REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.39 OF 2019

BONIFACE NGUMBI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal arising out of the conviction and sentence of Hon. H.M. Nyaga CM

delivered on 20th February 2018 in Makadara CM Cr. Case (S/O) No. 5314 of 2014)

JUDGMENT

The Appellant, Boniface Ngumbi was charged with three counts of the offence of sexual assault contrary to Section 5(1)(a)(i) as read together with Section 5(2) of the Sexual Offences Act. The particulars of the offence were that on 25th October 2014 at [particulars withheld] slums in Embakasi Division within Nairobi County, the Appellant unlawfully used his forefinger to penetrate the vagina of three minors namely AM, FN and MN respectively. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charges. After full trial, the Appellant was convicted as charged on all three counts. He was sentenced to serve fifteen (15) years imprisonment in each count. The sentences were ordered to run consecutively.

In his petition of Appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that the prosecution violated his right to a fair trial under Article 50(2)(c) and (j) of the Constitution by failing to furnish him with witnesses' statements prior to the start of the trial. He was of the view that element of penetration was not established by the prosecution to the required standard of proof beyond any reasonable doubt. He faulted the trial magistrate for failing to find that critical witnesses necessary to prove basic facts of the case were not availed by the prosecution to testify before court. He took issue with the fact that the trial court failed to properly evaluate his *alibi* defence in arriving at its decision. He was aggrieved that the prosecution failed to establish its case against him to the required standard of proof beyond any reasonable doubt. In the premises, 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 court written submission in support of his appeal. He urged the court to allow his appeal. This court also heard oral submission made by the Appellant and Ms. Akunja for the State. The Appellant submitted that he was framed of the charges that he faced. He averred that evidence from the P3 forms indicated that the minors were examined by the police doctor on 3rd February 2015, which was after his arraignment in court. He stated that the evidence of the P3 forms contradicted information from the Post Rape Care Forms with regard to the element of penetration. He asserted that D as well as the investigating officer, who were crucial witnesses in proving the prosecution's case, were not availed to adduce evidence before the trial court.

The Appellant faulted the trial court for relying solely on the evidence of the complainants in convicting him. He maintained that the medical evidence on record failed to establish the element of penetration. He submitted that the trial court did not consider his sworn testimony in arriving at its decision. He was of the view that the cumulative custodial sentence of forty-five (45) years meted by the trial court was harsh and excessive in the circumstances. He averred that he had spent three (3) years in remand custody prior to his conviction. He submitted that the trial court ought to have put this period into consideration in meting out his sentence. In the premises, he urged this court to allow his appeal.

Ms. Akunja for the State opposed the appeal. She submitted that the prosecution called six witnesses who established the case against the Appellant to the required standard of proof beyond any reasonable doubt. She averred that the complainants narrated to the court how the Appellant separately lured them to his house and sexually assaulted them by inserting his finger into their vaginas. She opined that the two medical reports gave contradictory findings due to the time that had lapsed since the time the complainants saw the first doctor on 30th October 2014, and when they were examined by the police doctor on 3rd February 2015. Learned State Counsel submitted that there did not

exist any grudge between the Appellant and any of the prosecution witnesses. She stated that the investigating officer failed to attend court despite several summons and adjournments that were granted to facilitate the same. She therefore urged this court to dismiss the Appellant's appeal.

The facts of the case according to the prosecution are as follows. PW1, AM, is one of the complainants. It was her testimony that she was eight (8) years of age at the material time. She stated that the Appellant was known to her. They lived in the same plot. On the material day of 25th October 2014, the Appellant asked her to go to his house. He desired to send her on an errand. When she entered his house, he asked her to sit down. He then inserted his finger in her vagina. She afterwards left his house. On a different day, the Appellant again called her to his house. When he tried to do the same thing as the last time, she slapped him and he stopped. He then sent her to the shop to buy him a cigarette. When she brought back the cigarette to the Appellant, she found him with a girl named L. L was on his bed. When the Appellant saw the complainant, he let L go. The complainant later informed a neighbour by the name D, who in turn told her mother what the Appellant had done to her.

PW2, F.N., was the second complainant. She stated that she was eleven (11) years of age at the time. The Appellant was her neighbour. On 25th October 2014, she was playing outside when the Appellant called her to his house. He told her that he wanted to send her to the shop. When she entered his house, he asked her to sit down. He sat next to her and lifted up her dress. He then inserted his finger in her vagina. He promised to give her Ksh.10. After he was done, she ran from his house. She did not tell anyone what happened at first, but when D questioned her, she disclosed what the Appellant had done to her. She and other girls were taken to the hospital.

PW3, MN, was the third complainant. She was eight (8) years old at the time. She lived with her parents in the same plot as the Appellant. On the material day, the Appellant called her to his house. He promised to give her Ksh.10. When she entered his house, he gave her his phone to play a game. He then inserted his finger into her vagina. She asked him to leave her alone and went back outside. She did not tell anyone what transpired. D saw her at the Appellant's house. She asked her what she was doing there. She told D what the Appellant had sexually assaulted her. She was later taken to the hospital.

PW4, AM is PW2 and PW3's father. He stated that he lived in the same plot as the Appellant, and he was therefore well known to him. The Appellant was a *bodaboda* taxi operator. It was his testimony that PW2 and PW3 were thirteen (13) years and nine (9) years old respectively at the time they testified before the court. On 25th October 2014, he attended a burial. When he came back home, he found a crowd gathered at the plot. He was informed that the Appellant had sexually assaulted several girls including his daughters. When he interrogated PW2 and PW3, they informed him that the Appellant had inserted his finger in their vagina several times and given them money. He confronted the Appellant who had nothing to say for himself. The Appellant disappeared leaving his motorcycle behind. PW4 reported the incident to the police. Later, sometime in November 2014, a motorcycle rider called him and informed him that he had spotted the Appellant at Taj Mall building operating using another motorcycle. He gathered a few men. They went to the said mall and arrested the Appellant. They took him to the police station.

PW5, Dr. Joseph Maundu based at Police Surgery, stated that he examined the three complainants on 3rd February 2015. They were alleged to have been sexually assaulted and had earlier been treated at Nairobi Women's Hospital. Upon examination, PW1 had no visible physical injuries. However, her hymen was freshly torn. PW2's hymen was also absent. PW3 had no visible physical injuries. Her hymen was intact. It was his opinion that PW1 and PW2 had been penetrated. He produced their respective P3 forms into evidence.

PW6, Edward Mbugua was a clinical officer working at Nairobi Women's Hospital. He adduced evidence on behalf of Dr. Gichema who examined the complainants but had since left the hospital to pursue further studies. PW6 stated that he had worked with her for about two years and was familiar with her handwriting and signature. He produced into evidence Post Rape Care Forms with respect to PW1, PW2 and PW3. The complainants were examined at the said hospital on 30th October 2014 on allegation of sexual assault. Upon examination of PW1, PW2 and PW3, their hymens were found to be intact. They had no visible physical injuries.

The Appellant was put on his defence. He gave a sworn statement. He stated that he left Nairobi and travelled to Makueni on 20th October 2014. He came back to Nairobi on 8th November 2014. When he got to his house, he found that the door had been locked using an extra padlock. He had a girlfriend who lived in the same plot known as D. He went to her house but discovered that it was vacant. The caretaker informed him that his house had been locked due to his failure to pay rent arrears. His motorcycle which he had parked at the corridor was also missing. The Appellant spoke to a neighbour who told him to talk to PW4. He went to his house. When PW4 arrived, he asked the Appellant to accompany him to the police station since a report had been filed against him. When they arrived at the police station, he was arrested. The police demanded for Ksh.100,000/- to facilitate his release. He however did not have the money.

The Appellant stated that he was not informed the reason for his arrest. He was later arraigned before the trial magistrate's court on 11th November 2014. He denied sexually assaulting the complainants. He stated that he was framed of the present charges by his girlfriend D. They had had differences for a long time, after she found out that he had a wife who lived in Makueni. He asserted that the complainants were coached with regard to their testimony before the trial court. Upon cross-examination, the Appellant admitted that he knew the complainants as well as their parents. They lived in the same plot. He stated that he did not have any prior disagreement or grudge with PW4.

As the first appellate court, it is the duty of this court to subject the evidence adduced before the trial court to fresh scrutiny and re-evaluation, before reaching its own independent determination whether or not to uphold the conviction and sentence of the Appellant. In doing so, this court is required to bear in mind that it neither saw nor heard the witnesses as they testified and cannot therefore make comment regarding the demeanour of the witnesses (See Okeno vs Republic [1972] EA 32). In the present appeal, the issue for determination by this court is whether the prosecution established the charges brought against the Appellant to the required standard of proof beyond any reasonable doubt.

This court has re-evaluated the facts of this case. It has also considered rival submission made by parties to the appeal**. Section 5** of the **Sexual Offences Act** provides that:-

1. Any person who unlawfully;

a. penetrates the genital organs of another person with;

i. any part of the body of another or that person; or

ii. an object manipulated by another or that person except where such penetration is carried out for proper and professional hygienic or medical purposes;

b. manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ into or by any part of the other person's body, is guilty of an offence termed sexual assault.

2. A person guilty of an offence under this section is liable upon conviction to imprisonment for a term of not less than ten years but which may be enhanced to imprisonment for life.

In the present appeal, the prosecution was required to establish penetration of the complainants' genital organs, in this case vagina, by the body part, in this case finger, of the Appellant. The evidence by the complainants was that the Appellant called each one of them separately to his house. While at his house, the Appellant inserted his finger in their vagina. The complainants stated that they did not inform anyone of the ordeal apart from a lady by the name D. PW1 stated that she informed D about the incident, and in turn D informed her mother. PW2 on her part testified that D saw her and inquired what she was doing in the Appellant's house. She told her that the Appellant had sexually assaulted her. PW3 told the court that D saw her at the Appellant's house. She asked her what she doing at the said house. That's when she told her what the Appellant had done to her.

This court notes that the said D was not availed to adduce evidence before the trial court. She was a crucial witness as she would have corroborated the assertions by the complainants' that she saw them leave the Appellant's house on the material day. The medical evidence adduced by PW5 and PW6 was inconsistent and failed to conclusively prove the element of penetration. The complainants were first examined at Nairobi Women's Hospital on 30th October 2014. This was approximately five days after the alleged sexual assault incident occurred. The evidence by PW6 as well as the Post Rape Care Forms produced in evidence established that upon examination of the complainants, no visible physical injuries were noted. Their hymens were also intact.

The complainants were later examined by PW5, Dr. Maundu, on 3rd February 2015. This was about three months after the alleged sexual assault incident occurred. PW5 stated that upon examination, no visible physical injuries were noted on PW1. Her hymen was torn with fresh margins. With regard to PW2, he stated that no visible physical injuries were noted and her hymen was absent. With respect to PW3, he stated that there was absence of any physical injuries and that her hymen was intact. This court notes that this oral evidence was inconsistent with PW3's P3 form which indicated that her hymen was torn with fresh margins. PW5 noted that the complainants' hymens were torn with fresh margins. Considering that the complainants were examined about three months after the date of the alleged sexual assault, this court is not in a position to ascertain whether the evidence of freshly torn hymen was conclusively attributable to the alleged sexual assault incident by the Appellant in the present case.

The court is therefore of the view that the medical examination that was undertaken at the Nairobi Women's Hospital five days after the sexual assault incident reflected the true medical condition of the complainants at the time rather than the latter examination by the police surgeon, which occurred three months after the alleged sexual assault occurred. The medical evidence by PW6 established that upon examination, no visible physical injuries were noted on any of the complainants. Their respective hymens were also intact. This court is of the opinion that the medical evidence adduced by the prosecution failed to establish the element of penetration. The same did not corroborate the complainants' case that the Appellant inserted his finger in their vaginas.

Aside from the complainants' unsworn testimonies, there is no other evidence that was led by the prosecution to establish the element of penetration. It was therefore clear that the Appellant was convicted essentially on uncorroborated testimony of the complainants. Although the Proviso to Section 124 of the Evidence Act states that a court can convict on uncorroborated evidence of a victim of a sexual assault, in the present appeal, it was evident that the testimony of the complainants was unsupported by other evidence. Their evidence was inconsistent and incredible. It would be unsafe for this court to convict on the basis of such evidence.

The court can convict on the evidence of children of young and tender age in sexual offences if it is convinced that they are telling the truth. The description given by the complainants in regard to the circumstances in which the alleged sexual assault occurred, does not give this court confidence that they were telling the truth**. In FAPPYTON MUTUKU NGUI –VS- REPUBLIC – CRIMINAL APPEAL NO.296 OF 2010**, the court held thus:

"Indeed courts should be cautious before convicting on the uncorroborated evidence of minors. There are many reasons for this. In J Heydon Evidence: Cases and material 2nd ed Butterworths London 1984, 84, the reasons were put this:

First, a child's power of observation and memory are less reliable than on adult's. Secondly, children are prone to live in a make-believe world, so that they magnify incidents which happen to them or invent them completely. Thirdly, they are also very egocentric, so that details seemingly unrelated to their own world are quickly forgotten by them. Fourthly, because of their immaturity they are very suggestible and can easily be influenced by adults and other children."

In the circumstances of this case, it cannot be ruled out that the complainants were influenced by adults in their lives to implicate the Appellant in the alleged sexual assaults. From re-evaluation of the three complainants' evidence, there was a strange semblance in the words that the three witnesses used in their testimonies that leads to the likely explanation that they were coached to give the evidence that they did before the trial court. In addition, the prosecution failed to avail vital witnesses whose testimonies were crucial in establishing the

prosecution's case against the Appellant. The said D, who was alleged to have seen the complainants leave the Appellant's house on the material day was not called to testify before the trial court. PW1, PW2 and PW3 stated that the only person they told about the alleged sexual assault was D. The prosecution ought to have availed her to give evidence to corroborate the complainants' assertions that they were at the Appellant's house on the material day. The prosecution also failed to avail the investigating officer and the arresting officer to give evidence before the trial court. As it is, this court is not informed as to the nature and details of the Appellant's arrest.

It is also important to note that the particulars of the offence in the charge sheet indicate that the three minors were sexually assaulted on the same day by the Appellant. In their testimonies, each of the complainants stated she was alone at the Appellant's house when he allegedly sexually assaulted them. They respectively stated that Diana saw them leaving the Appellant's house. They informed her what the Appellant had done to them. This court has a hard time believing that the Appellant separately sexually assaulted the three complainants on the same day, and the said Diana who saw them leave the Appellant's house failed to raise alarm. As stated earlier in this judgment, their testimonies as to the details of the alleged sexually assault were suspiciously too similar, and the conclusion that they may have been coached on what to say in court was not beyond the realm of possibility.

In the premises, this court is not convinced that the complainants were telling the truth due to the stated gaps in the prosecution's case. The prosecution failed to establish the element of penetration to the required standard of proof beyond any reasonable doubt. There is simply no evidence to support the charge. The Appellant in his defence denied sexually assaulting the complainants. He stated that he had travelled to Makueni when the incident was said to have taken place. He may well be telling the truth.

Taking into consideration the totality of the evidence adduced by the prosecution witnesses and the defence, this court is of the considered opinion that the evidence that was adduced by the prosecution witnesses failed to establish the charges brought against the Appellant to the required standard of proof beyond any reasonable doubt. It may well be that the *alibi* defence given by the Appellant is true. In the premises therefore, the appeal has merit and is hereby allowed. The Appellant's conviction in counts I, II and III is hereby quashed. The custodial sentence imposed on him on each count is set aside. The Appellant is ordered set at liberty forthwith and released from prison forthwith unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 9TH DAY OF APRIL 2020

L. KIMARU

JUDGE