REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CRIMINAL APPEAL NO. 186 OF 2016

GSA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

[An Appeal from conviction and sentence in original Bungoma CM CR. 244/2015

delivered on 1.9.2016 by Hon. C.L. Yalwala (SRM)].

JUDGMENT.

The appellant GSA was charged with the offence of ***defilement of a child contrary to section 8(1) as read with section 8(3) of the Sexual offences Act No. 3 of 2006.*** Particulars of offence were on the 20th day of January, 2015 at [particulars withheld] area within Bungoma County, intentionally and unlawfully caused his penis to penetrate the vagina of MM a child aged 14 years.

Upon hearing witnesses for the prosecution and at appellants defence, the trial magistrate Hon. Yalwala found the appellant guilty of the offence of defilement convicted him and sentenced him to serve Twenty five years (25) imprisonment. Dissatisfied with the conviction and sentence the appellant filed this appeal. The main ground of the appeal are that;

a) That although the age of the complainant indicated 14 years on age assessment form, same was not fully ascertained, No birth certificate was produced. That the charge of defilement was not supported by the evidence as it ought to have been charged with committing an indecent Act.

b) That the charge of defilement was not supported by the evidence as it ought to have been charged with committing an indecent Act.

c) The learned Magistrate erred both in law and facts by meting out harsh and excessive sentence of 25 years imprisonment.

d) That, not withstanding the provision of Section 124 of the evidence Acts none of the Prosecution witnesses testimony are corroborated by that of the complainant, as they who were not an eye witness and did not get the appellant in the act as alleged.

e) That the recorded evidence of medical officer's evidence did not indicate that the appellant had sexual intercourse with Pw1, because he tested HIV positive and the complainant tested HIV negative, a strong believe and prove of no possibility of sexual penetration of the girl.

f) That prosecution failed to note that the appellants defense was not considered by the trial court.

g) That, the Magistrate erred in both law and facts, with regard to identification of the perpetrator as, there was a possibility of mistaken identity which was a very crucial issue to consider.

The appellant filed written submission in support of the grounds of appeal. The appellant submitted that there were inconsistencies in the evidence of the prosecution witnesses. He submitted that the evidence that the complainant was a child and her evidence that she met the appellant at 4 a.m. in the morning are inconsistent as a child of her age would not be alone at that late hour. He submits that the prosecution did not call the parents of the complainant to testify. He submits that the allegation that she reported the matter to the mother of appellant is not true as she did not know the appellant's mother. The appellant submits that the evidence of the Pw2 his alleged a father and mother should be treated with care because they said they were annoyed with him for insulting them. That evidence he submits should be disregarded by the court. The appellant finally submitted that the sentence of 25 years imprisonment imposed is harsh and the period he was

in remand was not considered. He prays that the court do quash the conviction and set aside the sentence.

Mr. Akello for state opposed the appeal. He submitted that the age of the complainant was proved by production of the age assessment report. He submitted that there was penetration was supported by the Medical examination report. Pw4 the Clinical officer testified that upon examination the appellant was found to be HIV Positive but complainant was negative. On sentence counsel for state submitted that the minimum sentence for the offence was 20 years imprisonment but the sentence of 25 years cannot be stated to be excessive.

This is a first appeal. This Court is therefore enjoined to consider and reevaluate the evidence and come to its own conclusions but at all times bearing in mind that it did not hear or see the witnesses testifying.

The evidence before the trial court was that on 20.1.2015 the complainant then a pupil in standard 5 at [particulars withheld] Primary School was travelling from Nairobi to Bungoma where she arrived at 4.00a.m. At the bus stage she met the appellant whom she asked to show her the vehicle to board to Mumias, her destination. The appellant told her to go with him to his home where she will sleep in his mother's house until the next day when he will show her the vehicle to Mumias. He then led her to his house where he removed her under pant and skirt and then inserted his penis into her vagina. The next day when appellants' brother opened the door, complainant went and reported to appellants' mother and later the father of the appellant what appellant had done. They took her to Luchio Police Station where Matter was reported.

Henry Simiyu Mukeya testified that he was informed by appellants mother that appellant had threatened her and that he was with a student. He spoke to the student, the complainant who explained what had happened. He took her to the police station and later appellant was arrested by Administration police officers. Pw4 Elias Aduka the Clinical officer examined the complainant on 22.1.2015 and observed that there was no hymen; He also examined the appellant who was found to be HIV Positive but was negative for the complainant because of the short period since exposure.

The appellant in his sworn testimony stated that on 22.1.2015 he was at Chemwa a drinking den when police officers arrested him and took him to the police station on allegation of taking illicit brew. He testified that he knew the mother of the complainant who had hired him to sell mitumba but she refused to pay him and she framed these charges against him.

The appellant was charged with the offence of defilement Contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act. The Section 8(1) and 8(3) provides;

> ***8(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.***
>
> ***8(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.***

In order to establish an offence under the Section of the Sexual Offences Act the prosecution must prove the ingredients of the offence namely; Age of the complainant, penetration and positive identification of the accused as the one who committed the act of penetration. The appellant in this first ground of appeal submits that the age of the complainant was not proved as no birth certificate was produced. Mr. Akello for the state in response submitted that an age assessment report was produced as Exhibit. 3 which showed the age to be above 14 years old based on the dental formula. The complainant in her evidence testified that she was 14 years old. Age of a complainant can be proved by evidence of the Minor or parent, production of birth certificate, birth notification documents, age assessment report and/or assessment by court; of the apparent age. In this case though no birth certificate was produced, I am satisfied that age assessment report by a Medical officer gave the approximate age of the complainant to be 14 years which was clear proof of age of the complainant.

The appellant submits that there were no eye witness to the commission of the offence and therefore the evidence of the complainant was not corroborated; as none of the witnesses got the appellant in the act as alleged. He further submitted that the prosecution failed to summon key witnesses who were mentioned by the clan elder (Pw2) and the Clinical officer Pw4. Mr. Akello submitted that the appellant has not indicated the witnesses he thought ought to have been summoned. He submitted properly in my view that he appellant should have indicated the names of witnesses. As no names were given, I do not find any merit on this ground. It is now settled that a fact can be proved by evidence of one witness and no number of witnesses are required to prove a fact. Indeed the prosecution only called witnesses that were necessary to prove their case. On the issue that there were no eye witnesses, the proviso to Section 124 of the evidence act allows the court to act on evidence of the complainant if for reasons to be recorded it believes the complainant to be telling the truth.

The appellant submits that there was no evidence that he had Sexual Intercourse with the complainant because if it were so, the Medical examination would have shown that he infected the complainant with HIV virus as he is HIV positive. There is no doubt that the appellant is HIV positive. He readily admits the same and the Medical examination by Pw4 Elias Aduka confirmed the appellant status. The examination was done on 21.1.2015 one day after the incident. On being asked by the appellant why HIV would have been transmitted if they had sex, the clinical witness explained***; According to our documents, you were aged 23 years old. The suspect was found to be HIV positive. Also had pus cells and warts. The complainant too had some of those infections but no all. The HIV and VDRL tests do not show immediately. Therefore if she had been recently infected/defiled. Those tests would not show. Her HIV test then was negative. The age of the suspect given is according to the history of the suspect. No age assessment was done for him.***

This explanation by the Clinical officer put to rest the appellant grounds on this issue.

The appellant submits that there was no evidence that he was the perpetrator of the act and that there is a possibility of mistaken identity. The complainant testified that she met the appellant at 4 a.m. upon arriving Bungoma from Nairobi. At his request he accompanied him to his home, after he had informed her that she will sleep in his mothers house. Instead he took her to his house, locked the door, had sexual intercourse and next day she went to appellants mother's house to report the incident. The father of the appellant was informed of this by the complainant and he reported to police who arrested him. Pw2 SM the father of the complainant confirmed in Cross – examination

" I found you and the girl in my homestead."

The evidence of the complainant who had been with the appellant that it is appellant who had defiled her and that of appellant's father that he had seen appellant with complainant in the homestead does not appear to me to be mistaken identity. I am satisfied that the appellant's identification was positive and free from error.

Finally the appellant submits that the sentence of 25 years imprisonment is excessive and harsh. The appellant who was charged with the offence of defilement Contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act. Section 8(3) provides; ***8(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.***

> The trial Magistrate in sentencing the appellant stated; *"I have considered the offence and mitigation by accused person and that he is a 1st offender. The offence he committed is a serious one that is punishable by a mandatory minimum sentence of 20 years. In this case, the accused person exposed the complainant to the risk of infection with sexually transmitted diseases and infact infected her with at least one. In the premises, I hereby sentence the accused to serve imprisonment for twenty five (25) years. R/A of 14 days from date hereof explained."*

It is not contested and the appellant readly admits that he knows that he is HIV positive. He knows of his status and knew that any defilement of the complainant would likely infect her with HIV; a life threatening infection. This deliberate act is a factor the trial court considered in sentencing. I do not find that there was any error in so doing, and I find the sentence imposed appropriate.

In the result I find that the prosecution provided its case beyond reasonable doubt; I uphold the conviction and affirm the sentence of Twenty five (25) years imprisonment imposed. This appeal is hereby dismissed.

Dated and **Signed** at **Bungoma** this 29th **day of** January, **2019.**

S.N. RIECHI.

JUDGE.