REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MARSABIT

CRIMINAL APPEAL NO.2 OF 2019

ADAN IBRAHIM HARROW.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from original conviction and sentence in Criminal case No.24 of 2017 of the (Hon. B.M. OMBEWA) Principal Magistrate's Court at Marsabit)

JUDGMENT

The appellant was charged with three different counts as follows:-

Count 1:

Child trafficking contrary to section 13 (b) of the Sexual offences Act. Number 3 of 2006. The particulars of the offence are that on the 26th day of December 2016 at Marsabit town in Marsabit central sub-county within Marsabit county, the appellant transported K.A a child aged 13 years from Marsabit town to Manyatta Didi Rigatu in a motor vehicle registration No. KBR 659Z Toyota within Kenya for the purpose of committing sexual offence with the child.

Count II:

Defilement Contrary to Section 8(1) as read with Section 8(3) of the Sexual Offence Act No.3 of 2006. The particular of the offence are that on the 26th day of December, 2016 in Marsabit central sub-county within Marsabit county, the appellant intentionally caused his penis to penetrate the vagina of K.A a child aged 13 years.

Count III:

Assault causing actual bodily harm Contrary to section 251 of the Penal Code. The particulars of the offence are that on the 26th day of December 2016 at manyatta Didi Rigatu in Marsabit central Sub-county within Marsabit county,the appellant unlawfully assaulted K.A. thereby occasioning her actual bodily harm.

The trial Court convicted the appellant on all the charges although the sentence meted out is on Count II and III only. The trial Court's finding is that the appellant was guilty as charged. The appeal herein has been brought on the following grounds which are reproduced verbatim:-

1. The Hon. Learned Magistrate erred in law and fact by holding that one Biftu called the appellant only to come and collect the complainant and subject her to defilement.

2. The Hon. Learned magistrate erred in law and fact in convicting the appellant for the reasons that he told the complainant to remove her clothes.

3. The Hon. learned Magistrate erred in law and fact by finding that the complainant was led to the accused's bed and defiled.

4. The Hon. Learned Magistrate erred in law and fact by ignoring the fact that the complainant was said to have managed to escape

5. The Hon learned Magistrate erred in law and fact by not finding that the appellant was married person with two children and there was no chance of him committing the act.

6. The Hon. learned Magistrate erred in law and fact by not appreciating that there was no eye witness or corroborating evidence to the statement of a minor to support a charge of such magnitude.

7. The Hon learned Magistrate erred in law and fact by holding that the appellant touched the vagina of the complainant with no credible evidence.

8. The Hon. Learned Magistrate erred in law and fact by stating that the complainant was examined by the doctor but was found with infection yet the appellant had no infection

9. The Hon. Learned Magistrate erred in law and fact by failing to consider the appellant's mitigation and proceed to hand the appellant a harsh sentence.

10. The Hon. Learned magistrate erred in law and fact by ignoring the reason adduced by the appellant that they were people who were well known to each other but there was business differences between the parents of the complainant and the appellant.

11. The Hon. Learned Magistrate erred in law and fact by not considering that there was no direct link between the purported injuries as evidenced by Dr. Dub of peri Orbital Oectema with the appellant.

12. The Hon. Learned Magistrate erred in law and fact by that on the P3 form it was recorded by the doctors that there was no evidence of sexual intercourse.

13. The respondent on balance of probability did not prove this case.

Mr. Kiogora, Counsel for the appellant, submit that while appearing for the appellant before the trial court, he applied to have PW1, PW2 , PW3 and PW4 recalled. PW4 was not recalled for further cross examination. PW4 is a doctor. They applied to recall PW4 because they were served with two medical reports.

One is dated 27.12.2016 and the second one is dated 28.12.2016. One medical report indicate that there was no evidence of assault or sexual intercourse. However, the medical report dated 28.12.2016 indicate that the complainant's hymen was raptured. Mr. Kiogora contends that there was procedural impropriety as the matter proceeded in his absence yet he was on record. The doctor was not recalled. The appellant was also examined and his medical report indicate that he had no infection yet one of the medical reports indicate that the alledged victim had an infection.

Mr. Mwangangi prosecution counsel, opposed the appeal. Counsel submit that Mr. Kiogora came on record on 7.3.2017. By that time the prosecution had closed its case and the appellant had been placed on his defence. PW1, PW2 and PW4 were recalled for further cross examination and re-examination.

Due to a variety of reasons, the doctor was not able to testify again. At times the witness was absent while on other occasions it was the defence counsel who was absent. There was no procedural impropriety as alledged. The recalling of witnesses was subject to their availability. Only one medical report was produced in court and it was duly signed and stamped. The alleged second medical report is not known to the prosecution as it never came out at the trial. It was not presented as an exhibit during the hearing and has no business being part of the record.

This is a first appeal. The court is duly bound to evaluate the evidence afresh and make its own conclusion. Five witnesses testified for the prosecution while the appellant was the only witness for the defense. PW1 was the complainant. After conducting voire-dire, the trial court allowed PW1 to give sworn evidence. It is the complainant's evidence that she was thirteen(13) years old and a class seven (7) pupil. She knew the appellant. On 26.12.2016 at about 6.00pm she left home heading to her mother's shop. On the way she met the appellant's brother called Biftu. Biftu called the appellant. The appellant promised to take her home in his vehicle. At Caltex area she wanted to alight but the appellant held her hand. She alighted and started running upon reaching the appellant's home but the appellant held her, took her to his house and locked the door. He assaulted her using his fists, removed her clothes and defiled her. She later managed to open the door and ran away. It was about 7.00pm when she was taken to the appellant's house. She informed her mother what had happened. A P3 form was filled.

It is PW1's further evidence that while in the appellant's house she started shouting. There was light in the sitting room. PW1 was recalled twice. She reiterated that the appellant switched on electricity light in his house. It was her first time to have sex. Her skirt was blood stained. She was treated at Marsabit hospital by Dr. Halake.

PW 2 is the mother to PW1. She has known the appellant since his childhood. She was expecting PW1 to go to her shop but on the material day she did not turn up. She went home but did not find PW1. She started looking for PW1. At about 11.00pm she met PW1 near Posta area while crying. PW1 had a swollen face. PW1 informed her that she had been defiled by the appellant. The matter was reported to the Police the following morning. PW1 was referred to hospital. PW1's pantie was torn and her skirt was blood stained. PW2 was equally recalled and she told the court that the appellant has a wife and children. She did not examine pW1's private parts.

PW3 Dr. Dub Halake Dido was based at the Marsabit General hospital. He examined pW1 who had swelling around the right eye, strangulation marks on the back of the head and scratch marks on the face. Upon examining her genitalia, there was blood inside. The hymen tissue was broken. He also saw PW1's clothes. He also examined the appellant and found that he had TB. He filled the two P3 forms on 28.12.2016. It is his evidence that the bleeding in PW1's vaginal cavity was active.

PW4 Chief Inspector Mwangi investigated the case. The case was reported on 27.12.2016. He saw PW1 with swollen face. PW1 was in pain and he referred her to hospital. He visited the scene of crime and recovered pieces of broken glass and cement on the floor. They were led to the appellant's house by PW1. He was given PW1's birth certificate which indicate that she was born on 29.6.2003.

PW5 PATRICK KAUMU is a laboratory technologist at ISCM Hospital. He attended to PW1 on 22.1.2017. He did pregnancy and HIV tests and the results were negative.

The appellant gave sworn evidence. He testified that he is a boda boda operator. He has a wife and two children. The person he is alleged to have taken is an adult and not a child. She did not scream. He was framed. He does not know PW1. He knows PW1's mother who is a friend to his mother. He used to supply charcoal to his mother who would in turn sell to PW1's mother.

The issue for determination is whether the prosecution proved its case against the appellant beyond reasonable doubt. The complainant's evidence is that the appellant took her to his house, locked the door and defiled her. It was about 7.00pm when the incident occurred. She stayed in the appellant's house for about four (4) hours. When the appellant left the bedroom, she took the keys, opened the door and escaped. She was assaulted using fists and had a swollen face. There is the evidence of the

complainant's mother. According to PW2, she was expecting PW1 to go to her shop that evening but PW1 did to turn up. She went home but did not find PW1. She started looking for her daughter and met her at about 11.00pm crying. PW1 had a swollen face. PW1 narrated what had happened to her. The medical evidence indicate that the complainant was still actively bleeding from her vagina. PW1 testified that it was her first time to have sex. PW1's hymen was raptured.

On his part, the appellant denied defiling PW1. It is his evidence that the person he took was an adult. He was framed and does not know PW1.

Ground one of the grounds of appeal makes reference to one Biftu. According to PW1, Biftu is the appellant's brother. He was not present when the alleged incident took place. I do not find any alleged error in law and fact in relation to this ground of appeal and the same fails. Biftu was only present when the complainant alleged to have entered the appellant's car but did not go with the appellant.

The second ground of appeal is that the trial court erred in law and fact in finding that the appellant told PW1 to remove her clothes. It is PW1's evidence that the appellant told her to remove her clothes but she refused. The appellant assaulted her. The appellant held her and removed her clothes. He also covered her mouth. I see no error of fact or law on the part of the trial court in relation to the second ground of appeal.

PW1 testified that the appellant took her to his house. There was no one in the house. Grounds three and four of the appeal relate to the allegation that pW1 was taken to the appellant's house and the contention that she escaped after having been defiled. This is part of the prosecution evidence. PW4 testified that the complainant led them to the appellant's home. The two grounds of appeal are not raising any issue for determination by this court. They are general statement of what is alledged to have happened.

The appellant testified that he has a wife and two children. The pre sentencing report dated 15.2.2019 confirms that contention. Ground five of the grounds of appeal is that the trial court erred in law and fact by not finding that the appellant was a married person with two children and there was no chance of the appellant committing the act. This contention is devoid of any legal backing. There is no research done which established that a married person with children cannot defile or rape a victim. The prosecution's contention is that it is the appellant who defiled PW1. Merely stating that one is married and has children without other evidence cannot disprove the prosecution's evidence.

Section 124 of the Evidence Act, Chapter 80 Laws of Kenya states as follows:-

> ***Notwithstanding the provisions of section 19 of the Oaths and Statutory Declaration Act, where the evidence of alledged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.***

Provided where in a criminal case involving a sexual offence the only evidence is* that *of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.

The appellant contends in ground 6 of his grounds of appeal that there was no eye witness or corroborating evidence to the evidence of the complainant who is a minor. I note that the trial court in its judgement stated as follows:-

> "**I note that there was no eye witness to the incident. I have warned myself of the danger of convicting on the uncorroborated evidence of a child. It is my considered view and so hold that the accused unlawfully assaulted the complainant and caused her bodily harm and proceed dot defile her. He assaulted her while demanding that she remove her clothes."**

There is the medical evidence of PW3. It is his evidence as stated in the P3 form that PW1 was bleeding from her vagina and her hymen tissue was disrupted. PW2 saw PW1 with a swollen face. PW3 and PW4 also observed that PW1 had a swollen face. PW1 testified that she was hit with fists on the face as the appellant told her to remove her clothes.

With regard to the charge of defilement, the law as stated under Section 124 of the Evidence Act is that the Court can convict in Sexual Offences on the evidence of the victim if the Court finds that evidence to be truthful**.** There is no mandatory requirement that the evidence of a minor victim in a sexual office case must be corroborated by other evidence. The complainant's evidence can sufficiently lead to a conviction in the absence of any other evidence if the trial court finds the minor's evidence to be truthful. Apart from the evidence of the minor, there is the evidence of PW2, PW3 and PW4. It should not be taken that corroboration in Sexual offences cases must confine itself to the sexual act. If a witness testified that he/she saw the accused taking the complainant or entering into a house and the victim later complain that defilement took place then the evidence of the person who saw the two together can be sufficient corroboration. In this case, PW2 found her daughter absent when she arrived home. She started looking for her and met her at about 11.00pm. PW1 testified that she was taken to the appellant's home at 7.00pm and stayed there for four hours. PW2 saw PW1 with a swollen face. This corroborates PPW1's evidence that she was assaulted with fists on the face. The same applies to the evidence of PW3 and PW4. According to PW3, PW1 had strangulation marks on the back of the neck with swollen face. PW4 testified that PW1 was in bad condition and had swollen face. I do find that the evidence of PW2, PW3 and PW4 corroborates that of PW1. There was no need for the trial Court to warn itself in relation to the Sexual Offences counts. The evidence of pW1 on assault was equally corroborated by that of PW2, PW3 and PW4. It is true that PW1 was the only eye witness to the offences. One does not expect the offence of defilement to take place in a public place or to have people called to witness such heinous act. I do find that ground six of the grounds of appeal fails.

Grounds 8, 11 and 12 of the appeal relate to the medical evidence. There is reference to infection on the part of PW1 while the appellant had no infection. PW3 did not testify that there was any infection on pW1. He referred PW1 for HIV test and PW5 conducted the test on 22.1.2017. PW3 testified that the accused had TB.

The evidence on record shows that only two P3 forms dated 28.12.2016 were produced. PW3 produced the P3 form for PW1 as the first prosecution exhibit and the appellant's P3 form as the fifth exhibit for the prosecution. Mr. Kiogora came up with a P3 form that was filled on 27.12.2016. That P3 form is nowhere mentioned in the proceedings of the trial court. Indeed the original P3 form dated 17.12.2016 is not part of the record. No one made reference to such a document. PW4, the investigation officer did not produce the P3 forms. It is PW3 who produced only two P3 forms, one for PW1 and the other one for the appellant. Further, Dr. Halake wrote his name on the two P3 forms he filled. The P3 form produced by Mr. Kiogora does not indicate which doctor filled it. PW1 testified that she was attended to by Dr. Halake only. Dr. Halake only filled two P3 forms.

It is the alledged P3 form filled on 27.12.2016 which indicate that there is no evidence of defilement. My conclusion is that the alleged P3 form was introduced after the case was concluded. It is only found in the record of appeal as prepared by Mr. Kiogora. The record of the trial Court has no such document. The evidence of PW3 is to the effect that PW1 was defiled. He did not fill the alleged P3 forms. The third P3 form only emerged at the appeal stage. I do agree with Mr. Mwangangi that the document is not part of the record. If Mr. Kiogora had the P3 form when he came on record, why didn't he put it to PW1 that the medical evidence showed that there was no proof of defilement. All what I can say is that the alledged P3 form filled on 27.12.2016 is an afterthought. It was not part of the record before the trial court. It was introduced by the appellant and his advocate at the appeal stage. Its introduction amounts to a criminal act and should not be entertained. No where in the record of the trial court is reference made to a P3 form filled on 27.12.2016. When an application was made to recall the witnesses, the P3 form was not annexed as one of the reasons as to why PW3 was being recalled. The prosecution did not produce the document and therefore its source is only known to Mr. Kiogora and his client.

The appellant contends that there was procedural impropriety in the trial as PW3 was not recalled. The

record shows that the matter was adjourned several times both at the instance of the prosecution and the defence. The case came up for hearing on 15.1.2019. The appellant requested the court to

have it heard the following day as his advocate was going to be present on 16.1.2019. The court allowed that request and fixed if for hearing on 16.1.2019.

On 16.1.2019 the appellant informed the court that his advocate was seeking adjournment to 17.1.2019. Although the trial court had twice granted the defence the last adjournment, it granted the appellant the last adjournment and fixed the case for hearing on 17.1.2019. on 17.1.2019 Mr. Kiogora did not appear for the hearing. The record reads as follows:

Accused: My lawyer has not arrived we can just proceed.

Mr. Mwangangi: I had closed this case. I wish to close it.

The appellant had cross examined PW3. He did not indicate that he wanted to further cross examine PW3. I do find that the trial was fair. Indeed several times the appellant was absent. He sought adjournments on account of being sick or his advocate being absent and the trial court allowed such applications. At times his security bond was cancelled but was subsequently reinstated. The trial was objectively fair. There is no procedural impropriety. Mr. Kiogora never appeared again before the trial Court and explain his absence. The contention that the trial was not fair or that PW3 was not recalled is not one of the grounds of appeal. It is an afterthought. Be that as it may, I do find that there was no procedural default on the part of the trial Court. The appellant urged the trial court to proceed with case in the absence of his advocate and cannot turn and accuse the trial court of procedural impropriety. I do find that there is no miscarriage of justice.

It is the prosecution evidence that PW1 knew the appellant. According to PW1 the appellant switched on electricity light while in the sitting room. She knew who defiled her. There is no mistaken identity. I am satisfied that PW1 was defiled and that it is the appellant who defiled her. Section 13 of the Sexual Offences Act was repealed. The first count is therefore improper. The trial Court sentenced the appellant to serve twenty (20) years imprisonment for count II. A fine of Ksh.40,000 and in default to serve four months imprisonment for Count III. It is contended that the sentence is harsh. The sentence is provided for under Section 8(3) of the Sexual Offences Act. The sentence of twenty (20) years imprisonment is therefore lawful and appropriate given the circumstances of the case.

The complainant knew the appellant. The Prosecution evidence does prove that PW1 was indeed defiled. The complainant's evidence is believable. She was defiled by the appellant. I do find that the prosecution proved its case beyond reasonable doubt. The upshot is that the appeal lacks merit and is hereby disallowed.

Dated, Signed and Delivered at Marsabit this 3rd day of May 2019

S. CHITEMBWE

JUDGE