REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

HIGH COURT CRIMINAL APPEAL NO. 85 OF 2019

SKM.....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(Being an appeal from the Judgment delivered by; Hon J. Kamau (SRM) in Criminal Case No.71 of 2013, at Chief Magistrate Court at Kibera on; 25th January, 2019)

JUDGMENT

1. The appellant was arraigned in court, on 30th December 2013, charged in the first count, with the offence of; defilement contrary to; section 8(1) (2) as read with section 8 (3) of the Sexual Offences Act No. 3 of 2006 and an alternative count of; committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act, N0.3 of 2006. The particulars of each charge are as per the charge sheet.

2. The charges were read to the appellant and he pleaded not guilty to both. The case proceeded to full hearing. The prosecution called a total of six (6) witness. Its case was led by the evidence of the complainant (herein "SK'), who testified that, in the months of; November and December 2013, she was staying with her aunt at [Particulars Withheld]. She was taking care of her aunt's baby, while she went to work.

3. That, on 17th December 2013, her friend Eva picked her up from home and they went to E's sister's house in [Particulars Withheld], where they found the Appellant herein, who is E's bother in-law. E then left her and the appellant in the house and the appellant convinced her to have sex with him.

4. That, the appellant took her to bed, pulled up her skirt towards her face and removed her pant. He then lowered his trousers to the knees and had sex with her, without using a condom. That, she went back home and did not tell anyone as she was embarrassed.

5. On 18th December 2013, at about 11.00 am, E called her again to the appellant's house and left her with the appellant, and he also had sex with her. On 20th December 2013, again Eva called her to the appellant's house and the appellant gave her a red skirt and she went back home.

6. On the 24th December 2013, the appellant went to her Aunt's house at 11.00 am but she was busy. However, later on, while on her way to buy groceries, she met the appellant who asked her to accompany him to his house, then to [Particulars Withheld], so that he could buy her a phone. That, she reluctantly followed him, leaving her two nephews in the care of a neighbour, whom the appellant promised pay for baby care, as there was a possibility that, they would take long to return.

7. That, she accompanied the appellant to his house where she found, the appellant's brother and cousin. She stayed there till 7pm. However, she was afraid to go home alone as the aunt was strict and the appellant refused to take her home, so she spent a night at the appellant's house and they engaged in sex many times.

8. The next day, the appellant left her in the house, in the morning and returned in the evening drank. He then asked her to leave his house, as he was going go to the village in Western Kenya and would return and get another house in [Particulars Withheld] where they would reside as husband and wife. However, she declined to return home alone. He then left her and locked the her in the house. He returned at 1.00 am with his brother and cousin, while they were all drank. Again the appellant had sex with her.

9. On 26th December 2013, at 7pm her mother, aunt and uncle stormed the appellant's house, he was arrested, taken to the Police Station and after the investigations, he was charged accordingly. In the meantime, the complainant was taken to the hospital treated and discharged on

medication. Later, she was examined by the Government doctor at Nairobi Area and a P3 Form filed on 26th December 2013. Thereafter, she underwent post rape care counselling as evidenced by the Post Rape Care Form dated; 26th December, 2013.

10. She produced her birth certificate in proof that, she was born on 6th October 1998 and that, at the time the offence was committed she was a minor. Further in the month of; November 2013, when she was first defiled, she was a student at [Partculars Withheld] Primary School in standard 7 and was on school holiday.

11. At the close of the prosecution case, the appellant was put on his defence and he testified that, he used to reside at; [Particulars Withheld] and worked as a businessman. On 26th December 2013, he woke up at 10.00am and at 11.00am, he left for town to meet his friends. He then received a call from the guards at his residence that, two women were waiting for him. He told the guard that, he would return home at 4.30pm. At 5pm he went home and asked the guard to call the two women. However, he went with a friend Otieno to play pool and asked the guard to call him, once the two women returned.

12. After a few minutes the guard called him and he returned and met the ladies who told him that, they were looking for one Sammy who was required to go to Kabete Police Station but he told them that, his name was; Simon but all the same accompanied the two ladies to the Police station where he was arrested by a police woman and kept in custody from; the 26th to 27th December.

13. On 28th December 2013, he was called to the Officer Commanding Station (OCS)'s office and told to give out cash for the case to be withdrawn but he did not have money and was kept in the cells till the 29th December 2013. All that time he was never informed of the charges. On 30th December 2013, he was taken to court and charged with offences herein.

14. At the conclusion of the trial, the Honourable Learned Trial Magistrate delivered a judgment dated; 21st January, 2019, and found that, the prosecution had adduced adequate evidence and therefore, proved the charges on the main count, against the appellant beyond reasonable doubt and convicted him accordingly.

15. The prosecution treated the appellant as a first offender and after considering the appellant's mitigation to the effect that, he takes care of his parents and is remorseful, sentenced the appellant to serve twenty-five (25) years in custody.

16. The appellant being aggrieved has lodged a Petition of appeal herein, seeking that, the conviction be quashed and the sentence set aside. The appeal is based on the grounds as here below reproduced: -

a. That, the learned trial magistrate erred in law when she upheld the conviction and affirmed the sentence yet failed to find that there was no sound medical evidence to support allegations raised;

b. That, the learned trial magistrate erred in law when he convicted him while acting on a defective charge sheet;

c. That, the learned trial magistrate erred in both law when she convicted him in the present case yet failed to resolve material contradictions in favour of the defence.;

d. That the learned trial magistrate erred in both law when he convicted him in the present case when relying on insufficient evidence, and thus unfair trial contrary to the constitution's principles;

e. That, the learned trial magistrate erred in law when he dismissed his plausible defence;

f. That, he prays to be furnished with a copy of trial record to enable me to raise more reasonable grounds and be present during the appeal hearing.

17. On 4th June 2021, the Appellant filed amended grounds of appeal which states as follows: -

a. That the ingredients of the offence were not (sic) as per the law in SOA, No. 3 of 2006, and contrary to section 111 (2) (c) of the Evidence Act;

b. That the element of the age was not proved;

c. That the element of the consent and defence was not exhaustively addressed;

d. That the element of penetration was not well analysed;

e. That there was admission of incredible witnesses contrary to; sections 144 and 150 of the CPC and non-production of crucial and essential witnesses contrary to section 146 (IV) of the Evidence Act;

f. That the procedure of plea taking was flawed as per Article 47, (4), 50(1) and (2) (b) of the Constitution of Kenya, 2010 and section 207 of the CPC;

g. That the investigations were shoddy contrary to section 48 of the Evidence Act;

h. That the defence was denied cross examination on the original maker of the medical examination report.

18. However, the appeal was opposed by the Respondent, vide grounds of opposition dated; 30th June 2021, which states as follows:

a. That, there exists no grounds to set aside the decision as evidence on record supports both conviction and sentence;

b. That, the Appellant was convicted on sound evidence that was clear, candid and consistent;

c. That, right to legal representation is not absolute and same should only be provided/used where substantial injustice would otherwise result;

d. That, the documentary evidence was produced in line with sections 33 and 77 of the Evidence Act and a basis was laid on why documents were produced by a person other than the maker;

e. That, prosecution proved its case to the required standard beyond reasonable doubt.

19. The appeal was disposed by filing of submissions by both parties, which are considered herein. In considering the appeal herein, I find that, first and foremost the amended grounds of appeal were filed without court's leave. However, in the interest of justice I shall not expunge from record.

20. Be that as it were, in my considered opinion, I find that, the main issues that have arisen from the grounds filed are as follows: -

a. Defective charge sheet and flawed process of plea taking;

b. Insufficient evidence to prove the case; and/or

c. Non procurement and or production of key witnesses and/or documents

d. Unfair dismissal of plausible defence;

21. In considering these issues, I note that, the role of the first appellant court, is to re-evaluate the evidence afresh and arrive at its own conclusion, as held by the Court of Appeal in the case of; ***Okeno vs. Republic (1972) EA 32,*** that*:*

> **"An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya V R 1975) E.A. 336 and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala V. R [1957] E.A. 570. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that, the trial court has had the advantage of hearing and seeing the witnesses".**

22. Having considered the aforesaid, I shall quickly dispose of the issue of the defective charge sheet and plea taking. First and foremost, I note that, the same was not raised at the trial in the trial court, and therefore, cannot spring up on appeal. Secondly, in relation to charge sheets, the provisions of; section 134 of the Criminal Procedure Code, states that:

> "Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged"

23. A perusal of the charge sheets herein discloses, that the charges and the particulars thereof are clearly stated in compliance with the aforesaid provisions and therefore there is no defect therein. Thirdly, the appellant does not state what he perceives to be the defects alluded to, as such I dismiss that ground.

24. In the same vein, I find no flaw in the manner in which the plea was administered. The record of the trial court indicates that; the charge was read to the appellant and interpreted into Kiswahili from English language and he pleaded guilty. However, the facts were not readily available, as the prosecutions required to produce the medical reports. Later on the charge was read again to the appellant and he entered a plea of not guilty on both counts. The case proceeded to full hearing. I find no flaw in plea taking.

25. The other grounds will be addressed under the consolidated ground, as to whether, the prosecution case was proved beyond reasonable doubt and/or whether, the appellant offered plausible defence. In that regard I note that, the appellant was charged and convicted of the offence of defilement.

26. The offence is created under section 8(1) of the Sexual Offences Act No. 3 of 2006, which provides as follows: -

> "A person who commits an act which causes penetration with a child is guilty of an offence termed defilement"

27. It is settled law that, the ingredients of an offence of defilement are; identification or recognition of the offender, penetration and the age of the victim. These essential ingredients for defilement were considered in the case of; *Agaya Roberts vs. Uganda, Criminal no. 18 of 2002*, where the Court of Appeal stated that, it is well settled that, in order to constitute the offence of defilement the following must be proved: (i) Sexual intercourse (ii) Victims age below 18 years (iii) The accused is the culprit.

28. Similarly, in *Bassita Hussein vs. Uganda Crimial Appeal No. 35 of 1995,* the Supreme Court of Uganda laid down the ingredients of the offence of defilement, which the prosecution must prove beyond reasonable doubt as (i) the facts of the sexual intercourse (ii) the age of the victim being under 18 years (iii) participation by the accused in the alleged sexual intercourse.

29. In the instant matter, I find that, the complainant testified in a detailed manner how, the Appellant had sexual intercourse with her on several occasions and even gave the dates thereof. To corroborate this evidence, PW6, Pacific Awour a nurse at MSF- Tumaini, produced the medical records prepared by; Florencia Magaga, who attended to complainant after the incident, told the court that, the complainant gave a history of defilement. That, she had sex intercourse severally with the perpetrator in his house.

30. That, upon examining her, the vagina had discharge with bad odour. Her hymen was torn and overstretched, which according to her was proof that sex took place. Dr Kizzy Shaka, also told the court that, upon examining the complainant, she found that, her hymen was normal with old tears at certain areas.

31. In my considered opinion, there is adequate proof of the element of penetration. In that regard, it suffices to note that, penetration is defined under the Act as: "The partial or complete insertion of the genital organs of a person into the genital organs of another person"

32. As regards the element age of the complainant, I find that proof of age of the complainant is of great importance, as the same is necessary under the Act for purposes of determining the sentence where an accused person is convicted. Therefore, the prosecution in this case has to prove the complainant was a child.

33. A child is defined under the Children Act, 2001, that, "child" means any human being under the age of eighteen years". In the instant matter, the charge sheet states that, the complainant was fifteen (15) years old, and in class seven (7) at the time the offence herein was committed.

34. The age of the complainant was supported by her own evidence and corroborated by her mother that, she was born on; 6th October, 1998. Indeed, her birth certificate was marked for identification in court. However, it was not formally produced as the investigating officer did not testify. The failure of the production of the same, generally makes it inadmissible.

35. The reason why the investigating officer could not testify is not quite convincing. The record indicates that, on 5th April, 2017, PC Cyrus Kiprop told the court he had taken over the matter as the investigating officer in the year 2015. On 19th July, 2018, the court issued summons to; Corporal Mary of Langata Police Station and the same order was repeated on; 6th September, 2018, 2nd and 12th October, 2018.

36. Subsequently, on 23rd October, 2018, the prosecution in a rather casual manner stated as follows: -

> "We are not ready to proceed. She is still unavailable. She is still in Kitale. We pray for another date in December. We did not know how long she was going to be away"

37. The appellant protested and in a brief ruling, the court stated that, the officer had been summoned severally and failed to honour summons over time and that the appellant has a right to speedy trial which was being infringed upon by non-attendance of the witness. The court actually went ahead and closed the prosecution case.

38. Pursuant to the aforesaid, it suffices to note that, the fact that, in every case there are two sides, in a criminal case for that matter: the prosecution representing the interest of the victim of crime, otherwise known as; the complainant and on the other part; the accused. Both sides are entitled to the protection of the law. To achieve that protection or objective, the scale of justice must be balanced.

39. The investigating officer is a "mere agent of necessity". He or she is, neither the victim nor the accused and therefore, at no time should the court, which literally has the constitutional mandate to protect the rights of the two parties cede or relinquish its mandate to such an agent.

40. The provisions of law and in particular the Criminal Procedure Code (cap 75) Laws of Kenya, is clear on what should happen where a witness fails to honour court summons. He should be summoned and if he or she fails to honour the summons, then a warrant of arrest should issue. Failure to invoke these provisions, as herein, may cause serious miscarriage of justice.

41. Be that, as it were, the trial court found that, the age of the complainant was proved by her own and her mother's evidence and that, Dr Kizzy Shaka noted the same on P3 form. In that regard, upon evaluation of the evidence, I find that the age of the complainant was not contested during the trial.

42. Furthermore, the court having had the benefit of seeing the complainant physically, supported by her own evidence and that of the mother and indeed the birth certificate albeit not produced having been availed to the trial court, it will not be in the interest of justice, to hold that, the age of the child was not proved. Additionally, the evidence revealed that, the complainant was in standard seven (7) at the time of offence. The court can take judicial notice of the age of a child in that class.

43. Similarly, the appellant's defence was that, he knew nothing about the offence and didn't know the complainant at all, therefore the issue

of him doubting her age, does not arise. Neither does his argument to the effect that, the trial court failed to consider the issue of consent. I therefore find that, the evidence produced proved the complainant's age as; fifteen (15) years and the failure to produce the birth certificate did not prejudice the appellants case.

44. In that case, I concur with the finding of the trial court that the age of the complainant was proved. A holding to the contrary in the given circumstances will amount to mockery of the criminal justice, and contrary to the law and in particular the provisions of; Article 159 (1) and (2) of the Constitution of Kenya which states that: -

> "(1) Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.
>
> (2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—
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> (a) justice shall be done to all, irrespective of status;
>
> (b) justice shall not be delayed;
>
> (c) alternative forms of dispute resolution including reconciliation, 96 Constitution of Kenya, 2010 mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);
>
> (d) justice shall be administered without undue regard to procedural technicalities; and
>
> (e) the purpose and principles of this Constitution shall be protected and promoted (emphasis added).

45. The last issue to determine herein is resolving whether the appellant committed the offences he was charged with, and the recognition and/or identification of the perpetrator of the crime. The complainant identified the appellant as the person who sexually assaulted her. That, he defiled her both day and night and on several days and/or occasion. In fact, she spent two continuous days in his house and on one or two occasions went to, Kangemi shopping centre with him. Therefore, can there be really an issue of inadequate identification? I find the answer in the negative.

46. To corroborate her evidence, her parents testified that, the complainant was found with the appellant in his house, where he was arrested and frog matched to the Police station. PW3 Geoffrey Mogadia, also confirmed the appellant was arrested by the mob from his house. From the evidence on record, the appellant had gotten a "wife".

47. I therefore find that the appellant's denial of the knowledge of the complainant as a mere denial and an afterthought. In fact, it is inconsistent with his cross examination, when he questioned why he was not "accused of defiling one, E, who allegedly said introduced, the complainant him". The appellant does not also deny knowledge of the said E and/or residing in the same plot with the auntie of the complainant, one Rebecca. In fact, the appellant did not recant and/or rebut the prosecution evidence as to the occurrence of the offence. I therefore find adequate evidence that, he committed the offence.

48. Finally, as regards sentence, I find that, section 8(3) of the Sexual Offences Act provides that, a person who defiles a child aged between twelve (12) and (15) years shall be liable to an imprisonment term of not less than twenty (20) years. The accused was sentenced to 25 years, therefore, that sentence is lawful.

49. In deed the record indicates that, the trial court considered his mitigation, records and the period he was in custody. However, although reference was made to the visible trauma of the victim, and that she was experiencing "spells of fainting" as a result of the defilement, but that evidence required medical certification.

50. Be that as it were, this was a school going child. She was therefore supposed to be protected by all, including the appellant, so as to pursue her purpose in life. The appellant had other alternatives. The complainant had only one option pursue her career in life. She could not serve two masters at the same time; be a student and wife. The bible is clear on this. What the appellant did is abominable and morally unacceptable. He deserves a deterrence sentence.

51. In the given circumstances I find no justification to interfere with the sentence meted herein. The upshot is that, I find no merit in the entire appeal both on; conviction and sentence and I dismiss it in its entirety.

It is so ordered.

DATED, DELIVERED AND SIGNED ON THIS 5TH DAY OF OCTOBER, 2021

GRACE L NZIOKA

JUDGE

In the presence of:

The appellant in person

Ms Chege for the Respondent

Edwin Ombuna, Court Assistant