REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 80 OF 2013

ADIEL GITARI JAPHET ..…… APPELLANT

VERSUS

REPUBLIC……..……..RESPONDENT

(Appeal from the original conviction and sentence in Criminal Case Number 5 of 2011 in the Principal Magistrate's court at Gichugu HON. T.M. MWANGI (PM)

JUDGMENT

ADIEL GITARI JAPHET, the appellant herein was charged with the offence of defilement contrary to **Section 8 (1)and (3) of the Sexual Offences Act of 2006** at Gichugu Principal Magistrate's Court. The particulars were that he intentionally caused his penis to penetrate the vagina of one **MNM** a child aged 12 years. After the trial, he was found guilty convicted and sentenced to serve 15 years imprisonment. Aggrieved and dissatisfied he filed this appeal listing 6 grounds.

I shall summarize the grounds as follows;

1. That he pleaded not guilty.

2. That the complainant was a trespasser in a place guarded by the appellant and that she had framed him to cover her acts of trespass as issue that was not considered by the trial court.

3. That prosecution relied on hearsay evidence.

4. That the medical evidence tendered showed that there was no penetration or spermatozoa a fact not considered by the learned magistrate.

5. That the Learned Magistrate erred by not considering that the appellant was a Meru and interpretation was being done by a Kikuyu a language he was no conversant with.

This court has gone through the appellants submissions which

appear to fortify the grounds of appeal raised above. According to the appellant there were contradictions in evidence of PW1 (complainant) and PW2 (her father).

The state through the office of the Director of Public Prosecution represented by Mr Sitati has

strongly opposed this appeal. He has supported the conviction of the appellant but has asked this court to enhance the sentence in accordance with the law. In view of the fact that the law provides a minimum sentence of 20 years upon conviction on an offence under **Section 8(3) of the Sexual Offences Act NO. 3 of 2006.** Before I consider the oral submissions by the state in opposing this appeal I shall consider the grounds raised by the appellant in his appeal and his submissions.

The first ground of appeal raised by the appeal is superfluous on account of the trial that went on as a result of a plea of not guilty entered by the trial court. The appellant pleaded not guilty to the charge and that is why the case was set down for hearing where the state called 8 witnesses to support/prove their case. The trial court upon evaluating the evidence presented was satisfied that there was sufficient evidence to put the appellant on his defence and thereafter convict him in accordance with the law. The first ground of appeal therefore is a misconception and unfounded.

The appellant has on his second ground of appeal faulted the trial court for failing to consider the fact that PW1 was a trespasser on the neighbouring farm he was guarding and further alleged that he was framed for defilement when he confronted her. I have however gone through the unsworn defence put forward by the appellant and I note that he did mention anywhere that he was framed on account of duty as a watchman in his employers farm or at all. The trial court cannot be faulted for not considering a fact that was not raised in the first place and this court does not find any basis therefore to interfere with the judgment of the trial court on this ground.

The appellant has questioned the medical evidence adduced at the trial court and stated that the evidence of one **STEPHEN NGIGI** (PW5) the clinical officer called by the prosecution to testify . According to the appellant actual penetration was not proved to show that there was defilement . He also submitted that there was no spermatozoa found on the victim and this are issues that were not considered by the trial court. Mr Sitati has however countered this contention demonstrating that the act of defilement was proved beyond reasonable doubt by production of P. exhibit 1 (P3 form) and treatment card (P. exhibit 2) by the said clinical officer which corroborated the evidence of PW1. This court has considered both submissions on this point. To begin with this court shall consider the meaning of " **penetration"** as defined by the law . Under **Section 2(1) of the Sexual Offences Act,2006** penetration is defined as

"partial or complete insertion of the genital organ of a person into a genital organ or another person"

The appellant has also contended that the victim was too young for him which is true but the evidence of PW5 at trial court found some telling evidence of penetration in his evidence before the trial court the clinical officer (PW5) told the Learned magistrate that on examining the victim (PW1), he found the clitoris swollen tender and red and concluded that the cause of the same was a trauma which may have been caused by penetration . I have seen the P3 form produced as exhibit 3 during the trial and the medical officer (PW5) who filled it indicated that the clitoris was inflamed and also noted some whitish foul smelling discharge from the genitaria of the victim(PW1) . I am unable to find any error in the finding of the trial court that defilement had occurred and I find that the magistrate properly directed himself on the evidence of PW5 which corroborated the evidence of PW1. This court noted the observations made by the learned magistrate concerning the demeanor of PW1. The trial court after observing her to be **"focused, steadfast, forthright, consistent, credible and truthful"** in her testimony. As an appellate court I did not get the opportunity to see the witnesses first hand and I have to entirely depend on the observations made by the trial court on the issue of demeanor and hence credibility of the witness. The appellant has not laid basis for this court to interfere with the finding of the trial court in that regard. The position is informed by the decision of the court of appeal in

the case of **N.K. –VS- REPUBLIC (2011) eKLR** where following observations were made;

" We think ourselves that the case (defilement) vested on the credibility of the child E whose evidence the appellant did not challenge. The trial court had the advantage of seeing and hearing her in the witness box and was therefore a better judge on credibility . We have no reasonable basis for interfering with that assessment…….".

The appellant has raised the absence of spermatozoa on examination,

The same for me is not material to prove that defilement had taken palace. The evidence and opinion of a doctor or medical officer who examined a victim is material and I find that the evidence relied on by the trial court in convicting the appellant herein is the evidence of a clinical officer in addition to the evidence of the victim.

The above observations disposes off ground four as well as ground five of the appeal because it is obvious that the trial court did not rely on evidence of a single witness even though in such offences the law allows a court to rely on evidence of a single witness so long as the court is satisfied that the witness is telling the truth . This is well provided for under **Section 124 of the Evidence Act.** The evidence of PW2 and PW7 pointed out by the appellant as hearsay evidence is immaterial in so far as the finding of the trial court on guilty of the appellant is concerned .

On the language used this court has found out that interpretation was properly done from English to Kikuyu a language the appellant confirmed to the trial court that he was familiar with . I have noted that the appellant participated in the proceedings quite extensively both in cross examinations and even during his defence and mitigation. It is clearly an afterthought for him to say that he was not familiar with the language used when the proceedings show otherwise.

The appellant also pointed out the fact the victim went to the school the morning following the incident and that the same showed that defilement has not taken place as the child would have been in pain. I am however not persuaded because the decision to go to school may have been informed by ignorance by the father (PW2) because I find that it took the advice of a block leader for him to go back to school and take the child to police station to report the incident . It was naïve for the father (PW2) not to report the incident to the police straight away instead of looking for the village elder but that does not negate the finding of this court that the trial magistrate weighed the evidence presented to him by the prosecution and properly directed himself on all procedural matters including properly conducting a voire dire inquiry prior to taking the evidence of witnesses who were minors. I do not find any error by the trial in taking down the evidence and its analysis which is well done.

In the premises I have come to the conclusion that the appellant was convicted on sound evidence and I agree with Mr Sitati for Director of Public Prosecution that the appellant was positively identified by the victim who was a neighbour and lured her away from her home with promise of firewood only to turn on her and defiled her.

I am however not able to find basis upon which the appellant was sentenced to serve 15 years imprisonment. In this appeal, the appellant was charged in the trial court with defilement of a girl aged 12 years and under **Section 8(3) of the Sexual Offences Act** the minimum sentence provided is 20 years imprisonment. It states.

" A person who commits an offence of defilement with a child between the age of 12 and fifteen years is liable upon conviction to imprisonment for a term of not less than 20 years".

The Learned magistrate correctly noted that the age of the minor as per the notification of birth produced as an exhibit showed that the victim was born on 13th July 1998 which means that she was 12 years 10 months at the material time . The court correctly allowed PW2 to be recalled to produce the notification of birth as exhibit NO. 3 . I have seen the exhibit and it is sufficient proof that the victim was indeed aged 12 years and 10 months at the material time. It is obvious therefore that the sentence meted out against the appellant was wrong and I will in accordance with **Section 354 (2)** confirm the conviction but substitute the sentence on record with one for 20 years imprisonment as provided for under **Section 8(3) of the Sexual offences Act NO.3 of 2006 .** I have no alternative in the end but to dismiss this appeal. The sentence of 15 years is set aside and in its place the appellant shall now serve 20 years imprisonment.

R.K. LIMO

JUDGE

DATED, SIGNED AND DELIVERED AT KERUGOYA THIS 9TH DAY OF DECEMBER 2014 in the presence of

The appellant

Mr Sitati for state

Mbogo Court Clerk.

And Samuel Bundi Kimanthi - interpreter