



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.110 OF 2011

*(An Appeal arising out of the conviction and sentence of Hon. T. Murigi – PM*

*delivered on 15<sup>th</sup> April 2011 in Makadara CM. CR. Case No.4545 of 2007)*

HABIL ACHONGO OLEMBO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

**JUDGMENT**

The Appellant, Haabil Achongo Olembo was charged with the offence of **defilement of a child** contrary to **Section 8 (1)** as read with **Section 8 (3)** of the **Sexual Offences Act**. The particulars of the offence were that on 15<sup>th</sup> September 2007 at [*particulars withheld*] Estate in Nairobi, the Appellant intentionally and unlawfully committed an act which caused penetration of his male genital organ into the female genital organ of M L S, a child aged twelve (12) years. He was alternatively charged with **committing an indecent act** contrary to **Section 11 (1)** of the **Sexual Offences Act**. The particulars of the offence were that on the same date, and in the same place, the Appellant intentionally and unlawfully committed an indecent act with M L S, a child aged twelve (12) years by inserting his male genital organs into her private parts, namely 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 as charged on the main count of defilement. He was sentenced to serve twenty (20) years 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 contradictory evidence by the prosecution witnesses. He complained that he was detained by the police beyond the stipulated period before he was arraigned in court. The Appellant was aggrieved that the trial court failed to consider his defence before reaching the decision to convict him. He was aggrieved by the trial court's reliance on the evidence of PW2 and PW6 which essentially he claimed was hearsay to convict him. He complained that the prosecution had failed to prove its case against him to the required standard of proof beyond any reasonable doubt. In his amended grounds of appeal filed without leave of court (this court will however consider them), the Appellant was aggrieved that the trial court erred in failing to make a finding that the prosecution tendered contradictory medical evidence. He also faulted the trial court for failing to make a finding that the case had not been properly investigated and therefore he could not have been convicted on the basis of the evidence that was adduced in court. For the above reasons, the Appellant urged the court to allow the appeal, quash his 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 further made oral submission in support of his case. He told the court that trial court mainly relied on the evidence of PW2 and PW6 to convict him. Ms. Atina for the State opposed the Appellant's appeal. In addressing the issue of contradictory medical evidence adduced by the prosecution, Ms. Atina explained that the reason why PW7 found the complainant's hymen to have been intact was because he had examined her a long time after the incident. She submitted that the prosecution established its case against the Appellant to the required standard of proof beyond any reasonable doubt. She therefore urged the court to dismiss the Appellant's appeal.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced by the prosecution witnesses and by the defence before the trial court so as to arrive at an independent determination whether or not to uphold the conviction of the trial court. In doing so, this court is required to be mindful of the fact that it neither saw nor heard the witnesses as they testified during trial and cannot therefore give an opinion as to the demeanor of the said witnesses (**see Okeno –vs-Republic [1972] EA 320**). In the present appeal, the issue for determination by the court is whether the prosecution established a case for this court to convict the Appellant on the charge of **defilement** to the required standard of proof beyond any reasonable doubt.

The facts of the case as presented by the prosecution are as follows. PW1 M L testified as the complainant. She was said to be aged twelve (12) years at the time of the incident. She was a pupil at **[particulars withheld]** Primary School. The complainant recalled on 15<sup>th</sup> September 2007, she left school at about 1.00p.m to go home. She was in the company of her friend PW2 M A. She testified that PW2 was the first to reach her home as they parted ways. She therefore proceeded to her home.

On the way, she met the Appellant who asked her to accompany him to his house where he was to give her something to take to her mother. The complainant testified that she accompanied the Appellant to his house. When they got inside the house, the Appellant locked the door. He then undressed her before placing her on his bed to lie on her back. The complainant testified that the Appellant also undressed himself and got on top of her. She testified that he then produced his penis which he inserted into her vagina. The Appellant had sexual intercourse with the complainant for about an hour. When he finished, he warned the complainant not to disclose what had transpired to anyone. The complainant dressed herself up and went home. The complainant testified that she did not disclose the incident to her mother when she returned home from the Appellant's house. She testified that she later confided in PW2 on what the Appellant had done to her.

The evidence of PW2 was that on 24<sup>th</sup> September 2007 she was at school with the complainant. She testified that the complainant confided in her that she had been defiled by a man whom she knew. The complainant told her that the man had asked her to accompany him to his house where he defiled her. PW2 testified that she advised the complainant to report the incident to their teacher, PW4 L K N. PW4 recalled that on the day in question she was in class when she was approached by both PW1 and PW2. She testified that the girls told her that they wished to talk to her urgently. PW4 therefore adjourned the class to talk to the girls. She testified that the complainant reported to her that there was a man back at home who had been telling her that he wanted to marry her. PW4 testified that they were joined by another teacher therefore they were not able to complete their conversation. PW4 later called the complainant's father, PW3 J S M and asked him to go to school. PW3 testified that when he went to school the following day, he had a meeting with the complainant and PW4. He testified that the complainant disclosed to them that she had been defiled by the Appellant on 15<sup>th</sup> September 2007.

PW3 immediately made a report to Huruma Police Station. The police advised PW3 to take the complainant to Nairobi Women Hospital for medical examination. At the hospital, the complainant was medically examined by PW6 Dr. Ketra Muhombe. The medical examination was done on 25<sup>th</sup> September 2007. He testified that the complainant told him that the Appellant had sexually assaulted her on 15<sup>th</sup> September 2007. He saw that the complainant had an old hymen tear. He concluded that the complainant had been defiled. PW6 prepared a report in respect to the complainant which was produced as **Prosecution's Exhibit No. 1**. The complainant and the Appellant were seen by PW7 Dr. Zephania

Kamau based at the Police Surgery. This was on 4<sup>th</sup> October 2007. He saw nothing remarkable on both the complainant and the Appellant. The evidence of PW7 was that the complainant's hymen was intact. P3 forms filled by the PW7 in respect of the complainant and the Appellant were produced into evidence as **Prosecution's Exhibits Nos. 2 and 3** respectively.

The Appellant was arrested by PW5 PC Michael Mutwiri on 28<sup>th</sup> September 2007 and was taken to Huruma Police Station. The case was investigated by PW8 PC Florence Thurairara. After concluding his investigations, PW8 formed the opinion that a case had been made for the Appellant to be charged with the offence for which he was convicted. When he was put on his defence, the Appellant denied committing the offence. He told the court that the charge against him had been fabricated. He testified that PW3, the complainant's father is his father's cousin. According to the Appellant, the complainant's family initially lived in one of the houses belonging to the Appellant's grandfather in Mathare. At the time, the Appellant lived with his mother in Eastleigh. The Appellant testified that the last time he met the complainant was in the year 2005 after the complainant's home was demolished by the government. The Appellant testified that in February 2007 he met PW3 in Mathare. He testified that he told PW3 that he was pursuing a visa as he was planning to travel abroad. The Appellant testified that when they later met in August 2007, PW3 inquired of the whereabouts of his household items. The Appellant told him to ask his uncle as he was the one who evicted him from the house. The Appellant testified that PW3 demanded Kshs.30,000/- from him as compensation and threatened him with dire consequences if they failed to pay up. He testified that on 28<sup>th</sup> September 2007 he was arrested by police officers who were accompanied by PW3. He claimed that on the day he was said to have defiled the complainant, he was at work where he left at 4.00p.m. According to the Appellant, PW3 sought to punish him by lodging a false claim that he had defiled the complainant after he failed to compensate him.

This court has carefully re-evaluated the facts of this case. For the prosecution to establish its case, the prosecution is required to establish that the Appellant caused his sexual organ to penetrate the sexual organ of a child. Under **Section 2 (1) of the Sexual Offences Act**, the definition of a child is the one assigned thereto in the **Children Act**. This means any human being of less than eighteen (18) years. In the present appeal, the prosecution claimed that the complainant was aged twelve (12) years old at the time the sexual assault was said to have been committed. However, the prosecution did not adduce any documentary evidence in support of this assertion. In determining the age of the complainant, it is imperative that the prosecution establishes the age of the complainant with the best possible evidence which is a birth certificate, birth notification, an immunization card or in some instances a baptismal card issued shortly after the birth of the child. However, where this best evidence is not available, the prosecution can rely on other documentary evidence such as the medical report and the P3 form. The prosecution can also rely on the testimony of the parents of the complainant and also by the court visually satisfying itself as to the apparent age of the complainant. This position was upheld by **the Court of Appeal in Nyeri C.A Criminal Appeal No. 61 of 2014, Richard Wahome Chege -versus- Republic** (unreported) and **Nyeri C.A Criminal Appeal No. 100 of 2013 J.W.A -versus- Republic** (unreported). In the present appeal, this court finds that the prosecution established the first ingredient being the complainant's age through the medical report form produced into evidence as **Prosecution's Exhibit No. 1** by PW6.

As regards whether the prosecution proved penetration, the prosecution relied on the evidence of the complainant who testified that the Appellant defiled her on 15<sup>th</sup> September 2007. The prosecution's case is that the evidence of the complainant is corroborated by that of medical evidence produced by PW6 who examined the complainant on 25<sup>th</sup> September 2007. PW6 noted that the complainant had old hymenal tears. This court therefore finds that the prosecution proved the second ingredient of penetration to the required standard of proof beyond any reasonable doubt. This court finds the subsequent medical report prepared by Dr. Zephania Kamau to be unreliable as it was made three weeks after the event.

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 complainant knew the Appellant as she had seen him on several occasions. In his defence, the Appellant claimed that he had been framed with the offence by PW3 following his refusal to compensate him for his lost household

goods. From a careful examination of the surrounding circumstances of the case, this court is satisfied that the complainant was truthful in her evidence. The complainant was medically examined and found to have been defiled. 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 5<sup>TH</sup> DAY OF MAY 2016**

**L. KIMARU**

**JUDGE**