



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 204 OF 2014

(An Appeal arising out of the conviction and Sentence of HON.S.N. TELEWA (RM) delivered on 28th November 2014 in Eldoret CM CR. Case No.4486 of 2013)

STANLEY KIPROP KOGO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Stanley Kiprop Kogo 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 29th September in Uasin Gishu County, the Appellant unlawfully and intentionally caused his genital organ (penis) to penetrate the genital organ (vagina) of PC (the complainant), a girl aged ten (10) 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 unlawfully and intentionally caused his genital organ (penis) to come into contact with the genital organ (vagina) of the complainant, a child aged ten (10) years. 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 as charged of the main count. He was sentenced to 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 a P3 form that had no incriminating facts. He was of the view that the evidence adduced by the prosecution witnesses was inconclusive and did not connect him with the offence. He took issue with the fact that the prosecution relied on a used condom to connect him to the offence yet no analysis of the contents of the condom was done to confirm whether or not the same was used by the Appellant. He complained that he was convicted despite the fact that crucial witnesses were not called to corroborate the testimony of the complainant. He was of the view that the circumstances prevailing at the time the offence was committed was not conducive for positive identification, and therefore, it could not be possible that the complainant was certain that she had identified him as the perpetrator of the offence. In the premises therefore, the Appellant urged the court to find that the circumstantial evidence relied on by the prosecution did not establish his guilt on the charge brought against him to the required standard of proof. 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 further made oral submission urging the court to find that the evidence adduced against him did not establish his guilt to the required standard of proof beyond any reasonable doubt. The Appellant submitted that the trial court relied on circumstantial evidence to convict him yet the evidence adduced by the prosecution witnesses did not irresistibly point to him as the person who perpetrated the offence. He reiterated that he was a victim of suspicion without any tangible evidence. The Appellant took issue with the evidence adduced by the complainant and her mother, which in his view, was fabricated to connect him with the offence.

The Appellant accused the investigating officer of not properly investigating the complaint to establish who had committed the offence instead of relying on the say-so of the complainant and her relative. He further submitted that the condom that was recovered from the scene and the complainant's pants should have been tested to establish if he was indeed the one that used the condom. The Appellant urged the court to find that the identity of the perpetrator was one **"Ken"** and not the Appellant because the Appellant was not known or referred to as **"Ken"**. The Appellant stated that the evidence adduced by the complainant's mother was false and was meant to make him suffer for something that he had not committed. He urged the court to allow the appeal.

Ms. Oduor for the State opposed the appeal. She submitted that the prosecution had established to the required standard of proof that indeed it was the Appellant who sexually assaulted the complainant. The prosecution established the ingredients to prove the charge *i.e.* that there was penetration, the age of the victim and the identity of the perpetrator. She explained that it was the prosecution's case that the Appellant waylaid the complainant while she was walking home from the shop where she had been sent by her mother, dragged her into a maize plantation and then sexually assaulted her. She submitted that after the act, the complainant reported the incident to a neighbour who

informed her mother. She identified the Appellant as the perpetrator of the offence. The Appellant was a neighbour and was known to the complainant prior to the sexual assault. Penetration was established by the testimony of the complainant and by medical evidence. The complainant's age was established by the immunization card which was produced as exhibit during trial. She urged the court to find the Appellant's appeal is without merit and proceed to dismiss it.

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(2)** of the **Sexual Offences Act** to the required standard of proof beyond any reasonable doubt.

This court has re-evaluated the evidence adduced before the trial court. It has also carefully considered the rival submission made by the parties to this appeal. For the prosecution to establish the charge of defilement, it was required to prove the three essential ingredients *i.e.* penetration, the age of the victim and the identity of the perpetrator. As regards penetration, the complainant, a girl aged ten (10) years at the time of the incident testified that on 29th September 2013, her mother PW1 EJS sent her to a nearby shop to buy some house provisions. On her way back, she met with the Appellant whom she referred to as Stanley Kipro, their neighbour. She narrated how the Appellant dragged her into a maize plantation, gagged her mouth, and threatened her with death before removing her panties and then forcefully having sexual intercourse with her.

After he was through, the complainant walked back to the road and found a lady by the name Mama P. She narrated to her what had transpired. PW2 was informed. She went to Mama P's home. She inspected the complainant's vagina. She noted that she was bleeding from the vagina. She inquired from the complainant who had sexually assaulted her. The complainant told her that it was Stanley Kipro. She referred to the Appellant by name. PW2 took the complainant to Soy Dispensary and was referred to Moi Teaching and Referral Hospital where the complainant was treated before being discharged. A P3 form was duly filled. It indicated that the complainant had sustained a fresh hymenal tear. Further test did not reveal the presence of spermatozoa. The P3 form was filled by Dr. Yatich. It was produced on her behalf by PW3 Dr. Imbenzi Joseph who explained the doctor's absence to have been occasioned by the fact that she was on maternity leave. PW3 testified that the injury sustained by the complainant was consistent with penetration. Dr. Yatich also saw the Appellant and noted that he had an injury on the left side of his forehead. His genitalia was normal with no discharge or injury. The P3 form was produced by PW3 as a prosecution's exhibit.

On re-evaluation of this evidence, it was clear to this court that the prosecution did indeed establish penetration to the required standard of proof. The testimony of the complainant coupled with that of medical evidence confirmed to the required standard of proof that indeed the complainant had been penetrated. The injury sustained by the complainant was fresh. Her hymen was freshly torn. PW2, the complainant's mother saw the complainant's genitalia immediately after the sexual assault. She noted that the complainant was bleeding from her vagina. This was consistent with the overall evidence of the prosecution that the complainant was penetrated.

As regard the age of the complainant, the prosecution produced the complainant's immunization card. The said card indicated that the Appellant was born on 11th January 2003. The complainant was therefore ten (10) years at the time of the sexual assault. The prosecution therefore proved the complainant's age to the required standard of proof.

As regards the identity of the perpetrator, the complainant had no doubt that it was the Appellant who had sexually assaulted her. The incident took place at dusk. There was sufficient light to enable the complainant identify her assailant. The complainant narrated how she was dragged from the road into a maize plantation before she was sexually assaulted. The Appellant was known to the complainant prior to the sexual assault. He was a neighbour. During her entire evidence, the complainant referred to the Appellant by his name. There was no reason other than the desire to tell the truth that motivated the complainant to point out the Appellant as the perpetrator of the offence. There was no suggestion either from the prosecution's evidence or by the defence that there existed a grudge or a dispute between the two families that could have motivated the complainant and her mother to give false testimony against the Appellant.

Although the identification of the Appellant was by the complainant, a single witness, upon re-evaluation of the evidence, and this court having warned itself of the danger of convicting the Appellant on the basis of the evidence of a single witness, reached the irresistible conclusion that it was the Appellant that sexually assaulted the complainant. The complainant's testimony and that of her mother had a ring of truth in it. The **Proviso of Section 124 of the Evidence Act** allows this court to convict an accused person in a sexual offence if it believes that the victim of the sexual offence was telling the truth. The complainant's testimony was cogent, consistent and truthful. The explanation given by the Appellant and his witnesses in his defence did not dent the otherwise strong culpatory evidence that was adduced against him by the prosecution witnesses. This court therefore holds that the prosecution established to the required standard of proof the identity of the perpetrator of the sexual assault: the Appellant.

The upshot of the above reasons is that the Appellant's appeal against both conviction and sentence lacks merit. It is hereby dismissed. The sentence that was imposed is legal. This court cannot interfere with it. This court therefore upholds the conviction and sentence of the trial court. 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