



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO.202 OF 2011**

**JOSEPHAT ISIAWA ISIAHO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(An Appeal arising out of the conviction and sentence of Hon. T. Murugi PM delivered on 2<sup>nd</sup> August 2011 in Makadara CM CR. Case No. 4555 of 2011)*

**JUDGMENT**

The Appellant, Josephat Isiawa Isiaho 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 19<sup>th</sup> October 2007 within Nairobi County, the Appellant intentionally and unlawfully committed an act which caused penetration of his male organ into the female organ of MA, 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 19<sup>th</sup> October 2007 within Nairobi County, the Appellant intentionally and unlawfully committed an indecent act with MA (the complainant), a child aged five (5) years 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, the Appellant was convicted as charged on the main count 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 by his conviction stating that the same was based on inconsistent evidence adduced by prosecution witnesses. He was further aggrieved that the trial court failed to acknowledge that crucial prosecution witnesses were not availed to give evidence. He faulted the trial court for failing to abide by the provisions of Section 33 of the Evidence Act in allowing the medical report to be produced in evidence. He took issue with his conviction asserting that the medical evidence failed to link him to the offence. He was of the view that the trial court did not consider his defence in arriving at its decision.

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. Sigei for the State opposed the appeal. She submitted that the prosecution established the Appellant's guilt to the required standard of proof beyond any reasonable doubt. She asserted that medical evidence by PW5 corroborated the complainant's evidence with respect to the element of penetration. PW5 stated that the complainant's hymen was freshly broken. Her vaginal wall was reddened and inflamed. She averred that the Appellant was known to the complainant. He was a neighbour. The incident took place in broad daylight at about 1.00 p.m. She was of the view that the Appellant was positively identified as the perpetrator of the sexual assault. She submitted that the Appellant's defence was an afterthought and the same ought to be dismissed. Learned State Counsel stated that the complainant was seen leaving the Appellant's house. She was crying. The complainant's testimony was truthful. She further submitted that the medical reports established that the complainant was aged seven (7) years at the time of the sexual assault. 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: On 19<sup>th</sup> October 2007 at about 1.00 p.m., the complainant (PW1) was playing outside their homestead with her friends. The Appellant was a neighbour. He asked them to go to his house. He offered them food. After they had finished eating, they decided to leave his house. The other children left the house. The complainant was the last to leave the Appellant's house. As she was leaving, the Appellant held her. He took her to his bed. He gagged her mouth with a piece of cloth. He removed her skirt and underwear. He also removed his trousers. He proceeded to insert his penis in her vagina. After sexually assaulting the complainant, he asked her to leave the house. PW4 Roseline Akeyo, a neighbour, saw the complainant leaving the Appellant's house. She stated that the complainant was running while crying. She informed the complainant's father PW2 SO that she had seen the complainant leave the Appellant's house while crying.

PW2 testified that the complainant was walking with a limping gait. He inquired from her what the problem was. She informed him that the Appellant had invited them to his house. He gave them food. As she was leaving the house, the Appellant held her, gagged her mouth and sexually assaulted her on his bed. PW2 took the complainant to Nairobi Women's Hospital for medical examination on the following day. At

the hospital, the complainant was seen by Dr. Muhombe. Medical examination established that her vaginal walls were reddened and inflamed. Her hymen was freshly torn at 2 to 6 o'clock position. There was no active bleeding. In a later examination by PW3 Dr. Zephania on 26<sup>th</sup> October 2007, he noted that the complainant's genitalia was normal and her hymen was intact. PW2 reported the incident at Soweto Police Station. The Appellant was arrested by PW6 Acting IP. Bernard Wamalwa. PW5 CPL Winrose Kituto was assigned to investigate the case. She interviewed the witnesses, recorded their statements and formed the opinion that a case of defilement had been made. She charged the Appellant with the offence.

The Appellant was put on his defence. He gave an unsworn statement. He stated that on the material day he was sick. The following day, he went to the market to buy food. At about 11.30 a.m., two police officers showed up at his house. They were accompanied by the complainant and her father. The complainant's father claimed that he had sexually assaulted his daughter. He was arrested and charged with the present offences. The Appellant's mother, DW2 Elizabeth Malezi Isaho, gave evidence. She stated that the Appellant did not sexually assault the complainant. She told the court that medical evidence did not implicate him. She urged the court to acquit him. DW2 was however not present on the material day when the Appellant was alleged to have sexually assaulted the complainant.

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 [1987] eKLR** stated this on the duty of the first 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, but 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.”***

The critical ingredients forming the offence of defilement are: the age of the complainant, proof of penetration and positive identification of the assailant. On the age of the complainant, the complainant testified that she was seven (7) years old at the time of adducing evidence in court. She was therefore about four (4) or five (5) years of age at the time of the sexual assault. The P3 form adduced in evidence indicated that the complainant was five (5) years old when the sexual assault occurred. The complainant's birth certificate was not produced in evidence. Where this best evidence is not available, the prosecution can rely on other documentary evidence such as a medical report and the P3 form to establish the age of the victim. The prosecution can also rely on the testimony of the parents of the complainant and also by the court visually satisfying itself as to the apparent age of the complainant. This position was upheld by the **Court of Appeal in Nyeri C.A Criminal Appeal No. 61 of 2014, Richard Wahome Chege -vs- Republic** (unreported) and **Nyeri C.A Criminal Appeal No. 100 of 2013 J.W.A -vs- Republic** (unreported).

The complainant's evidence of her age was corroborated by the P3 form adduced in evidence by PW3. The same was not challenged by the Appellant on cross-examination. The trial magistrate, who had the benefit of seeing PW1 testify, assessed the complainant's age to be that of a child of tender years. 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.”***

As regard the evidence of penetration, the prosecution produced two medical reports which were contradictory. The complainant was seen at Nairobi Women's Hospital the following day after the alleged sexual assault occurred. Her vaginal walls were found to be reddened and inflamed. Her hymen was freshly torn at 2 to 6 O'clock position. There was no active bleeding. In a later examination by Dr. Zephania (PW3) on 26<sup>th</sup> October 2007, he noted that the complainant's genitalia was normal and her hymen was intact. 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.

The complainant was candid that the Appellant inserted his penis in her vagina. He laid her on his bed. He removed her skirt and underwear. He gagged her mouth with a piece of cloth. He proceeded to insert his penis in her vagina. She stated that ***“he removed his thing for urinating...he did bad manners to me at the place I use for urinating”***. PW4 saw the complainant leaving the Appellant's house. The complainant was crying. She was running while crying. Her father (PW2) stated that the complainant was walking with a limping gait. The complainant told her father that the Appellant had sexually assaulted her. All these factors taken into account, this court is of the opinion that the complainant was telling the truth. Even if her hymen was not broken, her vaginal walls were inflamed and reddened. This evidence corroborated the complainant's assertion that the Appellant inserted his penis in her vagina. The penetration could have been partial. This still falls under the definition of penetration under the **Act** as stated earlier in this judgment. The court is however convinced that the medical examination that was undertaken at the Nairobi Women's Hospital a day after the sexual assault reflected the true medical condition of the complainant at the time rather than the latter examination by the police surgeon. In the premises therefore, 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 Appellant submitted that the medical report from Nairobi Women's Hospital was improperly allowed in evidence since it was not produced by the author. This court had perused the trial court's record. PW5, Dr. Thuo, did explain that Dr. Muhombe, who examined the complainant, was not available to give evidence since she had died. **Section 33** of the **Evidence Act** allows the court to admit documentary evidence from a witness other than the author. Documents from a medical practitioner are among the qualified documents under **Section 77** of the **Evidence Act** that may be admitted into evidence in the absence of the maker. PW5 was also a medical practitioner. The prosecution

sufficiently explained why Dr. Muhombe could not be availed before court to give evidence. This court is of the opinion that the medical report was properly allowed in evidence. This ground of appeal must therefore fail.

The third issue is whether the sexual assault was perpetrated by the Appellant. There is no doubt that the complainant implicated the Appellant as the person who sexually assaulted her. The Appellant was a neighbour to the complainant. He was therefore known to the complainant and her father. The Appellant admitted as much in his defence. The Appellant lived alone. The complainant told her father that the Appellant sexually assaulted her. PW4 saw the complainant leave the Appellant's house on the material day. She was crying and in distress. The investigating officer who visited the scene confirmed that the Appellant was a neighbour to the complainant. In this court's assessment, the complainant was telling the truth. The defence of the Appellant was merely evasive and did not dent the otherwise strong culpatory evidence adduced by prosecution witnesses. It was properly dismissed as being of no evidential value. His 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 15<sup>TH</sup> DAY OF MAY 2019**

**L. KIMARU**

**JUDGE**