



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.115 OF 2018

DENNIS MUTEGI KAMENCHU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal arising out of the conviction and sentence of Hon. E. SUTER (SRM) delivered on 11th June 2018 in Makadara CM CR. Case No. 3693 of 2015)

JUDGMENT

The Appellant, Dennis Mutegi Kamenchu was charged with the offence of **defilement of a child** 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 10th December 2015 and 12th December 2015 at Kinyago slum in Shauri Moyo within Nairobi area County, the Appellant intentionally and unlawfully caused his genital organ (penis) to penetrate the genital organ (vagina) of CA, a girl aged eleven (11) years old. He was alternatively 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 the 10th December 2015 and 12th December 2015 at Kinyago slum in Shauri Moyo within Nairobi area County, the Appellant intentionally and unlawfully committed an indecent act with CA, a girl aged eleven (11) years old by using his hands and penis to touch 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 found guilty as charged and sentenced to life 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 of a crime he had not committed. He took issue with his conviction stating that the charge sheet was defective. He faulted the trial magistrate for relying on the medical evidence that did not connect him with the crime. He was aggrieved that the trial magistrate had relied on contradictory and unreliable evidence to convict him. He was further aggrieved that the trial magistrate had failed to find that essential witnesses and exhibits were not availed to prove the prosecution's case. In summary, he was aggrieved that he had been convicted on the basis of the evidence that did not establish his guilt to the required standard of proof beyond any reasonable doubt.

During the hearing of the Appeal, the Appellant presented to the court written submission in support of his appeal. He urged the court to allow the appeal. Ms. Akunja for the State opposed the appeal. She submitted that the prosecution had established its case on the charge of **defilement** to the required standard of proof. She stated that the complainant identified the Appellant as the person who defiled her. The Appellant was well known to the complainant as they lived in the same neighbourhood. According to Learned State Counsel, the complainant's testimony was corroborated by medical evidence of PW2 Barbara Salano and PW4 Dr. Shako. She further submitted that the complainant's age was established by the age assessment test ordered by the court that revealed that the complainant was between the ages 13 - 14 years as of 19th June 2017, meaning that the complainant was eleven (11) years at the time of the offence on 10th December 2015. She also stated that the charge sheet was not defective. For above reasons, Ms. Akunja urged the court to disallow the appeal as it lacked merit.

The facts of the case according to the prosecution are as follows: The complainant was at the material time aged eleven (11) years. Her age was confirmed in an Age Assessment Report ordered by the court which was produced into evidence as **Prosecution's Exhibit No. 4**. The report put the complainant's age between 13 – 14 years as of 19th June 2017. This meant that the complainant was eleven (11) years at the time the offence took place on 10th of December 2015. At the material time the complainant lived in Eastleigh with her mother. She testified that she had been playing with her friends. Her friends left. She was left alone. The Appellant called her and requested her to buy milk for him from a nearby shop. As PW1 was going to collect the money, the Appellant pulled her and took her into his house. The Appellant ordered PW1 to remove her clothes or he would kill her. PW1 being afraid, removed her trouser and the panty that she was wearing. The complainant testified that the Appellant pushed her to the bed and defiled her. When the Appellant was finished, he told PW1 that she should be going to his house on a daily basis.

PW1 testified that she felt pain and saw blood oozing out of her vagina. She went home. She took a bath. She saw blood and a whitish discharge on her panty. A day later, while the complainant was playing outside with her friends, she saw the Appellant passing by. PW1 went and hid behind her friends so that the Appellant could not see her. PW1's friends left. She was left alone as her mother had left with the house keys. The Appellant noticed her and called her to this house. He reminded her of the threats he had made on the first day. The Appellant ordered her to remove her clothes and defiled her again. PW1 went home. Her mother asked her where she had been. The mother became suspicious. The mother went to the police station and reported her suspicion. When the complainant was asked where she had been, she disclosed that she was at the Appellant's house.

On the 11th December 2015 at about 10.00 p.m., PW3 APC Edwin Mbaya was at the material time attached at Biafra Camp Makadara Sub-County. He was on night duty. A group of people came to the Post accompanied by a girl. They were looking for the mother of the child. The mother of the child appeared and stated that her child had been sleeping with a man not known to her. The complainant took them to the house of the Appellant. She identified him as the person who had defiled her. The Appellant was arrested and taken to Shauri Moyo Police Station accompanied by the complainant and her mother.

The complainant was taken to MSF at Mathare Eastleigh Clinic on 12th December 2015 at 4.00 p.m. in the company of her mother. At the MSF Clinic, she was examined by PW2, Barbara Salano, a Clinical Officer working with MSF at Mathare. She established that the complainant did not have any physical injuries. She had a normal genitalia with milky smelling discharge, reddening of the labial walls with visible tears. The hymen had a partial tear at the 6 O'clock position and bruises at the margins. Anal examination was normal. PW2 produced the medical certificate and the Post Rape Care form as exhibits.

On 14th December 2015, PW1 was further examined by Dr. Shako at the police surgery. Dr. Shako observed that PW1's female genitalia was normal. The hymen was reddened which was a sign of a wound healing. She had a tear at 6 O'clock. He produced the P3 form which had been duly filled.

The case was assigned to PC Isaack Mohammed attached at Shauri Moyo Police Station to investigate. He recorded statements from the complainant, her mother and the arresting officer. Upon concluding his investigations, he established that indeed a case had been made for the Appellant to be charged with the offence for which he was convicted.

When the Appellant was put on his defence, he testified that he was a school dropout. He had dropped out of school due to lack of school fees. He owned a kiosk, which he operated till 10.00 p.m. On the material day, he had gone to work till 10.00 p.m. He then went to sleep. At 1.00 a.m., he heard a knock at his door. When he opened the door, there was a police officer who was known to him, a child and her mother. The child identified the Appellant as the person who had defiled her. The Appellant was taken to the police station alongside the complainant and her mother. The Appellant denied that he defiled the minor.

This being a first appeal, it is the duty of this court to subject the evidence adduced before the trial court to fresh evaluation with the ultimate objective of ascertaining whether the conviction of the Appellant ought to stand. In doing so, this court must take cognizance of the fact that it neither saw nor heard the witnesses as they testified and must therefore give due regard in that respect (See **Okeno vs Republic (1972) EA 32**). The issue for determination by this court is whether prosecution did indeed establish the guilt of the Appellant to the required standard of proof beyond any reasonable doubt.

This court has carefully re-evaluated the evidence adduced before the trial court in light of the submission made by the parties to this appeal. It was clear to this court that the prosecution did indeed establish the guilt of the Appellant to the required standard of proof beyond any reasonable doubt. In a case of defilement, the prosecution is required to establish that there was penetration, that the victim of the sexual offence was a child and finally the identity of the perpetrator. In the present appeal, proof of penetration was established by medical evidence. The complainant was examined on 12th December 2015 by Barbara Salano, a Clinical Officer at Médecins Sans Frontières (MSF) Clinic at Mathare. She observed that the complainant had normal female genitalia with milky smelling discharge, reddening of the labial walls with visible tears. The hymen had a partial tear at 6.00 O'clock position and bruises at the margins. This evidence was corroborated by Dr. Shako at the Police Surgery who informed the court that the complainant had normal genitalia, the hymen was reddened, a sign of a wound healing and the hymen had a tear at 6.00 O'clock. He produced a duly signed P3 Form which was produced as a prosecution's exhibit. The medical evidence indeed proved that complainant had been penetrated. **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."** In the present appeal, it was clear that penetration was established by medical evidence and the testimony of the complainant.

The second issue that the prosecution was supposed to establish is the age of the complainant. From the charge sheet, the complainant was said to be eleven (11) years old at the time of the sexual assault. Her age was confirmed by the Age Assessment Report which was ordered by the court and produced into evidence as prosecution's exhibit. The report put the complainant's age between 13 – 14 years as of 19th June 2017. This meant that complainant was eleven (11) years as at the time of the offence was committed on 10th of December 2015. 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**.

As regards to who perpetrated the sexual assault, the complainant testified that she knew the Appellant since they lived in the same neighborhood. On the second attempt when the complainant saw the Appellant, she had tried to hide from him. There was no doubt that the complainant properly identified the Appellant as the perpetrator of the sexual assault. The Appellant was known to the complainant prior to the sexual assault. She even took her mother and the police to the Appellant's house during his arrest. This court is of the view that the **Proviso of Section 124** of the **Evidence Act** applies in this case. The complainant was telling the truth. The evidence of the complainant was credible. The evidence was consistent.

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 of the trial court. This court holds that the prosecution proved the charge of defilement to the required standard of proof beyond any reasonable doubt. The defence of the Appellant did not dent the otherwise strong evidence adduced by the prosecution witnesses.

The upshot of the above reasons is that the appeal lodged by the Appellant lacks merit and is hereby dismissed. The conviction and the sentence of the trial court is hereby upheld. The sentence was legal since the same is provided by statute. It is so ordered.

DATED AT NAIROBI THIS 12TH DAY OF JUNE 2019

L. KIMARU

JUDGE