



**REPUBLIC OF KENYA**

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

**FAMILY DIVISION**

**CRIMINAL APPEAL NO.130 OF 2014**

*(An Appeal arising out of the conviction and sentence of HON. D.K. MOCHACHE (MRS.) - PM delivered on 1<sup>st</sup> August 2014 in Kiambu CM. CR. Case No.615 of 2014)*

**DANIEL OWINO AILA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The Appellant, Daniel Owino Aila 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 the night of 16<sup>th</sup> and 17<sup>th</sup> February 2014 at [particulars withheld] village within Kiambu County, the Appellant unlawfully and intentionally committed an act which caused penetration of his genital organs (penis) into the genital organs (vagina) of M W M, a child aged 9 years. He was alternatively charged with the offence of **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 dates and in the same place, the Appellant unlawfully and intentionally touched the vagina of M W M , a child aged 9 years with his 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 as charged on the main count of defilement and sentenced to serve life imprisonment as is mandatorily provided by the law. He was aggrieved by his conviction and sentence and 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 took issue with the fact that he was convicted on basis of the evidence adduced by the prosecution witnesses which, in his view, was insufficient to sustain a conviction. He complained that the prosecution failed to establish its case against him to the required standard of proof beyond any reasonable doubt. He was further aggrieved that his defence was not considered when the trial magistrate reached the decision to convict him.

In his supplementary grounds of appeal filed without the leave of court (the court will however consider it), the Appellant complained that he was not accorded a fair trial. He took issue with the fact that the trial magistrate failed to take note of his demeanour during trial. He faulted the trial magistrate for reaching the decision to convict him yet the medical evidence adduced during trial was inconsistent with the prosecution's case. In the premises therefore, he urged the court to allow his appeal, quash his conviction

and set aside the sentence that was imposed on him.

During the hearing of the appeal, the Appellant submitted to the court written submission. He urged the court to allow his appeal. A response to the Appellant's submission was made by Ms. Aluda on behalf of the State. Ms. Auda opposed the Appellant's appeal. She submitted that the prosecution had established its case on the charge of **defilement** to the required standard of proof beyond any reasonable doubt. She submitted that the sentence meted by the trial magistrate was legal. She therefore urged the court to disallow the appeal and confirm the conviction and sentence of the trial court.

The facts of this case according to the prosecution are as follows. The complainant Magdaline Wairimu Muiru was said to be aged nine (9) years at the time of the incident. Her age was confirmed by her mother PW2 Grace Mumbi who produced her clinic card. The clinic card was produced into evidence as **Prosecution's Exhibit No. 1**. The clinic card indicated that the complainant was born on 23<sup>rd</sup> May 2005. The Appellant was an employee of the complainant's parents. At the material time, he lived alone in a single roomed house within the same compound with the complainant's family. The complainant recalled that on the evening of 15<sup>th</sup> February 2015 she was at home with her mother and her siblings. She recalled that she had misplaced a set of keys given to her by PW2. She testified that PW2 threatened to beat her up when she could not find the keys. She therefore went to seek refuge at the Appellant's house.

She found the Appellant alone in the house cooking supper. She told him that she was running away from her mother who wanted to beat her. She testified that the Appellant allowed her into his house and she spent the night there. She testified that she slept on the same bed with the Appellant. She remained at the Appellant's house the following day for the entire day. The Appellant gave her bread and water and locked her inside the house as he went about his duties at her parent's home. The complainant testified that when she woke up on the third day, she saw that she was bleeding from her genital organs. The Appellant was sitting on the bed. She realized that she was wearing different clothes from what she wore to bed the previous night. She testified that she had gone to bed in a red trouser and flowered underpants but woke up in a different trouser, underpants and sweater. She tried to open the door after the Appellant had left but found that it was locked. She testified that she heard someone walking past the door and she stretched her fingers through an opening on the side of the door. She then heard her aunt PW3 E W M calling out her name.

PW2 confirmed that on the day in question, the complainant ran away from home that evening after she threatened to beat her up after she lost some keys. She stated she thought that the complainant would return home after they slept since she had the habit of running away from home when she was in trouble. She stated that when the complainant failed to return home the following day, she looked for her in the neighbourhood. She asked the Appellant whether he had seen the complainant but he told her that he had not. PW2 therefore reported that matter to Karuri Police Station.

PW3 lived in the same compound with the complainant's family. Her evidence was that on 18<sup>th</sup> February 2014 at around noon, she walked past the Appellant's house as she was going to her kitchen. She testified that she saw a child's wrist emerging from an opening on the Appellant's door. Since she knew that it was not the Appellant's wrist, she decided to open the door. She forced the door open as it was locked. When the door opened, PW3 called out the complainant's name and asked her come out of the house. When PW3 saw the complainant, she screamed drawing the attention of neighbours. The Appellant was apprehended for keeping the complainant in his house. The police were called and took both the complainant and the Appellant to Karuri Police Station. The police referred both the complainant and the Appellant to Karuri Health Center for medical examination. At the health center, they were medically examined by PW4 Richard Munene, a Clinical Officer.

The medical examination was done on 18<sup>th</sup> February 2012. On examining the complainant, PW4 observed that the complainant's genital organ was tender. She had a bruised *labia minora* and *introitus*. She also had a fresh hymen tear. Spermatozoa were detected in the vaginal swab carried out on the complainant. The complainant was also diagnosed with a sexually transmitted infection after a urine test was done. PW4 formed the opinion that indeed the complainant had been defiled. PW4 produced the complainant's outpatient card as **Prosecution's Exhibit No. 2**. He also signed the P3 form and produced

the same into evidence as **Prosecution's Exhibit No. 3**. A urine test carried out on the Appellant showed that the Appellant had the same sexually transmitted disease as the complainant.

After the matter was reported at Karuri Police Station, Cpl. Ozia Daudi was assigned to investigate the case. After concluding his investigations, he formed the view that indeed a case had been established for the Appellant to be charged with the current offence. When the Appellant was put on his defence, he denied committing the offence.

This being a first appeal, it is the duty of the court to re-evaluate and to reconsider the evidence adduced before the trial court before reaching its own independent determination whether or not to uphold the decision of the said court. In doing so, this court is required to always keep in mind the fact that it neither saw nor heard the witnesses as they testified and therefore give due regard in that respect (see **Njoroge – vs- Republic (1987) Klr 19**). The issue for determination by this court is whether the prosecution proved its case on the charge brought against the Appellant 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.

Upon re-evaluating the facts of this case, the grounds of appeal and the submission made during the hearing of the appeal, it was clear to the court that for the prosecution to prove its case on the charge of defilement, there are three elements of the charge the prosecution was required to establish. Under **Section 8 (1)** of the **Sexual Offences Act**, the prosecution was required to establish that there was penetration. The penetration was perpetrated on a child. Finally, the prosecution was required to establish the identity of the perpetrator. **Section 2 (1)** of the **Sexual Offences Act** defines penetration as **“the partial or complete insertion of the genital organs of one person into the genital organs of another person”**. In the present case, the prosecution established that indeed the complainant was penetrated. The medical evidence of PW4 established to the required standard of proof that indeed the complainant had been penetrated. There was tenderness in her genital organs. Her *labia minora* was bruised and she had a fresh hymen tear. A vaginal swab carried out on her revealed presence of spermatozoa. That fact was not disputed by the Appellant. The prosecution further established that the complainant was a child. Under **Section 2 (1)** of the **Sexual Offences Act**, the meaning assigned to **“a child”** is that provided under the **Children Act**. Under **Section 2** of the **Children Act** a child is defined as any human being under the age of eighteen years.

In the present appeal, the prosecution produced a clinic card for the complainant which established that indeed the complainant was born on 23<sup>rd</sup> May 2005. She was about nine (9) years old at the time of the sexual assault. As regards the identity of the perpetrator, the complainant was found in the Appellant's house. He was known to the complainant. Indeed, he was employed by PW2 and lived in the same compound with the complainant. There was no doubt that the complainant properly identified the Appellant as the perpetrator of the sexual assault. The prosecution established that indeed the complainant had been defiled by the Appellant to the required standard of proof beyond any reasonable doubt.

The upshot of the above is that the Appellant's appeal on conviction lacks merit and is hereby dismissed. The conviction of the Appellant is upheld. The sentence meted on the Appellant is legal. It is upheld. It is so ordered.

**DATED AT NAIROBI THIS 8<sup>th</sup> DAY OF MARCH 2016**

**L. KIMARU**

**JUDGE**