



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.178 OF 2018

(An Appeal arising out of the conviction and sentence of Hon.Kithinji A.R. SPM) delivered on 27th July 2018 in Makadara Criminal Case No.6076 of 2011)

ARTHUR MURAGURI MWANGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Arthur Muraguri Mwangi 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 diverse dates between January 2009 and 8th December 2011 at Kayole Estate in Nairobi County, the Appellant unlawfully and intentionally committed an act which caused penetration with his penis into the vagina of LN (the complainant), a child aged 8 years. The Appellant 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 dates and in the same place, the Appellant unlawfully and intentionally committed an indecent act with 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 charges. After full trial, he was found guilty of the main count. He was sentenced to serve twenty-one (21) years imprisonment. The Appellant was aggrieved by his conviction and sentence. He has 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 on the basis of unproved allegations that did not establish the charge to the threshold expected by the law. He was aggrieved that he was convicted despite the fact that crucial witnesses failed to testify in the case. He faulted the trial magistrate for convicting him yet vital exhibits were not produced in court. He took issue with the fact that the trial court had not considered his defence and especially the fact that he was framed up by the complainant. 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.

Prior to the hearing of the appeal, the prosecution filed notice seeking to have the custodial sentence that was imposed on the Appellant enhanced on the basis that the one was imposed by the trial court was illegal. The Appellant filed written submission in support of his appeal. He also made oral submission in support of his appeal. The Appellant submitted that he was the step-father of the complainant. He faulted the trial court in the manner in which it conducted the trial. He was particularly irked that his rights under **Section 200** of the **Criminal Procedure Code** were not read to him before the succeeding magistrate took over the proceedings from the previous magistrate. He submitted that the trial magistrate failed to properly evaluate the medical evidence which was adduced by two doctors and which were contradictory. One medical report found that there was penetration while another found that there was no penetration. The DNA analysis that was done did not connect him with the offence. The Appellant faulted the trial magistrate for failing to consider his defence especially the testimony to the effect that the complainant was a difficult child who had run away from home and had previously made unsubstantiated allegations of sexual assault against him and his father. He urged the court to consider his mitigation on sentence if it were to find the appeal to be without merit.

Ms. Sigei for the State opposed the appeal. She submitted that the prosecution adduced sufficient evidence to establish the charge that was brought against the Appellant to the required standard of proof. The testimony of the complainant was corroborated and pointed to the Appellant as the perpetrator of the sexual assault. She submitted that the Appellant sexually assaulted the complainant on several occasions to the extent that the complainant found home to be hostile. She ran away from home, was rescued and a report made to the police. Investigations commenced which established that the offence was committed. She urged the court to dismiss the appeal and sentence the Appellant to serve the enhanced legal custodial sentence.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced before the trial court so as to reach its own independent determination whether or not to uphold the conviction of the Appellant. As was held by the Court of Appeal in **Njoroge -Vs- Republic [1987] KLR 19 at P.22:**

“As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect (see Pandya v R [1957] EA 336, Ruwala v R [1957] EA 570)”.

In the present appeal, the issue for determination by this court is whether the prosecution established the case against the Appellant on the charge of **defilement** contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offence Act** to the required standard of proof beyond any reasonable doubt.

Before addressing the merit of the appeal, the court will first deal with the ground of appeal raised by the Appellant which was to the effect that his rights as provided under **Section 200(3)** of the **Criminal Procedure Code** were not explained to him before the convicting magistrate took over the proceedings from the magistrate who first heard the case. This court has perused the proceedings of the trial court. Trial commenced before Hon. T. Mwangi (SRM) on 27th August 2012. The trial court heard one witness before it ceased to have jurisdiction. On 16th September 2013, the trial court read to the Appellant his rights under **Section 200(3)** of the **Criminal Procedure Code**. In answer to the question that was posed to him, the Appellant answered **“case should proceed from it reached with no recall of witnesses.”** It was therefore clear that the Appellant’s right to recall the witness who had testified was read to him. He exercised the option to have the proceedings continue from where it had reached. That being the case, the Appellant cannot complain on this appeal that his right to have the witness who had testified recalled was not read to him. That ground of appeal lacks merit and is hereby dismissed.

On the merits of the appeal, the prosecution was required to establish three ingredients in order to establish the charge of **defilement** that was brought against the Appellant. The three ingredients are: the age of the victim, whether there was penetration and finally, the perpetrator of the offence. In the present appeal, the prosecution produced medical evidence which established that the Appellant was eight (8) years at the time of the Appellant’s arrest and charge. The medical report prepared by Medicins Sans Frontieres dated 8th December 2011 and the P3 form dated 21st December 2011 clearly indicated the age of the complainant to be eight (8) years. The complainant herself told the court that she was eight (8) years. This testimony was not challenged by the Appellant. The trial court as well as this court is convinced that the complainant was eight (8) years at the time of the incident. Although no birth certificate or birth notification was produced into evidence, this court has no doubt that the evidence that was presented before the court was sufficient to establish the age of the complainant. This court therefore holds that the complainant was a child within the meaning ascribed to the term under **Section 2(1)** of the **Children Act**.

As regard whether there was penetration, the complainant testified that the Appellant sexually assaulted her on several occasions over a period of two years when her mother was absent from home to the extent that she was forced to run away from home. She told the court that despite the fact that she told her mother about these incidents, she was dismissed by her mother and accused of falsely making allegations against the Appellant. It was when she ran away from home that neighbours intervened and reported the incident to the police. The complainant was taken to Medicins Sans Frontieres (MSF), Mathare Clinic where she was examined by Dr. Barbana Salano. The report that was prepared was produced on her behalf by PW2 Purity Kajuju. The report showed that the complainant was sexually assaulted both vaginally and anally. She had injuries on both her vagina and anus. The PRC form and the medical report were produced as prosecution’s exhibits No.1 & 2. The medical report by PW3 Dr. Zephania Kamau dated 21st December 2011 contradicted the above medical report. The doctor noted that on examination of the complainant’s vagina, it was normal. The hymen was intact. This court has seen the two reports and is of the view that the report prepared at MSF gave the true picture of the complainant’s medical condition. The complainant was seen by MSF immediately after she had complained that she had been sexually assaulted. The report is detailed. It is a true reflection of the complainant’s medical condition at the time. The subsequent report prepared by Dr. Zephania Kamau is not as detailed. This court does not believe that the doctor undertook a thorough medical examination of the complainant. In the premises therefore, this court holds that the complainant’s testimony coupled with the medical evidence adduced by PW2 established penetration to the required standard of proof beyond any reasonable doubt.

As regard the identity of the perpetrator, the complainant testified that she lived with the Appellant. She called the Appellant her father. The Appellant and DW2 Martha Njeri Muraguri confirmed that the complainant lived with them during the material period. The Appellant is the complainant’s step-father. He married DW2 after she had already given birth to the complainant. The complainant testified that she was severally sexually assaulted by the Appellant during the absence of his mother. The complainant testified that the situation at home became so intolerable that she ran away from home. She told her mother about the incidents. The mother was however dismissive and did not believe her. The Appellant testified that he did not sexually assault the complainant. He accused the complainant of being a truant, who without excuse, ran away from home. This court’s evaluation of the evidence leads it to the conclusion that the complainant was telling the truth when she said that it was the Appellant who sexually assaulted her. This court, just as the trial court, believed that the complainant was telling the truth. The **Proviso** of **Section 124** of the **Evidence Act** applies. There was no reason why an eight (8) year old child could run away from home if the situation at home was not untenable. The Appellant’s defence to the effect that it was the complainant who had framed him without any reason is not credible in light of the corroborative evidence that was adduced by the prosecution witnesses. The upshot of the above reasons is that the Appellant’s appeal on conviction lacks merit and is hereby dismissed.

On sentence, although the prosecution applied for enhancement of sentence, this court will not interfere with the sentence imposed by the trial court. The Appellant’s sentence is therefore confirmed. For the above reasons, the Appeal on conviction and sentence lacks merit and is hereby dismissed. It is so ordered.

DATED AT NAIROBI THIS 15TH DAY OF MAY 2019

L. KIMARU

JUDGE