



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.126 OF 2018

(An Appeal arising out of the conviction and sentence of Hon. S. Jalang'o - SRM

delivered on 9th July 2018 in Makadara CM. CR. Case No.5760 of 2012)

MKK.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, MKK 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 9th September 2012 at about 4.00 p.m. in Kayole within Nairobi County, the Appellant intentionally and unlawfully committed an act which caused penetration with his male organ (penis) into the female organ (vagina) of MM (hereinafter referred to as the complainant), a girl aged twelve (12) years. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was convicted as charged. 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 yet there were glaring contradictions from the prosecution witnesses which raised doubt as to the victim's actual age. The Appellant faulted the trial magistrate for failing to take into consideration the fact that the testimony of the complainant had not been sufficiently corroborated and therefore ought not to have formed the basis of the trial magistrate's decision to convict him. The Appellant took issue with the fact that the trial court in its decision ignored the Appellant's alibi defence thereby arrived at the erroneous determination that the prosecution had established its case to the required standard of proof beyond any reasonable doubt. The Appellant was aggrieved that the trial magistrate failed to appreciate that the evidence adduced by the prosecution witnesses were contradictory and inconsistent and therefore ought not to have been the basis of his conviction. He was of the view that the entire judgment was against the weight of all the evidence that was adduced during trial. In the premises therefore, the Appellant urged the court to allow the appeal, quash the conviction and set aside the sentence that was imposed upon him.

During the hearing of the appeal, this court heard oral rival submission made by Mr. Mwinzi for the Appellant and by Mr. Momanyi for the State. Mr. Mwinzi urged the court to consider the written submission that the Appellant had filed. He further made oral submission urging the court to find that the prosecution failed to establish the charge of **defilement** that was brought against the Appellant to the required standard of proof. Mr. Momanyi for the State opposed the appeal. He submitted that the prosecution had adduced sufficient cogent and credible evidence which established the Appellant's guilt. The ingredients of the charge of defilement were established to the required standard of proof.

This court shall revert to the arguments made on this appeal after briefly setting out the facts of this case. The complainant in this case is the step-daughter of the Appellant. The Appellant lived with the complainant and her mother PW2 CWM at Kayole Estate. PW2 testified that on 9th September 2012 at around 4.00 p.m., she left the Appellant in the house while she went to look for food. She alleged that at the time the Appellant was drunk. She requested the complainant to accompany her to the bus stage. On reaching the bus stage, she instructed the complainant to go and play with her friends and await her return. According to the complainant, she did as she was told by her mother. She played with her friends, PW3 BA and PW4 CK for a while before she decided to go home and watch a certain programme on the television. She stated that while seated watching the TV, the Appellant came to where she was and started showing her some photographs of nude men and women from his phone. He then grabbed her and took her to the bedroom. He removed her clothes before he forcefully had sexual intercourse with her. She was graphic in her description of what transpired. She stated that **"he inserted his penis inside my vagina and after five minutes some white stuff was ejected from his penis. He then said that since my mother had gone to prostitute he will deal with me and that I will see."**

The complainant testified that the Appellant was drunk at the time. She was able to persuade him to let her go. She made good her escape from the house and met her friends PW3 and PW4. PW3 and PW4 testified that the complainant went to where they were and was extremely distressed. She was crying. She told them that her father (the Appellant) had raped her. The complainant wanted them to escort her to Soweto Police Post. Since they did not know the place, they suggested to the complainant that a report be made to the Area Chief instead. They went to the Area Chief and made the report. The mother of the complainant (PW2) was called by the Chief. So as not to alarm her, the Chief told her that the complainant had been hit by a stone. When PW2 reached the Chief's office, she was told what had transpired. She was advised to take the complainant to hospital. At that time, an ambulance had been called.

She was taken to Medecins San Frontieres (MSF) Clinic at Mathare. On arrival at the clinic, she was examined by PW5 Purity Kajuju, a Clinical Officer. She made the following observations:

“She was however crying and sad as she narrated the story. She talked about fear of pain. She had not changed her clothes, the clothes were however not torn. On genital exam her outer genitalia was normal in structure with stains of clear mucoid fluid. The vaginal opening and inner labial walls were very red with areas of bleeding, multiple fresh bruises were seen. She also had a tear at the lower vaginal entry which was bleeding when touched. The hymen was intact. The anal region was normal.”

The post rape care form and the medical examination documents were produced into evidence.

The complainant was further seen by PW6 Dr. Joseph Maundu based at the Police Surgery. She was seen on the following day i.e. 10th September 2012 by the doctor. She was referred for examination by Soweto Police Station. This is what the doctor observed:

“The external genitalia was inflamed and had bruises which meant that force and friction had been applied.”

The doctor further noted that the labias were reddish and bruised. He however noted that the hymen was intact. The P3 form was produced into evidence. The case was investigated by PW7 IP Florence Ouma after conclusion of her investigations, found there was a case for the Appellant to be charged with the offence that he was convicted.

When he was put on his defence, the Appellant denied the charge. He denied that he was at home on the material day of 9th September 2012. He told the court that he had travelled to his rural home in Konza on an errand that he had been sent by his mother. He returned home later that evening and was surprised when he was accused of having defiled the complainant. In regard to his alibi that he was away on the material day, the Appellant called his mother CMK who testified as DW2 and his brother WNK who testified as DW3 and a taxi driver DW4 Zacharia Mwario who all corroborated the Appellant's testimony that he was away on the material day and had arrived home at Kayole Estate after 9.00 p.m. In essence, the Appellant was saying that he was away from the scene of crime when the offence is said to have been committed.

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(2)** of the **Sexual Offences 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 in light of the Appellant's grounds of appeal and the submission made by the parties in support of their respective opposing positions. For the prosecution to prove its case on the charge of **defilement**, it was required to establish the following three elements: that there was penetration. In the case of penetration, the same need not be complete but could be partial; the age of the victim and finally the identity of the perpetrator.

In the present appeal, the prosecution was able to establish the age of the complainant. PW2 the mother of the complainant produced a birth certificate which indicated that the complainant was born on 1st March 2012. At the time of the alleged offence, she was ten (10) years. The complainant herself testified that she was twelve (12) years. She however said that she was born in the year 2002. The two medics who examined the complainant gave the apparent age of the complainant at ten (10) years. Indeed, PW5 Purity Kajuju wrote in her notes that the complainant's date of birth was 28th February 2002. This was information that she was obviously given to her either by the complainant or her mother.

The Appellant took issue with this evidence. It was the Appellant's case that the prosecution failed to establish to the required standard of proof the age of the complainant and therefore the trial magistrate could not have conclusively reached the determination on the age of the complainant. This court takes the view that the evidence adduced by the prosecution, especially the birth certificate had indeed established to the required standard of proof beyond any reasonable doubt the age of the complainant at the time the offence is alleged to have been committed. The complainant was 10^{1/2} years at the material time. This court while acknowledging that the complainant's testimony may have given an impression that the complainant was older than her actual age, the documentary evidence proved otherwise. This court holds that the contradictions that became apparent during trial as regard the age of the victim were minor and did not in any way raise any issue that would raise reasonable doubt that would be resolved in the Appellant's favour.

The second issue that the prosecution was supposed to establish was penetration. This court is guided by the definition of penetration under **Section 2** of the **Sexual Offences Act** which states:

““Penetration” means the partial or complete insertion of the genital organ of a person into the genital organs of another person.”

As to whether penetration is established by partial or complete insertion of the male genital organ into the female genital organ, the Court of Appeal in **Erick Onyango Ondeng' v. Republic [2014] eKLR** stated thus;

“We agree with the first appellate court that to establish defilement, it is not necessary that the hymen must be broken; even partial penetration of the female genital by male genital will suffice to constitute the offence. In TWEHANGANE ALFRED VS UGANDA (supra) the Uganda Court of Appeal expressed the same view as follows;

“In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured.”

In the present appeal, the prosecution relied on the testimony of the complainant and the two medical reports to establish penetration. The complainant testified that she was sexually assaulted. After the sexual assault she was immediately taken to hospital and was seen by PW5 who established that indeed she had been sexually assaulted. There were bruises on her vagina which clearly indicated that she was sexually assaulted. Although she noted that her hymen was intact, this court finds that there was partial penetration thus establishing penetration in terms of the definition of **Section 2** of the **Sexual Offences Act**. If there was any doubt that indeed the complainant was sexually assaulted, that doubt was removed when the complainant was seen on the following day by PW6 Dr. Maundu who arrived at the same finding with PW5. It is in that regard that this court holds that the prosecution established to the required standard proof beyond any reasonable doubt that indeed the complainant was penetrated.

As regard the identity of the perpetrator, the complainant was known to the Appellant. Indeed, the Appellant and the complainant lived in the same house. The Appellant is the complainant's step-father. The complainant narrated how on the material day as she was watching a programme on television, the Appellant grabbed her, took her to the bedroom, undressed her and then sexually assaulted her. Immediately after the sexual assault, the complainant rushed out of the house and told of the incident to PW3 and PW4. She was escorted to the Chief's office where her mother PW2 was summoned. She was then taken to hospital where she was medically examined. The examination revealed that she had been sexually assaulted. The Appellant denied that he was at the house at the material time. Indeed, he gave an alibi defence to the effect that he had travelled to his rural home on an errand he had been sent by his mother. The Court of Appeal in **Athuman Salim Athuman v Republic [2016] eKLR** held thus in regard to how the court should treat the alibi defence put forward by an accused:

“It is trite that by setting up an alibi defence, the Appellant did not assume the burden of proving its truth, so as to raise a doubt in the prosecution's case. (SSENTALE V. UGANDA [1968] EA 365). The burden to disapprove the alibi and to prove the Appellant's guilt lay throughout on the prosecution (WANG'OMBE V. REPUBLIC [1976-80] 1KLR 1683). As was stated in R. V. CHEMULON WERO OLANGO (1937) 4 EACA 46, the purpose of the defence of alibi is to account for so much of the time of the transaction in question as to render it impossible for the accused to have committed the imputed act.”

In the present appeal, on re-evaluation of the evidence, it was clear to this court that the evidence of the complainant and PW2 placed the Appellant at the scene of crime on the material day the offence was committed. PW2 testified that she left the Appellant in the house when she left the house to fetch for food. The Appellant was drunk at the time. She was escorted out of the house by the complainant. The complainant later returned to the house and was sexually assaulted by the Appellant. Later that night, the Appellant was arrested while in the house by the police. This court holds that the prosecution displaced the alibi defence adduced by the Appellant. The alibi defence of the Appellant can be concluded to be self-serving. Two of his defence witnesses are his mother and brother. They cannot be expected in the circumstances to be impartial. They would give evidence to support their kin in a bid to rescue him from facing conviction from the act that he committed.

This court therefore holds that the prosecution was able to establish to the required standard of proof beyond any reasonable doubt that it was the Appellant who sexually assaulted the complainant. He was the perpetrator of the offence. The evidence adduced by the complainant, PW2, PW3 and PW4 was cogent, consistent, credible and corroborative in all material respects in regard to the circumstances in which the offence was committed.

In the premises therefore, this court holds that the Appellant's appeal both on conviction and sentence lack merit and is hereby dismissed. On sentence, were it not for the Supreme Court decision of **Francis Karioko Muruatetu v Republic [2017] eKLR**, this court would have interfered with the same with a view to enhancing it. As it is, this court cannot interfere with the exercise of sentencing discretion by the trial magistrate. The conviction and the sentence of the trial magistrate is hereby confirmed. It is so ordered.

DATED AT NAIROBI THIS 2ND DAY OF OCTOBER 2019

L. KIMARU

JUDGE