



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT EMBU**

**CRIMINAL APPEAL NO.37 OF 2016**

**FESTUS MUCHANGI GICHOVI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from original conviction and sentence of*

*Hon. V.O. Nyakundi Resident Magistrate Embu*

*in Criminal Case(S.O) No.13 of 2014)*

**JUDGMENT**

The appellant was charged with the offence of defilement Contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act No.3 of 2006. The particulars of the offence are that the appellant, on the 1<sup>st</sup> day of December 2014 at [particulars withheld] Estate Embu township within Embu County, unlawfully and intentionally caused his Penis to penetrate the vagina of JIK, a child aged 10 years.

The trial Court convicted the appellant and sentenced him to 45 years imprisonment. The grounds of appeal are that: -

- 1. The appellant pleaded not guilty.***
- 2. The trial Court relied on the evidence of PW1 and PW2 who is PW1's mother without considering that no Independent witness testified.***
- 3. The appellant was not examined and no DNA was conducted on PW1.***
- 4. The trial Court erred in law and fact when it rejected the appellant's defence on weak reasons.***
- 5. The trial magistrate was not of a high rank and could not have heard the case.***
- 6. There were discrepancies between the evidence given to the Police and sworn evidence in relation to PW2.***

The appellant opted to file a hand written mitigation plea indicating that this was an amendment to his grounds of appeal. During the hearing of the appeal, the appellant informed the court that he was relying on his mitigating plea. In his mitigation, the appellant states as follows: -

- 1. I seek the mercy of the Court to reduce for me the sentence imposed against me.***
- 2. That I am a pauper by myself.***
- 3. It was my first time to appear in Court over any offence.***
- 4. I am remorseful and reformed***
- 5. I am a casual labourer by profession.***

Miss Nandwa, prosecution Counsel, opposed the appeal. Counsel submit that the evidence of PW1 corroborated that of PW2. A P3 form was produced as well as a post rape care form. P3 adduced medical evidence. There was no need for DNA test. Counsel submit that defilement is not proved by DNA test but by way of evidence. The appellant 's defence was considered. The defence only explain how the appellant was arrested and it was unsworn.

It is further submitted that Section 23(2) of the Interpretation and General Provisions Act gives Resident Magistrate jurisdiction to hear cases under the Sexual Offences Act. The prosecution evidence is clear and well corroborated. The ingredients of defilement were proved. The complainant's age was proved through a birth notification. PW1 was born on 10.4.2004. Penetration was proved. PW1 knew the appellant very well and he was positively identified.

This is a first appeal. This court is duty bound to re-evaluate and assess the evidence afresh and make its own conclusion. PW1 JIK was the complainant. She gave unsworn evidence. She was cross examined by the appellant. It is her evidence that the appellant used to be their neighbour. On the material day her mother had gone to work. The appellant went to their home and told her to open the door. He then defiled her. She felt pain. After he was done he used tissue paper to clean her private parts and discarded it in the toilet. The appellant cleaned white substance he had deposited in her private parts. He then warned her not to report otherwise he would beat her by stepping on her head. He gave her 10 shillings to go and buy "Ngumu". She bought porridge with the money. The incident took place on a bed. PW1 then told mama Njeru that the appellant had defiled her. Mama Njeru then told her mother. That was the first time the appellant had defiled her.

**PW2 FN** is the complainant's mother. She testified that PW1 was born on 10.4.2004. On the material day she went to her work of selling apples. When she returned home another lady told her that PW1 had been defiled by the appellant. She examined PW1 and saw whitish substance. PW1 told her that the appellant had used tissue paper to clean her. PW1 told her that the appellant was still inside the house. There was a mob shouting and they stormed the house. The appellant was beaten seriously by the mob. The area sub-chief tried to stop them but she was overwhelmed. Other men rescued the appellant and took him to Embu Police station. PW1 was taken to hospital. It is her evidence that the appellant used to be her boyfriend and they used to have sexual intercourse in his house. The relationship did not last for long.

**PW3 Corporal AGNES NJERI** was attached at the Embu Police Station. She investigated the case. The case was reported on the same day 1.12.2014 by PW2 who went to the station with PW1. She escorted PW1 to Embu General Hospital. A P3 form and a post rape care form were filed. The appellant was taken to the Police station by members of the public. She produced PW1's birth notification. PW1 was born on 10.4.2004.

**PW4 Dr. KEN MATU** was stationed at Embu general Hospital. He tried to produce the P3 form and post rape care form on behalf of his colleague, **Dr. Ernest Kimani** but the appellant objected. **PW5, DR. KIMANI ERNEST** was based at the Embu General hospital. He examined PW1 and filled a P3 form and post rape care form. PW1's underwear was dirty but had no blood stains. PW1's genitalia was normal but her hymen was not intact. It is his evidence that if the hymen had been broken recently he could have observed blood.

In his unsworn defence the appellant testified that he works in a butchery. On the material day he went to work at 6.30am. He went back home at 9.00pm. On the road he met boda boda operators. They wanted to know which offence he had committed before he left for work that day. He told them that he had not committed any offence. Another lady told the mob to lynch him. He was attacked by many people. An old man went there and rescued him. He was taken to the Police station. Later PW2 arrived at the Police station. She told the Police that mama Njeri had told her that he had defiled PW1. He used to be a boyfriend to PW2 in 2013. They disagreed over loss of his money. He had suspected that she was responsible for the loss. Mama Njeri is a friend to PW2.

The issue for determination is whether the prosecution proved its case beyond reasonable doubt. The evidence of PW1 is that the appellant went to their home and defiled her. She was defiled on the bed. She knew the appellant. The incident occurred during the day. She used to see the appellant in the neighbourhood. She then informed mama Munene. PW2 was informed by a neighbour what had happened to PW1. PW1's evidence is that she noticed that the tissue paper was missing. PW1 testified that the appellant used the tissue paper to wipe out her private parts.

The P3 form was filled the following day 2.2.2014. PW5 observed that PW1's hymen was not intact. The rest of the examination on PW1's genitalia was normal. The post rape care form indicate that there were signs of vaginal penetration. PW1 testified that she felt pain and demonstrated to the court how the appellant inserted his urinating organ into her urinating organ.

The prosecution case does prove that indeed PW1 was defiled. PW1's age was proved as the birth notification was produced. PW1 was born on 10.4.2004. The incident occurred on 1.12.2014. PW1 was by then below 11 years. The appellant's defence is that he was arrested by the mob and taken to the Police station. The mob assaulted him. The issue of money being lost and suspecting PW2 did not arise while cross examining PW2. PW2 did acknowledge that she used to have a sexual relationship with the appellant but the friendship had stopped. It is therefore clear that the appellant knew PW2's home as well as her children.

The appellant did not raise any issue on the conviction by the trial court other than the grounds of appeal. It is not mandatory that in each defilement case DNA test be conducted. Although mama Njeri was not called to testify, PW2 testified that she was informed by a lady neighbour that PW1 had been defiled by the appellant. PW2 examined PW1's private parts and saw whitish substance.

Although the appellant pleaded not guilty to the charge as per his grounds of appeal, I am satisfied that the prosecution proved its case beyond reasonable doubt. The appellant was known to PW1 as Muchangi. The incident occurred during the day. PW2 did not frame the appellant. The evidence of PW1 is corroborated by the Medical evidence. It is the appellant who defiled PW1. Section 8(2) provides for life imprisonment where the victim of Sexual Offence is below 11 years. PW1 was below 11 years. The trial court opted to impose a 45 years sentence. I do not wish to disturb the sentence. Unlike section 8(3) and 8(4) which specifically states that the punishment shall not be less than the stipulated sentence. Section 8(2) states that the convict shall be sentenced to imprisonment for life. The word "**liable**" was not used by the drafter's of the Sexual Offence Act in relation to Section 8(2) of the Act. Life imprisonment has been taken to be the minimum

sentence. I do find the sentence imposed by the trial court is not excessive.

In the end, I do find that the appeal lacks merit and is hereby dismissed.

**Dated and Signed at Marsabit this ..... Day of July 2018**

**S. CHITEMBWE**

**JUDGE**

**Dated, Signed and Delivered at Embu this 25<sup>th</sup> day of July, 2018**

**F. MUCHEMI**

**JUDGE**