



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.78 OF 2016

PETER GEORGE GITHINJI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal arising out of the conviction and sentence of Hon. Shadrack

M. Mwinzi (SRM) delivered on 12th April 2016 in Kibera CM CR. Case No. 69 of 2014)

JUDGMENT

The Appellant was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act. The particulars of the offence were that on diverse dates between 18th May 2014 and 23rd May 2014 in Riruta within Nairobi County, the Appellant unlawfully and intentionally caused his penis to penetrate the vagina of AN, a child aged fifteen (15) 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 18th May 2014 and 23rd May 2014 in Riruta within Nairobi County, the Appellant unlawfully and intentionally committed an indecent act by touching with his fingers the vagina of AN, a girl aged fifteen (15) years. 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 of defilement and sentenced to serve twenty (20) years imprisonment.

In his petition of Appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that his constitutional rights under Article 25(c) and Article 50(2)(a) of the Constitution were violated by the trial court. He faulted the trial magistrate for failing to abide by the provisions of Section 211 of the Criminal Procedure Code. He took issue with the fact that the prosecution failed to avail material witnesses to give evidence. He was of the view that the prosecution's case was not proved to the required standard of proof beyond any reasonable doubt. He therefore urged the court to allow his appeal, quash the conviction and set aside the sentence that was imposed on him.

During the hearing of the appeal, the Appellant presented to court written submissions in support of his appeal. This court also heard oral submissions from the Appellant. He stated that he knew the complainant. They lived together for a while. He submitted that he thought the complainant was an adult. He averred that he accepted responsibility when he was told that the complainant was pregnant. The complainant's mother however asked him to pay Ksh.200,000/-. He did not have the money. He was of the view that his defence was not considered by the trial court. He urged this court to allow his appeal.

Ms. Sigei for the State opposed the appeal. She asserted that the prosecution established the ingredients of the offence of defilement. She submitted that the complainant told the court how the Appellant took her to his house and sexually assaulted her. After he was done, he chased her away and warned her not to tell anyone. She was bleeding. She was also experiencing abdominal pains. She was not able to go to school that week. Her brother took her to hospital. They discovered that she was pregnant. Learned State Counsel averred that medical evidence established the element of penetration. She submitted that DNA evidence established that the Appellant was the child's father. On identification, Ms. Sigei stated that the Appellant was known to the complainant prior to the sexual assault incident. His identification was safe. She asserted that the clinical card produced in evidence proved that the complainant was a minor at the time of the sexual assault. She was of the view that the Appellant's defence was an afterthought. In the premises therefore, she urged this court to dismiss the Appellant's appeal.

The facts of the case according to the prosecution are as follows: The complainant, AN, stated that she met a man on her way to school on 15th May 2014. The said man was the Appellant. He asked whether he could be her friend. She declined. A week after that, she was sent to the shop to buy milk by a neighbour. She delivered the milk to the said neighbour. As she was leaving her compound, she met the Appellant. He dragged her to his house. He sexually assaulted her. He afterwards chased her out of the compound and warned her against telling anyone about the incident. She was bleeding. She was experiencing abdominal pains. She went to a nearby river and took a bath. She afterwards

went home. She was not able to attend school the next week due to the abdominal pains. Her brother took her to a clinic in Kawangware. She found out that she was pregnant. She went to the Appellant's house and informed him that she was pregnant. She stayed at the Appellant's house for two days. She later went back home. Her mother asked her where she had been. She took her mother to the Appellant's house. They afterwards went to the police station where the Appellant was arrested.

The complainant's mother, PW2 RM told the court that the complainant went missing for two days from 27th to 29th June 2014. She tried looking for her but her efforts were cut short since she had to go back to work. On the evening of 29th June 2014, she came back from work and found the complainant in the house. She inquired from the complainant's brother where the complainant had been. The complainant said that she could take them to the Appellant's house. They left the same evening and went to the Appellant's house. When they got to his house, he opened the door for them. She asked the Appellant if he knew the complainant. He admitted that the complainant had been to his house. PW2 reported the incident at the D.O's office. She also made a report at Satellite Police Station. The Appellant was arrested. She took the complainant to Nairobi Women's Hospital the following day. When the complainant was examined, they discovered that she was pregnant. The complainant narrated to her how the Appellant forcefully took her to his house and sexually assaulted her.

PW3, Dr. Njoroge was based at Nairobi Women's Hospital. He adduced evidence on behalf of his colleague Dr. Muola who was no longer working at the said hospital. He stated that the complainant was examined at the said hospital on 30th June 2014. She was accompanied by her mother. She complained of abdominal pains. She also claimed to have been sexually assaulted. Medical examination indicated that the complainant was pregnant. Her external genitalia was normal. The hymen was absent. She also had a urinary tract infection. PW3 produced the Post Rape Care Form in evidence. PW4, Dr. Maundu, based at the Police Surgery, examined the complainant on 1st July 2014. He noted that she did not have any injuries on her external genitalia. Her hymen was absent. There was presence of a white vaginal discharge.

PW5, AP David Chege was stationed at the D.O's office. On 30th June 2014, he received instructions from his superior to transfer a suspect who was brought in the previous night by PW2 to Riruta Police Station. The said suspect was the Appellant. The Appellant was alleged to have defiled and impregnated a minor. He escorted the Appellant to Riruta Police Station. PW6, Ann Kimani was an analyst at the Government Chemist. On 16th April 2015, she received buccal swabs collected from the Appellant. The police also came with the complainant's child. She was required to do a paternity test to determine whether the Appellant was the father of the complainant's child. After her analysis, she concluded that the Appellant was the father of the said child. She produced a report of the same in evidence.

This case was investigated by PC Janet Mackenzie (PW7) attached at Riruta Police Station. She stated that on 30th June 2014, the Appellant was brought to the station by PW4 on allegations of defilement. They were accompanied by the complainant. The Appellant was alleged to have defiled the complainant on 23rd May 2014. The complainant was pregnant. She took the witnesses' statements. The complainant gave birth on 21st January 2015. She took the Appellant to the Government Chemist where his buccal swabs were collected. She later took the complainant and her child to the Government Chemist. A paternity test was conducted which revealed that the Appellant was the father of the complainant's child. PW6 produced in evidence the complainant's clinic card which established that she was fifteen (15) years of age when the sexual assault occurred.

The Appellant was put on his defence. He gave an unsworn statement. He stated that PW1 and PW2 came to his house on 29th June 2014. PW1 claimed that she had been to his house. PW2 asked him to accompany him to the police station. They went to the D.O's office. The Appellant said that PW2 reported that he had sexually assaulted PW1. PW2 asked him to pay Ksh.200,000/-. He was later charged with the present offences. He denied sexually assaulting 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 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 to the required standard of proof beyond any reasonable doubt. This court has re-evaluated the facts of this case. It has also considered rival submissions made by parties to this appeal. 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, the complainant stated that she was born in 1998. She was fifteen (15) years old at the time of the incident. She was in class six. Her mother (PW2) told the court that she was born in 1998. The complainant's clinic card was produced in evidence. The same confirmed that the complainant was fifteen (15) years of age at the time the sexual assault occurred. The same was not challenged by the Appellant on cross-examination or in his defence statement. **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.**

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 that she met the Appellant a week prior to the sexual assault incident. He asked her to be his friend but she declined. When she met the Appellant again, he forcefully dragged her to his house and proceeded to insert his penis in her vagina. He afterwards chased her from the compound and warned her against telling anyone about the incident. The complainant stated that she was bleeding. She also experienced abdominal pains. She was not able to attend school due to the abdominal pains. The complainant did not inform anyone about the sexual assault incident. About a month later, she complained of abdominal pains. Her brother took her to hospital where she discovered that she was pregnant.

The complainant was examined approximately one month after the sexual assault occurred. Both PW3 and PW4 stated that the complainant's hymen was absent. She had vaginal discharge. The Post Rape Care form produced in evidence indicated that the complainant had pus cells in her vagina. She was also pregnant. This court is of the view that the medical evidence established that the complainant was penetrated. Taking into consideration the P3 form and Post Rape Care Form produced in court, as well as the complainant's testimony, this court is of the opinion 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 complainant told the court how the Appellant sexually assaulted her. When she discovered that she was pregnant, she went to inform the Appellant of the same. She stayed at the Appellant's house for two days. When she went back home, PW2 inquired where she had been. The complainant took PW2 to the Appellant's house. PW2 stated that the Appellant admitted that the complainant stayed at his house. The Government Analyst (PW6) testified that after conducting a DNA test on the complainant's child, her findings indicated that the Appellant was the father of the complainant's child. The positive paternity test corroborated the complainant's testimony that indeed the Appellant defiled her. The Appellant, in his submission admitted that he knew the complainant. He stated that he stayed with the complainant for a while and that he accepted responsibility when she got pregnant. There is therefore no doubt that the Appellant was the perpetrator of the sexual assault. The Appellant submitted that he thought the complainant was an adult. He did not however adduce any evidence to prove that the complainant deceived him into thinking that she was an adult. His defence was merely evasive and did not dent the otherwise strong culpatory evidence adduced by prosecution witnesses.

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(3) of the Sexual Offences Act provides for a minimum sentence of twenty (20) years imprisonment for any person convicted of defiling a child aged between twelve (12) and fifteen (15) years. 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 6TH DAY OF JUNE 2019

L. KIMARU

JUDGE