



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.140 OF 2013

(An Appeal arising out of the conviction and sentence of Hon. L.O. ONYINA - SRM delivered on 6th June 2013 in Kibera CM. CR. Case No.1202 of 2011)

B M M.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, B M M was charged with **defilement** contrary to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act**. The particulars of the offence were that on the 30th day of April 2011 in Nairobi County, the Appellant intentionally and unlawfully committed an act by inserting his male genital organ (penis) into a female genital organ (vagina) of T D M. 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 by touching the genital organ (vagina) of T D M, a girl aged 15 years.

When the Appellant was arraigned before the trial magistrate court, he pleaded not guilty to the charges. After full trial, he was convicted of the main count of **defilement** and sentenced to serve twenty (20) years in prison. The appellant was aggrieved by his conviction and sentence and duly filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. In his amended grounds of appeal filed without leave of court (the court will however consider it), the Appellant complained that he was convicted on the basis of evidence that was at variance with the charge brought against him. He was aggrieved that he was charged with defilement under the **Sexual Offences Act** instead of incest under the **Penal Code**. He was further aggrieved that he had been convicted on the basis of untrustworthy testimony of the prosecution witnesses. He was of the opinion that the prosecution had not proved its case to the required standard of proof beyond reasonable doubt. Finally, the Appellant took issue with the fact that his defence had not been taken into consideration before he was convicted. In the premises therefore, the Appellant urged the court to allow his appeal, quash his conviction and set aside the sentence that was imposed upon 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 submitted that the prosecution adduced credible evidence which connected the Appellant to the offence. She urged the court to dismiss the appeal.

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 on the charge brought against the Appellant of **defilement** contrary to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act** to the required standard of proof beyond any reasonable doubt.

The facts of the case according to the prosecution are as follows; The complainant, T D M was at the material time aged fifteen (15) years. The complainant's birth certificate was produced as **Prosecution Exhibit No. 3** showing that she was born on 18th October 1995. The Appellant is married to the complainant's aunt and have two children who were said to be aged about five (5) and six (6) years at the material time. The complainant testified that she came to live with the Appellant's family on 26th December 2010 after completing her primary school education. At the time, the family resided in a single roomed house with two beds in it. The complainant shared one bed with the Appellant's children while the Appellant shared the other with his wife. The complainant recalled that in January 2011, the Appellant began making sexual advances towards her. She testified that the Appellant once asked to take measurements of her for a dress he allegedly wanted to tailor for her. She testified that the Appellant called her to his bed and removed her clothes. He used a tape measure to measure her waist while they were standing facing each other. He then removed her petty coat and proceeded to measure her chest and hips. The complainant remained with her underwear as the accused took the tape measure round her buttocks. She told the court that the Appellant then removed her underwear after telling her to lie down in bed in order to take measurements for a small pant. That, when he removed her underwear he pricked her vagina with his index finger. She felt pain but she did not cry and told the accused to leave her.

The complainant further told the court that on 30th April 2011 at midnight while she was sleeping with the children she heard her uncle calling her while he touched her. The complainant's aunt was not at home at the time. The Appellant removed the complainant's clothes before having sexual intercourse with her. She did not report the incident to anyone. On 2nd May 2011, a cousin of the complainant took her to PW2 A M, the complainant's grandmother who lived in Kangemi. PW2 inquired from the complainant whether the Appellant had done anything to her. The complainant informed PW2 that the Appellant had defiled her. The matter was reported at Muthangari Police Station where the complainant was advised to seek medical attention at Nairobi Women Hospital.

At the said hospital, the complainant was seen by Dr. David Thuo on 14th May 2011. The medical report was produced on his behalf by PW3 Dr. Demeke Temesgem. The doctor noted that the complainant's vagina was normal. However, her hymen was broken. The medical report was produced as **Prosecution Exhibit No. 1**. The complainant was also seen by Dr. Zephaniah Kamau on 16th May 2011 who noted that the complainant had no bodily injuries. Although her hymen was broken, it was not fresh. The medical report by Dr. Zephaniah Kamau was produced as **Prosecution Exhibit No. 2**.

PW5 Corporal Catherine Wanjohi was assigned to investigate the case. She concluded that a case had been made for the Appellant to be charged with defilement. When the Appellant was put on his defence, he denied committing the offence.

The first issue for determination is whether the Appellant was charged with the right offence. The Appellant was charged with **defilement** contrary to **Section 8(1)** of the **Sexual Offences Act**, which stipulates that a person who commits an offence of defilement with a child whose age is between 12 and 15 years shall upon conviction, be sentenced to serve a custodial sentence of not less than twenty (20)

years imprisonment. Under this Section of the **Sexual Offences Act**, the relationship between the Appellant and the complainant is immaterial. What is material is the age of the complainant. The Appellant's ground of appeal that he was charged under the wrong section of the law does not therefore hold.

In the present appeal, for prosecution to prove its case on the charge of defilement there are three elements of the charge the prosecution was supposed to establish. Under **Section 8(1)** of the **Sexual Offences Act**, the prosecution was required to establish that there was penetration. The penetration was perpetrated on a child. Finally, 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, the victim of the sexual assault was penetrated. The medical evidence produced by PW3 established to the required standard of proof that indeed the complainant had been penetrated. Her hymen was broken. This fact was not disputed by the Appellant. 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 birth certificate of the complainant which established that indeed the complainant was born on 18th October 1995. She was about fifteen (15) years old at the time of the sexual assault. As regards the identity of the perpetrator, the complainant testified that the Appellant had sexually assaulted her several times. The Appellant was known to the complainant. He was married to the complainant's aunt. He lived in the same house with the complainant. There was no doubt that the complainant properly identified the Appellant as the perpetrator of the sexual assault. Therefore, the culpability of the Appellant was established to the required standard of proof beyond any reasonable doubt. His appeal on conviction lacks merit and is hereby dismissed.

As regards sentence, **Section 8(3)** of the **Sexual Offences Act** provides that where an accused person is convicted of defiling a victim whose age is between 12 and 15 years, such accused person shall be sentenced to serve a custodial sentence of not less than twenty (20) years imprisonment. In the present appeal, the Appellant was sentenced to serve twenty (20) years imprisonment. It was the minimum sentence provided by the law. The sentence was legal. In the premises therefore, his appeal on sentence lacks merit and is hereby dismissed. He shall serve the sentence imposed by the trial court.

DATED AT NAIROBI THIS 9TH DAY OF SEPTEMBER 2015

L. KIMARU

JUDGE