



**REPUBLIC OF KENYA**

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

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO.50 OF 2014**

*(An Appeal arising out of the conviction and sentence of Hon. Ondieki - RM delivered on 20<sup>th</sup> March 2014 in Kibera CM. CR. Case No.4089 of 2014)*

**LUCAS OBURA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The Appellant, Lucas Obura was charged with **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 25<sup>th</sup> August 2012 in Kajiado County, the Appellant intentionally and unlawfully caused his male genital organ to penetrate the female genital organ of MK (the complainant), a child aged 8 years. He was alternatively charged with **committing an indecent act with a child** contrary to **Section 11(a)** 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 male genital organ to touch the female genital organ 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 convicted as charged. He was sentenced to serve life imprisonment. He 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 on the basis of medical evidence that was inconsistent and did not establish penetration to the required standard of proof. He faulted the trial magistrate for failing to properly evaluate the evidence as to the identification of the perpetrator of the offence to his detriment. He took issue with the fact that the trial court had relied on the evidence of a child without warning itself of the dangers of relying on such evidence especially when the child did not understand the duty to tell the truth. The Appellant was aggrieved that the trial court had not properly evaluated the entire evidence adduced before it arrived at the decision to convict the Appellant. The Appellant faulted the trial magistrate for failing to take into consideration his defence thereby reaching the erroneous determination to convict him. In the premises therefore, 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 the court written submission in support of his appeal. In the said submission, he urged the court to allow his appeal as the prosecution had failed to prove that he had sexually assaulted the complainant to the required standard of proof. Ms. Sigei for the State opposed the appeal. She submitted that the prosecution had indeed established that it was the

Appellant who sexually assaulted the complainant after luring her into his house. She urged the court to dismiss the appeal.

This court shall revert to the specific arguments made on this appeal after briefly setting out the fact of this case. The family of the complainant and the Appellant at the material time resided within the same rental premises at [Particulars Withheld] Township. The family of the complainant consisting of *inter alia* PW2 AKN and PW4 FAL lived in House No.8 while the Appellant lived in House No.12. According to the complainant, on 25<sup>th</sup> August 2012 while she was playing outside their house with her friend by the name C, she was invited by the Appellant into his house to take some food. The complainant, then aged 8 years old (birth certificate produced into evidence indicated that she was born on 20<sup>th</sup> June 2004) accepted the invitation. She entered the Appellant's house. The Appellant locked the door. He gave her an apple to eat. He then requested her to lie on the mattress with him. He removed her clothes including her innerwear. He then had sexual intercourse with her after which he opened the door and let her go. The complainant told her friend C who later told her parents. The information reached the Appellant to the effect that the children were alleging that he had defiled the complainant.

On 27<sup>th</sup> August 2012, he saw PW2 and informed her of what he had heard. PW2 requested the Appellant to see the complainant's father (PW4) later that evening. According to PW2 and PW4, the Appellant told them that he was concerned by the false rumours that were circulating to the effect that he had defiled the complainant. PW4 called PW3 FKL to witness what the Appellant was saying. They also asked the complainant if indeed it was true that the Appellant had sexually assaulted her. The complainant confirmed that indeed it was true that the Appellant lured her into his house after which he had sexual intercourse with her. The parents of the complainant made the decision to take the complainant to Nairobi Women Hospital where she was examined by PW5 Dr. Martin Kariuki Muhoro. He confirmed that indeed the complainant had been sexually assaulted. There was tenderness around her vaginal area. Her hymen was broken. This was consistent with sexual defilement. The complainant was examined by another doctor PW6 Dr. Joseph Maundu on 3<sup>rd</sup> September 2012. He noted that the complainant's vagina had recent bruises. There was blood in her vaginal area. Her hymen was broken. This was proof that the complainant had indeed been defiled. The case was reported to Ongata Rongai Police Station. PW7 PC Joseph Mugandi was assigned to investigate the case. After concluding his investigations, he reached the determination that indeed a case had been made for the Appellant to be charged with the offence that he was convicted.

When he was put on his defence, the Appellant denied that he had sexually assaulted the complainant. He called two witnesses DW2 Allan Mungai and DW3 Nicholas Obuya in support of his case. He told the court that he became concerned when on 27<sup>th</sup> August 2012 he heard children in the compound where he resided allege that he had sexual intercourse with the complainant. He sought to clarify these allegations with the parents of the complainant. Unfortunately, the parents of the complainant were not receptive to a civilized discussion. The father of the complainant became hostile. He decided to reside elsewhere from the compound to let things cool down. When he returned to his house on 3<sup>rd</sup> September 2012, he was surprised when he was apprehended and taken to Ongata Rongai Police Station. He reiterated that he had not defiled the complainant and that no evidence had been adduced to link him with the alleged defilement.

This being a first appeal, it is the duty of this court to re-evaluate and to reconsider the evidence adduced before the trial court in light of the submission made during the hearing of the appeal and reach its own independent determination whether or not to uphold the conviction of the Appellant. In doing so, this court is required to keep in mind the fact that it neither saw nor heard the witnesses as they testified and therefore cannot make any comment regarding the demeanour of witnesses (See **Okeno –Vs- Republic [1972] EA 32**). In the present appeal, the issue for determination by this court is whether the prosecution adduced sufficient evidence to sustain the conviction of the Appellant on the charge of **defilement** contrary to **Section 8(1)** of the **Sexual Offences Act** that was brought against him.

In defilement cases, the prosecution is required to establish three essential elements of the offence. The first one is whether there was penetration. In the present appeal, the prosecution did present to court two

medical reports prepared by PW4 Dr. Martin Kariuki Muhoro and by PW5 Dr. Joseph Maundu. Both doctors testified that indeed the complainant had been sexually assaulted. Their examination of the complainant established that there were bruises in her vaginal area while her hymen was broken. The complainant was seen two days after the alleged sexual assault by PW4. She was seen on 3<sup>rd</sup> September 2012 by PW5. The two doctors were in agreement that indeed the complainant had been sexually assaulted. The sexual assault took place contemporaneous with the time that the complainant claimed that she had been sexually assaulted by the Appellant.

The Appellant in this appeal alleged that the prosecution did not establish penetration. He questioned the manner in which the medical evidence particularly that of PW4 was admitted into evidence. He submitted that the medical report that was produced by PW4 was not signed hence it could not form a basis upon which the court could reach determination that there was penetration. Having carefully re-evaluated this evidence, this court forms the view that the explanation given by PW4 for his failure to sign the medical report was sufficient and did not dent the credibility of the evidence that he had adduced in court. Even if this court were to discount that medical evidence, the testimony of PW5 which was in tandem with the testimony of PW4 proves that there was penetration to the required standard of proof beyond any reasonable doubt.

The second issue that the prosecution was supposed to establish is the age of the complainant. In this case, PW2, the complainant's mother produced a birth certificate which indicated the complainant was born on 20<sup>th</sup> June 2004. At the time of the sexual assault, the complainant was 8 years old. The birth certificate was produced as an exhibit in the case. This court therefore holds that the prosecution did establish that the complainant, and confirmed that she was below the age of 11 years, to the required standard of proof beyond any reasonable doubt.

The third issue and an issue which the Appellant vigorously argued on this appeal is the identity of the perpetrator of the sexual assault. According to the prosecution, it was the Appellant who sexually assaulted the complainant after luring her into his house. The Appellant submitted that it was only the complainant who adduced evidence implicating him in the offence. He urged the court to take into account that the complainant was a child of tender years at the time and could not be trusted to tell the truth. The Appellant also questioned why the complainant did not tell her parents of the incident until after the Appellant himself had raised the issue with the parents. On re-evaluating the evidence of the complainant in this regard, this court formed the firm opinion that the complainant was telling the truth when she narrated the circumstances of her sexual assault. Her testimony was sufficiently detailed and gave a step by step account of what transpired on the material day. From the evidence, it was clear that the complainant was afraid to inform her parents because of the fear that her parents would react negatively to the information. From the evidence adduced by the prosecution witnesses, it was evident that the evidence placed the Appellant at the scene where the complainant was sexually assaulted. The complainant knew the Appellant prior to the sexual assault. They were neighbours. There was no reason discernable from the evidence of the existence of any difference or a grudge between the Appellant and the complainant's parents or between the complainant herself and the Appellant. The defence put forward by the Appellant did not dent the otherwise strong, cogent, credible and consistent evidence that was adduced by the prosecution witnesses.

The upshot of the above reasons is that the appeal lodged by the Appellant lacks merit and is hereby dismissed. The conviction and sentence of the trial court is hereby upheld. It is so ordered.

**DATED AT NAIROBI THIS 7<sup>TH</sup> DAY OF FEBRUARY 2017**

**L. KIMARU**

**JUDGE**