



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO.69 OF 2017**

**ASS.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(An Appeal arising out of the conviction and sentence of Hon. H. Okwani SRM delivered on 6<sup>th</sup> June 2017 in Milimani CM Cr. Case No.1069 of 2016)***

**JUDGMENT**

The Appellant, ASS, was charged with the offence of 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 25<sup>th</sup> June 2016 in Ngong within Kajiado County, the Appellant intentionally and unlawfully caused his male genital organ (penis) to penetrate the vagina of EK, a child aged 11 years. In the alternative charge, the Appellant was charged with the offence of 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 25<sup>th</sup> June 2016 in Ngong within Kajiado County, the Appellant intentionally and unlawfully touched with his hands the breasts and buttocks of EK, a child aged 11 years. 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 the main charge of defilement and sentenced to life imprisonment.

In his petition of Appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was of the view that the decision of the trial court was based on a misapprehension of the evidence on record. He was aggrieved by his conviction, stating that there was insufficient evidence to prove the particulars of the charge as stated in the charge sheet. He faulted the trial magistrate for failing to observe that the medical evidence adduced was inconsistent with the facts of the case, as the complainant did not have any recent hymenal tear; the medical evidence indicated that the complainant's hymen was torn one month prior to 2<sup>nd</sup> July 2016. She therefore could not have been sexually assaulted on 25<sup>th</sup> June 2016 as alleged. He took issue with the fact that the trial magistrate deviated from the evidence adduced by the prosecution witnesses in relation to the alleged date of the offence and erroneously found that the complainant could not remember the date of the offence.

The Appellant opined that his conviction was based on the contradictory evidence of the complainant who stated that no one was present at the plot when the offence occurred, and later alleged that she gave a pencil to a *fundi* who was at the plot. He was aggrieved that the trial court failed to properly evaluate his defence in arriving at its decision. He opined that the evidence on record, and especially medical evidence, was insufficient to sustain a conviction. He was of the opinion that if he had defiled the complainant as alleged, the complainant would have contracted HIV since he was HIV positive. In the premises, the Appellant urged this 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 parties presented to court their written submission. This court also heard oral submission from Mr. Ombati for the Appellant and Mr. Momanyi for the State. Counsel for the Appellant submitted that the prosecution failed to establish their case against the Appellant to the required standard of proof beyond any reasonable doubt. He stated that the age of the complainant was not established by the prosecution. The burden was shifted to the Appellant to prove otherwise. He asserted that the medical evidence adduced by the prosecution failed to establish the element of penetration. He faulted the trial magistrate for relying on the evidence of a broken hymen as proof of penetration. He opined that the evidence of the complainant was not reliable, since she could not remember the date of the offence, where the offence took place and if there were people in the plot at the material time. He stated that the complainant had just started residing at the said plot and the Appellant was therefore not well known to her. In the premises, he urged this court to allow the Appellant's appeal.

Mr. Momanyi for the State opposed the appeal. He submitted that the complainant narrated to the trial court the events as they occurred on

the material day. She testified that the Appellant lured the complainant to his house and proceeded to sexually assault her. The Appellant threatened to harm her if she told anyone what had happened. PW2 saw the complainant go to the Appellant's house. He told PW3. PW3 reported the matter to the police. Learned State Counsel asserted the medical evidence adduced established penetration. The complainant's hymen was broken. He stated that the complainant's age was established by oral evidence of the complainant as well as that of her elder sister, PW3. He averred that the Appellant was well known to the complainant. He was a caretaker at the plot where they resided. Mr. Momanyi was of the view that the prosecution proved its case to the required standard of proof beyond any reasonable doubt. He therefore urged the court to dismiss the Appellant's appeal.

The facts of the case according to the prosecution are as follows: PW1, EK, is the complainant. She was 11 years of age at the material time. She gave sworn evidence. She told the court that on 25<sup>th</sup> June 2016, she had just arrived home from school when she met with the Appellant. She referred to him as "Ole". She stated that he was employed as the caretaker in the plot where they lived. The Appellant asked her for drinking water which she took to him at his house. The Appellant asked her to remove her clothes. He then proceeded to insert his penis in her vagina. The complainant stated that there was no else in the plot. She felt pain. She yelled but no one came to her rescue. She was afraid to tell her sister, whom she lived with. She stated that the Appellant threatened to stab her if she told anyone. The complainant stated she often frequented the Appellant's house. Her younger brother told her sister that the complainant had gone to the Appellant's house. Her sister reported the matter to the police station. The complainant was examined at Nairobi Women's Hospital. On cross examination, the complainant stated that the Appellant sexually assaulted her on a Saturday at about 4.00 pm. She stated that her brother had gone to Mama Mukui and that no one was in the compound.

PW2, DB, is the complainant's younger brother. He was 9 years of age at the time. He told the court that he often saw the complainant go to the Appellant's house. On the material day, the Appellant and the complainant locked themselves in the Appellant's house. Afterwards, PW2 saw the complainant leave the Appellant's house. Later that night, he informed his sister that the complainant went to the Appellant's house. His sister reported the matter to the police. PW2 stated that the Appellant was a caretaker at the plot where they resided. He testified that the complainant would cry every time he threatened to tell her sister that she had visited the Appellant's house.

PW3, RK, is the complainant's elder sister. She lived with her husband, the complainant and PW2. She testified that sometime in June 2016, PW2 informed her that the Appellant often asked for sugar from the complainant, and that the complainant would go to his house. She interrogated the complainant who told her that the Appellant had sexually assaulted her. She reported the matter to the police. The complainant was examined at Nairobi Women's Hospital. On cross examination, PW3 stated that the offence had occurred one week before the complainant informed her about the sexual assault.

PW4, Dr. Kizzie Shako, of Police Surgery, examined the complainant on 8<sup>th</sup> July 2016. Upon examination, she stated that the complainant's hymen had a tear at 7 and 6 o'clock positions. The tears were old but not properly healed. The complainant was alleged to have been sexually assaulted 13 days prior to the medical examination. PW4 stated that on the same day, she also examined the Appellant. His genital area was normal. She produced the complainant's and the Appellant's respective P3 Forms into evidence.

PW5, Simon Nzabo, was a clinical officer at Nairobi Women's Hospital. He stated that he examined the complainant on 2<sup>nd</sup> July 2016. The complainant was alleged to have been sexually assaulted on 25<sup>th</sup> June 2016. He stated that upon examination, the complainant's hymen was broken with old tears. He averred that physical examination showed that the hymen was broken about a month prior to the examination. She had a whitish foul discharge from her vagina, and dirt, which was indicative of an infection. PW5 said that a HIV test was conducted and the same was negative. The Appellant was also examined at the said hospital. He was found to be HIV positive.

PW6, PC Anne Wanjiku Karimi, based at Ngong Police Station investigated this case. She was assigned the case on 2<sup>nd</sup> July 2016. The complaint had been recorded the previous night. She recorded statements of the prosecution witnesses. PW2 informed the complainant's sister (PW3) that the complainant often frequented the Appellant's house. PW3 inquired from the complainant what she was doing at the Appellant's house. The complainant told her that the Appellant asked her to bring him some water at his house. While there, the Appellant asked her to lie on the bed. He removed her panties. He then inserted his penis in her vagina. PW6 stated that the offence occurred on 25<sup>th</sup> June 2016. PW3 informed her that the Appellant was a caretaker at their plot. She had just moved to the said plot one month prior to the incident. After concluding her investigations, she decided to charge the Appellant with the present offences.

The Appellant was put on his defence. He gave unsworn evidence. He told the court that he was a caretaker at the plot where the complainant lived with her sister, PW3. On the material day of 25<sup>th</sup> June 2016, he went to PW3's house. PW3's husband welcomed him for tea but he declined. He left her house at about 10.00 am. PW3's husband asked to see the landlord. The landlord came to the plot in the evening. While there, a plumber known as Davy came to ask the landlord for his pay. A man known as Simon was also present. The Appellant later left for Ngong at about 6.00 pm. On 2<sup>nd</sup> July 2016, PW3 came to the plot in the company of two people who stated that they were looking for a house. They however arrested him. He was accused of defiling the complainant. He was taken to the police station and later arraigned before the trial court. DW2, Samuel Mugo, stated that he went to the said plot on 25<sup>th</sup> June 2016, at about 5.00 pm. He found the Appellant, the landlord and a plumber standing outside. The landlord paid him his dues and he left.

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 any comment regarding the demeanour of the witnesses (See David Agwata Achira vs. Republic [2003] eKLR). In the present appeal, the issue for determination is whether the prosecution established the charge of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act brought against the Appellant, to the required standard of proof beyond any reasonable doubt.

**This court has re-evaluated the facts of this case. Section 8(1) of the Sexual Offences Act provides that:-**

***"A person who commits an act which causes penetration with a child is guilty of an offence termed defilement."***

The prosecution is required to establish three ingredients; the age of the complainant, the act of penetration and the identity of the perpetrator. In defilement cases, it is imperative that the prosecution establishes the age of the complainant to the required standard of proof beyond any reasonable doubt. The Court of Appeal in **Stephen Nguli Mulili v Republic [2014] eKLR** held thus:

***“In the case of Kaingu Elias Kasomo vs. R, Malindi CR. NO. 504 OF 2014, the Court of Appeal stated that age is a key ingredient to the offence of defilement and failure to prove it beyond reasonable doubt amounts to failing to prove the offence. However, as the Court clarified in Tumaini Maasai Mwanja v R, MSA CR.A. NO. 364 OF 2010, proof of age for purpose of establishing the offence of defilement which is committed when the victim is under the age of 18 years should not be confused with proof of age for purpose of appropriate punishment for the offence in respect of victims of defilement of various statutory categories of age.”***

In the present appeal, the complainant stated that she was eleven (11) years old at the time. She was in class five. The Post Rape Care Form and P3 Form produced into evidence indicated that the complainant was 11 years of age. **The trial magistrate, who had the benefit of seeing the complainant testify**, assessed her age to be that of a child of tender years. This is evident since the trial magistrate deemed it necessary to conduct a *voire dire* examination on the complainant before proceeding to take her evidence. **The Appellant did not challenge the evidence adduced with regards to the complainant’s age. This 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 to the required standard of proof.**

**This court now turns to the ingredient of penetration. 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.”***

In the present appeal, it was the complainant’s testimony that on the material day of 25<sup>th</sup> June 2016, at about 4.00 pm, she and her brother arrived home from school. The Appellant asked her to bring some water to his house. He then asked her to lie on a bed, undressed her and inserted his penis in her vagina. She stated that she felt pain. She told the court that she often went to the Appellant’s house at his invitation. The Appellant threatened to stab her if she told anyone what had transpired. She said that she was scared to tell her sister whom she lived with. On cross examination, the complainant stated that the incident happened on a Saturday at about 4.00 pm. She said that there was no one in the compound as her brother had gone to Mama Mukui’s house.

The medical evidence adduced by PW4 and PW5 established that indeed the complainant’s vagina was penetrated. PW5 examined the complainant on 2<sup>nd</sup> July 2016. He stated that there was dirt and a foul discharge from the complainant’s vagina which was indicative of an infection. Her hymen was broken with old tears. He averred that physical examination showed that the hymen was broken one month prior to the medical examination. He also conducted a HIV test on the complainant which turned out negative. PW4 examined the complainant on 8<sup>th</sup> July 2016. She stated that the complainant looked very sad. Her hymen had tears at 7 and 6 o’clock positions. She stated that the tears were old but had not properly healed. **The medical evidence of the old hymen tears corroborated the element of penetration as narrated by the complainant.** The complainant did not immediately tell anyone about the sexual assault incident since she was scared. She told her sister of the sexual assault about one week later. PW4 testified that that though the complainant’s hymen tears were old, they were not properly healed. **The prosecution therefore did establish the ingredient of penetration to the required standard of proof beyond any reasonable doubt.**

The third issue was whether penetration was perpetrated by the Appellant. The Appellant was well known to the complainant. The complainant told the court that the Appellant was a caretaker at the plot where they lived. This fact was corroborated by PW2 and PW3. The Appellant admitted as much in his defence statement. The complainant stated that she used to frequent the Appellant’s house. PW2 corroborated this evidence. He said that every time he told the complainant that he would report her to her sister (PW3) for going to the Appellant’s house, the complainant would start crying. On the material day, PW2 stated that he saw the complainant leaving the Appellant’s house. He told PW3 that the complainant was at the Appellant’s house. PW3 asked the complainant what she was doing at the Appellant’s house. That’s when she came clean and told PW3 that the Appellant sexually assaulted her.

The complainant was the only witness to the alleged defilement. The law is however clear that a conviction can be founded on the evidence of a victim of a **sexual offence. Section 124** of the **Evidence Act** states thus:

***“Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him: Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”***

The complainant narrated in detail how the Appellant called her to his house and sexually assaulted her. The incident happened during the day, at about 4.00 pm. She told PW3 what had happened. She identified the Appellant as the person who sexually assaulted her. He was known to her and she identified him as the caretaker at their plot, a fact which was not denied by the Appellant. There was therefore no chance of mistaken identity as the Appellant was well known to the complainant. PW2 saw the complainant leaving the Appellant’s house on the material day. Having considered the evidence on record, this court is of the view that the complainant was telling the truth.

The Appellant in his defence gave an account of what transpired on 25<sup>th</sup> June 2016. He stated that on that evening, he was outside the compound with the landlord and a plumber known as Simon. The landlord paid them their dues and he left for Ngong at about 6.00 pm. DW2 told the court that on the stated date at about 5.00 pm, he went to the plot where the Appellant worked as a caretaker. He found the Appellant standing outside with the landlord and a plumber. The landlord paid him and he left. He stated that he could account for the whereabouts of the Appellant prior to 5.00 pm. Neither the Appellant nor DW2 spoke to the whereabouts of the Appellant at 4.00 pm when the offence was alleged to have occurred.

The Appellant in his submissions stated that he could not have defiled the complainant since he was HIV positive and the complainant was tested and found to be HIV negative. He stated that if he had indeed sexually assaulted the complainant, she would have contracted the HIV virus. However, Dr. Shako (PW4), told the court that the fact that the complainant did not contract the HIV virus did not imply that the Appellant did not sexually assault the complainant.

This court is of the view that the Appellant's defence was merely evasive and did not dent the otherwise strong culpatory evidence adduced by prosecution witnesses connecting him with the sexual assault of the complainant. It was properly dismissed as being of no evidential value. He was properly identified by the complainant as the perpetrator of the sexual assault. There was no evidence of existence of bad blood between the Appellant and any of the prosecution witnesses. The Appellant's guilt was established to the required standard of proof beyond any reasonable doubt. This court, having re-evaluated the evidence adduced before the trial court and the submission made by parties to this appeal, cannot see any reason to disagree with the finding reached by the trial court. The Appellant's appeal on conviction lacks merit. The same is hereby dismissed.

As regards the sentence, Section 8(2) of the Sexual Offences Act provides a mandatory sentence of life imprisonment for any person convicted of defiling a child aged eleven (11) years or less. However, the recent decision of the Supreme Court in Francis Karioko Muruatetu & another v Republic [2017] eKLR held that the mandatory death sentence prescribed for the offence of murder by Section 204 of the Penal Code was unconstitutional and that the mandatory nature deprives courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case. The reasoning in the Muruatetu case was also extended to mandatory sentences imposed under the Sexual Offences Act in recent decisions by the Court of Appeal in Christopher Ochieng vs R [2018] eKLR and Jared Koita Injiri vs R [2019] eKLR. The Court of Appeal in Jared Koita Injiri (supra) held thus;

***“...In this case the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by section 8(2) of the Sexual Offences Act, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis. The appellant was provided an opportunity to mitigate in the trial court where it was stated that he was a first offender. He pleaded for leniency. However, it cannot be overlooked that the appellant committed a heinous crime, and occasioned severe trauma and suffering to a young girl. His actions have demonstrated that around him, young and vulnerable children, like the complainant could be in jeopardy.***

***Needless to say, pursuant to the Supreme Court decision in Francis Karioko Muruatetu & Another vs Republic (supra), we would set aside the sentence for life imposed and substitute it therefore with a sentence of 30 years from the date of sentence by the trial court.”***

Guided by the aforesaid decisions of the Supreme Court and Court of Appeal, this court has jurisdiction to relook at the sentence of the Appellant to determine whether the life imprisonment sentence that was meted on him was deserved or another sentence ought to be imposed. This court has considered the Appellant's mitigation in the present appeal. The Appellant is a first offender. He was in remand custody for approximately three years prior to his conviction. In the premises, this court sets aside the life imprisonment sentence meted by the trial court. The same is substituted with an order of this court sentencing the Appellant to serve twenty (20) years imprisonment with effect from the date he was sentenced before the trial court *i.e.* 6<sup>th</sup> June 2017. This court has taken into consideration the period that the Appellant was in lawful custody both before his conviction and after his conviction by the trial court. It is so ordered.

**DATED AT NAIROBI THIS 7<sup>TH</sup> DAY OF OCTOBER 2020**

**L. KIMARU**

**JUDGE**