REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCRA NO. 01 OF 2020

JOSEPH KILONZO MUTUKU.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. J. O. Magori

in Makindu Senior Principal Magistrate's Court SPMCR Case No.24 of 2017

pronounced on 16th December, 2019).

JUDGMENT

1. The appellant herein 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 the offence were that on 26th March 2017 at Muthaiga area Kibwezi township in Kibwezi Sub-County within Makueni County intentionally and unlawfully caused his penis to penetrate the vagina of F.M (*name withheld*) a girl child aged 14 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 offence were that on the same day and place, intentionally and unlawfully touched the vagina of FM (*name withheld*) a child aged 14 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 learned trial magistrate erred in both law and fact and misdirected himself by holding that the case for the prosecution was proved to the required standard whereas on the basis of the record the burden of proof was not discharged and indeed left reasonable doubts that ought to have been resolved in appellant's favour.***
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> ***2) The learned trial magistrate erred in law and fact by wholly relying on prosecution witness's testimony yet in the circumstances of the case ought to have been backed by evidence linking him to the defilement case.***
>
> ***3) The honourable magistrate misdirected himself after failing to cautiously explore statements of Pw1, Pw2 and Pw4 whose statements were purely fabricated hearsay.***
>
> ***4) The honourable magistrate preferred a harsh and extensive (excessive) sentence to the accused person.***

5. The appeal was canvassed through written submissions. In this regard I have perused and considered the submissions by both the appellant and the Director of Public Prosecutions.

6. This being a first appeal, I am duty bound to evaluate all the evidence on record afresh and come to my own independent conclusions and inferences. See **Okeno –vs- Republic (1972) E.A 32.**

7. In proving their case, the prosecution called four (4) witnesses. Pw1 KPwas the mother of the victim who relied on a birth certificate of the victim to show the victim's date of birth as 2/5/2002. It was her evidence that on 26/03/2017 at 7:30 am she sent the victim to fetch firewood, but the victim returned home crying, and when asked, she said someone she could identify by appearance had raped her. They then

took her to hospital and reported the incident to the police. It was her further evidence that later the victim spotted the appellant and identified him and was arrested. It was also her testimony that she knew the appellant before as a son of a neighbour.

8. Pw2 was the victim whose evidence was that she was 15 years old and in form 2 at the time of testimony. It was her evidence that she went to fetch firewood on government land, when a person she knew by appearance claimed to be a forest ranger, and forced her to have sex with him. According to her, she was a virgin. It was her testimony that she informed her parents about the incident and, was taken for medical treatment and the matter reported to the police. It was her further evidence that on a later date in April, she spotted the appellant somewhere and in company of four people and immediately informed her father and he was arrested and charged in court.

9. Pw3 was Dr. Anthony Masila of Kibwezi hospital who filled the medical examination (P3) report on the basis of prior treatment notes. It was his evidence that the victim went to hospital within two hours of the incident and the genitalia was noted to have lacerations, hymen broken and there was bleeding.

10. Pw4 was PC Richu Ndungu the succeeding Investigating Officer, who testified that a report of the incident was made to the Kibwezi Police Station, and that the suspect was later arrested by the public who took him to the police station and was charged.

11. When put on his defence, the appellant stated that he was aware of the charges but had nothing to tell the court in defence and left the court to decide the matter.

12. This being a case of defilement, the first element of the offence to be proved by the prosecution was the age of the victim (complainant). In this regard, the victim Pw2 testified to her age as being 15 years at the time of trial in 2018.

13. Pw1 KP the mother of the victim confirmed the same age. In addition the birth certificate of the victim was relied upon by both the victim (Pw2) and thee mother (Pw1) and was produced as an exhibit by Pw4 Pc Richu Ndungu the Investigating Officer.

14. I find that indeed, the prosecution proved beyond any reasonable doubt that the victim was 14 years old at the time of the alleged incident in 2017.

15. The second element of the offence to be proved by the prosecution was penetration, even if partial. In this regard, the victim Pw2 stated that she was penetrated sexually. The medical evidence produced by Pw3 Dr. Anthony Masila also was to the effect that there were fresh lacerations in the vagina of the victim and the hymen was freshly broken with traces of blood stains.

16. In my view, the prosecution proved beyond any reasonable doubt that penetration of a sexual nature had occurred on the victim.

17. The third element of the offence to be proved by the prosecution was the identity of the culprit. The evidence on the identity of the culprit was only that of the victim Pw2. Such evidence can sustain a conviction in a sexual offence if it is believable and is so believed by a trial court without it being corroborated by independent evidence. See the provisal to section 124 of the Evidence Act (cap. 80).

18. In the present case the incident occurred in broad daylight, in the morning after 7:30 am. Pw2 immediately thereafter informed her mother Pw1 that though she did not know the name of the culprit, she could identify him by appearance. Indeed, the incident occurred in March, and in April when Pw2 first saw the appellant again in company of four others, she easily identified him as the culprit and made a report to her parents. I also note that the appellant chose not to say anything in his defence, nor did he cross – examine the victim (Pw2). Thus the evidence of the victim Pw2 on the identity of the culprit is uncontroverted.

19. In my view, in the circumstances of this case, the possibility of mistaken identity of the culprit was removed by the evidence on record which was straight forward and non-contradictory. I thus find that the victim was telling the truth. The prosecution thus proved the identity of the culprit as the appellant beyond any reasonable doubt.

20. With regard to sentence, the sentence imposed was lawful.

21. Based on the foregoing, I find no merits in the appeal. I dismiss the appeal, and uphold the conviction and the sentence.

DELIVERED, SIGNED & DATED THIS 22ND DAY OF FEBRUARY, 2022, IN OPEN COURT AT MAKUENI.

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GEORGE DULU

JUDGE