



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT EMBU**

**CRIMINAL APPEAL NO. 19 OF 2017**

**PETER NJIRU NJUE.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**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 9<sup>th</sup> May 2016 at [particulars withheld] Village, Mbeti North Location within Embu County, intentionally caused his genital organ, penis, to penetrate the genital organ vagina of RK a girl child aged 11 years.

The trial court convicted the appellant and sentenced him to serve life imprisonment. the grounds of appeal are:-

- 1. THAT, the appellant pleaded NOT guilty to the charge.***
- 2. That the trial Court erred in law and facts when it failed to note that there was no eye witness who appeared in court to testify.***
- 3. That the trial Court erred in law and facts when it failed to make findings that there was a fatal contradiction between the witnesses who were summoned for the sake of this trial.***
- 4. That the trial Court erred in law and facts when it failed to consider that the evidence adduce by Ann Murugi was outdated hence she confessed that the last time he saw the appellant was in 2014.***
- 5. That the trial court erred in law and facts when it failed to consider that the complainant in this case failed to give a description of the perpetrator who defiled her.***
- 6. That the trial Court erred in law and facts when it failed to consider that the only vital witness namely Mama Fundi who alerted the witness who then alerted the police and later arrested the appellant.***
- 7. That the trial court rejected the defence on weak reasons.***

The appellant submit that there was no eye witness apart from the complainant. The evidence shows that the appellant was a stranger to the complainant. The complainant made reference to “someone” and therefore he did not know the appellant. The complainant did not give out any name or description of her defiler. The complainant only made dock identification. The appellant was only arrested as a suspect.

It is further submitted that the P3 form indicate that the complainant was defiled by an unknown person. There was no first report to the Police giving the appellant’s description. The Investigation Officer was called by PW2 and told that the suspect had been seen. According to the appellant, the identification is not conclusive.

The appellant also contend that the prosecution evidence is full of contradictions. PW1 testified that the incident took place at Ngugi’s farm where grass was planted. PW3 stated that PW1 told her that it was at a maize plantation. PW2 testified that she knew the appellant but on cross examination changed and said she did not know him. One witness called Mama Wanja was not called to testify. The alleged blood stained clothes were not produced in court. There was also one Mama Fundi who was not called to testify. The medical evidence of PW4, a doctor does not support the charge.

Miss Nandwa, prosecution counsel, opposed the appeal. All the ingredients of defilement were proved. PW1’s age was proved. She was born

on 20<sup>th</sup> September, 2004. She was 11 years old. An age assessment report was also done and she was found to be between 10-11 years old. The prosecution evidence also proved that there was penetration. PW1 explained how she was defiled. PW4, a medical doctor, did confirm that there was tear of PW1's private parts near the clitoris. The trial court found PW1 to be truthful.

Counsel further submits that the incident occurred when there was enough light. PW1 was able to positively identify the appellant. PW1 described her defiler as one with squinted eyes. PW1 saw the appellant when she had been sent to the shop and she quickly identified him. The prosecution evidence according to counsel is well corroborated. All vital witnesses testified. The appellant's defence was considered.

This is a first appeal. This court has to re-evaluate the evidence afresh and make its own conclusion. PW1 was the complainant. She testified under oath. On 9/5/2016 she was from school. She was a class five pupil. On her way home she found someone seated near St. Stephen Church gate. The person pulled her. She screamed and was hit on the cheek. She was taken to a farm. She screamed and was strangled. The man defiled her and she felt pain in her private parts. She went home but did not find anyone. She went to her neighbor, (PW3) and informed her. PW3 called PW1's mother (PW2) and informed her about the incident. PW1 was taken to Embu General Hospital. The matter was reported to the Police.

PW2 MG is PW1's grandmother. It is her evidence that she has brought up PW1 and she is like a mother to her. On 9/5/2016 at about 4:00pm she received a phone call from PW3 that the complainant had been defiled. She quickly went on a Motor bike and found PW1. She saw PW1's clothes were blood stained. PW1 was crying. She took PW1 to Embu General Hospital. The following day the matter was reported to the police. On 12/5/2016 she sent PW1 to the shop. PW1 saw the appellant and said "Ndiye huyu". The shop keeper, Mama Fundi called her and informed her that the suspect had been seen. She called the Police and the appellant was arrested at a bar. The bar was about 20 metres from Mama Fundi's shop.

**PW3 Ann Murungi** is PW2's neighbor. She knew the appellant. On 9/5/2016 at about 4:30pm PW1 went to her home from school. PW1 was crying. PW1 told her that she had been taken to a maize plantation and defiled. She decided to call PW2.

**PW4 Dr. Phyliss Muhoja** was based at Embu Level 5 Hospital. She produced a P3 form that had been filed by her colleague, Dr. Mwiti. PW1 was examined on 9/5/2016 at 9:00pm. PW1 had marks on the right side of the neck. There was tear at the paenium near the clitoris. PW1's neck had scratches.

**PW5 PC JOHN GITAHI** was stationed at Itabua Police station. The case was reported on 10/5/2016 at 11:00am. He investigated the case. A P3 form was filled and it showed that the minor had been defiled. PW1's age was assessed. He was called by PW2 and informed that the suspect had been seen. They went to a bar and the appellant was pointed out. PW1 was with PW2 when the appellant was arrested. The appellant was charged with the offence.

In his unsworn defence the appellant testified that PW2 went to his home with a mob at 5:00pm. PW1 did not identify him as she did not know him. He was arrested the following day as he left a pub.

The issues for determination are:-

1. *Whether PW1 was defiled.*
2. *Whether it is the appellant who defiled PW1.*

According to PW1, she was from school when someone pulled her, strangled her and took her to a farm and was defiled. According to the evidence, the incident occurred at around 4:00pm. PW1 went home crying and when she did not see anyone she went to her neighbours home (PW3). The medical evidence indicates that PW1 was defiled. The post rape care form indicates that PW1's hymen was not intact. PW1 also had injuries on her neck.

From the evidence on record, I am satisfied that PW1 was defiled. The medical evidence does confirm that PW1's private parts were penetrated.

The appellant in his submission dwelt on the issue of identification. The circumstances of the case are that the defiler took off after the incident. The incident occurred in the open at a farm. The incident occurred on 9/5/2016 and the appellant was arrested on 12/5/2016, about three days later. According to PW2, PW1 told her that the defiler had squinted eyes.

The charge sheet indicates that the appellant was arrested on 13/5/2016. According to PW2, she sent PW1 to the shop on 12/5/2016 and she spotted the appellant. PW1 informed Mama Fundi who called PW2. PW5 was informed and went to arrest the appellant. PW1 was present and pointed out at the appellant at the bar where the arrest was made.

The appellant contends that PW1 did not identify him when she went to his house. That line of evidence did not arise during cross-examination. PW2 stated that they went to the appellant's house during cross-examination. It is not clear at what point in time she went there. The appellant can't make a conclusion that PW1 did not identify him.

The evidence show that the incident occurred during the day. PW1 was able to see her defiler. She was pulled up to the farm. She saw her defiler unzip his trouser then removed her pantie. The person stood up after the act. She clearly saw that person. When she was sent to the shops three days later, she saw the appellant and identified him. The complainant did not pick any other person other than the appellant. There is no evidence that there was grudge between the appellant and PW1's family. PW1 testified that as she was being pulled to the farm she screamed.

The defence evidence deals with the issue of arrest. It does not raise doubt on the prosecution case.

From the evidenced on record, I do find that PW1 saw her defiler properly and was able to identify him. It was not possible for PW1 to direct the police to the appellant's home as she did not know him. The description given was that the defiler was at large and it was only PW1 who could identify him. PW1 indeed saw her defiler and she identified him.

I am satisfied that the prosecution proved its case beyond reasonable doubt. PW1 was defiled and when she saw her defiler within a period of three days she was able to identify him. PW1'S age was assessed. Her grandmother gave PW1'S date of birth which is in line with the age assessment. The identification of the appellant is proper. No identification parade could be done as it is PW1 who identified the appellant when she saw him and she could not be called again to an identification parade.

I do find that the appeal lacks merit and is hereby disallowed.

**Dated and signed at Marsabit this.....day of June 2018**

**S. CHITEMBWE**

**JUDGE**

**Dated, Signed and Delivered at Embu this 12<sup>th</sup> Day of July, 2018**

**F. MUCHEMI**

**JUDGE**