

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.38 OF 2013

***(AN APPEAL ARISING OUT OF THE CONVICTION AND SENTENCE OF HON. NGENO - CM
DELIVERED ON 28TH FEBRUARY 2013 IN MAKADARA CM. CR. CASE NO.1359 OF 2010)***

MARY SYOMBUAAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Mary Syombua was charged with **defilement** contrary to **Section 8(1) and (2)** of the **Sexual Offences Act**. The particulars of the offence were that on 28th March 2010 at about 9.00 p.m. [particulars withheld] Estate in Nairobi, the Appellant intentionally and unlawfully caused her vagina to be penetrated by B K, a child aged 9 years. She was alternatively charged with 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 intentionally touched the penis of B K, a child aged 9 years (hereinafter referred to as the complainant). When the Appellant was arraigned before the trial magistrate's court, she pleaded not guilty to the charge. After full trial, the Appellant was found guilty as charged on the main count and sentenced to life imprisonment. The Appellant was aggrieved by her conviction and sentence and duly filed an appeal to this court.

In her petition of appeal, the Appellant raised several grounds of appeal challenging her conviction and sentence. In total, she raised twenty (20) grounds of appeal which may be summarized thus:

The Appellant faulted the trial magistrate for convicting her on the basis of insufficient evidence. She took issue with the fact that the trial was conducted in haste thus violating the Appellant's right to fair trial. The Appellant was aggrieved that the trial magistrate had convicted her on the basis of inconsistent medical evidence adduced by prosecution witnesses. She faulted the trial magistrate for permitting PW5, a prosecution witness, to testify after the prosecution had closed its case. She was of the view that the evidence adduced by the complainant was not sufficiently corroborated to entitle the court to reach the verdict that she was guilty as charged. She was of the view that there was complicity between the investigating officer, the prosecution and the trial court which resulted in the Appellant's right to fair trial being breached. She averred that the trial court failed to take into consideration her defence before reaching the verdict that she had sexually assaulted the complainant. In the premises therefore, the Appellant urged the court to allow the appeal, quash her conviction and set aside the sentence that was imposed on her.

Prior to the hearing of the appeal, both the Appellant and the Respondent filed written submission in support of their respecting opposing positions. This court has carefully considered the said written submission. It has also considered the oral submission made by Mr. Kihang'a for the Appellant and Ms. Aluda for the State. This appeal is unusual because it is a female who has been charged with defiling a boy child. According to the prosecution, the Appellant was employed as a house help by PW2 L W. PW2 lived with the complainant, her son, and with her husband at [particulars withheld] Estate Nairobi. At the material time, the complainant was 9 years old. He was a class 4 pupil. The house the family resided in was two-bedroomed. According to the complainant and PW2, the Appellant slept with the complainant in

one of the bedrooms while PW2 and her husband slept in the other bedroom. According to the complainant, on 17th March 2010 at about 1.00 a.m., as he was asleep in his bed, the Appellant pulled him to her bed and lay on him. He testified that the Appellant inserted his penis into her vagina and then pushed forward and backward against him. After she was through, she warned the complainant not to tell anyone. He stated that the Appellant sexually molested him three more times before he had the courage to tell his father. Upon receiving the information, the father (who did not testify during trial) took the complainant to Oasis Medical Clinic where he was treated. According to PW2, the complainant told her on 28th March 2010 that he had pains on his penis. Upon examination, she saw that the penis was swollen. They decided to take the complainant to the hospital on the following day. The complainant told her that the injury had been caused by a bicycle. She recalled that when the complainant was examined by the doctor, she was informed that the complainant had a sexually transmitted disease. She confronted the complainant who told her that he had sexual intercourse with the Appellant. It was upon receiving this information that she reported the incident to Buruburu Police Station.

Upon the report being made to the police station, PW3 PC Moses Gitonga was assigned to investigate the case. After concluding his investigation, he formed the opinion that indeed the complainant had been sexually molested by the Appellant, and in the course of the molestation, she had infected him with a sexually transmitted disease. The complainant was seen Dr. Zephaniah Kamau on 7th April 2010. He noted that the complainant's penis had no physical injuries. He had no infection. The penis had bacteria. He testified that it was not normal for the penis to have the kind of bacteria. The P3 form was produced as an exhibit in the case. The prosecution called PW5 Sebastian Njiru, a medical officer based at Oasis Medical Clinic after it had closed its case. The case was not reopened before the prosecution allowed PW5 to testify. In his testimony, he stated that his examination had revealed that the complainant had a sexually transmitted disease. He did not state what type of sexually transmitted disease the complainant had been infected with. This court's perusal of the medical report produced by PW5 revealed that PW5 was unsure of the diagnosis. He speculated that the complainant had urethritis. He also had bacteria. He treated the complainant with antibiotics and advised the parents that the complainant had been sexually molested.

When she was put on her defence, the Appellant denied sexually molesting the complainant. She testified that on 7th May 2010, she was informed by PW2 that her son had been infected with syphilis. PW2 implicated her. She was arrested and taken to Kenyatta National Hospital where she was examined and found not to be suffering from any sexually transmitted disease. She testified that it was not possible that she sexually molested the complainant and infected him with the sexually transmitted disease while she herself was not suffering from such disease.

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 the evidence offered by the defence to determine whether or not to uphold the conviction of the Appellant. In doing so, this court is required to always put in mind the fact that it neither saw nor heard the witnesses as they testified and therefore give due regard to that fact (see **Okeno –Vs- Republic [1972] EA 32**). The issue for determination by this court is whether the prosecution adduced evidence which established the charge of **defilement** brought against the Appellant to the required standard of proof beyond any reasonable doubt.

For the prosecution to establish its case on the charge of **defilement** under **Section 8(1)** of the **Sexual Offences Act**, it must prove that there was penetration, that the victim of the offence was a child and finally the identity of the perpetrator. In the present appeal, it was the prosecution's case that the Appellant sexually molested the complainant by forcing the complainant to insert his penis into her vagina. A main plank of the prosecution's case is that in the course of the sexual molestation, the Appellant infected the complainant with a sexually transmitted disease. According PW4 Dr. Kamau, the complainant had bacteria in his penis. However, he testified that the complainant did not have an infection. The testimony of PW5 was irregularly admitted into evidence. This is because the prosecution closed its case on 26th November 2010 after the prosecutor informed the court that he was not able to trace PW5. The court ruled that the Appellant had a case to answer. It put the Appellant on her defence. On 17th March 2011, the prosecution called PW5 to testify in the case. The court allowed PW5 to testify

despite the fact that the prosecution had closed its case. The prosecution did not make an application for the prosecution's case to be re-opened before it called PW5. This court therefore rules that evidence is inadmissible and shall therefore not be considered for the purpose of this judgment.

As stated earlier in this Judgment, the basis upon which the Appellant was charged was that she had sexually molested the complainant thereby causing him to be infected with a sexually transmitted disease. It was imperative that the Appellant be medically examined to determine if indeed she was suffering from a sexually transmitted disease. From the medical report produced in evidence, it is not clear what type of sexually transmitted disease the complainant had been infected with. According to PW4, the complainant did not have an infection. He did not categorically say that the bacteria that was in the complainant's penis was as a result of the sexual molestation. The evidence adduced by the complainant and her mother in regard to the day the sexual molestation is alleged to have taken place is contradictory. Whereas the complainant said he was sexually assaulted on 17th March 2010, the charge sheet indicates that he was sexually assaulted on 28th March 2010.

PW2 testified that on 28th March 2010 the complainant told her that he had been injured in his penis from a bicycle accident. He later changed his story and said that he had been sexually molested by the Appellant after he had been seen by the doctor. From the evidence adduced by PW4, this court makes the finding that the complainant may have suffered from a normal infection on his penis that had nothing to do with a sexually transmitted disease. There are too many gaps in the prosecution's case that raise reasonable doubt to the story put forward by the complainant that he was sexually molested by the Appellant. Reasonable doubt has been raised in the mind of this court as to whether the Appellant committed the offence that she was charged with. Her defence that she had not sexually assaulted the complainant may well be the true position.

In the premises therefore, this court finds merit with the appeal. The Appeal is allowed. The Appellant's conviction is quashed. The sentence imposed on the Appellant is set aside. The Appellant is set at liberty forthwith unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 2ND DAY OF JULY 2015

L. KIMARU

JUDGE