REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CRIMINAL APPEAL NO. 87 OF 2016

SKM.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

The appellant was charged with the offence of defilement contrary to Section 8(1) as read with section 8(3) of the Sexual Offence Act No.3 2006. The particulars of the offence were that the appellant on the 9th day of December, 2014 at [particulars withheld] village Kiriari location within Embu County, intentionally and unlawfully caused his genital organ namely penis to penetrate the genital organ namely vagina of CM a child aged 14 years.

The appellant was also charged with an alternative count of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offence Act No.3 of 2006. The trial Court convicted the appellant on the main count of defilement and sentenced him to serve forty (40) years imprisonment. The grounds of appeal as per the amended petition of Appeal dated 15th October, 2017 are that: -

1. That the learned trial Magistrate erred in Law and fact in holding that the prosecution had proved its case beyond reasonable doubt.

2. That the learned trial Magistrate erred in law and fact in shifting the burden of proof to the Appellant.

3. That the learned trial Magistrate erred in law and fact when he dismissed the appellant's defence without any good reason.

4. That the learned trial Magistrate erred in Law and fact when he failed to consider the evidence given by the appellant's witnesses.

5. That the learned trial Magistrate erred in law and fact when he held that there had been corroboration of the complainant's evidence.

6. That the learned trial Magistrate erred in law and fact when he held that the defence by the appellant was an afterthought and lies meant to conceal crime.

7. That the learned trial Magistrate erred in law and fact when he held that the act of the accused appellant absconding from court showed that he had committed the offence.

8. That the learned Trail Magistrate erred in law and fact in sentencing the appellant contrary to the provisions of the law *A. That the Sentence by the learned Trial magistrate was excessive in the Circumstances.

9. That the judgement of the trial court was against the weight of evidence.

10. That the learned trial magistrate erred in Law and fact when he believed the evidence of PW1 which was unreliable.

10.A That the learned Trial Magistrate erred in law and fact in relying on the assumption that PW1 was from a poor background as proof that she was telling the truth.

10B. That the learned trial Magistrate erred in law and fact in holding that the appellant took advantage of the destitution of PW2 to violate PW1 when there was no evidence to that effect.

11. That the learned Trial Magistrate erred in law and fact in failing to comply with the Provision of section 169 of the Criminal Procedure Code.

12. That the learned Trial Magistrate erred in law and fact in failing to indicate the language used and/or conducting the proceedings in a language that the accused did not understand.

Mr**.** Andande appeared for the appellant. Counsel submit that the prosecution failed to prove its case beyond reasonable doubt. The evidence of PW1 and PW2 is doubtful. The description of the scene creates a lot of doubt. PW1 testified that the house had three rooms while PW4 who visited the scene stated that it was a one roomed house. PW1 testified that she was placed on pieces of timber but later changed to one piece of timber. PW4 talked of a timber being placed diagonally but PW1 did not testify to that effect. According to Mr. Andande, the case was not proved to the required standard. Counsel relies on the case of ***PIUS ARAP MAINA V REPUBLIC (2013) eKLR*** where it was held as follows:-

"…..It is gainsaid that the prosecution must prove a criminal charge beyond reasonable doubt. As a corollary, any evidential gaps in the prosecution's case raising material doubts must be interpreted in favour of the accused."

It is also submitted that the complainant alluded to a previous defilement. She stated that "there was a day my uncle also defiled me…" The medical officer also testified that there had been a previous defilement on the victim by a different persons. No spermatozoa was found on PW1 yet she testified that no protection was used. Medical examination was done on the same day. PW1 also mentioned a lady whom she asked to tell the appellant to let her go. The name of the lady is not given. The judgment relied on the evidence of PW3, a medical officer. No injuries to the genitalia were noted on PW1. There were minor tears. PW3's role was only to fill the P3 form. He did not examine PW1. The contents of the post rape care form are different from those in the P3 form. The treatment notes did not observe any injuries.

It is submitted further that the trial court shifted the burden of proof. The trial court used its own estimation of the victim to find that the appellant took advantage of PW1's poor background and defiled her. The appellant's defence was wrongly dismissed. The trial court put the entire burden on the appellant to prove his innocence. No valid reasons are give for the dismissal of the appellant's defence. The trial court was under obligation to anlayse the defence. The trial court even went further and held that the appellant absconded court and this proved that he committed the offence.

Mr. Andande further contend that there was no proof that PW1 was a child of tender age. PW1 testified that she never disclosed to her mother what had happened. She lied about everything until when her mother told her to tell the truth. PW1 testified that she tried to scream but the appellant held her mouth. However, she later decided to keep quite. The trial court relied on assumption that PW1 was destitute and helpless. The judgement of the trial court did not state the issues for determination contrary to section 169 of Criminal Procedure Act. The sentence is quite excessive and unjustified in the circumstance. The minimum sentence is 20 years.

Miss Nandwa, learned prosecution counsel, opposed the appeal. The prosecution proved all the ingredients of defilement. The age of the victim was proved to be 14 years. PW1 was born on 28th July, 2001. A birth certificate was produced. On penetration, PW1 testified what happened on 9.12.2014 at 8.00am. PW1 testified that the appellant defiled her severally and he kept on lubricating her vagina with his own saliva. The room where pW1 was defiled is inside the appellant's house. PW1's evidence was corroborated by that of PW3, a Medical officer. The appellant was properly identified. The incident occurred in the morning. The appellant was known to the complainant.

It is submitted that the prosecution proved its case. The appellant took advantage of the complainant who had been sent to his place to pick tea baskets. The burden of proof was not shifted. The alledged alibi defence was an afterthought. The sentence is within the law as the minimum sentence is twenty (20) years. The trial court considered the issues for determination and complied with the law.

This is a first appeal. The court has to examine the evidence afresh and make its own conclusion. PW1 was the complainant. She stated that she was 14 years old and a class seven (7) pupil. She knew the appellant as a farm manager. On 9.12.2014 at 8.00am she was sent to the appellant's home. The appellant pulled her inside the house, removed her clothes and defiled her. He lubricated her vagina with his saliva. He defiled her severally. She screamed but he covered her mouth with his hand. He then locked her inside the house. The appellant came back and he defiled her again. He then released her. She took a tea picking basket and left. Her mother wanted to know where she was. She then told her mother what had happened. The matter was reported to the Police and she was taken for medical examination. At the time of the incident, no one was near the house and even if she screamed, no one could have heard her screams. At one time her uncle also defiled her.

PW2 is PW1's mother. She produced PW1's birth certificate which showed that pW1 was 14 years old. On 9.12.2014 she sent PW1 to collect tea picking baskets from the appellant's place. It was the appellant who was issuing them. The baskets used to be issued quite early. PW2 then followed PW1 but did not find her at the farm where she was to pick tea. She later saw PW1 with the basket at around 8.30am. PW1 told her that she had been sent by another lady "mama Mukami" to deliver some money to the officials of their group. She was not satisfied with that explaination. She inquired from mama Mukami who told her that she had seen PW1 at the appellant's gate. Mama Mukami denied sending PW1 to deliver some money. PW1 politely talked to PW1. PW1 then revealed that she had been defiled. She reported the matter at Kianjokuma Police post. It is her evidence that PW1 was defiled earlier when she was eight (8) years old. The appellant used to stay in the house with his son. His wife was staying in Meru.

PW3 Dr. TITUS NDUGIRI KARIUKI was the Medical Officer in charge of Kiamjukoma sub District hospital. He filled the P3 form. He was informed that PW 1 had also been sexually assaulted by a different person in2009. PW1 had minor tears and blood stains on the vaginal vault. The hymen was missing. High vaginal swab was positive for puss cells and red blood cells. This was evidence of venereal infection. No spermatozoa was identified. He filled the P3 form on 11.12.2014.

PW4 Sergeant JERIDAH NYATICHI was attached to manyatta Police station. The case was reported on 10.12.2014 by PW2 who was with PW1. She investigated the case and caused the appellant to be charged with the offence. PW4 visited the scene and saw several pieces of timber. PW1 explained to her what had happened.

In his unsworn defence, the appellant denied committing the offence. He told the court that he had worked at the farm for long. People said that he had acquired riches from the farm and swore that one day they would fix him so that he leaves the area. People fed his employer with lies that he used to steal tea leaves. At one time he employed PW2's son on the farm but he ended up stealing tea leaves. PW2 had to pay money for the stolen tea leaves by her son. The owner of the farm is a Kikuyu. The appellant is a Meru while the workers were Embu by tribe.

On 9.12.2014 he saw pW1 coming from the coffee factory. He didn't bother about her. He went to his house and took out the baskets. PW1's father was the first to collect his basket. He saw PW1 on the farm. He then visited the workers. He met PW2 at around 8.00am who told him that she was going to collect her basket. All the workers were there including PW2's husband.

It was the appellant's evidence that at around 10.00am, PW2 arrived from her home. She called pW1 and told her to leave the farm. She then saw PW2 beating pW1. PW2 did not tell the workers that he had defiled PW1.

DW2 CATHERINE WANJA is a casual worker at the farm. On 9.12.2014 she was working at the tea farm. She reported at 8.00am. A small girl took a basket and they picked tea. At around 10.00am another lady went there. She told pW1 that she had warned her not to pick tea in the farm. The lady and the small girl left. The lady was screaming at the small girl as they went away.

DW3 ROSELINE WANJA also used to work at the farm. On 9.12.2014 she collected her basket. She was with a young girl. She collected her basket and went with the child to the farm. Later the child's mother went there and told the child to leave the farm. At about 1.00pm she heard people saying that the appellant had sexually assaulted the child. She had gone to the farm at about 8.00am. PW2 arrived at about 9.00am.

The appeal raises the following issue:

Was PW1 defiled, if so, who defiled her?

It is PW1's evidence that she was defiled. She had been defiled by her uncle previously. The medical evidence by PW3 shows that PW1 was infected with a venereal disease. According to PW3, PW1 was indeed defiled. I do find that PW1 was actually defiled on 9.12.2014. According to PW2, the first defilement took place in 2009. There was a period of over three years before PW1 was defiled again. There cannot be any confusion as to whether pW1 was defiled in the second instance. I am satisfied that PW1 was defiled.

The prosecution's evidence is that it is the appellant who defiled PW1. The circumstances of the case are that the appellant was a farm Manager at a tea farm. Casual workers used to collect tea picking baskets from the appellant's house. The evidence of DW2 and DW3 does confirm that they too went to collect their tea picking baskets and left for the farm.

According to PW1, she was sent to collect the tea picking basket by her mother. It is PW2's evidence that at times the baskets run out. The defence evidence is to the effect that PW1 picked the basket and went to the farm. Her mother later went to the farm at about 9.00am and told her to leave the farm.

PW1 was 14 years old. She testified that she was defiled and then locked inside the house. The appellant then went out and released the tea picking baskets. He returned to the house and defiled her once again. PW1 was later released. The circumstances show that DW2 and DW3 could have seen PW1 after she had been defiled. The two defence witnesses do not state whether they saw the appellant when they went to collect their baskets. The evidence by DW2 and DW3 does not prove that PW1 picked the basket and went to the farm. PW1 did not testify that she was with DW2 and DW3 at the farm. It is her evidence that she met her mother who enquired as to where she was.

Counsel for the appellant contends that PW1 decided to lie to her mother yet she had just been defiled. PW1 was 14 years old. One should not expect that she could come out of the house screaming that she had been defiled. The evidence has to be evaluated in totality. The comments by the trial court that the appellant took advantage of PW1 cannot be held to be irrelevant issues. All what the trial court was saying is that from the facts of the case, the appellant took advantage of a young girl. This comment is not the basis of the trial court's decision.

It is established from the evidence that the appellant was at the farm. DW2 and DW3 do not state that it is the appellant who gave them their baskets. PW1 testified that the appellant went out to place the baskets outside. This was after the first defilement incident. The defence evidence does not raise any doubt on the prosecution case. PW1 did not testify that the appellant ejaculated in her. The contentions by the appellant's counsel that no spermatozoa was found in PW1 cannot raise any doubt in the prosecution case. The evidence of PW1 is quite believable. She had no reason to alledge that she had been defiled by the appellant if that did not happen.

Mr. Andande made reference to minor issues like number of wood planks and the number of rooms in the appellant's house. These are not issues which create doubt in the prosecution case. Further, the evidence by PW4 that PW1 was pulled by the appellant and then defiled does not contradict the evidence of PW1. PW4 was simply explaining what PW1 had told her.

The prosecution evidence is consistent. The trial court explained the alledged lies by PW1. According to the trial court, those alledged lies did not contradict the prosecution case. The alledged lies are that PW1 told her mother that she had been sent to deliver money by another lady. That line of evidence does not state that PW1 was not defiled. The evidence of PW1 is corroborated by the medical evidence. There is no evidence that PW3 did not examine PW1 when he filled the P3 form. PW3 met PW1 who gave her the history of having been defiled before. When a Doctor or medical officer fills the P3 form, it does not mean that he/she does not examine the victim but entirely relies on

the treatment notes. The evidence of PW3 does confirm that PW1 had been defiled.

There was no shifting of the burden of proof. PW1 went to the appellant's house at about 8.00am. There was no other person who had gone to collect the tea picking baskets when PW1 reached the appellant's house. The appellant pulled PW1 inside his house and defiled her. He then went out and released the other baskets leaving PW1 inside the house. It is clear to me that the appellant had the time to defile PW1. He was at the farm and his house seems to have been located within the farm.

From the evidence adduced before the trial court, I do find that the conviction is proper. It is the appellant who defiled pW1. The prosecution proved its case beyond reasonable doubt. The appeal lacks merit and is hereby disallowed. On the issue of sentence, I do find that it is excessive. I do set aside the 40 years sentence and replace it with the minimum sentence of twenty (20) years imprisonment. The appellant to serve twenty (20) years imprisonment from the date of conviction.

Dated and Signed at Marsabit this ... day of May, 2018

S. CHITEMBWE

JUDGE

Dated, Signed and Delivered at Embu this 29th day of May, 2018

F. MUCHEMI

JUDGE