



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.84 OF 2018

NZIVO MUTUKU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal arising out of the conviction and sentence of Hon. O. William Oketch SRM

delivered on 31st May 2017 in Makadara CM Cr. Case No. 1505 of 2015)

JUDGMENT

The Appellant, Nzivo Mutuku 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 11th May 2015 at Mathare [particulars withheld] within Nairobi County, the Appellant intentionally caused his penis to penetrate the vagina of SO, a child aged fourteen (14) 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 11th May 2015 at Mathare [particulars withheld] within Nairobi County, the Appellant intentionally touched the vagina of SO, a child aged fourteen (14) years with his penis. 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 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 the trial court convicted him on the basis of a non-existent charge. He faulted the trial court for contravening the provisions of **Section 89(5)** of the **Criminal Procedure Code**. He took issue with the trial court for his conviction stating that his plea was unequivocal. He complained that the trial magistrate failed to observe the rules of evidence as enshrined in the **Evidence Act**. He asserted that the prosecution's evidence was not sufficient to sustain a conviction. He was of the view that the trial court failed to consider his defence in arriving at its decision. He pointed out that the prosecution failed to call material witnesses to prove its case. Finally, he was aggrieved that his constitutional rights outlined under **Articles 25(c), 27(1), 48, 20(1) & (2) and 50(1) & (2)** of the **Constitution** were violated.

During the hearing of the appeal, the Appellant presented to court written submission in support of his appeal. He urged this court to allow his appeal. Mr. Momanyi for the State opposed the appeal. He made oral submission to the effect that the prosecution established its case against the Appellant to the required standard of proof beyond any reasonable doubt. He stated that the complainant narrated in detail how the Appellant took her to his house and sexually assaulted her. He asserted that the complainant's mother (PW3) told the court that she found the complainant at the Appellant's house. He averred that the complainant's age was proved by the immunization card adduced in evidence. The complainant was fourteen (14) years of age at the time of the sexual assault. He submitted that the medical evidence established the element of penetration to the required standard of proof beyond any reasonable doubt. He pointed out that the Appellant was not a stranger to the complainant. They had been neighbours for close to five (5) years before that fateful day of 11th May 2015. He maintained that the Appellant's identification was safe. In the premises he urged this court to dismiss the Appellant's appeal.

The facts of the case according to the prosecution are as follows. The complainant, S.O., told the court that she was fourteen (14) years of age at the time of giving evidence. She was in Class Seven at [particulars withheld] School. On 11th May 2015, at about 1.00 pm, she was having lunch with her sister at their house. Her sister left the house after they had finished eating. A man came to the house to repair electricity. The complainant stated that the said man was Mutuku, the Appellant. He was a neighbour. He asked her to accompany him to his house. When they got to the house, the Appellant asked to her to lie on the bed. He undressed her. He also removed his clothes. He then proceeded to insert his penis in her vagina. She felt pain. The complainant stated that she asked the Appellant to leave her alone. He however sexually assaulted her. She afterwards heard children outside calling out her name. She stated that the Appellant opened the door and chased them away. He locked her in the house and left. After about an hour, her mother came to the Appellant's house and rescued her.

The complainant's mother, AA (PW3), stated that she came back home from work on the material day of 11th May 2015 at about 3.00 p.m. She did not find the complainant at the house. Her younger child told her that the Appellant had locked the complainant inside his house. The Appellant was her neighbour. She went to the Appellant's house and found the door was latched from outside. She saw the Appellant walking away. She opened the door and went inside the house. She found the complainant lying on the Appellant's bed. The complainant informed her that the Appellant asked her to go to his house where he proceeded to sexually assault her. PW3 raised an alarm. A crowd gathered to find out what the problem was. The Appellant suggested that they amicably settle the matter. She took the complainant to hospital for medical examination.

PW2, Irene Nyagwachi, was a clinical officer from Medicins Sans Frontieres Clinic located at Eastleigh in Nairobi. She adduced evidence on behalf of her colleague Purity Kajuju who examined the complainant on 11th May 2015. Purity Kajuju, a clinical officer at the said hospital was not able to attend court to adduce evidence. The Appellant stated that he did not object to PW3 giving evidence on her behalf. PW3 told the court that upon medical examination, the complainant had no visible physical injuries. There was presence of a whitish vaginal discharge. Her vaginal walls were reddened. Her hymen was absent with a fresh tear at 3 and 9 O'clock position. There was an old tear at 6 O'clock. She produced a Post Rape Care Form as well as a medical report in evidence. The complainant was examined by PW4, Dr. Maundu on 12th May 2015. He stated that the complainant alleged to have been sexually assaulted on the previous day. He told the court that the complainant's labia was inflamed. There was presence of a whitish discharge. Her hymen was absent with fresh and old tears. He testified that the complainant was penetrated due to the presence of the fresh tears.

PW5 PC Louis Kosgey, was the arresting officer. He was based at Muthaiga Police Station. He stated that on 12th May 2015 at about 9.30 a.m., the Appellant was escorted to the said police station by members of the public. He was alleged to have defiled the complainant. PW5 re-arrested the Appellant and put him in custody. This case was investigated by PW6, PC Leah Muthoni. She was present when the Appellant was brought to the police station by PW3 accompanied by members of the public. She recorded statements from the witnesses. The complainant narrated to her how the Appellant took her to his house and sexually assaulted her. The Appellant was a neighbour to PW3 and the complainant. PW3 found the complainant at the Appellant's house. The complainant had received treatment from Medicins Sans Frontieres Clinic. She escorted the complainant to the police doctor (PW4) for medical examination. PW4 issued the complainant with a P3 form. PW4 confirmed that the complainant had been sexually assaulted. She afterwards charged the Appellant with the present offences. PW6 produced the complainant's clinical card in evidence which indicated that the complainant was born on 24th February 2002.

The Appellant was put on his defence. He gave an unsworn statement. He stated that he was at his house with his daughters on the material day of 11th May 2015. At about 11.30 a.m., the complainant came to his house to play with his daughter. An hour later, his daughter started preparing lunch. He decided to go and seat outside within the compound where his house is situate. The complainant's mother (PW3) approached him and inquired on the whereabouts of the complainant. He told PW3 that the complainant was at his house. PW3 went to his house and left with the complainant. The following day, at about midday, two women came to his house. They informed him that he was required at Muthaiga Police Station. They went to the police station where he was arrested. The Appellant 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 [1982 – 88] 1 KAR 1134** 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(3)** of the **Sexual Offences Act** brought against the Appellant, to the required standard of proof beyond any reasonable doubt. This court has re-evaluated the facts of this case. **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.

The prosecution is required to establish three ingredients; the age of the complainant, the act of 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 fourteen (14) years of age at the time of giving evidence. She was in Class Seven. Her mother (PW3) told the court that she was born in February 2002. PW3 stated that the complainant was about thirteen (13) years of age at the time the sexual assault occurred. The complainant's clinic card was produced in evidence. The same confirmed that the complainant was thirteen (13) 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.**

This court now turns to the ingredient of penetration. **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 testified that the Appellant took her to his house. He placed her on his bed, undressed her and proceeded to insert his penis in her vagina. She asked him to leave her alone but he forced himself on her. The medical evidence adduced by PW2 and PW4 established that indeed the complainant's vagina was penetrated. PW2 stated that there was presence of a whitish vaginal discharge. She told the court that the complainant's vaginal walls had reddened. Her hymen was absent with a fresh tear at 3 O'clock and 9 O'clock positions respectively. She produced a Post Rape Care Form as well as a medical report in evidence. PW4 told the court that the complainant's labia was inflamed. There was presence of a whitish discharge. Her hymen was absent with fresh and old tears. He testified that the complainant

was penetrated due to the presence of the fresh tears. The medical evidence of the fresh hymen tears, reddened vaginal walls and inflamed labia corroborated the element of penetration as narrated by the complainant. The prosecution therefore did establish the ingredient of penetration to the required standard of proof beyond any reasonable doubt.

The third issue is whether the penetration was perpetrated by the Appellant. The Appellant was well known to the complainant. He was her neighbour. She referred to him by name. She informed her mother PW3 that it was the Appellant who sexually assaulted her. PW3 confirmed that the Appellant was a neighbour. She had known him for over five (5) years prior to that fateful day. PW3 told the court that she was informed that the complainant was at the Appellant's house. When she got to the Appellant's house, she found the house locked from the outside. She saw the Appellant walking away. She opened the latch on the door and got inside. PW3 found the complainant in the Appellant's house. She was lying on a bed. The complainant's evidence as well as that of PW3 clearly implicated the Appellant as the perpetrator of the sexual assault.

The Appellant in his defence stated that the complainant was at his house playing with his daughter. He stated that he had a dispute with a neighbour by the name '**Mama Grace**' who he claimed framed him in regard to the present offences. The said Mama Grace was neither a prosecution witness nor a party to this suit. This court is of the view that the Appellant's defence was merely evasive and did not dent the otherwise strong culpatory evidence adduced by prosecution witnesses connecting him with the sexual assault occasioned on the complainant. It was properly dismissed as being of no evidential value.

The Appellant in his grounds of appeal argued that the charge as drafted was fatally defective since the particulars of the charge failed to include the term "**unlawful**". This court is of the view that the omission of term "**unlawful**" did not in any way prejudice the Appellant in defending the case against him. In the present appeal, the complainant was thirteen (13) years of age at the time of the sexual assault. Any sexual act occasioned against a child of such an age would not be deemed lawful. The fact that the age of the complainant was stated in the charge sheet clearly shows that the sexual act was unlawful whether or not the word "**unlawful**" appeared in the charge sheet. Defilement cases involve minors who are not able to consent unlike rape cases which involve adults who are able to give consent to a sexual act. Therefore the issue of consent is irrelevant in the present appeal. This court is of the opinion that the omission of the term "**unlawful**" is curable under **Section 382** of the **Criminal Procedure Code**.

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 by parties to 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) 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. This court however notes that the Appellant was in remand custody for a while before he was released on bond, that period is taken into account as a result of which the Appellant's custodial sentence is hereby reduced to eighteen (18) years from the date of his conviction *i.e.* 31st May 2017. It is so ordered.

DATED AT NAIROBI THIS 9TH DAY OF OCTOBER 2019.

L. KIMARU

JUDGE