



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.225 OF 2011

BENSON WAITHIMA MUCHONGEAPPELLANT

VERSUS

REPUBLICRESPONDENT

(An Appeal arising out of the conviction and sentence of Hon. L. Wachira SRM delivered on 8th September 2011 in Thika CM CR. Case No. 28 of 2011)

JUDGMENT

The Appellant 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 1st January 2011 in Murang'a County, the Appellant intentionally caused his penis to penetrate the vagina of LWK, a child aged five (5) 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 1st January 2011 in Murang'a County, the Appellant intentionally touched the vagina of LWK, a child aged five (5) years with his penis. 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 and sentenced to life imprisonment.

In his petition of Appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that the trial court improperly admitted into evidence the P3 form which was not produced by its maker in contravention of Article 50(4) of the Constitution. He asserted that his right to a fair trial under Article 25(c) of the Constitution had been violated since he was not accorded a chance to cross-examine Dr. Kinyua who authored the P3 form. He faulted the trial court for failing to abide by the set out rules with regard to how to conduct *voire dire*. He was of the view that the prosecution's evidence was insufficient to sustain a conviction.

During the hearing of the appeal, the Appellant presented to court written submissions in support of his appeal. He urged this court to allow his appeal. Ms. Atina for the State opposed the appeal. She submitted that the P3 form was properly allowed in evidence. The Appellant did not object to the production of the same before the trial court. The Appellant was also given the opportunity to cross-examine PW4 who produced the P3 form. Ms. Atina asserted that the evidence by the prosecution witnesses established the Appellant's guilt. The complainant narrated to the court how the Appellant carried her on his donkey cart and later sexually assaulted her. The complainant told PW1 what the Appellant had done to her. PW1 testified that the complainant's vagina was swollen with presence of vaginal discharge. Learned State Counsel averred that medical evidence adduced indicated that the complainant's hymen was absent. She submitted that the Appellant's wife (DW2) confirmed that she left the Appellant at the complainant's compound. DW2 testified that the Appellant came back home with the complainant and gave her Ksh.10/- to purchase *mandazi*. She submitted that this corroborated the complainant's testimony. In the premises, she urged this court to dismiss the Appellant's appeal.

The facts of the case according to the prosecution are as follows: The complainant

was at home with her two siblings on 1st January 2011. Her mother was not in the home. The Appellant came and picked the complainant from the house. He carried her on his donkey cart. He told her that he was taking her to a nearby dam. They got to a maize plantation. The Appellant removed her clothes. She stated that she was only wearing a skirt and a blouse. He asked her to lie down. He inserted his penis into her vagina. She felt pain. She started crying. She had difficulty walking. When she cried, he went and bought her three *mandazis*. PW1 Margaret Wanja, a neighbour saw the complainant leave the compound with the Appellant at about 4.00 p.m. She saw the complainant carrying three *mandazis* when she came back home. The complainant came back home at about 5.00 p.m. She asked the complainant where she got the *mandazi* from. The complainant told her that the Appellant bought them for her. She further inquired from the complainant why the Appellant bought her the *mandazi*. The complainant did not give her an answer. She threatened to discipline her if she did not tell her the truth. That is when the complainant narrated to her how the Appellant had sexually assaulted her. PW1 checked the complainant's private parts. Her genitals were swollen. There was also presence of vaginal discharge.

PW3 MWK is the complainant's mother. She went to the river to fetch water and left her three children at home on the material day of 1st January 2011. When she returned back home, she did not find the complainant at the house. She reported to a village elder that her daughter was missing. The complainant came back later in the evening. She was carrying three *mandazis*. The complainant told her that the Appellant bought her the mandazis. She narrated to her and PW1 how the Appellant had sexually assaulted her. The complainant stated that it was the second time that it had happened. The Appellant had earlier sexually assaulted her at his house. Accompanied by PW1, she reported the matter to the Chief who referred them to Kabati Police Station. They afterwards took the complainant to Thika District Hospital for medical examination. PW3 stated that the Appellant was well known to her. He used to come to her house to sell her vegetables.

PW4 Dr. Thinwa Wilson of Thika District Hospital produced the P3 form which was prepared by Dr. Kinyua upon examining the complainant. He told the court that the complainant was treated at the hospital after the sexual assault. The P3 form was filled on 19th January 2011. The examination revealed that the complainant's hymen was absent which was consistent with defilement. However, at the time of examination, no spermatozoa was seen. The treatment card and the P3 form were produced into evidence. The Appellant did not object to the P3 form being produced by Dr. Thinwa on behalf of his colleague Dr. Kinyua.

The case was investigated by PW5 IP. Judy Asembo. After concluding her investigations, she reached the decision to have the Appellant charged with the offence that he was convicted.

The Appellant was put on his defence. He gave an unsworn statement. He stated that on the material day of 1st January 2011, he was at his homestead constructing a chicken pen. At about 4.00 p.m., he went to the farm with his wife to pick tomatoes. They afterwards returned back home. At about 10.00 p.m., two village elders came to his house. They asked him to accompany them to Kabati Police Station. He was later charged with the present offences. He denied sexually assaulting the complainant. The Appellant availed his wife, DW2, to give evidence. She stated that on the material day, she went to the farm with the Appellant. They had a donkey cart. She later went back home and left the Appellant behind. The Appellant wanted to get an order for cabbages from the complainant's mother (PW3). The Appellant later came back with the complainant. He gave Ksh.10/- to the girl to buy *mandazis*. The girl left and they went back to the farm. The Appellant was arrested later that night.

This being a first appeal, this Court is mandated to re-evaluate the evidence afresh. The Court of Appeal in the case of **Gabriel Kamau Njoroge –vs- Republic [1982 – 88] 1 KAR 1134** stated this on the duty of the 1st Appellate court;

“It is the duty of the first Appellate court to remember that parties are entitled to demand of the court of first appeal a decision on both questions of fact and of law and the court is required to weigh conflicting evidence and draw its own inferences and conclusions, bearing in mind always that it has neither seen or heard the witnesses and make due allowance for this.”

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.”

It is now trite that for the prosecution to establish the charge of **defilement**, it must establish three ingredients; the age of the complainant, 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. In the present appeal, no documentary evidence was adduced by the prosecution to establish the complainant's age. However, the age of the complainant can be ascertained by documentary evidence, oral testimonies or by professional age assessment. In the case of **Richard Wahome Chege vs Republic [2014] eKLR**, the Court of Appeal while considering the question of proof of age of the victim held as follows;

“On the contention that the age of the complainant was not established, it is our considered view that age is not proved primarily by production of a birth certificate. PW2 the mother of the complainant testified that the complainant was 10 years old. What better evidence can one get than that of the mother who gave birth? It is our considered view that the age of the complainant was not only proved by PW2 but supportive evidence was given by PW3 [the doctor] who examined the complainant, and the complainant herself.”

PW3 is the complainant's mother. She testified that the complainant was five (5) years of age at the time the sexual assault occurred. She was in nursery school. The same was not challenged by the Appellant on cross-examination or in his defence statement. **The trial magistrate, who had the benefit of seeing the complainant testify**, assessed the complainant's 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. **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.**

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.”

The complainant told the court how the Appellant picked her from their house. He carried her on his donkey cart. He told her that he was taking her to a nearby dam. They got to a maize plantation. He undressed her and asked her to lie down. He then inserted his penis into her vagina. She stated that she felt pain. She cried. She also experienced difficulty in walking. The medical evidence adduced by PW4 established that indeed the complainant's vagina was penetrated. The P3 form indicated that the complainant had been defiled. Her hymen was absent. She also had pus cells in her vagina.

The Appellant submitted that the P3 form was improperly admitted into evidence since it was not produced by the author of the same. Dr. Kinyua prepared the P3 form. During trial, the trial court asked the Appellant if he had any objection to PW4 producing the P3 form on behalf of Dr. Kinyua. The Appellant indicated that he had no objection. The Appellant cannot therefore complain at the appellate stage that the P3 form was irregularly admitted into evidence.

The fact that the complainant was defiled was corroborated by the evidence of PW1 and PW3. PW1 saw the Appellant leaving PW3's house with the complainant. When the complainant came back, she informed her that the Appellant had defiled her. PW1 and PW3 examined the complainant's genitalia. Her external genitalia was swollen. There was presence of discharge from her vagina. She also experienced difficulty in walking. They immediately reported the matter at the police station and took the complainant to hospital for medical treatment. This corroborates the complainant's testimony. **This court is of the view that the prosecution did establish the element of penetration to the required standard of proof beyond any reasonable doubt.**

The third issue is whether penetration was perpetrated by the Appellant. The Appellant was well known to the complainant. He was her neighbour. She referred to him by name. She informed PW1 and PW3 that it was the Appellant who sexually assaulted her. Her mother, PW3, stated that the Appellant used to visit her house to sell vegetables. He was therefore not a stranger to the complainant. The Appellant's identification was by recognition. PW1 saw the Appellant leave PW3's house with the complainant. The Appellant's wife, DW2, confirmed that the Appellant went to PW3's house to take an order for cabbages. She saw the Appellant carrying the complainant on his donkey cart. She stated that the Appellant came to the house with the complainant and gave her Ksh.10/- to buy mandazi. Her testimony to a large extent corroborated the complainant's evidence. The Appellant in his defence stated that he was at the farm with his wife and they later went home at 10.00 p.m. His wife's testimony clearly displaces his defence. The defence of the Appellant was merely evasive and did not dent the otherwise strong, culpatory evidence adduced by prosecution witnesses as well as DW2. It was properly dismissed as being of no evidential value.

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 on 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 sentence of life imprisonment for any person convicted of defiling a child aged eleven (11) years or less. The sentence meted out by the trial court was therefore legal. The appeal on sentence is similarly dismissed. It is so ordered.

DATED AT NAIROBI THIS 2ND DAY OF MAY 2019

L. KIMARU

JUDGE