



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO. 200 OF 2013**

*(An Appeal arising out of the conviction of HON.B. KASAVULI (Ag. SRM) delivered on 23<sup>rd</sup> August 2013 and sentenced on 1<sup>st</sup> November 2013 in Eldoret CM CR. Case No.5007 of 2012)*

**SILAS NYONGESA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The Appellant, Silas Nyongesa was charged with the offence of **defilement of a child** contrary to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act**. The particulars of the offence were that on 21<sup>st</sup> November 2012 in Uasin Gishu County, the Appellant intentionally and unlawfully caused his genital organ (penis) to penetrate the genital organ (vagina) of FC (the complainant), a child aged eleven (11) 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 touched the private parts (vagina) of the complainant with his private parts (penis). When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was convicted of the main charge. He was sentenced to serve life imprisonment. The Appellant was aggrieved by his conviction and sentence. He has appealed to this court against the said conviction and sentence.

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 conflicting and contradictory evidence of prosecution witnesses that did not establish his guilt to the required standard of proof. He faulted the trial magistrate for failing to take into consideration the fact that no investigations were conducted, or if they were, it was shoddy and did not connect him to the crime. The Appellant was aggrieved that he was convicted on the basis of unreliable medical evidence that did not support the complainant's assertion that she had been sexually assaulted. The Appellant reiterated that the trial court ignored his defence and particularly the fact that he was a minor and should have sentenced him under **Section 191** of the **Children Act**. For the above reasons, the Appellant urged the court to allow his 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. In the submission, the Appellant asserted that the evidence that was used by the trial court to convict him was fabricated and doubtful. He stated that no investigations were conducted to link him with the offence. He took issue with the fact that crucial witnesses were not called to testify in the case. He insisted that he was a minor and therefore should not have been sentenced in any other manner other than as provided under **Section 191** of the **Children Act**. The Appellant stated that the complainant had not positively identified him as the perpetrator of the offence nor did the medical evidence corroborate the complainant's claim that she had been defiled. He complained that his defence was rejected by the trial court without the court ascribing any reasons for disbelieving the evidence. In the premises therefore, the Appellant urged the court to allow the appeal.

Ms. Oduor for the State opposed the appeal. She submitted that the prosecution had established all the essential ingredients to establish the charge of **defilement** to the required standard of proof beyond any reasonable doubt. She explained that the prosecution had adduced evidence which established that the complainant was penetrated. This evidence included that of the complainant and medical evidence. The age of the complainant was established by a birth certificate. The prosecution established that it was the Appellant who was the perpetrator of the sexual assault. The trial court considered all the evidence including the defence of the Appellant and reached the correct verdict. She urged the court to dismiss 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 by the trial court. 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(3)** of the **Sexual Offences** to the required standard of proof beyond any reasonable doubt.

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 prosecution to establish the charge of defilement, it is required to prove three elements of the charge: penetration, the age of the victim and finally the identity of the perpetrator. In the present appeal, the complainant testified that the Appellant accosted her as she was herding her parent's cattle. The Appellant was also at the time herding cattle for a neighbour. The complainant testified that the Appellant forcefully removed her panties before removing his trousers and then inserting his penis into her vagina. The complainant started bleeding after the incident. Her panties became bloodstained. Her blue jeans skirt also became bloodstained. Due to the fact that the Appellant had threatened the complainant with dire consequences if she disclosed what had transpired to anyone, the complainant though in pain, went to sleep.

It was on the morning of the following day that the mother of the complainant PW2 Philomena Too noticed that the complainant was unwell. She had not woken up as usual. When she entered the bathroom she found the complainant's bloodstained jeans skirt, panties and bikers. She inquired from the complainant what had transpired. It was then that the complainant disclosed that she had been sexually assaulted by the Appellant. PW2 took the complainant to Moi Teaching and Referral Hospital Eldoret where it was discovered that the complainant had sustained an injury to her genitalia which extended into the vagina. The complainant was taken to theatre where she was stitched. She was given drugs to cure the infection that she had on the tear. She was admitted for two days before she was discharged.

PW4 Dr. Cynthia Kibet produced the P3 form which indicated the injury that the complainant had sustained. The doctor concluded that the injury sustained by the complainant was consistent with penetration to her vagina. From this evidence, this court holds that the prosecution established penetration to the required standard of proof beyond any reasonable doubt.

As regard the age of the complainant, the complainant produced her birth certificate which indicated that she was born on 6<sup>th</sup> June 2004. At the time of the sexual assault, the complainant was eight (8) years old. This court holds that the prosecution established the age of the complainant to the required standard of proof beyond any reasonable doubt.

The issue that remains for determination is whether the Appellant was the perpetrator of the offence. According to the complainant, the Appellant was known to her prior to the date of the incident. She used to see the Appellant herd cattle near their home. The Appellant was therefore familiar with the complainant prior to the fateful date of the sexual assault. The complainant identified the Appellant to her mother after she had disclosed that she had been sexually assaulted. This court has no doubt that the Appellant was properly identified by the complainant at the scene of crime. He was the perpetrator of the offence.

This court has cautioned itself that the testimony of the complainant is that of a single identifying witness. The complainant is a child. The **Proviso to Section 124** of the **Evidence Act** is clear. The court can convict an accused based on the sole evidence of a victim of sexual offence if the court is satisfied that the victim was telling the truth. In the present appeal, it was clear that the complainant was telling the truth when she pointed out the Appellant as the perpetrator of the sexual assault. Although the Appellant denied that he sexually assaulted the complainant, weighed against the evidence of the complainant, this court is convinced to the required standard of proof beyond any reasonable doubt that the complainant's testimony in regard to the circumstances of her sexual assault was cogent, consistent and truthful. This court therefore holds that the prosecution proved that the Appellant was the perpetrator of the sexual assault.

There is an issue that the Appellant put forth in this appeal: that is, in regard to his age at the time of the sexual assault. The Appellant stated that he was a minor at the time of the sexual assault. He raised this issue before the trial court. The trial court referred the Appellant to Uasin Gishu District Hospital to have his age assessed by a doctor. The Appellant's age was assessed on 16<sup>th</sup> October 2013. According to the report, the Appellant was over eighteen (18) years at the time of examination. During the hearing of this appeal, the Appellant reiterated that he was a minor at the time of the offence. He informed the court that he had documentary proof to establish his age at the time of the incident. This court adjourned for a day to enable the Appellant present the document to court to establish he was a minor at the time of the commission of the offence. When he appeared before the court on the scheduled date, he did not have any document to contradict or disapprove the age assessment report which had been supplied to the trial court. The Appellant was therefore an adult at the time he committed the offence.

The upshot of the above reasons is that the Appellant's appeal against conviction lacks merit. It is hereby dismissed. The appeal against sentence is also dismissed. The sentence was legal since the age of the victim was less than eleven (11) years at the time of the sexual assault. The conviction and sentence of the trial court is upheld. It is so ordered.

**DATED AND SIGNED AT NAIROBI THIS 26<sup>TH</sup> DAY OF SEPTEMBER 2018**

**L. KIMARU**

**JUDGE**

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 4<sup>TH</sup> DAY OF OCTOBER 2018**

**HELLEN OMONDI**

**JUDGE**