REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CRIMINAL APPEAL NO. 6 OF 2016

PETERSON MURIITHI NJERU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from original conviction and sentence in Criminal Case No.1022 of 2013

of the Senior Principal Magistrate's Court at Embu)

JUDGMENT

The appellant was charged with the offence of defilement contrary to section 8(1) and 8(3) of the sexual offences Act No 3 of 2006. The particulars of the offence were that the appellant between 29th day of August 2010 and 1st September 2010 at [2020] Village in Mbeere South, District within Embu County intentionally and unlawfully caused his penis to penetrate the vagina of SW a girl aged 15 years.

The appellant was also charged with an act of indecency by touching the vagina of SW a girl aged 15 years. The trial court convicted the appellant and sentenced him to serve 20 years imprisonment less four years when the appellant was in remand. The grounds of appeal are:-

1. That the appellant pleaded not guilty to the charge before the trial magistrate.

2. That the trial magistrate erred in both points of law and fact when she failed to consider that the medic officer and no DNA was done so as to clear the doubts involved in this case and thus violated section 36(1) of Sexual Offences Act.

3. That the learned trial magistrate still erred in law and fact when she failed to consider that the evidence of PW1, PW2 and PW3 no dates of which the alleged incident took place and thus violated in section 163(1) of Evidence Act Cap 80 Laws of Kenya.

4. That the learned trial magistrate still erred in both matter so law and facts when she failed to consider that no spermatozoa was noted in examination of the complainant PW1 so as to prove the said allegations yet the complainant was examined few hours prior to the alledged offence neither tears or blood was noted in complainant private parts or clothes so as a prove of whether the alleged hymen was broken recently.

5. That PW1, PW2 and PW3 produced single evidence as they were from one family (daughter, mother and father).

6. That the trial magistrate erred in both law and facts when she failed to consider that no independence witness saw PW1 entering or leaving the appellant's house and nothing belonging to the complainant was recovered from appellants house so as to prove whether she was there.

7. That, the learned trial magistrate erred in both matters of law and facts when she failed to consider that there was a grudge between the appellant and PW1 parents in regard to business competition of which lead PW2 and PW3 to frame the appellant using their daughter PW1.

8. That the trial magistrate still erred in both matters of law and fact when she failed to consider my defence of which contained some reasonable facts. Thus violating in section 169(1) CPC and section 212 of CPC Cap 75 Laws of Kenya.

9. That the case was never proved beyond and reasonable doubt as required by the law under section 111 of evidence act Laws of Kenya.

The appellant contends that the prosecution failed to prove that there was penetration. The medical evidence did not support the allegation of defilement. The medical officer testified that the complainant was not defiled. PW1's external genitalia was normal. The medical examination was just done some hours after the incident but the trial court held that it was after lapse of long time. The medical evidence does not corroborate the charge.

It is also submitted that whereas the complainant alleged that she was locked inside the house, the investigating officer testified that they found the house open. Therefore nothing could have prevented the complainant from escaping. PW1 testified that she was sent to the shop by her mother while her mother denied sending PW1 to the shop. The evidence is contradictory and inconsistent. The appellant was not arrested in the said house. The prosecution did not prove its case beyond reasonable doubt.

Miss Nandwa, prosecution counsel, opposed the appeal. Counsel submit that there was no need for DNA test. PW1 did not become pregnant due to the defilement. The prosecution evidence is clear and consistent. PW1 disappeared from home on 28/8/2010 and was rescued on 1/9/2010. Spermatozoa need not be noted for the offence of defilement to be proved. It's also not mandatory for bruises to be noted after sexual intercourse. The appellant's defence was considered. He did not raise the issue of grudge during cross examination. The case was proved beyond reasonable doubt.

Before the trial court, PW1 was the complainant. By the time she testified she was 19 years old. On 28/8/2010 she was in class 7 and was 15 years old. She was sent by her mother to a shop at 11:00am. She met the appellant who was selling at a hotel. He promised to give her a book. They went to his rental house later that evening at about 5:00pm. She was left in the house. The appellant locked the house and went to the hotel. He returned at 9:00pm. It was late and she slept there. They had sex at night. The following day she was locked inside. The appellant was not working far from the house and he would go to open for her so that she could attend to her natural calls and lock her again. Her parents went there with Police Officers and the appellant. She was taken to hospital and the matter was reported to the Police. She did not sustain any injury. The appellant promised to marry her but she refused as she was in school. She had not had sex before. The appellant would watch her when she attended her calls of nature so that she did not escape.

PW2 MWS is PW1's mother. On 29/8/2010 at about 8:00pm PW1 went outside to take a bath. The bathroom is outside the house. PW1 was 15 years. She later checked in her room to find out if she was studying but did not find her. Together with her husband (PW3) they looked for her but could not trace her. On 31/8/2010 she went to Rwika. She heard that a child was being locked inside a house. She called her husband. They reported at Gachoka Patrol base. On 1/9/2010 they went to the appellant's house with two Police Officers. They took the appellant from the hotel first before heading to his house. The Police asked him to open the house and PW1 was inside.

PW3 is PW1's father. His evidence is similar to that of PW1. He did not know the appellant before. PW1 told him that the appellant had bought her a Soda at the shop and drugged her. PW1 did not tell them how she went to the appellant's house. It is the appellant who opened the house when they went with the police.

PW4 JOHN MWANGI is a Clinical Officer who was based at the Mbeere District Hospital. He produced a P3 form that had been filled by his colleague Naomi on 2/9/2010. Naomi was undergoing training at Nairobi Medical Training College (MTC). PW1'S external genitalia was normal. Vaginal Swab was normal. According to him PW1 was not defiled. PW1 had initially been attended at Kiritiri Health Centre on 1/9/2010. PW1 had no bruises or physical trauma on her body. There was no indication whether the hymen was broken. She was given protective drugs because she alleged she was defiled.

PW5 PC PAUL WACHIRA GATHENYA was stationed at the Gachoka Patrol base. The case was reported on 31/8/2010. On 1/9/2010, he went with PW2 and PW3 to arrest the appellant. They went to Rwika hotel and found the appellant. They went to his house and knocked, PW1 opened the door for them. PW1 was washing clothes. They took the appellant to the Police Station. PW1 was referred to hospital. PW1 was 15 years old. PW1 told him that she had sex with the appellant .PW1 did not have any visible injuries.

In his unsworn defence, the appellant testified that he is a farmer. On 20/9/2010 he was working in a hotel at Rwika Market. On 25/9/2010 three people went to the hotel and asked him if he was married. They took him to his house which he had forgotten to lock in the morning. He was told that he had defiled PW1. PW1 was not in his house. He had grudges with PW2 and PW3. He further stated that he was charged and convicted and the case was sent for retrial.

The issue for determination is whether PW1 was defiled. It is PW1's evidence that she stayed in the appellant's house from 29/8/2010 to 1/9/2010 when she was rescued. During that period she had sex with the appellant. She was locked inside the house. The medical evidence of PW4 is that there was no indication that PW1 had been defiled. According to him PW1 was not defiled.

In the absence of medical evidence to corroborate PW1's contention, the court has to entirely rely on the evidence of PW1. Section 124 of the Evidence Act allows the court to convict a person charged with a sexual offence on the evidence of the victim if the court is satisfied that the victim is telling the truth.

From the evidence on record, I do find that indeed PW1 was found in the appellant's house. However, I do find that PW1's evidence that she was defiled is not believable. On 29/8/2010 she was at home. They took supper and she was having a bath outside. She later disappeared from home. In her evidence to the court, she testified that she met the appellant during the day and was promised a book. In the evening at 5:00pm she went for the book and she was taken to his house. She was locked inside upto 9:00pm as the appellant went to close the hotel. These are lies as the evidence of her parents is that she was taking her bathe outside the house and was to go and study in her room. PW2 testified that she called PW1 after one hour, that is about 9:00pm, but there was no response. It is clear that PW1 escaped from home and went to the appellant's place.

The other fallacy of PW1's evidence is that she was locked inside the house. Her parents testified that it is the appellant who opened the house. The evidence of the Investigation Officer is that they knocked the house and PW1 opened for them. She was washing clothes. This is the evidence of a Police Officer who was an Independent witness. If indeed she was locked inside and the appellant left for his work, how comes she did not scream for help. It is her evidence that there were other houses nearby but had no people. How did she know that there

were no people in those houses. Whenever she was allowed to go for short calls she could have also screamed while in the toilet or even attempt to ran away to the hotel which was not far from the house.

There is the evidence of her father. He testified that PW1 told him that the appellant had given her a Soda that day and drugged her. Although in her evidence she never testified about having been drugged, it is clear to me that she lied to her parents.

I do find that PW1's evidence is doubtful. The medical evidence also confirms these doubts as nothing unusual was observed in PW1's private parts despite the fact that she was having sex for the first time at 15 years old. I do agree that bruises are not mandatory but the Clinical Officer did not detect anything to confirm that there was penetration. Vaginal Swab was done. There was no indication that the hymen was broken. It is her evidence that she did not feel pain.

The defence evidence does not raise any doubt that the appellant was with PW1. The appellant promised to marry PW1 and that is why PW1 decided not to go back to her parents. The appellant knew that PW1 was a child. This is not a case where PW1 lied to the appellant that she was over 18 years old. He took advantage of PW1 and stayed with her for three days. I cannot simply presume that during those three days the two had sex. The trial court did observe in its judgment that the medical evidence was lacking. PW1 was seen at a hospital on 1/9/2010 and nothing unusual was noted.

From the evidence adduced by the prosecution, I do find that PW1 was not defiled. The expert evidence of PW4, a Clinical Officer, is part of the prosecution evidence. According to PW4 the girl had not been defiled. I do find that the prosecution did not prove the main court of defilement beyond reasonable doubt. The evidence of PW4 raises doubt as to whether PW1 was indeed defiled. This is a Criminal case which had to be proved beyond reasonable doubt.PW1's evidence is doubtful and the medical evidence does not support her case. PW1 was an adult by the time she testified.

In his defence, the appellant testified that he was initially convicted and the case was sent for a retrial. The record shows that the appellant was arrested on 1/9/2010. The charge sheet indicates that he was apprehended in court on 4th September, 2010. The appellant told the court on 3/1/2014 that he was charged on 3/1/2010, convicted and sentenced to 20 years imprisonment. He could not raise surety and has been in custody since 1/9/2010.

Given the evidence on record, I do find that the prosecution did not prove the main count of defilement. I do find that the prosecution did prove the alternative count of indecent act contrary to section 11 (i) of the Sexual Offences Act No 2 of 2006. The appellant is hereby found guilty of the alternative count. The twenty (20) years sentence on the main count is hereby set aside. The appellant is hereby sentenced to serve ten (10) years imprisonment.

The trial court observed that the appellant had been in custody since 2010. It took into account the remand period of four (4) years. I do agree with that finding. The appellant shall serve ten(10)years imprisonment from the date of his arrest on 4/9/2010. The ten (10)years sentence shall run from 4/9/2010 for purposes of computation of the period of imprisonment.

Dated and signed at Marsabit this……day of June, 2018

S. CHITEMBWE

JUDGE

Dated, Signed and Delivered at Embu this 12th Day of June, 2018

F. MUCHEMI

JUDGE