



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MAKUENI**

**CRIMINAL APPEAL NO. 117 OF 2019**

**KITHEKA MASILA.....APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

*(From the original sentence by Hon. A. Ndungu (S.R.M) in Makindu*

*Senior Principal Magistrate's Court Sexual Offence Case No. 7 of 2016*

*delivered on 15<sup>th</sup> July, 2019).*

**JUDGMENT**

1. The Appellant was charged in the magistrates' court with defilement contrary to section 8(1)(2) of the Sexual Offences Act No 3 of 2006. The particulars of offence were that on 30<sup>th</sup> September 2016 at [particulars withheld] village in Makindu sub-county within Makueni County intentionally caused his penis to penetrate the vagina of MWM (*name withheld*) a girl aged 11 years.

2. He denied the charge. After a full trial, he was convicted of the offence and sentenced to serve life imprisonment.

3. Dissatisfied with the decision of the trial court, the Appellant has come to this court on appeal and relied on six (6) amended grounds of appeal as follows –

*1) The trial magistrate erred in law and facts by failing to find that the charge sheet was defective for non-conformity with the Sexual Offences Act.*

*2) The trial magistrate erred in law and fact by failing to find that there were massive contradictions and inconsistencies in the prosecution case.*

*3) The trial Magistrate erred in law and fact by failing to note that defilement was not concussively proved.*

*4) The trial magistrate erred in law and fact by failing to find that the evidence tendered was not corroborative thus rendering the conviction of the accused injustice, in breach of Article 50(2) of the Kenyan Constitution.*

*5) That the trial court failed to consider the mitigation to render any other sentence this court will be pleased to consider the mitigation circumstances of the Appellant and reduce the sentence.*

*6) The trial court erred in law and fact by failing to note that the prosecution did not prove the case beyond reasonable doubt.*

4. The appeal proceeded by filing written submissions. The Appellant filed written submissions and the Director of Public Prosecutions also filed written submissions. None of the parties highlighted the written submissions which I have perused and considered. The Appellant relied on several cases.

5. This being a first appellate court, I am duty bound to evaluate afresh all the evidence on record and come to my own conclusions and inferences bearing in mind that I did not have the opportunity to see the witnesses testify to determine their demeanor – see **Okeno –vs- Republic (1972) E.A 32.**

6. I have re-evaluated all the evidence on record. In attempting to prove their case the Prosecution called four (4) witnesses. Pw1 is the complainant who testified that the Appellant was their domestic worker a herder of livestock and that he called her and defiled her in his house at the homestead a number of times. On the last of those incidents she was 11 years old and her mother noticed her big breasts and reported the incident to the police. She relied on a birth certificate to demonstrate her age.
7. Pw2 **MGM** was the mother of the complainant who testified to the age of the complainant, and relied on the birth certificate and stated that when she noticed the big breasts of the complainant she enquired from her and though the complainant was initially reluctant, she later disclosed that the Appellant had defiled her severally and thus the cause of the pregnancy. She reported the matter to the police and the complainant was medically examined and the Appellant who was her employee as a livestock herder was charged with the sexual offence.
8. **Pw3 was Dr. Josephine Muthengi** who testified on behalf of Dr. Makeli who had gone for training. He testified that the medical examination was done and P3 form filled at Makindu Hospital on 06/10/2016 by Dr. Makeli who found nothing **unusual though hymen of the complainant was missing. He produced P3 form and treatment notes.**
9. **Pw4 was I.P Faith Chesire** who took over from the investigating officer **Sgt. Caroline Kibiwot**. She gave evidence on the investigations carried out and produced the birth certificate of the complainant as an exhibit. That was the prosecution evidence.
10. The Appellant in his defence elected to keep quiet.
11. The trial court, on evaluation of the evidence on record, came to the conclusion that the prosecution had proved their case against the Appellant beyond any reasonable doubt, convicted and sentenced him to life imprisonment. Therefrom arose the present appeal.
12. The Appellant has complained that the charge sheet defective. He stated that the charge referred to a non-existent section 8(1)(2) of the Sexual Offences Act, instead of section 8(1) as read with section 8(2) of the Act. In my view though there is such apparent error on the charge sheet, it did not make the charge fatally defective since the section exists. The mere miswriting of the section did not mislead the Appellant in any way thus that complaint has no basis and I dismiss the same.
13. I now turn to the contention of the Appellant that there were massive contradictions in the prosecution evidence. The contradictions he refers to are the variance of the evidence of Pw1 and Pw2 in that Pw1 said that Appellant worked for the family for six months while Pw2 said he worked for them for three years. There was also a contradiction on whether he was arrested at Kai.
14. Though indeed there were such contradictions, in my view, they were not of substantive nature in the present case. They said contradictions appear to be mere lapses for memory which did not affect the actual allegation of defilement. Whether the Appellant was employed for six months or three years he could still have defiled the complainant. Whether he was arrested at Koi grazing the livestock or not, he could still have defiled the complainant. I dismiss that ground,
15. Ground 3 and 6 go together as they relate to the proof of the charge beyond reasonable doubt. I note that the Appellant did not tender any defence when asked to do so. That was his constitutional right. He however asked questions to Pw2 indicating that he had not been paid and his wages that he was implicated herein for no genuine reason. Was the charge proved?
16. From the evidence of Pw2 on record, it is clear that the main reason why the complainant had been said to be defiled was because the complainant had big breasts. On the face of it one would imagine that the complainant got pregnant but there was no such medical evidence tendered. In my view people have different features and some girls have small breasts and others **big breasts. Such big breasts is no sign or proof of sexual activity or defilement.**
17. The evidence on record is also that the said Pw2 asked the complainant to say what happened but complainant did not say anything. Then Pw2 who was the mother, literally scared the young girl by taking her to the police station where she is said to have admitted being defiled. Is that credible evidence on which to found a conviction? In my view it is not. In my view the prosecution evidence is based on false allegations and coercion and as such cannot be a basis for conviction.
18. The next ground relates to corroboration. Under the provisos to section 124 of the Evidence Act (Cap 80), the evidence of a single witness victim a sexual offence does not require corroboration in order to found a conviction. However such evidence has to be believable for reasons to be stated by the trial court. In my view the evidence of the complainant (Pw1) herein implicating the Appellant was obtained by coercion by her mother Pw1. It was thus not believable or credible. The fact that Pw2 had big breasts did not mean that she had been defiled. The fact that she did not have a hymen did not mean that the hymen was broken by the Appellant.
19. In my view therefore the prosecution did not discharge its burden of proving the Appellant guilty of the offence charged beyond any reasonable doubt and the appeal on conviction will succeed.
20. With regard to the sentence, the complainant was proved to be 11 years at the time of alleged commission of the offence through to the production of the birth certificate in court as an exhibit. In my view, if the conviction was proper the sentence imposed herein was not illegal but maybe harsh in view of recent court decisions on minimum sentences such as **Evans Wanjala Wanyonyi –vs- Republic (2019) eKLR and Christopher Ochieng –vs republic (2018) eKLR** in which courts have held that lesser sentences can be meted out. I will however say nothing more on sentence since I am allowing the appeal against conviction.
21. 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 23<sup>rd</sup> day of February, 2021, in open court at Makueni.

.....

GEORGE DULU

JUDGE