REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 63 OF 2013

JOHN NJAGI JAMES.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

1. This is an appeal from the judgment of the Ag. Principal Magistrate, Runyenjes where the appellant and his co-accused Ann Njoki Njue were convicted jointly in Count I of the offence of abduction with intent to confine contrary to Section 259 of the Penal Code. The appellant was separately convicted in count II and sentenced to twenty (20) years imprisonment for the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act. In count III the appellant was convicted of the offence assault causing bodily harm and sentenced to one year imprisonment.

2. On 8/09/2016 the appellant amended his grounds of appeal and filed submissions. He did so in person for he had withdrawn his advocate Mr. Morris Njage who filed the original petition.

3. The State represented by Ms. B. Manyal filed its submissions.

4. In his amended petition, the appellant set out ten (10) grounds of appeal which in summary raised the following issues:-

> *(a) That the magistrate misdirected himself in convicting him of the offences of abduction with intent to confine contrary to Section 259 of the Penal Code which was not proved.*
>
> *(b) The magistrate erred in convicting him of the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act while there was no medical evidence to support the conviction.*
>
> *(c) That the conviction on the offence of assault was also a misdirection on part of the learned magistrate for it was against the weight of the evidence.*
>
> *(d) That his constitutional rights for fair hearing under Article 50(2) of the Constitution, for fair administrative action, Article 47 among others were violated in the trial.*

5. This court has perused the submissions as it deals with the issues raised in relation to the petition.

6. The duty of the first appellate court was explained by the Court of Appeal in the case of ***KARIUKI KARANJA VS REPUBLIC [1986] KLR 190*** that:-

> *On first appeal from a conviction by a judge or magistrate, the appellant is entitled to have the appellate court's own consideration and view of the evidence as a whole and its own decision thereon. The court has a duty to rehear the case and reconsider the material before the judge or magistrate with such materials as it may have decided to admit.*

7. The prosecution called nine (9) witnesses whose evidence was that the complainant, PW1 was a primary school drop out and a resident in Embu County. She testified that on the 17/06/2013 around 4.00 p.m., she was approached by the 2nd accused who was a neighbour to take up a job of a house-help with the appellant who was said to living away from Ena and offered a monthly salary of Shs.5,000/=. She was at first reluctant but was persuaded by the 2nd accused. She then left home with the 2nd accused who handed her over to the appellant after introducing him as would be employer.

8. The 2nd accused was left behind as PW1 and the appellant boarded a matatu to Embu town and then took a taxi to the stage near the home

of the appellant. The two walked from 7.00 p.m. towards home of the appellant. PW1 was led away from the road to a bush near a river where she was threatened with death by the appellant who had armed himself with a knife from his bag. The appellant used his hand to block PW1's mouth and then stabbed her with a knife on the right thigh ordering to remove her clothes.

9. The 1st appellant used his knife to cut off the under wear of the complainant before defiling her. The two stayed at the scene up to 1.00 a.m. when they continued with the journey to the home of the appellant where they arrived at around 5.00 a.m.

10. The following day the complainant who had no doubt she was in real danger used the appellant's phone to send a message to her aunt PW2 alerting her of her problem.

11. PW2 traced the 2nd accused who could not help her trace the complainant's whereabouts. The matter was reported to the police who embarked on efforts to trace the appellant on phone signal. The phone had been switched off until the 28/06/2013 when the police used its signal to trace the appellant and PW1 in his house. He was arrested and taken to Embu police station together with the complainant for further investigations.

12. The complainant was found to have sustained injuries on the cheek, thigh and lacerations in her vaginal carnal. The P3 form was filled and produced in evidence by Dr. Sheilla PW4.

13. The issues arising from this appeal is whether the charge in court in count II was defective and whether the case was proved to the standards required in criminal cases as well as whether the sentences were manifestly excessive.

14. In regard to the alleged defective charge, the magistrate relied on the case of ***George Gitonga Mbithi Criminal Appeal No. 40 of 2012 Garissa High Court*** where it was held that the charge of defilement drafted the same way as the one in this appeal was not defective and was curable under Section 382 of the Criminal Procedure Code.

15. I have perused the charge herein herein and find it is not defective for it includes all the ingredients of the offence. The purpose of the charge is to ensure the accused understands clearly the offence he is charged with so as to plead to it and to prepare his defence.

16. The appellant was represented by an able counsel throughout the trial. There is nothing in the appeal record to suggest that he did not understand the charge. He fully participated in the proceedings and did not raise any issue.

17. The magistrate was right to observe that the omission of the sub-heading “particulars of the charge” was not fatal to the charge provided that the charge included all the relevant particulars. This observation was correct in my considered opinion.

18. PW1 testified to the effect that on 17/06/2013 at Ena village, Embu county, Anne Njoki Njue persuaded her to take up employment as a house-girl with someone who was later to be introduced as the appellant. The salary offer was Shs.5,000/= to which PW1 accepted. She was handed over to the appellant the same day at around 4.00 p.m. She narrated how the two travelled by matatu, then by taxi and then took a long walk to reach the home of the appellant at Kiamatuka village within Embu county.

19. In the course of the long walk, the appellant led her to a bush around 9.00 p.m. where he stabbed her with a knife on the right thigh before forcefully having sexual intercourse with her. She was also threatened with death by the appellant who was armed with a knife at the material time. On reaching the house of the appellant in the wee hours of the night, she was confined in the house which was always locked for a period of ten (10) days.

20. The appellant provided PW1 with a plastic basin in which she relieved herself any time she was in need. PW1 was rescued by a team of police officers on 28/06/2016 who traced the appellant through his mobile phone signal. PW1 had secretly used the phone to send PW2 a message that she was in danger.

21. The appellant denied the offence and said he had employed the complainant as a house-help with her consent and that she was never confined. He said that at the material time, he had gone back to work in Kitui. His witness DW3 supported his case. It was his testimony that they used to find the complainant working in the house of the appellant on the material dates free and not confined. During the period, the appellant was in his place of work at Kitui and had left the complainant alone in the house.

22. PW1 gave a very clear and detailed account on how the appellant confined her to his house. Any time he went out, the had to lock her inside and would not allow her to go outside. On the day the appellant was arrested, PW1 said that he had gone to the shamba armed with a panga leaving her to wash his dirty clothes. After a while he came back running and locked the door on entering the house. He instructed PW1 to hide under the bed. Police found her under the bed according to the testimony of PW8.

23. One of the police officers PW8 who arrested the appellant disapproved the appellant's defence that he was in Kitui at the material time. He said that used his phone signal to trace him in his house at Kiamatuka village. He indeed confirmed that the appellant was at his home at Kiamatuka. On 18/06/2013, PW1 used the same phone to send a message to her aunt PW2. This was confirmed after investigations on he phone messages.

24. The testimony of PW1 and PW8 as well as the other prosecution witness was credible in the narrative of the chain of events. On the other hand, the appellant's defence was not truthful as to what transpired during the material period. DW3 and DW4 contradicted the appellant's evidence on the time he allegedly left his house to go to his place of work at Kitui and the time he came back on 28/06/2013.

25. The appellant said he and PW1 left her home about 2.28 p.m. pm 17/06/2013 and reached his home at 3.00 p.m. This was proved untrue by his co-accused who said she met the accused at around 4.00 p.m. and that the two left for the appellant's home around 5.30 p.m. PW1 also

gave similar timings with those of the co- accused. The appellant by pushing the timings forward was trying to create room for the court to believe that he returned to Kitui on 17/06/2013 after taking the complainant to his house. PW3 also said that Njoki was looking for the complainant in her home at around 4.00 p.m. on 17/06/2013. The time given by PW1, PW3 and Anne Njoki was correct as opposed to that of the appellant.

26. It is important to note that the evidence of DW3 and DW4 was untruthful. DW3 said he went to the house of the appellant on 28/06/2013 and found the complainant washing clothes and she told him that the appellant had gone to Kitui. The truth is that the appellant had been arrested two hours earlier by police and taken to Embu. DW4 lied to the court when he said he had witnessed the arrest of the appellant. There was evidence that he was nowhere near the home at 11.30 a.m. when the arrest was effected.

27. DW4 testified that he was the employee of the appellant and was at the farm at the time of arrest. He then said the appellant had returned home on 28/06/2013 at 3.00 p.m. Once again, the court notes that the appellant had been arrested in the morning hours. He could not have been at his home at 3.00 p.m. the same day. DW3 also lied that the appellant took the complainant to his (appellant's) home on 17/06/2013 at 3.00 p.m. This was not true because the appellant was yet to pick the complainant from Ena by that time. The accused reached Ena at 4.00 p.m., left with the complainant at 5.30 p.m. and was to reach his house around 5.00 a.m. At that time DW4 must have been dead asleep wherever he lived.

28. The trial magistrate made a correct observation that DW3 and DW4 had been coached by the appellant to support him in his defence. The two contradicted the evidence of the appellant in almost all material particulars.

29. In regard to Count 1, the offence of abduction is described under Section 256 of the Penal Code as follows:-

Any person who by force compels, or by deceitful means induces any person to go from any place is said to abduct that person.

30. The appellant and his co-accused did not by force compel the complainant to go to the house of the appellant. However, the evidence on record from PW1 is that she was given an attractive offer of a job with Shs.5,000/= monthly salary considering that in the year 2013 the value of the shilling was low. In her evidence she said that she agreed to take up the job and voluntarily left with the appellant for his house and it was after reaching there that she was confined. She also testified that she had been told that the appellant's wife was living with him which proved untrue.

31. The defence witnesses also said that the wife of the appellant was not living there. It also turned out that PW1 was being used by he appellant for immoral purposes in the environment of the unlawful confinement.

32. In her phone message to PW2, the complainant said that there was no woman in the house and that she was being treated as the woman. The complainant was to remain confined for eleven days until she was rescued by police on 28/06/2013.

33. The 2nd accused worked together with the appellant in execution of a common intention to deceive the complainant that she was going to be employed as a house-girl knowing it was not the case. Rather, it was the appellant who was to gain an advantage of exploiting the complainant for sexual purposes as he confined her in his house.

34. There was evidence from PW1 that the appellant never went to his place of work at Kitui after placing her in solitary confinement. His evidence to the contrary was contradicted by that of his defence witnesses.

35. I reach the conclusion that the ingredients of he offence of abducting with intent to confine in terms of Section 259 as read with Section 256 were proved against the appellant to the standards required.

36. On the charge of defilement , the appellant said the age of PW1 was not proved and that the medical evidence was not reliable.

37. The testimony of the complainant was clear and gave vivid details of the incident. The evidence of the doctor was that there were lacerations on the genitalia and that the hymen was broken. This was evidence of penetration as defined under Section 2 of the Sexual Offences Act, 2006. The medical evidence sufficiently corroborated the testimony of the complainant that she was defiled. The lack of evidence on the laboratory results to identify the nature of the infection which resulted in the discharge was not material. Neither was the failure to produce medical evidence on examination of the appellant to connect him with the offence.

38. The complainant was defiled on 17/06/2013 and the age of the injuries at the time of examination was eleven (11) days. I agree with the learned magistrate that it was not necessary to prove repeated sexual assaults in respect of the days that followed. PW1 said she bled on 17/06/2013 and it was not possible to produce evidence of blood- stained underwear eleven days later. The evidence may have been destroyed in washing of the clothes.

39. It was not necessary as claimed for the doctor to tell when the hymen was broken. This is not an ingredient of the offence.

40. As for the age of the complainant, she testified that she was born in 1998 which evidence was supported by her aunt PW2. Her baptism certificate was marked for identification but not produced in evidence.

41. Dr. Sheilla indicated in her report that PW1 was aged 14 years. The difference of one (1) year in age between the witnesses was not fatal to the prosecutions case. The age of 14 and 15 years falls within the bracket stipulated under Section 8(3) and does not change or affect the sentencing.

42. It is trite law that age is a matter of fact and may be proved by factual evidence of a parent or of the complainant herself. It is not

necessary that a birth certificate or an age assessment report be produced.

43. In the Court of Appeal case of ***RICHARD WAHOME CHEGE VS REPUBLIC [2014] eKLR*** was held that the evidence of a mother is sufficient proof of the age of her child.

44. The complainant was not a minor of tender age who may not know its date of birth. PW1 was aged 15 years and her testimony was clear and reliable. Her evidence on the date of birth was corroborated by her aunt PW2 and PW4 Dr. Sheilla.

45. The defence of the appellant was not plausible and was seriously hampered by the contradictory evidence of his witnesses DW3 and DW4. The alibi was outrightly dislodged by the prosecution's case and the magistrate had a sound basis of rejecting it.

46. It is my finding that the prosecution tendered overwhelming evidence on the charge of defilement. The conviction was based on the law and the evidence. The evidence on the injuries sustained by the complainant was reliable save for whether she was injured on the right cheek and right shoulder as indicated in the P3 form. In her testimony she said she sustained injury on he right thigh. The magistrate relied on the P3 form and the entire evidence of PW1 and convicted the appellant.

47. In determining whether the appellant ought to have been convicted on this offence, it is important to interrogate the circumstances in which the offence was committed. The evidence on record is that PW1 was in the process of being defiled when the appellant stabbed her on the right thigh with the knife he was holding. She was already bleeding from the mouth as a result of injury caused by the appellant inserting his hand to block her from screaming.

48. From this evidence, it is clear that the injuries were inflicted by the appellant in the course of committing the offence of defilement with the intention to fight or avoid resistance by PW1. It was really cruel of the appellant to use such violence on the complainant who was only aged 15. Back to the point, I am of the considered opinion that the appellant used the violence as a vehicle to facilitate the defilement.

49. I therefore find that the appellant was wrongly convicted of the offence of assault causing actual bodily harm.

50. I accordingly quash the conviction on count III and set aside the sentence.

51. I have considered the sentences imposed on counts I and II and it is my finding that the same are within the law and are not excessive.

52. The convictions and sentences on counts I and II are hereby upheld.

53. The appeal is partly successful.

54. It is hereby so ordered.

DATED, DELIVERED AND SIGNED THIS 19TH DAY OF JULY, 2017.

F. MUCHEMI

JUDGE

In the presence of:-

Ms. Manyal for respondent

Appellant present in person