REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCRA NO.E19 OF 2020

HARRISON KILONZO MUTISO......APPELLANT

-VERSUS-

REPUBLIC.......................................RESPONDENT

(Being an appeal from the original judgment of Hon. C.A Mayamba in

Kilungu Principal Magistrate's Court PMCR (S.O) Case No.

33 of 2020 pronounced on 2nd November, 2020).

JUDGMENT

1. The appellant was charged in the magistrates' court with defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on diverse dates between September 2019 and February 2020 at Lumu Sub-Location in Kioo Location within Makueni County intentionally caused his penis to penetrate the vagina of MNM (name withheld) a child aged 12 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 between the same diverse dates and at the same place intentionally touched the vagina of MNM a child aged 12 years using his penis.

3. He was also charged with a second count with another (Lilian Mutindi) of conspiracy to commit a felony contrary to section 157(1) of the Penal Code. The particulars of offence were that on diverse dates between September 2019 and February 2020 at [Particulars withheld] Primary School in Makueni County conspired to commit a felony namely defilement.

4. They both denied the charges. After a full trial, the appellant was convicted of both count 1 and count 2. His co-accused Lilian Mutindi Musau was convicted of count 2. He was sentenced to 25 years imprisonment on count 1, and sentenced to pay a fine of Kshs.100,000/= and in default to serve 3 years imprisonment and same sentence was imposed on the co-accused in respect of count 2.

5. Dissatisfied with the conviction and sentence of the trial court, the appellant has come to this court on appeal through counsel on the following grounds –

> ***1. The learned magistrate erred in law and in fact by holding that the minor was had carnal knowledge of.***
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> ***2. The magistrate erred in law and in fact in taking into consideration irrelevant and extraneous facts and matters.***
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> ***3. The learned magistrate erred in law and fact in basing a conviction on a defective charge.***
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> ***4. The learned magistrate erred in law and facts in holding that failure to provide particulars of the place the alleged offence occurred did not prejudice the appellant.***
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> ***5. The learned magistrate erred in law by shifting the burden of proof to the appellant.***
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> ***6. The learned magistrate erred in law and facts in heavily and entirely relying on circumstantial evidence.***
>
> ***7. The learned magistrate erred in law and in fact in basing a conviction on suspicion and assumptions.***

8. The learned magistrate erred in law and fact by failing to undertake a thorough evaluation of the capacity of the minor in giving evidence under oath and warning themselves on the reliance on the evidence of the minor.

9. The learned magistrate erred in law and fact in arriving at conclusions without evidence.

10. The learned magistrate erred in law and in facts in not taking into account the defence of the appellant as pertains to the minor's state of mind and character.

11. The learned magistrate erred in law and fact in convicting the appellant.

12. The sentence meted on the appellant is irregular, unlawful, and excessive.

6. The appeal proceeded through written submissions. I have perused and considered the written submissions of the appellant filed by his counsel E.K Mutua & Company as well as the submissions filed by the Director of Public Prosecutions for the respondent. I note that both sides relied on case authorities. The appellant's counsel argued the grounds of appeal as 4 grounds.

7. This being a first appeal, I am required to re-evaluate all the evidence on record and come to my own independent conclusions and inferences, bearing in mind that I did not have the opportunity to see witnesses testify to determine their demeanor, and give due allowance to that fact. See **Okeno –vs- Republic (1972) E.A 32.**

8. In proving their case, the prosecution called four (4) witnesses. Pw1 was the alleged victim whose evidence was that she was 12 years old at the time of incident and a standard 8 boarding pupil at [Particulars withheld] Primary School Sultan Hamud. She stated that in September 2019 the school matron Mrs. Mutindi asked her to go and clean the bathroom only for her to direct her to her cube where the patron (appellant) came and the matron left the room and the appellant asked her to have sex with him, but she declined.

9. It was her evidence that yet again in February 2020 the matron took her to the same cube and the appellant came and asked her for sex which she agreed to and they had sex that day and another day also in the same month. It was her evidence that some school girls peeped the cube during the last incident but were warned not to disclose the matter. Her mother (Pw2) however came to know about the incident and the matter was reported to the police, and thus the criminal case filed against the appellant.

10. Pw2 SMK was the mother of the victim who testified that the victim was born on 23/10/2007 and that on 19/3/2020 she was called by a neighbour George who informed her that there was information that the victim was involved with the school patron (the appellant), and that on enquiry the victim confirmed having sexual intercourse with the appellant, and thus she reported the matter to the police.

11. Pw3 was Jackson Nzivo a Clinical Officer at Sultan Hamud Sub County Hospital, who examined and filed the medical examination report of the victim and noted the hymen broken but not freshly.

12. Pw4 was Pc Mwanaidi Hussein the Investigating Officer, who received the report of defilement at the police station, conducted investigations and charged the appellant and the co-accused with the offences.

13. When put on his defence the appellant tendered sworn defence testimony denying the offence and claiming that the charge was a frame up due to his having found the victim in a compromising situation with school boys and reporting the incident to superiors in school, and punishing the victim by caning.

14. I will deal first with the appellant's contention that the charge was defective, because the exact place of the incident was not indicated and the alleged dates of the offence were far and wide. The appellant's counsel has relied on Article 50(2) of the Constitution, the relevant part of which states as follows -

50(2) Every accused person has a right to a fair trial, which includes the right –

a) ……………………..

b) to be informed of the charge, with sufficient detail to answer it

c) to have adequate time and facilities to prepare a defence.

15. Indeed, the charge of defilement herein did not state the exact place in Lumu Sub-County where the offence allegedly occurred. It also gave diverse dates between September 2019 to February 2020.

16. The duration of the diverse dates, in my view, was not a defect as the allegation was that there were continuous acts of defilement within the period in question. The defect in the charge is the failure to state the place such as village, or school where the incidents occurred. That defect however in my view was curable under section 382 of the Criminal Procedure Code (cap.75), as from the evidence on record, the appellant was not prejudice in any way and thus the charge was not fatally defective. The nature of the charge herein, in my view, even without mentioning the school, was sufficiently clear and there was no possibility of the appellant being confused in his defence. In this, I rely on the case of **Bernard Ombuna –vs- Republic (2019) eKLR** where the Court of Appeal stated as follows –

"Of relevance is whether the defect on the charge sheet prejudiced the appellant to the extent that he was not

aware or at least he was confused with respect to the nature of the charges preferred against him and as a result, he was not able to put up an appropriate defence.

17. In my view, the defect herein the charge was minor and did not prejudice the appellant nor did it confuse him. I dismiss that complaint.

18. All the other grounds go to the proof of the two offences, except the last ground of sentence.

19. With regard to the 1st count of defilement, the age of the victim, penetration of a sexual nature, and the identity of the culprit were to be proved by the prosecution beyond any reasonable doubt.

20. From the evidence on record, in my view, the age of the victim was proved to be 13 years at the time of the alleged incident, as her birth certificate produced in evidence as exhibit 4 was clear on her date of birth. Thus just like the trial court, I find that the prosecution proved the age of the victim beyond reasonable doubt. It was also proved that penetration of a sexual nature had occurred to the victim before the date of the medical examination. The penetration was proved through the evidence of Pw3 Jackson Nzivo a Clinical Officer who testified that the victim's hymen was broken.

21. Was the appellant the culprit of the sexual penetration? In my view the prosecution did not prove beyond any reasonable doubt that the appellant was the culprit or that he had sexual intercourse with the victim.

22. Firstly, though evidence was tendered on girls who peeped through a window and saw the appellant and the victim in the cube in February, none of these girls was called by the prosecution to testify and no reason was given for the failure to do so. These girls were in my view crucial witnesses.

23. Secondly, though evidence was tendered by the mother of the victim Pw2 SM that she was given initial information about the incident, by George this person George was also not called as a witness by the prosecution and no reason was given for the failure to call this crucial witness. Thus any evidence on record regarding the girls who peeped in the cube and George, fell in the category of hearsay evidence as it could not be tested in cross examination and should not have been relied upon by the trial court.

24. It follows that the evidence on the connection of the appellant to the alleged defilement was that of only the victim Pw1, as what her mother Pw2 testified to regarding the incident was what she was told by the victim. The question is whether the evidence of the victim Pw1 is believable, since under the provisal to section 124 of the Evidence Act (cap. 80), such evidence of a single victim of a sexual offence needs no corroboration to sustain a conviction if it is believable and is so believed by a court on reasons to be recorded in the proceedings.

25. From her own admission in evidence, the victim Pw1 had been caught with boys by the appellant in a class at night and even punished by the appellant for that conduct. She thus had reason to implicate the appellant if opportunity arose. Secondly, if it was true that other girls found her in the matron's cube with the appellant, those witnesses should have been called to testify. I note that the victim Pw1 also admitted that she had been engaging in sexual activities with a boyfriend, who is not the appellant.

26. In the circumstances of this case and bearing in mind the totality of the evidence on record, I find that the evidence of the single sexual offence victim Pw1 herein, is not believable and cannot be protected by the provisal to section 124 of the Evidence Act. I thus find that the prosecution did not prove beyond any reasonable doubt that the appellant was the culprit for defilement as alleged in the charge sheet. He should thus have been acquitted on the charge of defilement.

27. With regard to the conspiracy charge, since the alleged conspiracy was for the commission of the offence of defilement, I find that following my findings as above on the defilement charge, it follows that the prosecution did not prove the alleged conspiracy charge against the appellant.

28. For the above reasons, I allow the appeal of the appellant. I quash the conviction for both counts of defilement and conspiracy and set aside the sentences imposed. I order that the appellant be set at liberty unless otherwise lawfully held.

DELIVERED, SIGNED & DATED THIS 26TH DAY OF JANUARY, 2022, IN OPEN COURT AT MAKUENI.

....

George Dulu

Judg