REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.248 OF 2018

JAIRUS LUGWA LUGUMBA …..…….…….……APPELLANT

VERSUS

REPUBLIC ……..…… RESPONDENT

(An Appeal arising out of the conviction and sentence of Hon. H. M. Nyaga CM delivered on 7th August 2018 in Makadara CM CR. Case No. 4527 of 2009)

JUDGMENT

The Appellant, Jairus Lugwa Lugumba was charged in first count 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 diverse dates between 1st August 2009 and 10th November 2009 at [particulars withheld] Estate within Nairobi County, the Appellant unlawfully and intentionally caused his penis to penetrate the vagina of SO, a child aged seven (7) 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 diverse dates between 1st August 2009 and 10th November 2009 at [pariculars withheld] Estate within Nairobi County, the Appellant unlawfully and intentionally committed an indecent act with SO, a child aged seven (7) years by touching her vagina.

The Appellant was charged in second count with the offence of **defilement contrary to Section 8(1)** as read with **Section 8(2) of the Sexual Offences Act. T**he particulars of the offence were that on diverse dates between 1st August 2009 and 10th November 2009 at [particulars withheld] Estate within Nairobi County, the Appellant unlawfully and intentionally caused his penis to penetrate the vagina of KAM, a child aged four and a half (4½) 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. T**he particulars of the offence were that on diverse dates between 1st August 2009 and 10th November 2009 at Huruma, Ngei Estate within Nairobi County, the Appellant unlawfully and intentionally committed an indecent act with KAM, a child aged four and a half (4 ½) years by touching her 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 alternative charges in both counts. He was sentenced to serve ten (10) years imprisonment for each count. The sentences were ordered to run concurrently.

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 material witnesses were not availed by the prosecution to adduce evidence. He faulted the trial court for relying on the prosecution's evidence which was inconsistent and full of contradictions. He took issue with his sentence stating that the trial court failed to consider his mitigation. He was of the view that the evidence adduced by the prosecution was not sufficient to sustain a conviction.

During the hearing of the appeal, this court heard oral submission made by Mr. Swaka for the Appellant and by Ms. Nyauncho for the State. Mr. Swaka submitted that the two complainants gave conflicting evidence. He pointed out that the househelp who was a key witness was not availed in court to give evidence. He asserted that testimony of the complainant's mother was hearsay evidence. He averred that medical evidence exonerated the Appellant. He stated that the prosecution witnesses' statements recorded by the police were at variance with the evidence adduced in court. He submitted that the police failed to visit the scene of crime. In addition, the investigating officer did not testify before the trial court. In the premises, he urged this court to allow the Appellant's appeal.

Ms. Nyauncho for the State opposed the appeal. She denied that the complainants gave conflicting evidence. The sexual assaults were on several occassions. The two complainants were not together during all the incidents. She asserted that the househelp was not a material witness since her testimony was hearsay evidence. Learned State Counsel submitted that the prosecution did its due diligence in trying to avail the investigating officer before court to give evidence. His failure to testify was not fatal to the prosecution case. She maintained that the prosecution had proved its case to the required standard of proof beyond any reasonable doubt. She therefore urged this court to dismiss the Appellant's appeal.

The facts of the case according to the prosecution are as follows: PW1, SO was the first complainant. She stated that she was eight (8) years old at the time of giving her testimony in court. She was playing with KAM (PW2) outside on the ground floor of their apartment. Nafula asked them to go to her uncle's house. The said uncle was the Appellant. He was inside the house when they entered the house. She sat on a chair. She was wearing a skirt. The Appellant removed her underwear. He inserted his fingers inside her vagina. He also inserted his fingers into PW2's vagina. He gave her a sweet and told her to go home. He warned them against telling anyone about the incident. PW1 stated that the Appellant repeated the act for three consecutive days. She stated that the Appellant was their neighbour. His house was next to PW2's house. PW1 lived on the 5th floor of the said apartment.

PW2 KAM. was the second complainant. She stated that she was five (5) years old at the time she testified before court. She was in nursery school. She told the court that she was playing with PW1 on the ground floor of their apartment. The Appellant called them to his house. She sat on the sofa. She was wearing a trouser. The Appellant removed her trouser and underwear. He inserted his finger in her vagina. He told her to wear a skirt the next time she visited him and not a trouser. She stated that he also inserted his finger in PW1's vagina. The Appellant sexually assaulted her on four different occasions.

PW3 LMO is PW1's mother. She stated that on 11th November 2009, her housegirl informed her that the Appellant had sexually assaulted her daughter. She said that the complainants would go to his house and he would sexually assault them. PW3 asked PW1 why she did not tell her what was going on. PW1 told her that the Appellant had threatened to kill them if they informed anyone. She took her daughter to the hospital for medical examination. Her husband reported the matter at Huruma Police Station. PW4 FAO is PW2's mother. On 11th November 2009, her husband called her and asked her to go home immediately. She was at work. When she got home, she found PW1, PW2 and PW3. PW3 informed her that her househelp had told her that the Appellant had been sexually assaulting the complainants. She asked her househelp about the allegations. The housegirl informed her that PW1 told her that the Appellant inserted his fingers into her vagina. PW4 stated that the Appellant was their next door neighbour.

PW5, Dr. Zephania Kamau examined PW1 and PW2 on 17th November 2009. He stated that they had no physical or vaginal injuries. Their hymens were intact. They did not have any vaginal discharge. He stated that the complainants had been examined at Nairobi Women's Hospital before he examined them. The Appellant was put on his defence. He gave an unsworn statement. He denied sexually assaulting the complainants. He stated that the prosecution witnesses lied to the court.

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 comment regarding the demeanour of the witnesses **(See Okeno vs Republic [1972] EA 32).** In the present appeal, the issue for determination is whether the prosecution established the Appellant's guilt with respect to the charges preferred against him, to the required standard of proof beyond any reasonable doubt.

This court has re-evaluated the facts of this case. It is now trite that for the prosecution to establish the charge of **defilement**, it must establish, firstly, the age of the complainant, secondly, penetration and thirdly, the identity of the perpetrator. With regard to the age of the complainants, no documentary evidence was adduced by the prosecution to establish the same. However the age of a 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."***

PW1 testified that she was seven (7) years old at the time of the sexual assault. Her mother PW3 confirmed the same. According to PW2's evidence, as well as that of her mother, she was four (4) years old at the time of the sexual assault. This evidence was not challenged by the Appellant on cross- examination or in his defence statement. The trial magistrate, who had the benefit of seeing the complainants testify, assessed the complainants' ages to be that of children of tender years. This court therefore holds that the prosecution did establish that the complainants were children within the meaning o**f Section 2(1) of the Children Act.**

The trial court correctly acquitted the Appellant of the main charge of **defilement** in both counts since penetration was not proved. He was however convicted in the alternative charges of the offence of **committing an indecent act with a child** contrary to **Section 11(1)** of the **Sexual Offences Act.** Particulars of the offence in both counts indicated that the Appellant touched the complainants' vaginas.

Section 2 of the Sexual offences Act defines "***indecent act"*** as act which causes:-

> ***"(a) Any contact between the genital organ of a person, his or her breasts and buttocks with that of another person;***
>
> ***or***
>
> ***(b) Exposure or display of any pornographic material to any person against his or her will, but does not include any act which causes penetration."***

The evidence adduced by the prosecution was to the effect that the Appellant committed an indecent act by touching the complainants' vaginas. PW1 and PW2 told the court that the Appellant was their neighbour. He invited them to his house. He would undress them and insert his finger in their vaginas. He did this on several occasions. PW2 stated that whenever she complained to the Appellant that she felt

pain, he would apply oil on her vagina. After the first incident, the Appellant told PW2 not to wear a trouser the next time she visited him. The complainants' evidence was that of children of young and tender age. Their evidence in regard to their alleged sexual assault by the Appellant was not corroborated by medical evidence. Indeed, the doctor who examined them formed the view that there was nothing in the examination that corroborated the complainants' assertion that they had been sexually assaulted on several occasions.

A crucial witness who would have corroborated the complainants' testimony i.e. the househelp was not called to testify in the case. It was not clear from the evidence adduced by the mothers of the complainants at what stage they became aware of the sexual assault. *Was it immediately after one of the alleged incidents or was it long after the alleged incidents had occurred?* The testimony of the househelp would have assisted the court in reaching a determination one way or the other. It was therefore clear that the Appellant was convicted essentially on uncorroborated testimony of the complainants. Although the **Proviso** to **Section 124** of the **Evidence Act** states that a court can convict on uncorroborated evidence of a victim of a sexual assault, in the present appeal it was evident that the testimony of the complainants was unsupported by other evidence. It would be unsafe for this court to convict on the basis of such evidence.

The court can convict on the evidence of children of young and tender age in sexual offences if it is convinced that they are telling the truth. The description given by the complainants in regard to the circumstances in which the alleged sexual assault occurred, does not give this court confidence that they were telling the truth or at least the entire truth. In **FAPPYTON MUTUKU NGUI –VS- REPUBLIC – CRIMINAL APPEAL NO.296 OF 2010**, the court held thus:

> ***"Indeed courts should be cautious before convicting on the uncorroborated evidence of minors. There are many reasons for this. In J Heydon Evidence: Cases and material 2nd ed Butterworths London 1984, 84, the reasons were put this:***
>
> ***First, a child's power of observation and memory are less reliable than on adult's. Secondly, children are prone to live in a make-believe world, so that they magnify incidents which happen to them or invent them completely. Thirdly, they are also very egocentric, so that details seemingly unrelated to their own world are quickly forgotten by them. Fourthly, because of their immaturity they are very suggestible and can easily be influenced by adults and other children."***

In the circumstances of this case, it cannot be ruled out that the complainants were influenced by adults in their lives to implicate the Appellant in the alleged sexual assaults. That is the reason why the trial court found it difficult to convict the Appellant on the main charges of **defilement.** There was simply no evidence to support the charges. This court, similarly too, holds that there was no evidence to support the prosecution's assertion that the Appellant had sexually assaulted the complainants.

In the premises therefore, this court holds that the prosecution failed to prove the charges of committing indecent assault contrary to **Section 11(1)** of the **Sexual Offences Act** to the required standard of proof beyond any reasonable doubt. The Appellant's appeal therefore has merit. It is hereby allowed. His conviction is hereby quashed. The Appellant is acquitted of the charge. The custodial sentence imposed upon him 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 8TH DAY OF MAY 2019

L. KIMARU

JUDGE