



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 76 OF 2017

(An Appeal arising out of the conviction and sentence of HON. C. OBULUTSA – (CM) delivered on 30th June 2017 in Eldoret CMC. CR. Case No.228 of 2016)

JLL.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, JLL 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 6th July 2016 in Uasin Gishu County, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of PM (the complainant), a child aged 8 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 and unlawfully caused his penis to come into contact with the vagina of the complainant. 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 of the main count. He was sentenced to serve life imprisonment. The Appellant was aggrieved by his conviction and sentence. He 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 on the basis of uncorroborated and contradictory evidence of the complainant and her mother. He took issue with the fact that the trial court did not take into consideration that the lodging of the complaint with the police by the complainant's mother was motivated by a grudge that existed between them as a result of the breakdown of their marital relationship. The Appellant was aggrieved that the trial court failed to properly evaluate the evidence of the alleged defilement especially taking into consideration that there was no blood seen after the alleged defilement. The Appellant complained that the age of the victim was not established to the required standard of proof. He was finally aggrieved that his meritorious defence was not taken into consideration before the trial court reached the impugned decision finding him guilty as charged. 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 both written and oral submission in support of his appeal. He submitted that the evidence adduced against him by the prosecution witnesses was motivated by malice and a grudge since there existed a difference between him and the complainant's mother. The Appellant asserted that the complainant's testimony was couched and was uncorroborated. He pointed out that the complainant's testimony in regard to what had happened was not corroborated by her mother's testimony. He was of the view that this supported his assertion that he had been framed. He faulted the trial magistrate for improperly admitting evidence that had not been subjected to analysis. He urged the court to properly re-evaluate the evidence of the complainant and reach the conclusion that it was contrived and did not happen. He asked the court to find that the age of the complainant was not established to the required standard of proof and therefore there was no basis at all for the trial court to sentence him to the custodial sentence that was imposed. The Appellant finally submitted that he was subjected to unfair trial in that his right to fair trial was infringed. He was ambushed when the trial court required him to proceed with the case before he had adequately prepared. In the premises therefore, he urged the appeal to be allowed.

Ms. Oduor for the State opposed the appeal. She submitted that the prosecution had established all the necessary ingredients to establish the charge of **defilement** to the required standard of proof. She explained that the Appellant, the complainant's step-father, lured the complainant into the bedroom before he undressed her and then sexually assaulted her. Medical evidence corroborated the complainant's testimony to the effect that she had been sexually assaulted. The age of the victim was established by production of a baptismal card. She urged the court to re-evaluate the evidence and reach the same conclusion as the trial court that the Appellant is guilty as charged. She urged the court to disallow the appeal.

This being a first appeal, it is the duty of this court to reconsider and re-evaluate the evidence adduced so as to arrive at its own independent determination whether or not to uphold the conviction of the Appellant. In reaching its verdict, this court is required to always bear in mind

that it neither saw nor heard the witnesses as they testified and therefore give due allowance in that regard. (See **Okeno –vs- Republic [1972] EA 32**). In the present appeal, the issue for determination by this court is whether the prosecution adduced evidence that established the Appellant's guilt 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 court. It has also considered the submission made by the parties to this appeal. For the prosecution to establish the charge of **defilement**, it is required to prove three ingredients: Penetration, the age of the victim and the identity of the perpetrator. As regard penetration, the complainant testified that the Appellant who is her step-father, requested her to fetch him socks from his bedroom. The Appellant followed her into the bedroom and threw her on the bed. He gagged her mouth, ordered her not to scream, removed her panties and then forcefully had sexual intercourse with her. After he was through, he sent the complainant to the shop to buy paraffin.

The complainant informed PW2 SK, her mother what had taken place. PW2 had noticed that the complainant's clothes were crumpled and wet. She went back to the house and requested the Appellant to accompany her and the complainant to the hospital. He declined. PW2 took the child to Huruma Health Centre where she was referred to Moi Teaching and Referral Hospital. She then made a report to the police and was issued with a P3 form. The P3 form was filled by Dr. Yatich. The P3 form was produced on behalf of Dr. Yatich by PW4, Dr. Eunice Tenet. The doctor made the following observation on examining the complainant's genitalia:

“Fresh hymenal tear at position 9 o'clock. Erythematous labia minora. Whitish discharge present.”

It was clear from the above evidence that the prosecution indeed established to the required standard of proof beyond any reasonable doubt that the complainant had been penetrated. The complainant's testimony coupled by medical evidence established that indeed there was penetration.

As regards the age of the complainant, PW2 produced the complainant's baptismal card which indicated that the complainant was born on 2nd March 2008. The complainant was therefore aged eight (8) years at the time of the offence. The complainant's age was therefore established to the required standard of proof.

As regards the identity of the perpetrator, as stated earlier in this judgment, the Appellant is the step-father of the complainant. He lived together in the same house with PW2, the complainant's mother. It was the Appellant's defence that the charge against him was brought as a result of a grudge that resulted from a disagreement that he had with the complainant's mother. The Appellant stated that the relationship with the complainant's mother soured resulting in their separation. It was his case that the complainant's mother, not being happy, framed him with the charge. PW2 denied this claim. It was her testimony that at the time the incident occurred, she was residing in the same house with the Appellant. They had not had a disagreement.

On re-evaluation of this evidence, it was clear to this court that the Appellant's defence was just but a way of attempting to exonerate himself from a crime that he had committed. If the Appellant was to be believed, then, it meant that PW2 caused her daughter to be defiled by someone and then framed the Appellant. Such a possibility can only be a product of a diabolical mind. No sane mother would put her child in harm's way just to settle a score with his erstwhile lover. The evidence adduced by the complainant and her mother was cogent, credible and consistent. The evidence corroborated each other in all material respects. There was no reason why the complainant would implicate the Appellant if she was not telling the truth. The Appellant's assertion to the effect that the complainant was coached to implicate him is not supported by evidence. In the premises therefore, the Appellant's appeal against conviction lacks merit and is hereby dismissed.

As regard sentence, the sentence imposed by the trial court is legal. It is provided under **Section 8(2)** of the **Sexual Offences Act**. This court cannot interfere with the sentence. The appeal against sentence is also dismissed. The conviction and sentence of the trial magistrate is hereby upheld. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 28TH DAY OF SEPTEMBER 2018

L. KIMARU

JUDGE

DATED, SIGNED AND DELIVERED AT ELDORET THIS 17TH DAY OF OCTOBER 2018

HELLEN OMONDI

JUDGE