REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCRA NO. 158 OF 2019

VILLARY AKINYI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence of Hon. E.K Too (P M) in Makindu

Principal Magistrate's Court Sexual Case No. 67 of 2019

delivered on 7th November, 2019).

JUDGMENT

1. The Appellant was charged in the Magistrates court with attempted defilement contrary to section 9(1)(2) of the Sexual Offences Act No 3 of 2006. The particulars of the offence being that on 8th June 2019 at [particulars withheld] township in Nzaui sub-county within Makueni county intentionally attempted to cause her vagina to be penetrated by the penis of DMM a child aged 16 years.

2. In the alternative, she was charged with committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006. The particulars of which were that on the same day and place intentionally touched the penis of DMM a child aged 16 years with her hand.

3. She denied both charges. After a full trial, she was convicted on the alternative count of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act and sentenced to serve ten (10) years imprisonment.

4. Dissatisfied with the decision of the trial court, the Appellant has now come to this court on appeal relying on an amended petition of appeal filed by counsel Lewis & company advocates on the following grounds:

1) The trial Magistrate erred in law and fact by not establishing that the prosecution case was not proved beyond reasonable doubt as the law demands.

2) The learned trial Magistrate erred in law and fact by misdirecting himself and convincing the Appellant based on the purported evidence of three persons who were never eye witnesses.

3) The learned trial Magistrate erred in law and fact by not arriving at a determination that the complainant had misrepresented himself to the accused as an adult.

4) The learned trial Magistrate erred in law and fact by stating in his judgment that the evidence of the prosecution witnesses were that the Appellant lured the complainant to a hotel room despite all the three not being eye witnesses.

5) The learned trial Magistrate erred in law and fact by not considering the evidence of the complainant that he ejaculated losing further interest in sex and not forced by the Appellant.

6) The learned trial Magistrate erred in law and fact by relying on the evidence that the complainant was in school uniform despite the same not being produced in court and or found when the police conducted a search.

7) The learned trial Magistrate erred in law and fact by not establishing that the complainant willingly took himself to the room

after misrepresenting himself as an adult.

8) The learned trial Magistrate erred in law and fact by admitting the clinical officer's P3 form as evidence despite the fact that he admitted to not filing it himself and that the complainant was not tested and the form was filled on basic assumption

9) The learned trial Magistrate erred in law and fact by not finding that where the complainant presents himself as an adult and the accused has no means of establishing otherwise, then the accused should not be convicted.

5. The appeal proceeded by way of filing written submissions. Counsel for the Appellant filed written submissions on 2nd December 2020 and the DPP filed written submissions on 7th January 2021 raising various issues. I have perused and considered the written submissions filed on both sides.

6. This being a first appeal, I have to start by reminding myself that as a first appellate court, I am required to evaluate the evidence on record afresh and come to my own independent conclusions and inferences. In doing so, I have to bear in mind that I did not have the opportunity to see witness testify to determine their demeanor and give due allowance to that fact – see **OKENO –vs- REPUBLIC (1972) E.A 72.**

7. Having re-evaluated the evidence on record on both sides it is clear to me that the age of the complainant was proved to be 16 years at the time of the incident, as a birth certificate was produced which was not contested.

8. From the evidence on record, that the complainant and the Appellant entered a room at Vision Lodge in Emali for sexual activity was also proved. Both the prosecution evidence and the sworn defence of the Appellant is to the effect that both went into a room for sex and the complainant paid Kshs.200/= for the service and then the Appellant supplied the complainant with a condom and fondled him and he ejaculated. Was the offence of indecent act with a child proved beyond any reasonable doubt?

9. If one does not consider the statutory defence available under section 11(2) of the Sexual Offences Act, the offence of indecent act with a child would be complete. However, section 11(2) of the Act provides as follows:

> ***"11(2) It is a defence to a charge under sub section (1) if it is proved that the child deceived the accused person into believing that the child was over the age of eighteen years at the time of the alleged commission of the offence, and the accused person reasonably believed that the child was over the age of eighteen years".***

10. The conduct of the child is very important in determining if the above defence will apply. In the situation and evidence on record in the present case, the complainant on his own accord went to a bar or brothel in broad day light, met commercial sex workers and proceeded to room no. 2 where the Appellant joined him and gave him a condom and fondled him and the complainant paid Kshs.200/=, for the service from Kshs.500/= which he had just received from his father. This conduct of the complainant (child) was in my view, very explicit and was clearly conduct of an adult seeking sexual satisfaction from a person of the opposite sex.

11. The Appellant in her defence stated that she did not know that the complainant was under the age of 18. Though on the other side, the prosecution witnesses mentioned that the complainant wore school uniform, the same was not produced in court to verify the truth of that evidence. Such evidence was also hearsay evidence as none of the police officers who opened the room and saw the complainant and Appellant in the room testified to describe how the complainant was dressed at that time. In any case, even if the complainant was in school uniform, that fact on its own could not establish the age of the complainant, as some people attend school when they are above 18 years. In addition, though there is one sock that was produced by the prosecution as an exhibit, the evidence of its recovery is contradictory as one witness said that it had been recovered under the bed, while another witness said that it was recovered in a dustbin outside the room. There is also no positive evidence that sock was part of school uniform, as socks are common items of dress and could resemble.

12. In the circumstances of this case therefore where the complainant went to a brothel for sex in broad daylight, entered a room in the brothel, paid for the service and accepted to use a condom; only to be ambushed by the police in my view he behaved openly like an adult and any reasonable man or woman would have taken him to be an adult. Thus is my view the defence under section 11(2) of the Act is available to the Appellant and the offence visiated.

13. I thus find that the trial court erred in not giving the benefit of the statutory defence to the Appellant as the Appellant said that she had no reason to suspect that the complainant was not an adult. The conviction cannot thus be sustained.

14. I thus 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 24th day of February, 2021, in open court at Makueni.

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GEORGE DULU

JUDGE