home where the complainant lived. In her testimony, the complainant referred to the Appellant by his name *“Stephen”*. She testified that the Appellant had defiled her several times. It was clear to the court that at all material times, the complainant knew the Appellant. The DNA report of PW4 to the effect that the Appellant was the biological father of the complainant’s child was conclusive in establishing the Appellant as the perpetrator of the penetration to the required standard of proof beyond any reasonable doubt.

The third element that the prosecution was supposed to establish is that the complainant is a child. Under **Section 2 (1) of the Sexual Offences Act**, the meaning assigned to *“a child”* is that provided under the **Children’s Act**. Under **Section 2 of the Children Act**, a child is defined *“as any human being under the age of eighteen years.”* In the present appeal, the prosecution produced the birth certificate of the complainant which established that indeed the complainant was born on 16<sup>th</sup> February 1996. She was about sixteen (16) years old at the time she became pregnant. The defence of the Appellant to the effect that he was framed does not hold since the prosecution established every element of the charge.

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

**DATED AT NAIROBI THIS 29<sup>TH</sup> DAY OF OCTOBER 2015**

**L. KIMARU**

**JUDGE**