



**REPUBLIC OF KENYA**

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

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO.52 OF 2013**

*(An Appeal arising out of the conviction and sentence of Hon. Mwangi (Mrs.) - RM delivered on 1<sup>st</sup> March 2012 in Kibera CM. CR. Case No.1228 of 2012)*

**HASSAN WAMI SAIDI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The Appellant, Hassan Wami Saidi was charged with the offence of **defilement** contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act No.3 of 2006**. The particulars of the offence were that on the 14<sup>th</sup> day of February 2012 at Nairobi West within Nairobi County, the Appellant intentionally and unlawfully committed a sexual act by inserting his male genital organ (penis) which caused penetration into the male organ (anus) of I M, a boy child aged two (2) years. The Appellant was also charged with an alternative charge of **indecent act with a boy child** contrary to **Section 11(A)** of the **Sexual Offences Act No.3 of 2006**. The Appellant was arraigned in court. He pleaded not guilty to the two offences. He was convicted of the main charge and sentenced to serve life imprisonment. The Appellant appealed against the conviction and sentence.

The Appellant filed the following grounds of appeal:

- a. That the trial court erred in law in relying on incredible witness whose testimony could not conclusively prove penile penetration of the complainant’s genitalia.
- b. That the evidence adduced by the prosecution was not corroborated by other witnesses.
- c. That the medical report did not prove the child’s injuries beyond reasonable doubt.
- d. That his constitutional rights to fair hearing under the **Constitution** was contravened by the fact that he was not availed witness statements before the trial commenced.

On the hearing of the Appellant’s appeal, the Appellant filed written submission in support of his appeal and urged the court to quash the conviction and set aside the sentence.

In response to the Appellant’s submission, Ms. Kimiri for the State opposed the appeal. She stated that the Appellant had the liberty to request for the witness statements which were available in the Registry;

that no one denied him the witness statements. She reiterated the fact that the Appellant was caught in the act by PW2 sodomizing the child and on being confronted, he attempted to flee from the scene of crime. She submitted that the child was taken to Nairobi Women's Hospital and produced a medical examination report that showed that the child sustained tears and lacerations in the anal area. The medical examination corroborated the evidence of PW2 who witnessed the sexual assault. The evidence was also corroborated by PW3 A B, the sister of the child who at the time was watching TV in house. She also produced a clinical card to establish the age of the child i.e. that he was two years old at the time of the incident.

The facts of the case as evaluated by this court is follows:

On the 14<sup>th</sup> February 2012, at about 10.00 p.m., the Appellant was found in the bathroom by PW2 I B who had gone to brush his teeth. On entering the bathroom, I found that the Appellant had put the child (boy) to stand against a bucket. The Appellant on seeing PW2 covered his private parts. On being forced to stand upright, his penis was erect and was ejaculating. The boy was at that instant holding the basin and looking away from the Appellant and had soap on his buttocks. PW2 slapped the Appellant. There was a commotion. This attracted the parents of the boy who rushed to the bathroom to inquire what was causing the ruckus. The Appellant took advantage of the confusion caused by the commotion and fled from the house. PW2 then called PW1, M B, the father of the boy who rushed home. On being told about the incident, he reported the matter to the police station whereupon he was advised to take the child to Kenyatta National Hospital. The child was examined and found to have a tear and laceration on his anus. Dr. Memke Tenesgna, the doctor who examined the boy at Nairobi Women's Hospital testified and presented a medical report to court in regard to the injuries that the child had sustained. He gave the diagnosis of sexual assault of defilement occasioned by penal penetration of the anus.

PW1 submitted the P3 and medical report to the police station. The police commenced a search for the Appellant with a view to charging him with the offence. The Appellant was arrested on 22<sup>nd</sup> February 2012 at Fuata Nyayo Slums. He was then taken to Nyayo Police Post. He was charged with the offence on conclusion of the investigations.

In his defence, the Appellant denied that he defiled the child. He claimed the evidence tendered to the court by the prosecution did not meet the standard of proof required in such a case: (i) that the witnesses lied; (ii) that he was not availed witness statements that linked him to the offence; (iii) that the medical report failed to link him to the offence.

This being a first appeal, it is the duty of the court to reconsider and re-evaluate the evidence before it so as to reach an independent determination to uphold or quash the conviction and sentence of the Appellant. In evaluating the evidence, the court has to bear in mind that it did not hear the evidence *viva voce* had no opportunity to observe the demeanour or otherwise of the witnesses. **(See Okeno -vs- Republic [1992] EA 32)**. The issue for determination is whether the prosecution proved the charge of **defilement** brought against the Appellant to the required standard of proof beyond reasonable doubt.

For the prosecution to establish the charge of **defilement** contrary to **Section 8(1)** of the **Sexual Offences Act**, it must prove three elements of the charge: that there was penetration, the identity of the perpetrator and finally the age of the victim. In this appeal, the prosecution proved that the boy was indeed sexually assaulted. PW2 testified that the Appellant was found in the bathroom with the victim. The victim was standing against the bucket facing away from the Appellant with soap on his buttocks. The soap was used to smoothen penetration by the Appellant. The Appellant was squatting with his zip open. The penis was erect and was ejaculating. PW2's evidence was corroborated by PW4, the doctor who examined the victim. He found tears and laceration on his anus which established penile penetration of the anus. This court is satisfied that the prosecution proved that indeed the victim was penetrated.

The second issue for determination is the age of the child. The prosecution produced the victim's health card which indicated that the victim was born on 2<sup>nd</sup> December 2009. Though a birth certificate was not produced, this court has no reason to doubt the clinical card and therefore find that the age of the complainant was two (2) years at the time of the sexual assault.

The third issue for determination by this court is the identity of the perpetrator. The Appellant was employed by the parents of the victim as a househelp. He was therefore known to PW1, PW2 and PW3 who lived with him in the same house. The Appellant was also known by the victim. He was his care giver. On the material day, the Appellant took the victim to the bathroom to give him a bath but instead took advantage of him and sexually assaulted him. This court finds the Appellant's assertion that he was framed to be devoid of credibility and finds that the prosecution established the identity of the Appellant as the perpetrator of the sexual assault to the required standard of proof beyond any reasonable doubt.

In the premises therefore, this court finds that the Appellant was properly convicted by the trial court. The sentence that was imposed by the trial court is legal. The Appellant's appeal against conviction and sentence lacks merit and is hereby dismissed. The verdict of the trial magistrate's court is hereby upheld. It is so ordered.

**DATED AT NAIROBI THIS 16<sup>TH</sup> DAY OF MARCH 2017**

**L. KIMARU**

**JUDGE**