



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 28 OF 2018

(An Appeal arising out of the conviction and sentence of Hon. A. R. Kithinji -SPM

delivered on 20th December 2017 in Makadara CMC. CR. Case No.4429 of 2011)

SAMUEL MWANGI GITAU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Samuel Mwangi Gitau 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 4th April 2011 at Kayole Estate in Nairobi County, the Appellant intentionally and unlawfully committed an act which caused penetration of his male genital organ into the female genital organ of LN (the complainant), a girl aged 6 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 same day and in the same place, the Appellant intentionally and unlawfully committed an indecent on the complainant by touching her private parts namely vagina. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was convicted of the main count. He was sentenced to serve twenty (20) years imprisonment. The Appellant was aggrieved by his conviction and sentence. He 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 whereas the prosecution had failed to discharge the burden of proof placed upon it to establish the charge to the required standard of proof beyond any reasonable doubt. The Appellant took issue with the fact that he was convicted on the basis of the prosecution's evidence that was full of discrepancies and inconsistencies. In particular, he faulted the trial magistrate for relying on contradictory and uncorroborated evidence to convict him. The Appellant was aggrieved that the trial magistrate failed to properly evaluate and analyze the evidence adduced and thereby reached the erroneous determination that he was guilty as charged. He was irked that the trial magistrate failed to weigh the prosecution's case as compared to the evidence that the Appellant had adduced in his defence and thereby reached the wrong conclusion that he was guilty as charged. In essence, the Appellant is saying that there was no legal basis upon which the trial court could make a finding that the Appellant was guilty of the offence that he was charged. In the premises therefore, the Appellant urged the court to allow the appeal, quash the conviction and set aside the sentence that was imposed on him.

During the hearing of the appeal, this court heard oral rival submission made by Mr. Kariuki for the Appellant and Ms. Akunja for the State. Mr. Kariuki submitted that the evidence adduced by the prosecution witnesses did not support the particulars set out in the charge sheet. He submitted that although it was alleged that the incident took place on 4th April 2011, the matter was not reported to the police until September 2011, a period of five months. Learned counsel stated that there was discrepancy in the medical evidence that was produced by the two doctors who testified in court. Whereas one doctor testified that the complainant's hymen was broken, another doctor testified that the complainant's hymen was intact. He further submitted that the subsequent examination of the complainant after the report was made to the police established that the complainant had no injuries in her vulva and vagina. He urged the court to take into consideration the fact that the mother of the complainant had admitted that she reported the incident to the police after she had disagreed with her husband who is related to the Appellant.

Learned counsel submitted that the trial court ignored the Appellant's defence which essentially established that the charge brought against the Appellant was motivated by malice due to the fact that the complainant's mother had failed to pay the Appellant his wages, having worked for her as a shopkeeper. The Appellant submitted that crucial witnesses were not called to testify in the case. In particular, it was alleged that there was a housegirl who noticed that the complainant was bleeding from her vagina. This witness was not called to testify in the case. The Appellant pointed out that the police did not visit the scene of crime to establish the veracity of the claim made by the

prosecution witnesses to the effect that he had defiled the complainant. Learned counsel submitted that the trial court ignored the Appellant's cogent defence and thereby arrived at the erroneous determination that the Appellant was guilty as charged. In the premises therefore, he urged the court to allow the appeal, quash the conviction and set aside the sentence that was imposed on the Appellant.

Ms. Akunja for the State opposed the appeal. She submitted that the prosecution had established the charge brought against the Appellant to the required standard of proof. The prosecution had established that on the material day, the Appellant went to the house where the complainant was sleeping, removed her clothes, then sexually assaulted her. The Appellant warned the complainant not to scream or tell anyone. The complainant did not heed the warning. She told the mother what had transpired. The complainant was taken to Nairobi Women Hospital where upon examination it was established that she had indeed been sexually assaulted. The medical report prepared at the time of examination was produced into evidence. Learned prosecuting counsel submitted that although the report of the sexual assault was later made to the police, the court should rely on the initial medical report and not subsequent medical report. It was the initial medical report that gave the true medical condition of the complainant. She further submitted that the prosecution was able to establish the age of the complainant and the fact that it was the Appellant who had sexually assaulted the complainant. On sentence, she pleaded with the court to enhance the sentence of the Appellant. She urged the court to take into consideration the age of the victim and mete out an appropriate sentence.

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(2)** of the **Sexual Offences Act** to the required standard of proof.

This court has carefully re-evaluated the evidence adduced before the trial magistrate's court. It has also had the benefit of considering the grounds of appeal put forward by the Appellant. It has considered the submission made before it during the hearing of the appeal. To establish the charge of defilement, the prosecution was required to prove the three essential ingredients, namely that the victim of the sexual assault was penetrated, the age of the victim and finally the identity of the perpetrator.

As regard the evidence of penetration, the prosecution produced two medical reports which were contradictory. The first medical report prepared by Dr. Thuo of Nairobi Women Hospital on 7th April 2011 indicated that on vaginal examination **"normal external genitalia, ulceration noted with foul smelling discharge, hymen broken with vaginal vault inflammation"**. The doctor concluded that the complainant had been sexually assaulted. The complainant was later on 12th September 2011 seen by Dr. Kamau of the Police Surgery. This is what he observed when he did a vaginal examination: **"Urine burns, has urinary rashes, N.E.G., no vulval vaginal penial injuries, Erythematous vulva. Hymen intact."** The trial court did not give an explanation he preferred the medical report prepared by doctor Thuo and rejected the medical report prepared by Dr. Kamau. On re-evaluation of this medical evidence, this court is of the view that it would independently evaluate the medical evidence together with the other evidence that was adduced in order to reach a determination which medical evidence ought to be upheld. What is clear from both medical reports is that it was apparent that the complainant was a victim of poor hygiene.

The evidence that the prosecution adduced to corroborate its assertion that the complainant had been sexually assaulted is that of the mother of the complainant, TM who testified as PW2 and that of the complainant who testified as PW1. In her testimony, the complainant did not specifically state that the Appellant had used his penis to penetrate her vagina. The words that she used were to the effect that the Appellant **"put something in my genitals"**. She later said **"I did not see what he put in my genitals as I was asleep"**. Although the mother testified that the housegirl whom she had employed at the time noticed that there were blood stains in the complainant's panties (this was on 3rd April 2011), she did not take the complainant to hospital until 7th April 2011. She did not report the incident to the police until September 2011. This was five months after the alleged incident. She explained this lapse of time to the fact that she had at that time been persuaded by her husband not to report the incident to the police. She only reported the incident to the police after her marriage to her husband had unraveled. They had separated.

On re-evaluation of this evidence, it was clear to this court that taken into context, the observation made in the latter medical report makes sense when the Appellant testified that the charge brought against him was motivated by a grudge that existed between the complainant's mother and her estranged husband. The contradictory medical evidence did not support the prosecution's assertion that the complainant had been sexually assaulted. Taking into consideration the age of the victim, it was not possible for the doctor who examined her after four months to fail to notice that her hymen had been broken. What is common in both medical reports is that the complainant was a victim of poor hygiene. It was clear that she was not being taken care of by the mother.

In the premises therefore, this court cannot make a finding that the evidence adduced by the prosecution witnesses, taken into totality, established the charge of defilement to the required standard of proof beyond any reasonable doubt. There are too many gaps in the prosecution's case that raises reasonable doubt in this court's mind as regard the evidence adduced by the prosecution witnesses. This court notes that it is highly probable and likely that the evidence adduced by the Appellant in his defence that he was a victim of a frame up is the case.

The upshot of the above reasons is that the Appellant's appeal is allowed. His conviction is quashed. He is acquitted of the charge. His custodial sentence is set aside. He is ordered set at liberty and released from prison forthwith unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 6TH DAY OF FEBRUARY 2019

L. KIMARU

JUDGE