



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO.179 OF 2012**

*(An Appeal arising out of the conviction and sentence of HON. J.K.NGENO - CM delivered on 21<sup>st</sup> May 2012 in Makadara CM.C. CR. Case No.3784 of 2008)*

**MOSES MUTUKU MBONDO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The Appellant, Moses Mutuku Mbondo was charged with **defilement** contrary to **Section 8(1) & (4)** of the **Sexual Offences Act**. The particulars of the offence were that on 26<sup>th</sup> day of August 2011 in Embakasi Division within Nairobi County, the Appellant intentionally caused his penis to penetrate the vagina of F M W, a child aged 16 years. 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 intentionally touched the breast of F M W, a child aged 16 years with his penis. 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 petition for 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 was aggrieved that he was convicted on the basis of defective charge sheet. He took issue with the fact that the trial court had failed to take into consideration the fact that his constitutional right had been breached when he was detained by the police beyond the constitutionally mandated period before he was brought to court. He faulted the trial magistrate for failing to observe the requirement of **Section 200** of the **Criminal Procedure Code**. He faulted the trial magistrate for relying on the prosecution’s inconsistent and contradictory evidence to convict him. He was aggrieved that the trial magistrate failed to take into consideration that there were no independent witnesses called to corroborate the complainant’s testimony. He was of the opinion that the prosecution had not proved its case to the required standard of proof beyond any reasonable doubt. He took issue with the fact that his defence had not been considered 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. Atina for the State opposed the appeal. She

submitted that under **Section 124** of the **Evidence Act**, the evidence of the complainant did not require corroboration. Nonetheless, Ms. Atina submitted that the complainant's evidence was corroborated by the medical evidence of PW3. Ms. Atina denied that the Appellant's constitutional right had been violated as alleged. She submitted that the Appellant was arraigned in court in time having been arrested on Friday, 26<sup>th</sup> August 2011 and produced in court on Monday, 28<sup>th</sup> August 2011. She submitted that the prosecution had established, to the required standard of proof, that indeed the Appellant defiled the complainant. It was the prosecution's case that the complainant was stranded at the bus station as she did not have bus fare. She approached the Appellant for assistance. The Appellant then asked the complainant to accompany him to his house where he was going to give her the bus fare. While at the Appellant's house, the Appellant defiled the complainant. Ms. Atina submitted that the Appellant was sentenced to serve the minimum sentence. She urged the court to disallow the appeal and confirm the conviction and sentence.

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 and thereafter reach its own independent determination whether or not to uphold the conviction of the Appellant. In doing so, this court is required by law to be mindful of the fact that it neither saw nor heard the witnesses as they testified and therefore give due allowance in that regard. (**See Okeno –Vs- Republic [1972] E.A. 32**). In the present appeal, the issue for determination by this court is whether the prosecution adduced sufficient evidence to support the charge brought against the Appellant of **defilement** contrary to **Section 8(1)** as read with **Section 8(4)** of the **Sexual Offences Act**.

Before giving reasons for its decision, this court is required to set out the facts of the case. The complainant in this case is F M W (PW1) who was said to be aged sixteen (16) years at the time of the incident. During the hearing of the case, the prosecution did not produce any documentary proof that the complainant was indeed aged sixteen (16) years at the time of the incident. According to the complainant, she worked as a househelp in Buru Buru. On the material day of 26<sup>th</sup> August 2011, she left her work place and was planning to travel to her home in Makueni. However, she did not have bus fare. According to the complainant, while at the country bus station, she met the Appellant who was selling handkerchiefs. She testified that the Appellant asked her to accompany him to his house in Kyangombe where he would give her the bus fare. At the Appellant's house, the Appellant asked to have sex with the complainant before he could give her the bus fare. She refused. The complainant testified that the Appellant got hold of her, removed her pant before forcefully having sexual intercourse with her. After the Appellant finished with her, he gave the complainant Kenya Shillings fourty (Kshs.40) which the complainant refused to take.

The Appellant then called a motorcycle rider and asked him to take the complainant to the bus stop near General Motors. The complainant was left at the said bus station stranded with no bus fare to take her to Makueni. She started crying. She drew the attention of the members of the public amongst them one Mr. Kimeu. The complainant told him what had taken place. He asked the complainant to accompany him to the Appellant's house. They left for the Appellant's house but did not find the Appellant at the time and decided to wait for him at his door step. Later the Appellant arrived and was arrested and taken to Embakasi Police Station. PW2 A S, the complainant's mother received a call from the said Mr. Kimeu on 27<sup>th</sup> August 2011 informing her of the incident. She testified that the man was her neighbour at home. The complainant sought medical attention at Nairobi Women Hospital on 27<sup>th</sup> August 2011. At the said hospital, the complainant was seen by Dr. David Thuo. The medical report was produced on her behalf by PW4 Dr. Ambrose Nyangao. The doctor noted that the complainant had blood stained clothes. Her vagina was normal. He noted that the complainant's genitalia had some blood stains with signs of bruising at the entry and that the hymen was not torn. The complainant was put on treatment to prevent sexually transmitted diseases and pregnancy. The medical report was produced as **Prosecution Exhibit No.1**. The complainant was also seen by Dr. Zephaniah Kamau on 28<sup>th</sup> August 2011 who noted that the complainant had no bodily injuries. She had old hymen tears.

The case was investigated by PW3 Corporal Regina Kitani of Embakasi Police Station. She concluded that a case had been made for the Appellant to be charged with the offence of defilement. When the Appellant was put on his defence, he gave an unsworn testimony denying committing the offence. He

stated that on the material day, he found people waiting outside his house when he arrived home from work in the evening. He told the court that he was arrested and taken to the police station.

*Did the prosecution adduce sufficient evidence that proved the charge of defilement to the required standard of proof?* This court has re-evaluated the facts of this case, the grounds of appeal and the submission made during the hearing of the appeal. 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 was penetrated. The evidence produced by PW4 established to the required standard of proof that indeed the complainant had been penetrated. Although her hymen was not broken, there were bruises in her vagina which was proof of penetration. The doctor formed the opinion that indeed the complainant was sexually assaulted. This court was further persuaded by the medical evidence which was produced as **Prosecution’s Exhibit No.1** which showed that the complainant was in a depressed mood when she was examined by the doctor. Her skirt was bloodstained. There was no doubt that indeed the complainant had been penetrated.

The second issue for determination is the identity of the perpetrator. According to the complainant, she was lured by the Appellant when she was at the bus station. The Appellant approached her and inquired from her where she was going. The complainant told him that she was going to Makueni. However, she did not have bus fare. The Appellant requested her to accompany him to his house where he would give her bus fare. The complainant accompanied the Appellant to his house in Embakasi. It was in that house that the Appellant sexually assaulted the complainant. The complainant narrated how she went through the ordeal before she was thrown out of the house. She went to the bus stage near General Motors where she was assisted by one Mr. Kimeu. A report was made to the police. The complainant escorted the police and Mr. Kimeu to the Appellant’s house. The Appellant was not at home at the material time. Later that evening, he arrived home. He was arrested. The complainant positively identified the Appellant.

Having re-evaluated the evidence in regard to the evidence of identification of the perpetrator of the sexual assault, this court is convinced beyond any reasonable doubt that the complainant positively identified the Appellant as the perpetrator of the sexual assault. The Appellant was arrested in the house where the sexual assault was committed. This court therefore holds that the prosecution did establish to the required standard of proof beyond any reasonable doubt that it was the Appellant who sexually assaulted the complainant.

The third ingredient that the prosecution was supposed to prove is the age of the complainant. According to the charge sheet, it was indicated that the complainant was sixteen (16) years old at the time of the sexual assault. However, no documentary evidence was placed before the court to support the contention by the prosecution that indeed the complainant was 16 years of age at the time of the sexual assault. Although the complainant testified that she was 16 years old at the time, the medical report produced by the PW4 indicated that the complainant was born in 1994. The exact date of birth was not indicated. The incident took place on 26<sup>th</sup> August 2011. The complainant was therefore at least 17 years when the incident occurred. This court also took judicial notice of the fact that the complainant had been employed as a househelp at the time of the incident. The possibility that the complainant was aged more than 18 years cannot be ruled out.

The reason why it is important for the prosecution to establish the age of the complainant is because, in defilement cases, the age of the complainant is material when the issue of sentence is being dealt with by the court. This court will therefore resolve the doubt raised regarding the age of the complainant in favour of the Appellant. The court will therefore set aside the conviction of the Appellant under **Section 8(1)&(4)** of the **Sexual Offences Act** and substitute the same with a conviction of the Appellant of the cognate offence of **rape** under **Section 3(1)** as read with **Section 3(3)** of the **Sexual Offences Act**. The sentence of fifteen (15) years imprisonment imposed on the Appellant by the trial court is set aside and substituted by a sentence of this court sentencing the Appellant to serve ten (10) years imprisonment. The sentence shall take effect from 21<sup>st</sup> May 2012 when the Appellant was convicted by the trial court. It

is so ordered.

**DATED AT NAIROBI THIS 9<sup>TH</sup> DAY OF SEPTEMBER 2015**

**L. KIMARU**

**JUDGE**