REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCRA NO. 83 OF 2019

DAVID KIOKO MAUNDU..APPELLANT

-VERSUS-

REPUBLIC..RESPONDENT

(Being an appeal from the original sentence of Hon. Patrick Wambugu Mwangi SRM in Kilungu Principal Magistrate's Court PMCR Case No.86 of 2015 pronounced on 2nd July, 2019).

JUDGMENT

1. The appellant was charged in the magistrates' court with defilement contrary to section 8(1) (3) of the Sexual Offences Act No. 3 of 2006. The particulars of offence were that on 21st February 2015 at about 22:00 hours at [Particulars Withheld] Village, in Makueni Sub-County within Makueni County intentionally caused his penis to penetrate the vagina of GMNC (name withheld) a child aged 13 years.

2. In the alternative, he was charged with committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act, the particulars of which being that on the same date and at the same place intentionally touched the vagina of GMN a child aged 13 years with his penis.

3. He denied both charges. After a full trial, he was convicted of the main count of defilement and sentenced to 20 years imprisonment.

4. Dissatisfied with the conviction and sentence, the appellant has come to this court on appeal on the following grounds –

> ***1) The trial magistrate erred in law and fact by failing to find that the elements of the offence were not conclusively proved to warrant a conviction.***
>
> ***2) The trial magistrate erred in law and fact by failing to find that the charges were defective in nature.***
>
> ***3) The trial magistrate erred in law and fact by failing to find that no voire dire was conducted in the present case in violation of the law.***
>
> ***4) The learned trial magistrate erred in law and fact by failing to find that there was no investigation conducted in the present case as it had no arresting or investigating officer.***

5. The appeal was canvassed through written submissions. I have perused and considered the written submissions of the appellant and those of the Director of Public Prosecutions.

6. This being a first appeal, I am required to evaluate all the evidence on record afresh and come to my own independent conclusions and inferences. Several cases have pronounced themselves on this principle. I need only refer to the case of **Okeno –vs- Republic (1972) E.A 32** where the Court of Appeal for East Africa stated as follows –

> ***"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya –vs- Republic (1957) E.A 366 and the appellate's court own decision on the evidence. The first appellate court must itself weigh***

conflicting evidence and draw its own conclusions (Shantilal M. Ruwala –vs- Republic."

7. I have re-evaluated the evidence on record. In proving their case the prosecution called 4 witnesses and the appellant tendered unsworn testimony and did not call any other witness.

8. The appellant has complained that the trial was fatally defective because no voire–dire examination of the alleged victim (Pw1) was conducted by the trial magistrate. From the record, indeed no voire-dire examination of the alleged victim who was below 18 years was conducted, as the prosecutor informed the trial court that Pw1 was 14 years at the time of testimony and that there was thus no need for voire dire examination.

9. The Children Act section 2, defines tender age as 10 years and below. However, courts have held before and after the enactment of the Children Act, that tender age is 14 and below for the purposes of tendering evidence. It has also been a consistent practice by courts to conduct voire dire examination, even for child witnesses aged above 14 years – see **Samuel Warui Karimi –vs- Republic (2016) eKLR**. That said however, the failure to conduct voire-dire examination per se does not make the proceedings or conviction in a criminal case fatal. Each case will depend on its specific circumstances. In the present case, I find no reason to persuade me that the proceedings conducted by the trial court herein without voire dire examination of the alleged victim prejudice the appellant. I thus dismiss that ground of appeal.

10. The appellant has complained that crucial witnesses, that is the Investigating Officer was not called by the prosecution to testify. In my view, the failure to call an Investigating Officer to testify is not *ipso facto* a sufficient reason for acquittal of an accused person. Each case will depend on its particular facts and circumstances.

11. Coming to the present case, all the three eye witnesses who testified in court against the appellant were close relatives that is the alleged victim Pw1, her mother Pw2 MNN and the victim's sister Pw3 AKN. The only independent witness was Pw4 the Clinical Officer Eric Kasiamani. Thus the only independent witness on what occurred would have been the Investigating Officer who would have clarified what he found in the investigation. I note that after some adjournments, he attended court to testify but the prosecutor elected not to call him to testify, and did not give any reason to the court for that decision.

12. In my view, since the prosecution was required to prove the appellant guilty beyond any reasonable doubt, the unexplained failure of the prosecution to avail the Investigating Officer in court to testify even after he attended court created sufficient doubt, on his intended testimony, and the court was entitled to make an adverse inference that his or her evidence would most likely contradict the evidence of the other prosecution witnesses who had testified. I make such adverse inference and rely on the case of **Bukenya –vs- Uganda (1973) E.A**. I thus give the benefit of the adverse inference to the appellant, which means that his appeal will succeed on that account.

13. The appellant has also complained that the charge is defective. However, on my careful perusal of the charge reveals that the only defect is reference to section 8(1) (3) of the Sexual Offences Act, which does not exist. The section should have been cited as section 8(1) as read with section 8(3) of the Sexual Offences Act. The defect however, is not fatal to the prosecution case, as it did not prejudice the appellant and could as well have been a typing error. It is curable under section 382 of the Criminal procedure Code. I dismiss that ground.

14. On the proof of the charge, as I have made an adverse inference on the prosecution evidence, due to failure of the prosecution to call a crucial witness, the Investigating Officer who had attended court, I do not find it necessary to analyze proof of the elements of the offence that is the age of the victim, penetration and the identity of the culprit.

15. Consequently and for the above reasons, I allow the appeal, quash the conviction and set aside the sentence. I order that the appellant be set at liberty unless otherwise lawfully held.

DELIVERED, SIGNED & DATED THIS 27TH DAY OF JANUARY, 2022, IN OPEN COURT AT MAKUENI.

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GEORGE DULU

JUDGE