REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCRA NO. 75 OF 2019

DAVID MULWA WAMBUA ..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(From the original conviction and sentence of Hon. C.A Mayamba (PM) in Kilungu Principal Magistrate's Court PMCRC No. 1 of 2019 delivered on 2nd May, 2019).

JUDGMENT

1. The Appellant was charged in the magistrates' court with defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on 30th December 2018 at around 1700 hrs in Kilungu sub-county within Makueni county unlawfully and intentionally committed an act which caused penetration of his genital organ to the genital organ of CNM (*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 offence being that on the same day and place unlawfully and intentionally committed an indecent act with CNM (*name withheld*) a child aged 13 years by touching her genital organs.

3. He denied both charges and after a full trial he was convicted of the main count of defilement and sentenced to twenty (20) years imprisonment.

4. Dissatisfied with the decision of the trial court, the Appellant has come to this court on appeal relying on four amended grounds as follows:-

1) **That** the learned trial magistrate erred in both law and facts 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 doubt that ought to have been resolved in the Applicant's favour.

2) **That** the trial magistrate erred in law and fact by wholly relying on prosecution witnesses' testimony yet in the circumstances the case ought to have been backed by evidence linking him to the defilement.

3) **That** the honourable trial magistrate misdirected himself after failing to cautiously explore statements of Pw1, Pw2 and Pw3 who could not prove that there was penetration.

4) **That** the trial magistrate preferred a harsh and excessive sentence to the accused.

5. The appeal proceeded by filing written submissions. Both the Appellant and the DPP filed their respective submissions, which I have perused and considered.

6. This being a first appeal, I have to start by reminding myself that I am duty bound to evaluate the evidence on record afresh and come to my own conclusions, inferences and conclusions – see **Okeno –vs-Republic (1972) E.A 32.**

7. I have re-evaluated the evidence on record. The prosecution called four witnesses in support of their case. Pw1, the Complainant and Pw2 the mother of the Complainant were later recalled to be cross-examined by counsel, as the Appellant was initially unrepresented. The Appellant tendered a sworn defence statement and called one witness Dw2.

8. The Complainant Pw1 testified on oath that she was 14 years at the time of testimony and that on the material day she had been sent to untie family goats in the evening with two younger siblings M and L wherein at the church the Appellant who was their pastor sent the other two children to charge his mobile phone and took her into his house where he did "*bad things*" to her. Thereafter the mother Pw2 arrived and called her to come out of the house which she did and she then disclosed the information about the incident to her mother thus the Appellant was charged.

9. Pw2 CKM the mother of Pw1 said that pw1 was born on 15/11/2005 and that on the material day at 4pmshe sent her for the goats with two siblings but on later seeing the goats still in the field she looked for the children and found the other two who said that they did not know where the Complainant was. Because the two children told her that they had been sent by the pastor, she went and called the name of the Complainant loudly near the pastor's house and both the Complainant and the pastor came out. The Complainant then disclosed to her that the pastor had defiled her. Pw3 CMM the father of the Complainant stated that he was present when the children left in the evening to go and pick the goats and was later called by Pw2 and informed about the defilement incident.

10. Pw4 Erick Kasiamani a Clinical Officer treated the Complainant, and medically examined both the Complainant and the Appellant. The hymen of the Complainant was missing, and both the Complainant and the Appellant had mild sexual infection of pus cells.

11. In his defence, the Appellant tendered sworn testimony and stated that the three children came near the church that evening and he sent two of them to charge his phone battery and the Complainant was left behind tendering to the goats. Thereafter, he heard the Complainant crying outside his house and the mother forced her to make an admission. When he walked out of the house the mother (Pw2) assaulted him and he was later arrested. He stated that he had suffered erectile dysfunction since 2016, though his condition had at time of incident improved abit. Dw2 Miriam Mulwa Wambua his wife testified that the Appellant had suffered erectile dysfunction since 2016.

12. Having re-evaluated all the evidence on record, I find that though no documentary evidence was relied upon to establish the age of the Complainant, her age was proved beyond doubt since the Complainant Pw1 said that she was 13 years at the time of incident and the mother Pw2 CKM confirmed that she was born on 15/11/2005, while the offence occurred in 2018. Thus though documentary proof was not relied upon, the consistency of the evidence of Pw1, and that Pw2 who gave the exact date of birth, was proof of the Complainant's age.

13. Was there sexual penetration of the Complainant on that day? The medical evidence was that the hymen was broken, but not freshly. From that finding I take it that it was not easy to scientifically determine if there was penetration that day. However, the Complainant was clear in her evidence that the Appellant penetrated her that day. This being the evidence of a single witness victim of a sexual offence, it is governed by the provisal to section 124 of the Evidence Act, which states as follows:-

> ***"124 …….***
>
> ***Provided that where in a criminal case involving a sexual offence, the only evidence is that of***

the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

14. In my view, though the Appellant said in his defence that the Complainant (victim) was in the field with the goats when the mother Pw2 forced her to admit that she had been defiled, I find that version very unbelievable, as the defence never raised such a suggestion in the cross examination by counsel. I am persuaded like the trial court that what the victim was saying was true with regard to having had sexual activity in the house of the Appellant that day. It was not true that the Complainant was in the field as pw2 clearly said that the Complainant and the appellant came out of the Appellant's house when she called aloud for the Complainant.

15. The last issue is whether the sexual activity that day was with the Appellant. In this regard I note that in evidence both for the prosecution and defence, the scene was the church compound where the Appellant lived alone. He admits seeing the three girls who included the Complainant. He admits sending two of the girls to charge his mobile phone leaving behind the Complainant. In my view, the Appellant had all the opportunity and used the same to commit the offence. He was thus the culprit. I note that the investigating officer of the case did not testify, but I hold that the evidence on record was sufficient to sustain a conviction. I will uphold the conviction.

16. Turning on to sentence, the minimum sentence under section 8(3) of the Sexual Offences Act is 20 years imprisonment. The Appellant was handed down the minimum statutory sentence by the trial court, which was not illegal. The jurisprudence on sentencing has however been changing over time and courts are now handing down lesser sentences depending on the circumstances of the case in line with the reasoning in the **Supreme Court petition No. 15 of 2017 – Francis Muruatetu & Others –vs- Republic**.

17. I note that the prosecution said that the Appellant was a first offender, and the Appellant prayed for the court's leniency before the trial court. In my view the sentence imposed in the circumstances was harsh and excessive. I will reduce the sentence to eight (8) years imprisonment.

18. To conclude, I uphold the conviction of the Appellant. I however, set aside the sentence imposed and order that the Appellant will instead serve eight (8) years imprisonment from the date he was sentenced by the trial court.

Delivered, signed & dated this 25th day of February, 2021, in open court at Makueni.

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GEORGE DULU

JUDGE