



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.18 OF 2015

(AN APPEAL ARISING OUT OF THE CONVICTION AND SENTENCE OF HON. W. NGUMI – SRM DELIVERED ON 30TH DECEMBER 2012 IN GITHUNGURI CM. CR. CASE NO.820 OF 2012)

JOHN NGARUIYA WANYEKI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, John Ngaruiya Wanyeki was charged with **defilement** contrary to **Section 8 (2)** of the **Sexual Offences Act**. The particulars of the offence were that on 16th July 2012 at [particulars withheld] in Githunguri District of Kiambu County, the Appellant intentionally caused his penis to penetrate the vagina of F 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 day and in the same place, the Appellant committed an indecent act with a female child namely F W M, aged 9 years by intentionally causing his penis to contact the genital organ namely vagina of the said child. When the Appellant was arraigned in court, he pleaded guilty to the charge. After full trial, he was convicted as charged on the main count of **defilement**. He was sentenced to serve life imprisonment. The Appellant 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 was aggrieved that he was convicted on the basis of evidence which was not sufficient to sustain his conviction. He faulted the trial magistrate for convicting him yet the prosecution had not established its case to the required standard of proof beyond any reasonable doubt. He complained that the trial magistrate failed to comply with the requirements of **Section 169 (1)** of the **Criminal Procedure Code**. In his amended grounds of appeal filed without leave of court (this court will however consider it), the Appellant faulted the trial magistrate for convicting him on the basis of a defective charge sheet. The Appellant claims that as a result, he was not able to properly defend himself during trial. The Applicant claims that the entire proceedings were therefore a nullity. He complained that his constitutional right to fair hearing had been infringed during trial. He faulted the trial magistrate for failing to take into account that the circumstances in which the defilement is said to have occurred did not point to his guilt. In the premises therefore, the Appellant urged the court to allow the appeal, quash the conviction and set aside the 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 urged the court to acquit him. Ms. Aluda for the State made submissions to the effect that the prosecution established its case against the Appellant to the required standard of proof beyond any reasonable doubt. She submitted that the sentence meted out on the Appellant was legal.

The facts leading to the charge against the Appellant as presented by the prosecution are as follows. The complainant was said to be nine (9) years old at the time of the incident. Her age was confirmed by her mother, PW1 LWM who produced her birth certificate. The birth certificate was produced as **Prosecution's Exhibit No. 2**. The birth certificate indicated that the complainant was born on 30th September 2002. The complainant testified that on the day of the incident, she had been sent by her mother PW1 to collect milk at the Appellant's home. She testified that when got there, she found the Appellant's wife with their new born child in the house. The Appellant's wife served her tea and left her with the child as she went to get her the milk. The complainant testified that she stepped out of the house after the Appellant walked in and stood outside the Appellants house. There were children playing outside the Appellants house. She testified that the Appellant came outside and asked the children to go away. He held her hand and led her to his son's house within the same compound. There, he removed her trouser and made her lie on the bed. He then removed his trouser and lay with her on the bed. The complainant tried to scream but the Appellant blocked her mouth with his head. She testified that the Appellant then produced his penis and inserted it into her vagina. She felt pain. They then heard a knock on the door and the Appellant stopped what he was doing. He opened the door and found PW2 at the door step.

The evidence of PW2 was that she went to the Appellant's home after the complainant took long to return home. She testified that she knocked at the main house but there was no response. She saw a group of children and asked them whether they had seen the complainant. She walked past the Appellant's son's house and saw the Appellant appear from his son's house with the complainant. She asked the Appellant what he had been doing with her daughter inside the house. She testified that the Appellant told her that they had entered the house through another door. Since she knew that the house only had one door, PW2 figured that the Appellant was lying. She asked the complainant what had happened and the complainant told her that the Appellant had sexually assaulted her. She testified that she then saw the Appellant's pointing at the complainant trying to intimidate her not to speak up. Due to the commotion, a crowd gathered at the Appellant's house.

PW2 reported the incident at Githunguri Police Station. The Police advised her to take the complainant to Githunguri Health Centre for medical examination. At the health centre, the complainant was examined by PW3 Sabina Njeri, a Clinical Officer. The medical examination was done on 16th July 2012. She testified that the complainant told her that she had been sexually assaulted. She saw that she had slight bruises on the vaginal wall. She also had a perforated hymen. She signed the P3 form which was produced as **Prosecution's Exhibit No. 2**. PW4 PC Alice Laban was assigned to investigate the case. After concluding her investigations, she 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. He stated that on the day in question he was at home with his wife when the complainant came to collect milk. The evidence of both the Appellant and his wife DW2 L M N was that they were inside their house at the material time. They testified that the complainant had already left with the milk that she had come to collect. They stated that the Appellant went to the kitchen to prepare food while DW2 went with the baby to their bedroom. They both stated that they later heard a woman screaming outside their house. When they went outside the house, they found PW2 screaming. A crowd started to gather at their home. PW2 told the crowd that the Appellant had defiled the complainant. They stated that the women in the crowd wanted to inspect the complainant in order to confirm that she had been defiled but PW2 refused to let them inspect her. The Appellant was later arrested and charged with the present offence.

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 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 against the Appellant to the required standard of proof beyond any reasonable doubt.

This court has re-evaluated the facts of this case. **Section 8(2)** of the **Sexual Offences Act** under which the Appellant was charged with relates to defilement of a child aged eleven years or less. To that extent, this court finds no defect in the charge sheet as **Section 8(2)** of the **Sexual Offences Act** discloses the offence the Appellant was charged with. In a case of defilement, the onus is on the prosecution to establish that there was penetration, that the victim of the sexual assault was a child and finally, the identity of the perpetrator. In respect of the first ingredient of penetration, the prosecution relied on the evidence of the complainant that the Appellant inserted his penis into her vagina. **Section 2 (1)** of the **Sexual Offences Act** defines penetration as *“the partial or complete insertion of the genital organ of a person into the genital organs of another person”*.

In the present case, the complainant’s testimony was corroborated by the medical evidence of PW3, a clinical officer. The finding of PW3 was that the complainant had bruises in her vaginal wall. She also noted that the complainant had a perforated hymen. The evidence of the complainant was therefore substantiated by the medical evidence since she had sustained injuries in her genital organs. In light of the medical evidence of PW3, although the complainant’s hymen was not torn, this court finds that there was at least partial penetration of the complainant. This court therefore finds that prosecution established to the required standard of proof that indeed the complainant was penetrated. Although this fact is disputed by the Appellant, this court finds that the prosecution proved the first ingredient of penetration to the required standard of proof beyond any reasonable doubt.

As to whether the prosecution established that the complainant was a child at the time the offence was committed, **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”*. The prosecution produced the complainant’s birth certificate which established that indeed the complainant was born on 30th September 2002. She was about nine (9) years at the time of the sexual assault. This court therefore finds that the age of the complainant at the time the offence was committed was also proved to the required standard of proof beyond any reasonable doubt.

In the present appeal, as regards the identity of the perpetrator, the prosecution basically relied on the evidence of the complainant who testified that it was the Appellant who sexually assaulted her. The evidence of PW2 was that she saw the Appellant emerge from his son’s house with the complainant. She stated that she saw the Appellant trying to signal the complainant not disclose what had transpired. In his defence, the Appellant stated that he came out of the house after hearing PW2 screaming outside his house. He denied that he sexually assaulted the Appellant. He relied on the alibi defence of his wife DW2 that they were at the time inside the house together. DW1 stated that she was at their bedroom at the time while the Appellant was in the kitchen. On cross examination, DW2 intimated that her brother in law whom they have had a family dispute with could have prevailed upon PW2 to frame the Appellant with the charged offence. Upon re-evaluation of the evidence adduced, it was clear to this court that the complainant had no reason to point at the Appellant as the person who sexually assaulted her if indeed he did not do it. There was no proof of PW2’S involvement in the Appellant’s alleged family feud as claimed by DW2. This court formed the view that the defence put forward by the Appellant did not displace the prosecution’s case. Accordingly, this court finds that the prosecution identified the perpetrator of the offence to the required standard of proof satisfying the final ingredient of the offence.

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 10TH DAY OF MARCH 2016

L. KIMARU

JUDGE

