



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION

CRIMINAL APPEAL 83 OF 2018

BETWEEN

IAI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the original conviction and sentence in Children's Court at Nairobi Cr. Case No. 24 of 2016 delivered by Hon. M.A. Otindo Ms, SRM on 23rd February 2018).

JUDGMENT

Background

1. The Appellant was charged with **defilement contrary to Section 8(2) of the Sexual Offences Act**. The particulars were that on 15th January, 2016 at Kibera Lindi in Langata District within Nairobi County unlawfully and intentionally caused his penis to penetrate that vagina of AA a child of 6 1/2 years old. In the alternative count he was charged with committing an **indecent act with a child contrary to Section 11(1) of the Sexual Offences Act** in that indecently touched the vagina of AA a child aged 6 1/2 years with his penis. At the conclusion of the trial, he was convicted of the main count and sentenced to serve life imprisonment.

2. Aggrieved by the conviction and sentence, he preferred the instant appeal. A Petition of Appeal was filed by his counsel, Angaya, Nasimiya & Associates on 18th May, 2018. Eight grounds of appeal were raised but which I have condensed into four, namely:

a. That the learned trial magistrate erred in law and fact in finding that the prosecution evidence was marred with contradictions and inconsistencies.

b. That charge of defilement was not proved beyond a reasonable doubt.

c. That the learned trial magistrate erred in law and fact by ignoring the legal principles governing circumstantial evidence and when to convict on the basis of such evidence.

d. That the sentence was harsh considering that the Appellant was a minor at the time of arrest.

Submissions

3. The Appellant through his counsel urged the court to quash the conviction and set aside the sentence. On conviction it was the submission of the counsel, Mr. Angaya that there was inconsistency in the evidence adduced in support of penetration. He submitted that **PW3**, Clinical Officer from Nairobi Women's Hospital stated that when he examined **PW1** she found that there was mucosal substance. However, **PW4**, a doctor from police surgery, found that there were no traces of mucosal substances. It was the latter's opinion that the genitalia had been cleaned. She further found that the offender used a condom. This examination was done three days later which found the genitalia was normal and that her hymen was intact. It was therefore his submission that there was no medical evidence to support the allegation of penetration.

4. Counsel for the Respondent, Miss Nyauncho opposed the appeal on conviction. She contended that there indeed was penetration as demonstrated by the evidence of **PW3** and **PW4** who stated that **PW1**'s genitalia was hyperemic and widened. As such, she submitted that the evidence was sufficient to support a conviction.

5. On Sentence, counsel for Appellant submitted that given that the Appellant was 17 years of age at the time of arrest, the sentence was excessive. She urged the court to consider the authorities of **JKK v R (Nyeri) Criminal Appeal number 11 of 2011[2013]eKLR and CMK v R [2015]eKLR**.

6. Miss Nyauncho conceded to the appeal on sentence. It was her submission that **Section 191(5) of the Children's Act** was instructive in this regard. That the section accords courts discretion to determine sentences other than the prescribed mini for a minor. She further referred the court to the case of **RKS v R [2018]eKLR** which cited the decision in **R v Dennis Kimi Cheruiyot [2014] eKLR** to buttress the submission.

EVIDENCE

7. **PW1 AAB**, the complainant then aged eight years in her testimony stated that she was playing outside with her friends when the Appellant called her. She said she knew the Appellant who lived in their neighborhood. She also testified that her friends knew the Appellant well. That it was not uncommon for him to send her. He told her to come to the house where he was alone then directed her to go to a bed. This bed, according to her, was located in the sitting room. He proceeded to remove both his and her clothes and defiled her. She however did not scream or raise alarm. She then went home and told her mother. She was taken to Nairobi Women's hospital for treatment.

8. **PW2 FT** the father to PW1 testified that on the fateful day at around 6.00 pm he was at home with his wife while his children were playing outside. His sons went back to the house as it was drizzling but PW1 did not. So he sent the boys to look for her. They returned with her. She had a balloon which the parents asked where she had gotten it from. After closely interrogating her, PW1 owned up and said that she had been called by the Appellant whom she referred on as I to his house where he defiled her and thereafter gave her the balloon. The Appellant's family had rented out the house where PW1's family lived. PW1's parents together with a neighbor accompanied the Appellant to his mother's house. He was asked why he defiled the PW1 and he asked PW1's parents to take the action they wished. They then all went to the police station where a report was made and the Appellant was locked up. Both PW1 and the Appellant were later taken to hospital.

9. **PW3, Kinuthia Edward Mbugua**, a Clinical Officer from Nairobi Women's Hospital examined **PW1** on 15th January, 2016 at about 6.00 pm. It was found that her hymen was hyperemic, widened and tender. There was redness and injury. As well when they did a urine test they found high levels of epithelial tissues which had unusually high levels of pus. It was in his opinion that the findings were the result of an aggressive process. He found the results consistent with penetration. On cross-examination, he confirmed that the hyperemia would cause the **PW1** pain. He agreed that the Appellant could have left spermatozoa on **PW1**. He further added that penetration may only cause interference with the integrity of the hymen and not necessarily the breaking of the hymen. He adduced the Post Rape Care Form (PRC) into evidence.

10. **PW5, BNN** mother to **PW1** entirely corroborated the testimonies of PW1 and 2. She additionally testified that the matter was reported at Kilimani Police Station. She also identified the birth certificate belonging to PW1 which showed that she was born on 8th May, 2009.

11. **PW4, Dr. Kizie Shako** examined **PW1** on the 18th of January, 2016 and filled out a P3 Form. It was her finding that the external genitalia was normal, that there was no injury but had tenderness in the labia majora. She also examined the Appellant and filed out a P3 which she also adduced in evidence.

12. **PW6, PC Robina Oyier** was the investigating officer. He adduced PW1's birth certificate into evidence

13. The Appellant gave an unsworn statement of defence and called two other witnesses to support it. He stated that he had been sent home for school fees. A day later, he was confronted by neighbors who accused him of defiling PW1. He was taken to Nairobi Women's Hospital but did not get examined. He was thereafter taken to Kilimani Police Station. **DW2 Musa Ibrahim** recalled seeing neighbors at their home and later took the Appellant to Kilimani Police Station. **DW3 BIM**, aunt to the Appellant stated that neighbors went to her house insisting that the Appellant had defiled **PW1**.

Analysis and determination

14. After considering the evidence and the respective rival submissions, I deduced that the only issue for determination is whether the offence of defilement was proved beyond reasonable doubt. In a case for defilement the prosecution is duty bound to establish the age of the complainant, the positive identification of the perpetrator and penetration.

15. The complainant in this case was aged 6 years old. Age can be proved in three ways; firstly the oral testimony of person of close relation to the complainant or the complainant himself/herself, secondly by way of documentary evidence and thirdly by way of an age assessment by a medical practitioner. In this instance, it was established by the production of a birth certificate of the complainant. This was identified by **PW5**, mother to **PW1** and produced by the PW6 the investigating officer. Secondly, the mother testified that the complainant was six (6) years old at the time of the incident. It is therefore clear that the age of the complainant was proved.

16. As regards penetration, **PW3** and **PW4** both medical practitioners produced medical evidence. **PW3** who examined the complainant on the day of defilement found that the integrity of the hymen had been interfered with. It was also his finding that there was traces of pus in the urine test conducted proving that the aggressive activity surrounding the genitalia. He also described finding tenderness and redness around the labia majora and labia minora. **PW4** examined the complainant three (3) days later. She confirmed finding tenderness in the labia majora. She however found the hymen to be normal. It appears to me that the medical evidence was consistent with defilement. The discrepancy in the reports can be explained by the fact that the two medical practitioners examined the complainant three (3) days apart.

17. On identification of the Appellant the same was by way of recognition. The law regarding identification by recognition is that it is a more foolproof way of identification. It is also clear that a person though familiar with another may be mistaken. However, in this case the complainant recalled the Appellant clearly who would often send her to the shop. I find that this fact weighs in on the fact of recognition. Further, the interaction between the Appellant and the complainant was during daytime. I find that there was unlikely that anything hindered

the complainant's observation of the Appellant. I am therefore convinced that the Appellant was properly identified.

18. In his defence, the Appellant did not attempt to dispel the evidence leveled against him. He testified that he was home all day and only got confronted in the evening by a group of neighbors. The version of his story is outweighed by the strong prosecution evidence against him. In sum I find that the Appellant was properly convicted. His defence was not sufficient to cast any doubt in the case of the prosecution.

19. On sentence, counsel for the Appellant submitted that the sentence was harsh and that the Appellant ought to have benefitted from a more lenient sentence being a minor at the time of arrest. The Respondent conceded on this. It was their submission that the court should consider a lesser sentence in light of this fact.

20. I find that the trial court did not misdirected itself in determining that the Appellant who had since become an adult could not benefit from sentences handed to minors. This is because **Section 191(1) of the Children's Act** provides alternative sentences applicable to a child who is found to be in conflict with the law. Indeed, a child who has attained the age of twelve years is deemed not to be criminally responsible unless it is demonstrate that he knew what he was doing. See: Section 14 of the Penal Code. Therefore, if he has attained the age of the majority as at the time of sentencing, but was charged having reached the age he was criminally responsible, nothing stops the court from sentencing him as if he is an adult. In so holding, I find solace in the case of **JKK vs Republic (2013) eKLR** where the Court of Appeal sitting in Nyeri determined that the Appellant having been duly convicted of murder, being aged 15 years old at time of commission of the offence, should serve a ten (10) year imprisonment sentence. It stated as follows:

“The purposes of the sentences provided for under the Children Act are meant(sic) to correct and rehabilitate a young offender, i.e. any person below the age of 18 years while considering the overarching objective is the preservation of the life of the child and his best interest. A death sentence or a life imprisonment are not provided for but when dealing with an offender who has attained the age of 16 years, the court can sentence him in any other lawful manner. We are of the view that the appellant who is now of the age of majority cannot be released to the society before he is helped to understand the consequences of his mistakes, which can only happen after serving a custodial sentence”

21. In another matter the High Court sitting in Naivasha in the case of **SCN v R [2018] eKLR** substituted the sentence of the Appellant convicted of defilement contrary to **Section 8(1)** as read **Section 8(2) of the Sexual Offences Act** from the mandatory life imprisonment to ten (10) years imprisonment. The Appellant was 17 years old at the time of commission of the offence but was sentenced while in the age of majority.

22. Respectively, I shall be guided by the now current jurisprudence set by the Supreme Court in the case of **Francis Karioko Muruatetu & Another V Republic (1917) e KLR** in which mandatory sentences were declared unconstitutional. Despite the Appellant insisting that he is remorseful it appears that he was the subject of another trial for a similar offence In Kibera Law Courts Sexual Offence Case number 10 of 2017. I therefore find that a non-custodial sentence may not be appropriate.

23. In so holding I have had regard to the fact that the Appellant preyed on a very young girl which impresses that such young girls cannot be safe in his presence. To say that he can serve a non-custodial sentence would be a mockery not only of the justice system but be tantamount to giving a guarantee to our young youth to go about committing offences because they know they will be slapped non-custodial sentences. It is important that the youth know they have a responsibility to abide by the law. I accordingly substitute the life imprisonment with an order that the Appellant shall serve twenty (20) years imprisonment.

Dated and Delivered at Nairobi This 6th November, 2019.

G.W.NGENYE-MACHARIA

JUDGE.

In the presence of:

1. *Appellant present in person.*

2. *Miss Akunja for the for the Respondent*