



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.322 OF 2012

(An Appeal arising out of the conviction and sentence of R.A.A. OTIENO - PM delivered on 30th November 2012 in Githunguri PM. CR. Case No.38 of 2011)

PAUL GIMADU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Paul Gimadu was charged with the offence of **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 10th January 2011 at Kagaa Village in Kiambu County, the Appellant unlawfully committed an act which caused penetration with his genital organ (penis) into the genital organ (vagina) of M N *alias* N, a girl aged eight (8) years. He was alternatively charged with **committing an indecent act with a female child** contrary to **Section 11(1)** of the same **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 M N by intentionally causing contact between his genital organ (penis) and the genital organ (vagina) of the said female child. When the Appellant was arraigned before the trial court, he pleaded not guilty to the charge. After full trial, he was convicted on the main count of **defilement**. He was sentenced to life imprisonment. The Applicant 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. In summary, the Appellant was aggrieved that the prosecution had failed to prove its case against him to the required standard of proof beyond any reasonable doubt. He complained that the trial court relied on the contradictory evidence adduced by the prosecution witnesses to convict him. The Appellant was also aggrieved that he had been convicted yet the trial magistrate had not considered his defence. In the premises therefore, the Appellant 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 presented to court written submission in support of his appeal. He urged the court to allow his appeal. Ms. Ngetich for the State opposed the appeal. She made oral submission to the effect that the prosecution had established its case on the charges brought against the Appellant to the required standard of proof. She submitted that the Appellant was caught red handed defiling the complainant. She stated that the medical evidence of PW3 confirmed that the complainant was indeed defiled. She therefore urged the court to dismiss the appeal.

The facts leading to the charge against the Appellant as presented by the prosecution are as follows. PW2 M N testified as the complainant. She was said to be aged eight (8) years old at the time of the incident. According to the age assessment which took place on 22nd November 2011 at Kenyatta National Hospital, the complainant was found to be aged about 9½ years. A radiological report from the hospital was produced into evidence as **Prosecution's Exhibit Nos. 4(a)**. The Appellant and his family lived within the same compound as the complainant's family. On the day of the incident, the complainant and her brother PW4, J N left school for home at about 4.00 p.m. When they got home, PW4 went to the farm to get the house keys from their mother while the complainant proceeded to Appellant's house to collect a book.

The complainant testified that she found the Appellant with his young child in the house. She testified that the Appellant took her by her hand and led her to his bed. He placed her on the bed and undressed her. He also undressed himself before he removed his penis which he inserted into her vagina. The complainant testified that she felt pain and therefore cried. The complainant's brother PW4 testified that when he got back to the house, he heard the creaking sound of a chair coming from the Appellant's house. He testified that the Appellant's door was not locked and he therefore peeped inside the house. He saw the Appellant lying on top of the complainant. According to PW4, the Appellant had inserted his genital organs into the complainant's genital organ. PW4 testified that the Appellant saw him and he quickly pulled up his trousers before running out of the house. The complainant also came out of the house and stood besides a tree. PW4 testified that he ran back to the farm to report the incident to his mother, PW1 R N.

The testimony of PW1 was that on the day in question she was working at the farm together with the Appellant's wife when they saw PW4 came running towards them. She testified that PW4 asked her to step aside so that he could tell her something. PW1 testified that PW4 told her that he had found the Appellant having sexual intercourse with the complainant. She stated that PW4 told her that he had found the Appellant lying on top of the complainant with his pants lowered down to his knees. PW1 asked PW4 to repeat what he had told her to the Appellant's wife and he did. They rushed home and found the complainant seated outside. When the complainant was interrogated, she confirmed that the Appellant had defiled her. PW1 testified that they examined the complainant's genital organs and observed that she had a whitish discharge. PW1 confronted the Appellant regarding the incident but he denied defiling the complainant.

The incident was reported to Kagaa Administration Police Post. The complainant was first taken to Kagaa Self Help Dispensary for treatment. She was later referred to Githunguri Health Centre where she was examined by PW3 Scolastica Wambui, a Clinical Officer. On examining the complainant's genitals, PW3 noted lacerations on her vulva which was also bleeding. She also noted that it was swollen and tender. 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. PW3 concluded that the complainant had been defiled. She filled a P3 form in respect of the complainant's medical treatment. It was produced into evidence as **Prosecution's Exhibit No. 2**. A treatment chit from Kagaa Self Help Dispensary was also produced as **Prosecution's Exhibit No. 1**.

PW7 Ag. IP. Christine Mwondi was assigned to investigate the case. She testified that she recorded the statements from the complainant, PW1 and PW4. In the course of her investigations, PW7 obtained blood samples from both the complainant and the Appellant, a saliva sample from the complainant and a blood stained underpant belonging to the complainant for scientific analysis. The items were examined by PW5 Albert Gathuri Mwaniki, a government analyst. His findings were that the blood stains on the complainant's underpant were not linked to the Appellant. He prepared a report in respect of his findings which was produced as **Prosecution's Exhibit No. 5**. The complainant's blood stained underpant was also produced as **Prosecution's Exhibit No. 3**.

After concluding her investigations, PW7 formed the opinion that a case had been made for the Appellant to be charged with the disclosed offence. When the Appellant was put on his defence, he denied committing the offence. He stated that the prosecution had not adduced medical evidence to link him to the offence. He claimed that PW1 had fabricated the charge against him after he declined sexual advances

from her.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced before the trial court so as to arrive at its own independent determination whether or not to uphold the conviction of the Appellant. In doing so, this court is required to be mindful of the fact that it neither saw nor heard the witnesses as they testified and therefore cannot make any comment regarding their demeanor (See **Njoroge –vs- Republic (1987) KLR 19**). The issue for determination by this court is whether the prosecution established the charge of rape against the Appellant to the required standard of proof beyond any reasonable doubt.

This court has re-evaluated the facts of this case. 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, the prosecution relied on the evidence of the complainant that the Appellant inserted his penis into her vagina. PW4 corroborated the evidence of the complainant when he testified that he found the Appellant lying on top of the complainant with his pants drawn to his knees. The complainant's evidence was further corroborated by the medical evidence of PW3 who examined the complainant on 12th January 2011. In her report which was produced as exhibit during trial, PW3 confirmed that indeed the complainant had been sexually assaulted. She had lacerations on the vulva which was also oozing blood. 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. **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 prosecution established to the required standard of proof that indeed the complainant was penetrated. This fact is not disputed by the Appellant. This court therefore 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 relied on a radiological report from Kenyatta National Hospital which showed that the complainant was found to be aged 9½ years when her age was assessed on 22nd November 2011. The prosecution therefore established that the complainant was a child at the time of the sexual assault to the required standard of proof beyond any reasonable doubt.

In the present appeal, as regards the identity of the perpetrator, the complainant identified the Appellant as the person who sexually assaulted her. PW4 testified that he saw the Appellant laying on top of the complainant with his pants drawn to his knees. The Appellant is well known to both the complainant and PW4 as he was their neighbour. Although the Appellant in his defence claimed that PW1 implicated him with the offence for reason that he declined her sexual advances, the prosecution was able to prove that the complainant had indeed been defiled thereby displacing the Appellant's defence. Accordingly, this court finds that the prosecution identified the Appellant as the perpetrator of the offence to the required standard of proof satisfying the final ingredient of the offence. This court found no reason why the complainant implicated the Appellant in the crime if he was not the one that committed it.

The upshot of the above is that the Appellant's appeal on conviction lacks merit and is hereby dismissed. The appeal on sentence similarly fails. The sentence was legal. The Appellant paced no material before this court to impeach the custodial sentence that was imposed on him. It is so ordered.

DATED AT NAIROBI THIS 2ND DAY OF JUNE 2016

L. KIMARU

JUDGE