

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.133 OF 2013

(An Appeal arising out of the conviction and sentence of Hon. C. OLUOCH - PM delivered on 27th June 2013 in Kiambu CM. CR. Case No.109 of 2013)

P N G.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, P N G was charged with the offence of **defilement** contrary to **Section 8 (1)** as read with **Section 8 (4) of Sexual Offences Act**. The particulars of the offence were that on the 12th day of January 2013 at about 11.00 a.m at *[particulars withheld]* village, Karuri sub-location within Kiambu County, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of B W, a child aged between 17-18 years. The Appellant 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 12th day of January 2013 at *[particulars withheld]* Village, Karuri Sub-location within Kiambu County, he committed an indecent act to B W, a child aged between 17-18 years by touching her genital organ (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 fifteen (15) years imprisonment. The Appellant was aggrieved by his conviction and sentence and has filed an appeal to this court.

In his amended petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been 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 proved its case to the required standard of proof beyond reasonable doubt. He was also aggrieved that his defence had not been considered before the trial court reached the decision to convict him. 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 presented to court written submission in support of his appeal. He urged the court to allow his appeal. Ms. Aluda for the State opposed the appeal. She urged the court to disallow the appeal since the prosecution had established its case on the charge of defilement to the required standard of proof beyond reasonable doubt.

The facts of this case are as follows: the complainant in this case is PW1 B W. She was said to be aged between seventeen (17) and eighteen (18) years at the time of the incident. The prosecution produced the complainant's Child Health Clinic card to confirm the same. The complainant was at the time a student at a tailoring school located at a plot owned by PW2 J W M. On the material day of 12th January 2013 at about 11.00 a.m., the complainant recalled that she was playing outside their house together with her brother and the Appellant's son. The complainant testified that the Appellant found them playing outside. She knew the Appellant as he was their neighbour. The Appellant sent his son and the complainant's brother to take *lesos* to the complainant's aunt. After the children had left, the Appellant got hold of the complainant by gagging her mouth and dragged her inside the house. He took the complainant to the kitchen where he removed her clothes before forcefully having sexual intercourse with her. After the

Appellant was through, he ordered the complainant to shower and wash her clothes. The complainant's aunt walked into the house as the complainant and the Appellant were talking. The complainant tried to tell her what had happened but the Appellant gestured to her not to.

When the complainant later went to school she could not focus and was crying. She confided to her teacher what had transpired. The complainant's teacher reported the incident to PW2 who in turn reported the same to PW3, the complainant's grandmother.

The incident was reported to Karuri Police Station where the complainant was advised to seek medical attention at Karuri Health Centre. At the said Health Centre, the complainant was seen by PW4 Richard Munene, a Clinical Officer at the hospital. The said clinical officer examined the complainant on 13th January 2013 and noted that the complainant had lacerations on the labia minora. The hymen was freshly torn. PW4 also took blood samples from the Appellant for DNA but the results were not availed in court. Results on the high vaginal swab, urine test, pregnancy test, HIV test and VDRL test were negative. The P3 form, medical treatment notes and the PRC form were produced into evidence as *Prosecution Exhibit Nos. 2, 3 and 4* respectively.

Upon receipt of the medical report, the case was assigned to PW5 Corporal Hadija Kenga of Karuri Police Station to investigate the case. Upon concluding the investigation, she concluded that a case had been made for the Appellant to be charged with defilement. The appellant was arrested and charged with the present offence.

After the close of the prosecution's case, the Appellant was put on his defence. The Appellant basically denied committing the offence. From his evidence, the Appellant alluded that he had been framed with the offence due to a disagreement he had with his landlord PW3 who is also the complainant's grandmother. He called his two (2) sons as witnesses namely G N DW2 and J N DW3. Both DW1 and DW2 testified that on the material day the Appellant woke up and went to sit outside his house. While there, the landlord, in the company of another woman, came to the house and started accusing the Appellant of defilement. According to them, the Appellant was at his house on the material day from the time he woke up in the morning.

This being a first appeal, it is the duty of this court to reconsider and re-evaluate the evidence adduced before the trial court, noting that that court had the opportunity of seeing and hearing the witnesses, before arriving at its independent determination whether or not to uphold the decision of the trial court. **(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 (4)** of **Sexual Offences Act** to the required standard of proof beyond any reasonable doubt.

In the present appeal, the Appellant in his written submission argued that the prosecution had not established its case against him to warrant the trial court to convict him of the offence charged. For the prosecution to establish its case, there are three (3) elements of the charge the prosecution is required to establish. Under **Section 8 (1)** of the **Sexual Offences Act**, the prosecution was required to establish that there was penetration, that penetration was perpetrated on the child and finally that 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 produced by PW4, the Clinical Officer, established to the required standard of proof that indeed the complainant had been penetrated. Her hymen was freshly torn.

Secondly, 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 the complainant's Child Health Card which revealed that indeed the complainant was born in the year 1995. She was below (18) years old at the time of the sexual assault. Finally, as regards the identity of the perpetrator, the complainant testified that it was the

Appellant who had sexually assaulted her. The Appellant was known to the complainant as he lived in the same compound with the complainant. There was no doubt that the complainant positively identified the Appellant. The Appellant's defence to the effect that he was framed does not displace the evidence adduced by the prosecution since the prosecution established that the complainant had been defiled. The Appellant's culpability was established to the required standard of proof beyond reasonable doubt.

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

DATED AT NAIROBI THIS 3RD DAY OF JUNE 2015

L. KIMARU

JUDGE