REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 66 OF 2016

(An Appeal arising out of the conviction and sentence of Hon. L.O. Onyina – SPM delivered on 29th January 2016 in Kibera CMC. Cr. Case No.2892 of 2012)

BRIAN ORINA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Brian Orina 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 18th March 2012 in Langata, Nairobi County, the Appellant unlawfully and intentionally caused his male genital organ (penis) to penetrate into the female genital organ (vagina) of G N (hereinafter referred to as the complainant), a child aged 17 years. He was alternatively charged with **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 the same day and in the same place, the Appellant intentionally caused his genital organ (penis) to come into contact with the female genital organ (vagina) of the complainant. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty not guilty to the charge. After full trial, he was found guilty as charged. He was sentenced to serve 15 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 despite the fact that the prosecution had not adduced adequate evidence to connect him with the offence. He faulted the trial magistrate for failing to consider that the evidence adduced by the prosecution witnesses was inconsistent, not properly investigated and was actuated by a grudge that existed between the Appellant and the complainant's family. The Appellant took issue with the fact that the medical evidence adduced did not prove that there was penetration and therefore an essential ingredient of the charge had not been established to the required standard of proof. The Appellant was aggrieved that his defence was not considered before the trial magistrate reached the impeached decision. He was finally aggrieved that he had been sentenced to serve a custodial sentence that was harsh and excessive in the circumstances. He was of the view that the two years that he was in custody prior to his conviction should have been taken into account when he was sentenced. 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, the Appellant presented to court written submission in support of his appeal. He urged the court to allow the appeal. Ms. Aluda for the State opposed the appeal. She submitted that the prosecution had adduced sufficient culpatory evidence to connect the Appellant with the sexual assault. She urged the court to dismiss the appeal. This court shall consider the arguments made on this appeal after briefly setting out the facts of this case.

The complainant in this case told the court that she was aged 17 years at the time she testified before court. She was a Standard 6 pupil. She was a resident in Langata where she lived with her mother PW2 M S N and other siblings. She recalled that on 18th March 2012, she was requested by a neighbour by the name Mama Collins to assist her take of a young child. As she was walking to Mama Collins' house, the Appellant, who was known to her prior to the incident (he was a neighbour) pulled her into his house, put on loud music, before he pushed her to the bed, removed her pants and had sexual intercourse with her. The complainant testified that during the entire time, the Appellant did not talk to her. After he had finished, he left the house. The complainant started crying and alerted neighbours who included a lady by the name Mama Brayo. The Appellant returned to the scene, slapped the complainant while calling her a prostitute. He then left the scene. The complainant was at the time walking with difficulty. She was bleeding from her vagina. Two elders by the name Wesonga and Mashete came to the scene. They advised that a report be made to the police.

PW2 was called to the scene and found the complainant crying. She also saw that the complainant was walking with difficulty. She carried the complainant to Langata Police Station where she made a report. They then proceeded to Nairobi Women Hospital where the complainant was treated before being discharged. At the hospital, the complainant was seen by Dr. Caroline Mwangi. She observed that the complainant's

vagina was bleeding. There was spermatozoa seen. She formed the opinion that the complainant had been sexually assaulted. The medical report was produced on behalf of Dr. Caroline Mwangi by PW3 Dr. Jebet Boit, her colleague at the hospital. PW5 Joseph Mutunga Mwanzia, a clinical officer based at Nairobi Women Hospital also confirmed that the complainant was seen on 18th March 2012 and a report made confirming that the complainant had been sexually assaulted. The complainant was on 3rd July 2012 seen Dr. Zephania Kamau based at Police Surgery. He did not observed anything remarkable other than observing that the hymen was missing. The P3 form was produced as an exhibit on behalf of Dr. Kamau by PW4 Dr. Kizie Shako.

PW7 Corporal Janet Sitienei then based at Langata Police Station Crime Office, was assigned to investigate the case. In the course of her investigations, she obtained the pant that the complainant wore when she was sexually assaulted. She took the pant to the Government Chemist for analysis. Blood samples were taken from the complainant and the Appellant. PW4 Anne Wangeci, a Government Chemist testified that she examined the samples that were sent to her with a view to establishing if any of the samples obtained from the pant which was stained with semen and human blood could be connected to the Appellant and the complainant. PW4 testified that upon generating DNA from the pant, and upon comparing the semen found in the pant with the blood samples of the Appellant, she found that it matched. The blood sample of the Appellant also matched with the semen that had stained the pant. The DNA reports were produced into evidence by PW4.

PW6 Inspector Yusuf Mucheke testified that on 14th June 2012, the Appellant was brought to him by the Assistant Chief accompanied by three people. PW6 was told that the Appellant was wanted by the police based at Langata Police Station on accusation that he had defiled a child. PW6 re-arrested the Appellant and took him to Langata Police Station. PW7 testified that upon concluding her investigations, she formed the view that a case had been established for the Appellant to be charged with the offence that he was convicted.

When the Appellant was put on his defence, other than narrating the circumstances of his arrest, he denied committing the offence. He told the court that he did not know anything about the sexual assault. He pleaded his innocence.

This being a first appeal, it is the duty of this court to reconsider and re-evaluate the evidence adduced before the trial magistrate's court so as to reach its own independent determination whether or not to uphold the conviction of the Appellant. In doing so, this court is required to be conscious of the fact that it neither saw nor heard the witnesses as they testified and therefore cannot make comments regarding the demeanor of the witnesses (See **Okeno –vs- Republic [1972] EA 32).** The issue for determination by this court is whether the prosecution established its case, to the required standard of proof beyond any reasonable doubt, to secure the conviction of the Appellant on the charge of **defilement** contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act.**

This court has carefully re-evaluated the evidence adduced before the trial magistrate's court. It has also considered the submission made by the parties to this appeal. For the prosecution to establish the charge of **defilement**, it was required to establish the following as pointed out in **Josephat Muoki Muunda –vs- Republic [2016] eKLR** where P. Nyamweya J held thus:

> ***"…this court is mindful of the ingredients of defilement which were highlighted in Charles Wamukoya Karani –vs- Republic Criminal Appeal No.72 of 2013 as follows:***
>
> ***"The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant.""***

In the present appeal, in respect of the first ingredient of penetration, the complainant testified that she was accosted by the Appellant, dragged into a house, had her pant removed, after which the Appellant forcefully had sexual intercourse with her. After he was through, the Appellant left the complainant. The complainant walked out of the house while crying. She could not walk properly because she had been injured in her vagina. She was bleeding from the vagina. PW2 her mother took her to Langata Police Station where a report was made before she was taken to Nairobi Women Hospital where she was examined. The medical examination established she had indeed been sexually assaulted. She was bleeding from her vagina. Spermatozoa was seen in her vagina. She was treated before she was discharged. The medical report was produced into evidence by two prosecution witnesses i.e. PW3 Dr. Jebet Boit and PW5 Joseph Mutunga. On re-evaluation of this evidence, this court is convinced to the required standard of proof beyond any reasonable doubt that indeed the complainant was penetrated. The complainant was seen by the said medical practitioners a few hours after the sexual assault.

As regard the age of the complainant, the complainant testified that she was 17 years at the time she testified before court. Her mother PW2 told the court that the complainant was born on 16th October 1997. At the time the complainant testified before court in 2013, she was between the ages of 16 and 17 years. She told the court that she was a Standard 6 pupil. It was apparent that the complainant may have delayed in going to school. This court holds that the prosecution established that the complainant was indeed a child as defined under **Section 2** of the **Children Act** i.e. she was a human being below the age of 18 years.

As regard the identity of the Appellant as the perpetrator of the sexual assault, this court holds that the Appellant was properly identified. The complainant was known to the Appellant prior the sexual assault. They were neighbours. The complainant referred to the Appellant by his first name Brian. After the incident, the complainant told the neighbours and her mother that it was the Appellant who had assaulted her. A report was made to the police identifying the Appellant as the perpetrator of the sexual assault. If there was any doubt that it was the Appellant who sexually assaulted the complainant, that doubt was removed when the DNA analysis done on the semen and blood that was found in the pants that the complainant wore on the material day that she was sexually assaulted. The DNA identified the Appellant as the source of the semen that was found in the particular pants. In the premises therefore, this court holds that the prosecution established to the required standard of proof beyond any reasonable doubt that the Appellant was the perpetrator of the sexual assault on the complainant. The Appellant's appeal against conviction therefore lacks merit.

As regard sentence, the Appellant has a case when he states that the period that he was in remand custody was not taken into account when he was sentenced by the trial court. Under **Section 8(4)** of the **Sexual Offences Act**, the Appellant was liable, upon conviction to be sentenced to serve a term of imprisonment of not less than fifteen (15) years. The Appellant was sentenced to serve this period of

imprisonment despite the fact that he had been in remand custody for some time between the time he took plea on 18th June 2012 to the time of his conviction 29th January 2016. The Appellant was released on bail pending trial but absconded. When he was rearrested, he remained in custody until the conclusion of his case. The period that he remained in remand custody before his conviction is about 2 years. Pursuant to **Section 333(2)** of the **Criminal Procedure Code**, this period ought to have been taken into account by the trial court. In the premises therefore, the Appellant's appeal on sentence partially succeeds. He shall be given credit for the two years that he remained in custody while awaiting trial.

In the premises therefore the appeal against conviction is hereby dismissed. The appeal against sentence is partially allowed as a result of which the sentence of the Appellant is adjusted so that instead of serving fifteen (15) years imprisonment with effect from 29th January 2016, he shall serve 13 years imprisonment with effect from the same date. It is so ordered.

DATED AT NAIROBI THIS 6TH DAY OF JUNE 2018

L. KIMARU

JUDGE