



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION

CRIMINAL APPEAL NO.167 OF 2013

(An Appeal arising out of the conviction and sentence of Hon. L.C. Kosgei – RM delivered on 6th September 2013 in Makadara CM. CR. Case No.5420 of 2011)

F G M.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, F G M 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 4th November 2011 at Mlango Kubwa in Nairobi County, the Appellant intentionally and unlawfully committed an act which caused penetration of his male organ into the female genital organ of M W (the complainant), a child 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 committed an indecent with the complainant by touching her private parts (vagina). 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 of defilement. He was sentenced to life imprisonment. 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 on the basis of evidence that did not sufficiently establish his guilt to the required standard of proof. He took issue with the fact that the trial court had relied on unreliable evidence motivated by an existing grudge to convict him. He was aggrieved that the trial court did not take into account the evidence that he had tendered in his defence before convicting him. In supplementary grounds of appeal, the Appellant stated that the prosecution failed to establish a key ingredient to prove the charge of **defilement** i.e. penile penetration. He faulted the trial magistrate for failing to make a finding regarding the age of the child and thus erroneously convicting him of the charge. He complained that the trial court did not interrogate the evidence of identification that was adduced which in his view, did not establish that he was the one who had committed the offence. The Appellant took issue with the manner in which the trial court failed to properly evaluate the medical evidence which in his view raised reasonable doubt that he had committed in the offence. In the premises therefore, the Appellant urged the court to allow the appeal, quash the conviction and set aside the custodial sentence that was imposed on him.

During the hearing of the appeal, the Appellant presented to court written submission in support of his appeal. He also made oral submission urging the court to allow his appeal. Ms. Atina for the State opposed the appeal. She submitted that the prosecution had established to the required standard of proof that indeed the Appellant had committed the offence. In the premises therefore, she urged the court to dismiss the appeal. This court shall revert to the submission made after briefly setting out the facts of this case.

The complainant in this case is the granddaughter of the Appellant. She used to live with her grandparents at the material time. The complainant went to live with her maternal grandparents after she had been sexually assaulted by her father. On 4th November 2011, the complainant told the court that she was with her grandfather at his house at M K. A couple of days prior thereto, the Appellant had had a disagreement with her grandmother. The grandmother left the home. On the particular day, the Appellant was the only adult living with the complainant and her younger brother by the name J. According to the complainant, while she was asleep, the Appellant crept into her bed removed her skirt and underpants before sexually assaulting her. She screamed and alerted neighbours who came to her rescue. Among the neighbours who came to her rescue were PW2 Hadija Nambuya and PW3 Rose Wamaitha. The two witnesses testified that at about 9.00p.m. on the material night, they heard noises. PW2 saw the complainant. She inquired from her what the problem was. The complainant told her that the Appellant had sexually assaulted her then chased her from the house. The two neighbours sought to confirm if indeed the complainant had been sexually assaulted. On physical examination, they confirmed that indeed the complainant had been sexually assaulted.

They mobilized neighbours who apprehended the Appellant and escorted him to Pangani Police Station. At Pangani Police Station, PW2 and PW3 were advised to take the child to Nairobi Women's Hospital for medical treatment. A Dr. Macharia of the Nairobi Women Hospital saw the complainant on the same night. She observed that the complainant's clothes were dirty. She appeared distraught. On vaginal examination, the external genitalia was normal. There was a foul smelling vaginal discharge. There was a slight vaginal tear. On the wall/sides, there was laceration and a few tissues. The hymen was torn. She formed the opinion that indeed the complainant had been sexually assaulted. She was immediately put on treatment. The medical report was produced as **prosecution's exhibit No. 1** on behalf of Dr. Macharia by PW6 Dr. Daniel Nguku. The complainant was on 22nd November 2011 seen PW5 Dr. Zephania Kamau based as the Police Surgery. He made the following observations: the complainant had no bodily injuries, her external genitalia was normal, the vulva was normal, the hymen was intact, there were no abnormal discharges. He assessed the age of the complainant at twelve (12) years. The P3 form and the age assessment was produced as prosecution's exhibit No.2 and 3 respectively. The case was investigated by PW4 Police Constable Moses Mwaniki. After concluding the investigations, he decided to charge the Appellant with the offence that he was convicted.

When he was put on his defence, the Appellant testified that the entire case had been motivated by a grudge that existed between him and PW2. He testified that in August 2011, four children, including the complainant and the granddaughter of PW2 went to City Park. On their way home, the granddaughter of PW2 was knocked down by a vehicle. The child was rushed to Guru Nanak Hospital before being transferred to Kenyatta National Hospital for treatment. The child was admitted at the hospital. The Appellant testified that PW2 attributed the accident to the fact that it was the Appellant's granddaughter who had influenced her granddaughter to go to City Park. She asked the Appellant to foot the medical bill of Kshs.11,000/- that the granddaughter incurred while admitted at Kenyatta National Hospital. The Appellant was unwilling to take responsibility because he was of the view that the children were the ones who decided to go to City Park. The Appellant's decision not to admit liability infuriated PW2. She threatened the Appellant with unspecified consequences. It was the Appellant's case that the entire allegation to the effect that he had sexually assaulted his granddaughter was motivated by the existence of a grudge between the Appellant and PW2. He denied that he had committed the offence that he was charged with.

This being a first appeal, it is the duty of this court to reconsider and re-evaluate the evidence adduced by the prosecution witnesses and the defence and reach its own independent determination whether or not to uphold the conviction of the Appellant. In reaching its determination, this court is required to take into

consideration that it neither saw nor heard the witnesses as they testified and therefore give due allowance in that regard. (See Njoroge –Vs- Republic [1987] KLR 19). In the present appeal, the issue for determination by this court is whether the prosecution adduced sufficient evidence to establish to the required standard of proof the charge of defilement.

This court has 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 must establish three essential ingredients: penetration, the age of the complainant and the identity of the perpetrator. In the present appeal, the prosecution adduced evidence to the effect that the Appellant, the grandfather of the complainant, had sexually assaulted her on the material night of 4th November 2011. The complainant testified that on that material night, the Appellant crept into her bed as she was asleep. He removed her underpants and skirt before sexually assaulting her. She screamed. Neighbours came to her rescue. PW2 and PW3 physically examined her and saw that she had indeed been sexually assaulted. The Appellant was taken to Nairobi Women Hospital where she was examined. The doctor formed the opinion that she had indeed been sexually assaulted. She had a tear in her vagina. The hymen was broken. She had a foul smelling discharge. A medical report to that effect was produced into evidence. She was put on treatment. Although the Appellant denied committing the offence, this court holds that the prosecution proved penetration to the required standard of proof beyond any reasonable doubt.

As regard the age of the complainant, no document evidencing the birth of the complainant was produced into evidence. However, the complainant was seen by PW5 Dr. Zephania Kamau who, upon medical examination, formed opinion that the Appellant was twelve years at the time of the incident. The age of the complainant at the time of the incident is material because it will determine the sentence that will ultimately be meted out on the Appellant if he was convicted of the charge. In the present appeal, this court holds that the complainant was twelve years at the time of the incident.

As regards the identity of the perpetrator, the complainant testified that she was sexually assaulted by the Appellant. The Appellant is her maternal grandfather. She lived with the Appellant prior to the sexual assault. The Appellant was known to her prior to the sexual assault. This court has carefully evaluated the evidence of the complainant. It has also taken into account the relationship of the Appellant and the complainant. This court formed the view that the complainant was telling the truth when she testified before court. Her testimony was lucid, consistent, cogent and give a chronological account of what transpired on the material night. This court saw no reason why the complainant would give false evidence or implicate her grandfather in the sexual assault. There existed no grudge between the Appellant and the complainant. Indeed, it was clear that the complainant appreciated the fact that her grandparents took her in when she was sexually assaulted by her father. The claim by the Appellant that the neighbours, particularly PW2 had a grudge against him was not borne out by evidence. If any grudge existed, it would be between the Appellant and the complainant. The evidence adduced by the Appellant in his defence therefore did not dent the otherwise strong culpatory evidence that was adduced against him by the prosecution witnesses.

The upshot of the above reasons is that the prosecution established to the required standard of proof beyond any reasonable doubt that indeed it was the Appellant who had sexually assaulted the complainant. The Appellant's appeal against conviction therefore lacks merit and is hereby dismissed.

On sentence, the Appellant is on firmer ground. The Appellant was sentenced to life imprisonment under **Section 8(2)** of the **Sexual Offences Act**. Under this Section, the victim of the sexual assault must be a child aged eleven (11) years or less. In this appeal, the complainant was twelve years at the time of the sexual assault. The Appellant ought to have been sentenced under **Section 8(3)** of the **Sexual Offences Act**. That sentence is a term of imprisonment of not less than twenty (20) years. This court has taken into consideration that the Appellant was in remand custody for a period of two (2) years before his conviction. He has served four (4) years in prison. In the premises therefore, the court sentences the Appellant to serve the remainder of the term of 14 years imprisonment as of today's date. The Appellant's appeal on sentence therefore succeeds to that extent. It is so ordered.

DATED AT NAIROBI THIS 7TH DAY OF MARCH 2017

L. KIMARU

JUDGE