REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.65 OF 2018

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

RM delivered on 16th February 2018 in Kibera CM. S.O. Case No.54 of 2015)

PETER MATHENGE NJOROGE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Peter Mathenge Njoroge was charged with **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 21st September 2015 in Ongata Rongai Township within Kajiado County, the Appellant intentionally and unlawfully penetrated by inserting his male genital organ (penis) into the female genital organ (vagina) of one JNO, a girl aged fourteen (14) years. 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 21st September 2015 in Ongata Rongai Township within Kajiado County, the Appellant intentionally and unlawfully touched the vagina of JNO, a child aged fourteen (14) years. 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 serve thirty (30) years 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 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 consider his defence. In summary, he was aggrieved that he had been convicted on the basis of 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. He urged the court to take into consideration his defence, as he was not involved in the crime. Mr. Momanyi for the State opposed the appeal. In his oral submission, he stated that the prosecution had established its case on the charge of defilement to the required standard of proof. He stated that the Appellant had been positively identified by PW1 and PW2. According to Mr. Momanyi, the complainant's testimony was corroborated by the medial evidence of PW5 Auma Wangeci Nderitu, PW6 Dr. Kinuthia Edward and PW7 Dr. Joseph Maundu. He further submitted that the complainant's age was established by a clinic card produced in evidence. It stated that the complainant was born on 1st December 2000. This shows that at the time of the alleged offence, the complainant was fourteen (14) years of age. Mr. Momanyi was of the view that the Appellant's appeal out to be dismissed.

The facts of the case according to the prosecution are as follows: the complainant was at the material time aged fourteen (14) years. Her age was confirmed by the clinic card which was produced in evidence. It confirmed that she was born on 1st December 2000. The complainant was therefore fourteen (14) years at the time of the alleged offence. PW1 testified that on 21st September 2015 at about 5.00 p.m., she was at her cousin's house at [particulars withheld]. She received a phone call from the Appellant who asked to speak to her cousin, R. The Appellant asked them to go to his house. PW1 accompanied her cousin R to the Appellant's house. The Appellant's house was a one-roomed house. In the house was another man not known to the complainant. R left PW1 alone with the two men to go and purchase airtime. The Appellant sent the man to go and buy them sodas. PW1 was left alone with the Appellant. He returned with two sodas, one for the complainant and the other for the Appellant. PW1 was given a Fanta orange that was already opened. While she drunk her soda, the other man left. After a while she started feeling dizzy. She fell on the bed and passed out. When she regained consciousness, she was being carried to the police station. PW1 testified that she felt extreme pain in her private parts and inner thighs.

PW2 KOO, the complainant's father testified that on the material day, PW1 had not gone to school because of the teachers' strike. PW2 left

for work at 6.00 a.m. having instructed PW4, JNN to pick the complainant and her siblings later in the day, as she stayed within the neighbourhood. PW4 arrived at PW2's house at about 1.00 p.m. She was left to prepare food for the complainant's younger sibling. PW1 left having told PW4 that she was going to PW4's house. When PW4 reached her house, she did not find the complainant. PW4 went to PW3's house who is the complainant's grandmother. PW1 was not there.

At 3.00 p.m., PW3 called PW2 and informed him that the complainant was missing. PW2, the complainant's father returned from work. By that time, PW1 had not been found. It was about 5.00 p.m. when PW2 started looking for PW1 at her friend's houses. A friend to PW1 informed PW2 that PW1 had gone to the Appellant's house. PW2 also got a description of the Appellant as a motorcycle rider who worked within the area. PW2 accompanied by one Roy Ochieng his brother and RNN, PW3 went to a bus stop, where a motorbike that belonged to the Appellant had been parked. They were informed that the motorbike had been parked there since noon and the owner had not come for it.

At about 7.00 p.m., the Appellant arrived to pick his motorbike when he was arrested by PW2's brother Roy Ochieng. They ordered the Appellant to take them to his house. When they reached his house they found the door was locked with a padlock. When they reached the house they asked him to open the door, the room was dark. PW2 saw the complainant lying on the bed, she was still drowsy and could not walk. PW2 carried her and accompanied with the Appellant and PW3 they went to the police station where they recorded their statements and later went to Nairobi Women Hospital where the complainant was examined by Dr. Ngatia, who established that her hymen had been broken previously before the incident hence he recommended that the complainant be sent to the laboratory for a high vagina swab. The Post Rape Care (PRC) form was produced on his behalf by PW6, Dr. Kinuthia Edward.

On 24th September 2015, the complainant was also examined by PW7 Dr. Maundu, the police surgeon. He observed that PLW1 did not have any physical injuries, her private female genitalia was normal. Her hymen had been broken but not recently. She had a white discharge. He produced a duly signed P3 form which was adopted as an exhibit. PW7 also examined the Appellant on the same day. He observed that the Appellant did not have any physical injuries on his body. His male genitalia was normal, he had pus discharge from his private parts. He had gonorrhea as he had gotten treatment. Dr. Maundu produced ***Exhibit 7*** which was a P3 form for the Appellant. PW7 informed the court that the white discharge from the complainant could be a symptom of a gonorrhea infection, which was under incubation because women took longer to exhibit symptoms of gonorrhea.

PW5, Auma Wangeci Nderitu, a Government Analyst at the Government Chemist testified that she had received specimen that belonged to both the Appellant and the complainant for scientific analysis. She had received a High vaginal swab (HVS) from PW1 and a swab sample from the Appellant. She carried out an analysis and found that the High Vaginal Swab had both semen and spermatozoa. After a DNA analysis, she found a DNA profile hence coming to the conclusion that the high vagina swab had a partial DNA profile matching the DNA profile from two of the Appellant's specimen.

PW8, PC Erickson Nyamwenga was assigned to investigate this case. After concluding his investigations, he formed the opinion that a case had been made for the Appellant to be charged with the offence.

When the Appellant was put on his defence, he denied committing the offence. He informed the court that he was a motorcycle rider and worked at [particulars withheld], Ongata Rongai. He stated that on the material day, before he left his house for work, a girl known to him as he used to see the girl at a club in Rongai had knocked at his door. She seemed to be intoxicated and wanted a place to sleep as she was scared of going home. The Appellant stated that he allowed her to sleep at his house. He left for work. At 5.00 p.m., he was at his work station when a man not known to him asked him the whereabouts of PW1. He agreed to take him to his house where he had left the complainant sleeping. At his house, PW2 appeared and claimed that he was the complainant's father and he had been looking for her. He was then taken to the police station and he was shocked by the charge since he had not defiled PW1.

This being a first appeal, it is the duty of this court to subject the evidence adduced before the trial court to fresh scrutiny and evaluation before reaching its own independent determination whether or not to uphold the conviction of the Appellant. In doing so, this court is required to bear in mind that it neither saw nor heard the witnesses as they testified and cannot therefore make a comment regarding the demeanour of the witnesses. (See **Okeno vs Republic [1972] EA 32).** In the present appeal, the issue for determination by this court is whether the prosecution established its case to the required standard of proof beyond any reasonable doubt on the charge of **defilement**.

This work has re-evaluated the facts of this case. In a case of defilement, the onus is on the prosecution to establish that there was penetration, that the victim of the sexual assault was a child and finally, the identity of the perpetrator. In respect of the first ingredient, the prosecution relied on the evidence of the complainant that the Appellant inserted his penis into her vagina. The evidence of the complainant was corroborated by medical evidence of PW5, PW6 and PW7. Both PW6 and PW7 observed that PW1 did not have any physical injuries, her private female genitalia was normal. Her hymen had been broken but not recently. She had a white discharge. It was the evidence of PW5, the Government Analyst that established that the High Vagina Swab (HVS) was stained with semen and spermatozoa. A partial DNA profile matched the DNA profile generated from the Bucca Swab sample from the Appellant. **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 case, the prosecution established to the required standard of proof that indeed the complainant was penetrated. The fact that the complainant was penetrated was not disputed by the Appellant. He disputed that he was the one who committed the offence. This court therefore finds that the prosecution proved the first ingredient of penetration to the required standard of proof beyond any reasonable doubt.

As to whether the prosecution established that the complainant was a child at the time the alleged offence was committed, **Section 2(1)** of the **Sexual Offences Act**, the meaning assigned to ***"a child"*** is that provided under the **Children Act**. Under **Section 2** of the **Children Act**, a child is defined ***"as any human being under the age of eighteen years."*** The prosecution produced the complainant's clinic card which established that indeed the complainant was born on 1st December 2000. This meant that the complainant was fourteen (14) years at the time of the sexual assault. This court therefore finds that the age of the complainant at the time the offence was committed was also proved to the required standard of proof beyond any reasonable doubt.

As regard the identity of the perpetrator, the prosecution basically relied on the evidence of the complainant who testified that it was the Appellant who sexually assaulted her. In his defence, the Appellant claimed that the complainant implicated him in the offence for reason

that he had allowed the complainant to sleep in his house while he left for work. This court finds that PW1 and PW2 were consistent in the identification of the Appellant. The complainant was known to the Appellant prior to the sexual assault. If there was any doubt as to the perpetrator of the sexual assault, the same as removed when the Appellant's DNA was found in the semen retrieved from the complainant's vagina. Accordingly, this court finds that the prosecution identified the perpetrator of the offence to the required standard of proof satisfying the final ingredient of the offence. The Appellant drugged the complainant so as to subdue her when he defiled her. This is an aggravating circumstance.

The upshot of the above reasons is that the Appellant's appeal against conviction lacks merit and is hereby dismissed. As regards sentence, **Section 8(3)** of the **Sexual Offences Act** provides for a minimum sentence of twenty (20) years for any person convicted of defiling a child of between twelve (12) and fifteen (15) years at the time the offence was committed. The Appellant was sentence to serve thirty (30) years imprisonment by the trial court. That sentence is set aside and substituted by a sentence of this court. The Appellant is sentenced to serve twenty (20) years imprisonment with effect from 14th February 2018 when he was convicted and sentenced by the trial court. It is so ordered.

DATED AT NAIROBI THIS 8TH DAY OF OCTOBER 2019

L. KIMARU

JUDGE