



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 80 OF 2016

(An Appeal arising out of the conviction and sentence of Hon. H. O. Barasa – (PM) delivered on 13th July 2016 in Eldoret CM CR. Case No.1541 of 2012)

MKK.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, MKK was charged with two counts of **defilement of girls** contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act**. The particulars of the offences were that on 24th March 2012 at about 10.00 a.m. in Keiyo South District of Keiyo Marakwet County, the Appellant unlawfully and intentionally caused his genital organ (penis) to penetrate the genital organs (vaginas) of FJK (1st complainant), a girl aged eight (8) years and SJK (2nd complainant), a girl aged ten (10) years. In the alternative, the Appellant was charged with two counts of **committing indecent acts with children** 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 unlawfully and indecently allowed his genital organ (penis) to come into contact with the genital organs (vaginas) of the complainants. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charges. After full trial, he was convicted of the main charges. He was sentenced to serve life imprisonment and twenty-five (25) years imprisonment respectively. 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 after the trial court had denied him the opportunity to cross-examine the prosecution witnesses. He was of the view that this failure occasioned a miscarriage of justice. He took issue with the fact that he was compelled by the trial court to proceed with the trial before he had been availed prosecution witnesses' statements. He was aggrieved that his defence had been rejected without the trial court giving any convincing reasons for rejecting of the same. In essence, it was the Appellant's appeal that the prosecution had not established its case against him to the required standard of proof. The Appellant urged the court to allow the appeal, quash his 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. In summary, it was the Appellant's appeal that the prosecution had failed to establish its case against him to the required standard of proof. He challenged the charges brought against him because he was of the view that since it was alleged that he was related to the complainants, he ought to have been charged with **incest** instead of **defilement**. He submitted that the charges that were brought against him were therefore defective. He submitted that since the evidence adduced against him by the prosecution witnesses was variance with the charges, he ought to be acquitted. The Appellant further argued that the prosecution failed to discharge the burden of proof placed on it to establish the case against him to the required standard. He urged the court to allow the appeal.

Ms. Oduor for the State opposed the appeal. She submitted that the prosecution had established the two charges brought against the Appellant to the required standard of proof beyond any reasonable doubt. The complainants testified that they were sexually assaulted by the Appellant who was known to them prior to the encounters. The respective ages of the complainants were also established. Medical evidence established that indeed the complainants had been defiled. In the premises therefore, she urged the court to dismiss the appeal and uphold the verdict of the trial court.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced before the trial court so as to reach its own independent determination whether or not to uphold the conviction of the Appellant. As was held by the Court of Appeal in **Njoroge -Vs- Republic [1987] KLR 19 at P.22:**

“As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court

are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect (see Pandya v R [1957] EA 336, Ruwala v R [1957] EA 570)”.

In the present appeal, the issue for determination by this court is whether the prosecution established the case against the Appellant 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 was required to prove that there was penetration; the age of the victims and finally the identity of the perpetrator. In the present appeal, the prosecution witnesses testified that the Appellant was a cousin to the complainants. The Appellant's mother and the complainants' fathers are siblings. The Appellant's mother is the sister to the complainants' fathers. According to the complainants, on the material day of 24th

March 2012, they had gone to the Appellant's farm to purchase sugarcane. In their evidence, they referred to the Appellant by his first name, Mathew. They told the court that when they entered the cane farm, the Appellant first enticed the 2nd complainant to go inside a bush near the farm. He then asked the 2nd complainant to remove her panties after which he sexually assaulted her.

After he was through, he called the 1st complainant into the same bush, asked her to remove her panties and then sexually assaulted her. In both instances, he warned the complainants not to utter a word of what had transpired. To reinforce the warning, he gave the complainants Kshs.10/- and Kshs.50/- respectively. The complainants went home and informed their parents PW3 TJK and PW5 GJK who, upon physically checking them, confirmed that they had indeed been sexually assaulted. They were taken to Chepkori Sub-District Hospital where they were referred to Moi Teaching and Referral Hospital, Eldoret.

At the hospital, they were seen by Dr. Cynthia Kibet who formed the opinion that the complainants had indeed been sexually assaulted. The P3 forms filled by Dr. Cynthia Kibet indicated that both the complainants had fresh hymenal tears which indicated that they had recently been sexually assaulted. The P3 forms were produced on behalf of Dr. Cynthia Kibet by PW4 Dr. Jane Yatich. She explained that she was familiar with the handwriting of Dr. Cynthia Kibet. She had worked with her for two years. Dr. Cynthia Kibet had gone to United States of America for Masters' degree studies.

Having re-evaluated this evidence, this court is convinced to the required standard of proof beyond any reasonable doubt that penetration was established. The complainants' testimony coupled with the medical evidence established that indeed the complainants were penetrated. The complainants' testimony is that of children. Even if this court were to disbelieve their testimonies, the medical evidence adduced clearly confirmed that the complainants were sexually assaulted in the manner in which the complainants described in their testimony. The medical evidence corroborated their respective testimonies. As regard the ages of the complainants, their respective immunization cards were produced into evidence. In the card, the 1st complainant is indicated to have been born on 25th March 2003 while the 2nd complainant was born on 6th August 2000. The complainants were respectively 8 and 10 years at the time of the sexual assault. The ages of the complainants were established to the required standard of proof.

As regard the identity of the perpetrator, as stated earlier in this judgment, the Appellant was well known to the complainants prior to the sexual assault. They are close relatives. The identity of the perpetrator of the sexual assault was therefore established to the required standard of proof. The respective testimonies of the complainants were consistent, cogent and corroborated each other in all material respects. Their respective testimonies had a ring of truth. The Appellant's defence, which was essentially a mere denial, did not dent the otherwise strong culpatory evidence that was adduced against the Appellant by the prosecution witnesses. A further piece of evidence that nailed the Appellant is the existence of close blood relationship between the Appellant and the complainants. There was no reason for the complainants to lay a false charge against the Appellant if in fact he had not committed the offence. The Appellant did not allege or claim that there existed a grudge between the complainants' families and their own.

The main thrust of the Appellant's appeal was that he ought to have been charged with **incest** contrary to **Section 20(1)** and not **defilement** contrary to **Section 8(1)** of the **Sexual Offences Act**. On re-evaluation of this ground of appeal, this court formed the opinion that nothing turns on it. The ingredients to establish the charge of **defilement** and that of **incest** are the same save that in the case of incest, there is an additional requirement that familial relationship between the perpetrator and the victim be established. The Appellant was not prejudiced by the decision made by the prosecution to charge him with **defilement** instead of **incest**. The custodial sentence that he was to incur were he to be convicted of incest is the same sentence that he was sentenced upon being convicted of defilement.

It is clear from the foregoing that the Appellant's appeal lacks merit and is for dismissal. It is hereby dismissed. The Appellant's appeal against conviction and sentence is hereby dismissed. The custodial sentence that was imposed on him was legal. The verdict of the trial court is upheld. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 26TH DAY OF SEPTEMBER 2018

L. KIMARU

JUDGE

DATED, SIGNED AND DELIVERED AT ELDORET THIS 4TH DAY OF OCTOBER 2018

HELLEN OMONDI

JUDGE