



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.10 OF 2018

(An Appeal arising out of the conviction and sentence of Hon. B. Ojoo (SPM) delivered on 19th December 2017 in Kibera Criminal Case No.1210 of 2010)

DANIEL ODINDO ADEM.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Daniel Odindo Adem was charged with **defilement** contrary to **Section 8(1)** as read with **Section 8(4)** of the **Sexual Offences Act**. The particulars of the offence were that on diverse dates between 8th August 2008 and 30th April 2009 at Ongata Rongai Township in Kajiado County, the Appellant intentionally and unlawfully committed an act by inserting his male genital organ (penis) into the female genital organ (vagina) of SAO(complainant), a child aged 17 years, an act which caused penetration. 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 between the same dates and in the same place, the Appellant intentionally and unlawfully committed an indecent act by touching the complainant's 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 on the main count of **defilement**. He was sentenced to serve fifteen (15) years imprisonment. The Appellant was aggrieved by his conviction and sentence. He has filed an appeal to this court challenging the same.

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 in the absence of cogent evidence that established his guilt to the required standard of proof. He pointed out that the ingredients to establish the charge, especially penetration and the age of the complainant, were not established to the required standard of proof. He took issue with the fact that the trial court had relied on uncorroborated evidence of the complainant to convict him yet her evidence was contradictory and inconclusive. He was aggrieved that his defence was not taken into account when the trial court reached the impugned decision. He faulted the trial magistrate for sentencing him to serve a manifestly harsh and excessive custodial sentence. In the premises therefore, the Appellant urged the court to allow the appeal, quash the conviction and set aside the custodial sentence that was imposed on him.

During the hearing of the appeal, this court heard oral rival submission made by Mr. Angaya for the Appellant and Ms. Akunja for the State. Mr. Angaya submitted that the age of the complainant was not established. During trial, the court ordered the complainant's age to be assessed. The court further ordered for DNA analysis to be done to determine the paternity of the child born of the complainant. This was not done. No reports were presented to court to indicate the age of the complainant or the paternity of the complainant's child. No doctor's evidence was adduced to establish whether or not there was penetration. Learned counsel for the Appellant submitted that in the course of the trial, the complainant had indicated severally that she wished to withdraw the complaint against the Appellant. The Appellant took issue with the fact that although the trial court was aware of the complainant's intention to withdraw the charges, the trial court did not recall the complainant to confirm whether her intentions should be given effect to. The Appellant finally submitted that the trial court erred in relying on **Section 124** of the **Evidence Act** to convict the Appellant yet it was clear that the complainant was no longer interested in pursuing the case. Learned counsel urged the court to allow the appeal.

Ms. Akunja for the State conceded to the appeal. She submitted that the only three witnesses were called to testify in the case unfortunately did not establish the ingredients required to prove the offence of defilement. A medical report was not adduced into evidence. Age assessment was ordered to be done but the same was not produced in court. The Appellant's defence was not considered. In his defence, the Appellant had stated that the lodging of the complaint by the complainant was motivated by a vendetta. Crucial witnesses who should have testified were not called. In the premises therefore, she urged the court to allow the appeal.

Before giving reasons for its decision, it is imperative that the facts of this case be set out albeit briefly. The complainant in this case told the court that she was fifteen (15) years in 2007 when she enrolled in a school called [particulars withheld] at Ongata Rongai. She joined the school as a Form One student. She was a day scholar. She told the court that she was from a single parent family. Her mother had problems in paying school fees. In 2008, the Appellant, who was a Director at the school, acceded to her request to join the boarding section at the school. She testified that on 8th August 2008, the Appellant approached her for a sexual relationship. She accepted the approach because the Appellant had promised to pay her school fees. She testified that the Appellant severally had sexual intercourse with her over a period of ten (10) months. During this time, she conceived twice. Her first pregnancy resulted in a miscarriage. Her second pregnancy went to term. She gave birth to a child. She told the court that during this period, she moved from the school and started living with the Appellant as husband and wife.

Later, the complainant's mother reported the incident to the Children's Officer at Ngong. From her testimony, it was apparent that during the period, she dropped out of school and started doing menial work. She had disagreed with her mother. She told the court that she contacted the Appellant who assisted her to be admitted to another school in the area. She stayed in the school for a term before she was sent home due to lack of school fees. She went back to the complainant who assisted her to lodge a complaint with the Cradle, an NGO dealing with children's rights. A complaint was lodged by the complainant at the Cradle with the assistance of the Appellant against the complainant's mother. It was apparent from her testimony that it is this complaint that led to the complainant's mother filing a complaint with the Children's Officer and later with the police.

PW3 Wellfon Simwa Busaka, a Children Officer based at Ngong testified that in June 2009, he received a complaint from the complainant's mother DOA. The mother reported her daughter missing. She told him she suspected that the Appellant had eloped with her daughter. They were living together despite the fact that the mother wanted the complainant to complete her education. PW3 investigated the case and noted that the information that he had been given by the mother of the complainant did not tally with the information that he got from the complainant. The complainant told him that it was her mother who had requested the Appellant to accommodate her at the school. On further investigation, he discovered that the age of the complainant was eighteen (18) years as per the age assessment report that he received from Ngong Sub-County Hospital. Since he had now established that the complainant was above the age of eighteen (18) he realized that the matter was beyond his purview. He advised the mother of the complainant to report the matter to the police.

From what subsequently transpired, it was evident that the mother of the complainant took up his advice and reported the matter to the police. The police commenced investigations. They arrested the Appellant. He was charged. However, during the hearing of the case, despite several adjournments that ran to several years, the investigating officer did not turn up in court to testify in the case. The only police officer who testified is PW2 Cpl Joseph Wanyama, the Arresting Officer. The failure by the investigating officer to testify in the case meant that crucial witnesses were not called to testify in the case. For instance, although it was claimed that the complainant's age was assessed, no such report was presented to court to enable the court determine the complainant's age at the time of the alleged incident. Further, although it was alleged that the complainant was seen by a doctor, no medical report was produced into evidence. It was further claimed that both the Appellant's and the complainant's DNA samples were taken to determine the paternity of the child born of the complainant. No DNA report was produced into evidence. The complainant's mother, a crucial witness, could not testify in the case because at the time the case was fixed for trial, she had passed away. This meant that there were gaps in the prosecution's case that weakened the case.

When he was put on his defence, the Appellant denied the charge. He attributed his travails to a vendetta against him by the complainant's mother. He explained that during the entire period, he had tried his best to assist the complainant who had initially indicated to him that she was an orphan. He denied the claim that he had sexually assaulted the complainant.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced before the trial court so as to reach its own independent determination whether or not to uphold the conviction of the Appellant. As was held by the Court of Appeal in **Njoroge -Vs- Republic [1987] KLR 19 at P.22:**

“As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect (see Pandya v R [1957] EA 336, Ruwalla v R [1957] EA 570)”.

In the present appeal, the issue for determination by this court is whether the prosecution established the case against the Appellant on the charge of **defilement** contrary to **Section 8(1)** as read with **Section 8(4)** of the **Sexual Offence Act** to the required standard of proof beyond any reasonable doubt.

This court has carefully re-evaluated the evidence adduced before the trial magistrate's court. It has also considered the grounds of appeal put forward by the Appellant. It has further considered the submission made before this court during the hearing of the appeal. For the prosecution to establish the charge of defilement, it was required to prove three essential ingredients: penetration, the age of the victim and the identity of the perpetrator. In the present appeal, it was clear to the court that the prosecution failed to establish two essential ingredients to prove the charge of defilement. The first element that was not proved is the age of the complainant. Although the complainant testified that she was sixteen (16) and seventeen (17) years respectively at the time of the alleged sexual assault, PW3 testified that from the assessment that he had requested, the complainant was over the age of eighteen (18) years at the time of the alleged incident. During trial, the court ordered for an age assessment to be done. The age assessment report was not produced into evidence. In the absence of concrete proof in regard to the age of the complainant, the trial court could not reach a finding that the complainant was a child within the meaning of the term as defined under **Section 2** of the **Children Act**.

Secondly, other than the evidence of the complainant, the doctor was not called to testify in the case to prove penetration. Although it is not necessary for the doctor's evidence to be adduced where it is alleged that a child was born out of a sexual assault, in the present case, a DNA test was ordered to be undertaken to determine the paternity of the child. Unfortunately, this evidence was not produced in court. The complainant's claim that she had sexual intercourse with the Appellant was discounted by the Appellant who claimed that the complainant conceived the child with another man. The DNA evidence would have been conclusive proof that the Appellant indeed sired the child born of

the complainant. In the absence of that evidence, this court is unable to make conclusive finding that penetration was proved to the required standard of proof. The lack of medical evidence further weakens the prosecution's case.

Thirdly, the evidence adduced by the complainant could not by itself, in the absence of corroboration secure the conviction of the Appellant. This was because the complainant gave contradictory evidence. From this court's re-evaluation of the evidence, it is not clear from the complainant's testimony whether it was the complainant who sought the Appellant's help due to her disagreement with her mother or due to their economic circumstances. On the one hand, the complainant seeks to portray the Appellant as a sexual predator, while on the other hand, it was evident that the Appellant was assisting her at her own request with the dispute with her mother. This raised reasonable doubt in this court's mind that the complainant was not being entirely truthful in what she told the court. The option of invoking the **Proviso to Section 124 of the Evidence Act** was not therefore available to the court. Further, it was evident from the proceedings of the trial court that on several occasions, the complainant requested the court to withdraw the charges against the Appellant. This court wondered why the request was not given a consideration taking into account that the complainant was over 18 years old at the time. The reluctance by the police to avail crucial witnesses was a clear pointer to the lack of enthusiasm by the prosecution to prosecute the case due to the doubtful nature of the evidence that they sought to present to court against the Appellant.

Taken in totality, it was clear to this court that reasonable doubt was raised in regard to the charges that were laid against the Appellant. The Appellant's defence to the effect that the charges may have been motivated by vendetta and vengeance cannot be ruled out. It was well that when the prosecution was confronted with these set of facts and circumstances, it did the right thing to concede to the appeal.

In the premises therefore, this court finds merit with the Appellant's appeal. The same is allowed. His conviction is quashed. The Appellant is acquitted of the charge of defilement. He is ordered set at liberty forthwith and released from prison unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 11TH DAY OF JULY 2019

L. KIMARU

JUDGE