



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.58 OF 2012

(AN APPEAL ARISING OUT OF THE CONVICTION AND SENTENCE OF G.W. NGENYE MACHARIA - PM DELIVERED ON 25TH JANUARY 2012 IN NAIROBI CM. CR. CASE NO.115 OF 2009)

PHILIP MAINGI MUEKE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Philip Mwaniki Mueke was charged with the offence of **defilement of a child** contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act**. The particulars of the offence were that on 13th January 2009, at [Particulars withheld] Estate in Nairobi County, the Appellant knowingly committed a sexual act by inserting his male genital organ (penis) which caused penetration into the female genital organ (anus) of K H, a girl aged 9 years. He 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 and unlawfully touched the anus of K H, a child aged 9 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 found guilty as charged and sentenced to life imprisonment. The Appellant 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. He was aggrieved that he had been convicted of a crime that he had not committed. He took issue with the evaluation and analysis of the evidence by the trial court which in his view failed to establish that he had been properly identified by the complainant. He faulted the trial magistrate for relying on the medical evidence which in his view vindicated him from the charges brought against him. In particular, he stated that the medical evidence did not connect him with the crime. He was aggrieved that the trial magistrate had relied on contradictory and unreliable evidence of prosecution witnesses to convict him. He further stated that the charge sheet upon which he was convicted was defective and therefore ought not to have formed a basis for his conviction. He faulted the trial magistrate for shifting the onus of proving the case on him and thereby breaching his right to fair trial. He accused the trial magistrate of selectively applying the standard of proof as regard the truthfulness of the prosecution witnesses by, on one hand, convicting him, and, on the other hand acquitting his co-accused. In summary, he was aggrieved that he had been convicted on the basis of evidence that did not establish his guilt to the required standard of proof beyond any reasonable doubt.

During the hearing of the appeal, this court heard the oral rival submission made by Mr. Kimeu for the Appellant and Ms. Nyauncho for the State. Mr. Kimeu submitted that the prosecution failed to establish the age of the victim. It was his submission that in defilement cases, it was imperative that the prosecution establishes the age of the victim to the satisfaction of the court. No documentary evidence was adduced to establish the age of the complainant. In his submission, this was fatal to the prosecution's case. He further submitted that the complainant had not positively identified the Appellant as the perpetrator of the crime. He explained that the testimony of the parents of the complainant *i.e.* PW1 and PW2 contradicted the evidence of the complainant in that while in one hand the parents testified that they knew the Appellant on account of them being neighbours, the complainant only identified the Appellant in a police identification parade. He stated that the evidence of identification by the complainant ought to have been corroborated. He took issue with the manner in which the police identification parade was conducted. He was of the view that the parade did not conform to the Judges Rules. He further submitted that there was contradiction in the evidence regarding the description of the room that the complainant was allegedly defiled. Whereas the parents of the complainant stated that the room was dark, the complainant's evidence was to the contrary. He stated that the trial magistrate erred when she shifted the burden of proof. He did not however set out in what part of the judgment that the trial court shifted the burden of proof. He urged the court to find that the proceedings were defective and therefore null and void in that the court that concluded the case did not comply with **Section 200(3)** of the **Criminal Procedure Code**. Failure to comply with this section, in the Appellant's view, rendered the proceedings null and void. He submitted that the prosecution witnesses gave contradictory evidence which did not support the eventual finding by the court that the Appellant was guilty as charged of the main charge of **defilement**.

Ms. Nyauncho for the State opposed the appeal. She submitted that the issue of the age of the complainant was established by the evidence of the mother of the complainant. That evidence was corroborated by medical evidence which was produced in court. She submitted that it is not necessary for the prosecution to produce a birth certificate in support of its evidence on the age of the complainant. She reiterated that the Appellant was positively identified by the complainant because the incident took place during daytime. The complainant gave a description of her assailant before pointing out the Appellant in an identification parade which was conducted by the police two days after the incident. She urged the court to take into account the circumstances under which the Appellant was arrested, which, in her view, corroborated the positive identification of the Appellant. As regard whether **Section 200(3)** of the **Criminal Procedure Code** was complied with, she submitted that the Appellant was given an opportunity to request for the case to start *de novo* when the magistrate who first heard the case was transferred. The Appellant told the court that he had no objection to the case proceeding from where it had reached when the subsequent magistrate took over the proceedings. In any event, she submitted that the court under **Section 382** of the **Criminal Procedure Code** can cure any contradictions in the prosecution's case. On the issue of medical evidence, she submitted that the prosecution had called two doctors who had testified as to the injuries the complainant had sustained. The injuries were consistent with one who had been defiled. She urged the court to take into account **Section 124** of the **Evidence Act** that mandates the court to rely on evidence of a single witness if the court is convinced that the witness was telling the truth. She urged the court to dismiss the appeal.

This being a first appeal, it is the duty of this court to reconsider and re-evaluate the evidence adduced before the trial court so as to enable it reach its independent determination whether or not to uphold the conviction of the Appellant. In doing so, this court is required to always have in mind the fact that it neither saw nor heard the witnesses as they testified and therefore cannot make any finding regarding the demeanour of witnesses (**See Njoroge -vs- Republic (1987) KLR 19**). In the present appeal, the issue for determination by this court is whether the prosecution established the charge of **defilement** contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act** to the required standard of proof beyond any reasonable doubt.

The facts of this case according to the prosecution witnesses are as follows: PW2 K H, the complainant in this case testified that on 13th January 2009 at about 4.30 p.m., while she was returning home from school, she was called by the Appellant who was at the time guarding the house of the former Vice-President Kalonzo Musyoka. The complainant testified that her home and that of the then Vice-President were within the same neighbourhood at [Particulars withheld] Estate, Karen in Nairobi. According to the

complainant, the Appellant requested her to accompany him inside the compound of the Vice-President. The Appellant told the complainant that he would introduce her to the Vice-President. The complainant testified that the Appellant took her to a room within the compound, closed the door and then asked her to remove her clothes. She refused. The Appellant then sprayed the room with a substance which made the complainant dizzy. She lost consciousness.

When she came to, she discovered that she was naked. She dressed up and knocked at the door. The Appellant's co-accused in the magistrate's court opened the door for her and escorted her to the gate. She did not tell her parents what had transpired on that day. On the following day, on returning from school, PW1 F H and PW3 H M H, the parents of the complainant, saw that the complainant was not her usual cheerful self. She had difficulty in sitting. Upon inquiry, the complainant told her parents that she had been sodomized by one of the officers guarding the house of the Vice-President. The parents of the complainant took her to Nairobi Women Hospital where she was examined by Dr. Muhombe. The medical report prepared by Dr. Muhombe was produced on her behalf by PW10 Dr. David Thuo. Dr. Muhombe could not produce the report because at the time she was deceased. Dr. Muhombe observed that the complainant had sustained multiple tender bruises on her upper limbs; her abdomen had an inflammation on the skin; she was bleeding under the skin with marks over the abdomen, chest and back. Her lower limbs had bleeding under the skin particularly over the buttocks. There was reduced anal sphincter (muscle of the anus). There was tenderness on digital radial examination. There was laceration in the anus. The doctor confirmed that indeed the complainant had been sodomized. The complainant was further seen on 19th January 2009 by Dr. Zephania Kamau who formed the same opinion that indeed the complainant had been sodomized. He noted the same injuries that Dr. Muhombe observed. He produced the P3 form which had duly filled. In both medical reports, it was noted that the complainant was at the time nine (9) years of age.

After the complainant had been seen at the Nairobi Women's Hospital, a report was made to Hardy Police Station. PW5 received the report. The case was assigned to PW7 PC Everlyne Angila and PW9 CIP Robert Mabera to investigate. The police officers who were guarding the house of the former Vice-President were rounded up and taken to Hardy Police Station. An identification parade was mounted. The police officers were ten (10) in number. The identification parade was conducted by PW8 IP Joseph Kimaru, the then OCS of Hardy Police Station. The complainant pointed out the Appellant in the identification parade. She also pointed out the Appellant's co-accused in the magistrate's court. It was after the identification parade that the Appellant was arrested and charged with the present offence.

When the Appellant was put on his defence, he denied the assertion that he had committed the offence. He narrated the events of the particular day. He told the court that he was not on duty on the particular day. He denied sexually assaulting the complainant. He told the court that other police officers were on duty on the particular day. He undertook to call them to testify on his behalf. However, the particular officers were not called to testify in the Appellant's defence by the time the Appellant closed his defence.

This court had carefully re-evaluated the evidence adduced before the trial court in light of the submission made by the parties to this appeal. There are several issues that emerge for determination by this court. The first issue for determination is whether the Appellant was accorded the right to have the witnesses who had testified before the previous magistrate recalled under **Section 200(3)** of the **Criminal Procedure Code**. On perusal of the trial court's proceedings, this court notes that on 11th January 2010, the court explained to the Appellant his rights under **Section 200(3)** of the **Criminal Procedure Code**. The Appellant indicated that he desired the case to proceed from where it had reached. The court gave an order to the effect it would take over the proceedings and proceed with the case from where proceedings had reached with the previous magistrate. This court finds no merit with the Appellant's submission that he was not afforded an opportunity to recall the witness as provided under **Section 200(3)** of the **Criminal Procedure Code**. That ground of appeal fails.

The second issue for determination is in regard to whether the Appellant was properly identified by the complainant. The Appellant argues that the prosecution adduced contradictory evidence in regard to the circumstances under which he was identified. The complainant testified that as she was walking past the gate of the house of the former Vice-President, the Appellant enticed her into the compound on the

promise that he would introduce her to the former Vice-President. The complainant testified that she was keen to physically see the former Vice-President as she had only seen him on TV. She accompanied him to the compound where she was taken to a room, locked inside before she was sodomized. The complainant testified that she did not know what had happened to her because she was sprayed with a substance which made her unconscious. She came to when she was naked.

The testimony of the complainant regarding identification was that of single witness. This court has warned itself of the danger of relying on the sole evidence of identification of the complainant to convict the Appellant (see **Maitanyi –Vs- Republic [1986] KLR 198 at page 200**). In the present case, it was clear that the Appellant was exposed to the complainant for a sufficiently long time to enable the complainant be certain that she had identified him. The incident took place during daytime. It was at 4.30 p.m. The Appellant did not wear any disguises. The complainant gave the physical description of the Appellant when she informed her parents and later the police. This physical description tallied with that of the Appellant when the complainant identified him in the identification parade mounted by the police two days later.

This court has no doubt in its mind that the complainant positively identified the Appellant. If this court had any doubt, that doubt was removed when the complainant described the role that the Appellant and his co-accused in the magistrate's court played during the incident. She did not accuse the Appellant's co-accused of assaulting her. In fact, she did not say that she actually saw the Appellant sexually assault her. She was unconscious when she was assaulted. She came to when she was naked. She realized that she was not physically okay when she could not sit down. She informed her parents. She was taken to hospital where she was examined by a doctor who confirmed that indeed the complainant had been sexually assaulted. This court is convinced that it was the Appellant and no one else who sexually assaulted the complainant. He was the one who procured the complainant from the gate into the compound of the former Vice-President. From the evidence, it was clear that he had only one intention i.e. to sexually assault the complainant. This court holds that the complainant positively identified the Appellant as the person who sexually assaulted her.

The other issue for determination is whether, from the evidence adduced by the prosecution, the ingredients to establish the charge of defilement was proved to the required of proof beyond any reasonable doubt. It is now trite that for the prosecution to establish the charge of defilement, it must establish, firstly, the age of the complainant, secondly, penetration and thirdly, the identity of the perpetrator. In the present case, the prosecution established the identity of the perpetrator. As regard the age of the complainant, it was the Appellant's case that the age of the complainant was not proved to the required standard of proof. In particular, the Appellant argued that the prosecution did not adduce any documentary evidence to support its contention that the complainant was aged 9 years at the time of the incident. The type of documentary evidence that the Appellant was referring to is a birth certificate or other documents proving the age the complainant. On its part, the prosecution argued that it not necessary for the prosecution to produce a birth certificate of the complainant to prove her age. Other documents, such as medical documents may establish the age of the complainant.

This court agrees with the Appellant that it is imperative that the prosecution establishes the age of the complainant in defilement case with the best possible evidence which is a birth certificate, birth notification, an immunization card or in some instances a baptismal card issued shortly after the birth of the child. However, where this best evidence is not available, the prosecution can rely on other documentary evidence such as the medical report and the P3 form. The prosecution can also rely on the testimony of the parents of the complainant and also by the court visually satisfying itself as to the apparent age of the complainant. This position was upheld by the Court of Appeal in **Nyeri C.A. Criminal Appeal No.61 of 2014 Richard Wahome Chege –Vs- Republic** (unreported) and **Nyeri C.A. Criminal Appeal No.100 of 2013 J.W.A. –Vs- Republic** (unreported). In the present appeal, this court holds that the prosecution established the complainant's age through the testimony of her parents and the P3 form and the medical report produced by the two doctors. Both parents testified that the complainant was a Standard 5 pupil aged nine (9) years old at the time. This court has no reason to doubt the assertion by the parents of the complainant.

As regard to whether the prosecution proved penetration, the medical evidence adduce by the two doctors established that indeed the complainant's anus was penetrated. The trial court had this to say in regard to whether sodomy constitutes defilement:

“The defence did also submit that the charge of defilement cannot stand because the diagnosis by the doctors revealed an offence of sodomy as opposed to one of defilement. The accused is charged under the Sexual Offences Act, Act No.3 of 2006 under section 3 defilement is defined as:

8(1) ‘A person who commits an act which caused penetration with a child is guilty of an offence termed defilement’.

The operative word under this definition is ‘penetration’. Under section 2 the word penetration is defined as:

“...the partial or complete insertion of the genital organs of a person into a genital organs of another person.”

Under the same section genital organs are defined as:-

“includes the whole or part of male or female genital organs and for purposes of this Act includes the anus”.

In this regard it is obvious the penetration was done through the anus; the result being defilement.

Before the enactment of the Sexual Offences Act, Act No.3 of 2006, Sexual offences were governed by the Penal Code, Cap 63, Laws of Kenya. Then any penetration through the anus was referred to as sodomy. It therefore matters not what the name the doctor gives to the offence as long as the diagnosis clearly indicates that the penetration was done through the anus. Again the particulars of count I are specific and do conform with the statement of the charge. As such the submissions by the Defence in this regard cannot stand.”

This court, having re-evaluated the evidence adduced before the trial court and the submission made on this appeal, cannot see any reason be disagree with the finding reached by the trial court. This court holds that the prosecution proved penetration to the required standard of proof beyond any reasonable doubt. The defence of the Appellant was mere evasion and did not dent the otherwise strong culpatory evidence adduced by the prosecution witnesses. It was properly dismissed as being of no evidential value.

The upshot of the above reasons is that the appeal lodged by the Appellant lacks merit and is hereby dismissed. The conviction and the sentence of the trial court is hereby upheld. It is so ordered.

DATED AT NAIROBI THIS 8TH DAY OF OCTOBER 2015

L. KIMARU

JUDGE