REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCRA NO. 65 OF 2018

NZUKI KYEVA.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(From the original conviction and sentence of Hon. C. A. Mayamba (SRM) in Kilungu Senior Resident Magistrate's Court Sexual Case No. 14 of 2018 delivered on 10th May, 2018).

JUDGMENT

1. The Appellant was charged with defilement contrary to section 8(1) (2) of the Sexual Offences Act no. 3 of 2006 the particular of which were that on 28th February 2018 in WATEMA Location MAKUENI County caused his penis to penetrate the vagina of CMM (names withheld) a child aged 7 years.

2. After a full trial he was convicted of the offence and sentenced to life imprisonment.

3. Dissatisfied with the conviction and sentence he filed his appeal in 2018. Before the appeal was heard, he filed additional grounds of appeal, which can be summarized that the evidence against him was fabricated, that other children mentioned by the Complainant were not called to testify, that the alleged date of offence 28/02/2018 was a school day and the Complainant should have been in school, and that he had gone to Machakos Equity Bank to withdraw money, that the Magistrate did not allow him to call all defence witnesses, and that the Magistrate did not record the evidence correctly.

4. The appeal proceeded through filing of written submissions and both the Appellant and the Director of Public prosecution (DPP) filed their respective written submissions which I have perused and considered. I note that the Respondent (DPP) relied on a number of decided case authorities.

5. 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, always bearing in mind that I did not have the opportunity to see the witnesses testify at the trial to determine their demeanor. See **Okeno –vs- Republic [1972] E.A 32.**

6. I have perused and re-evaluated the evidence on record. The prosecution called five (5) witnesses to prove their case. The Appellant tendered a sworn defence testimony and called two (2) defence witnesses.

7. In a criminal case the burden is always on the prosecution to prove their case against an accused person beyond any reasonable doubt. See **Woolmignton –vs- DPP (1935) A.C 462** and **Kelvin K. Kyongi –vs- Republic (2018) eKLR**. The accused does not bear any burden to prove his innocence, he can merely raise some doubts. In the present case the Appellant tendered a defence of alibi.

8. The main evidence connecting the Appellant to the alleged offence is that of the Complainant (Pw1) said to be seven (7) years of age. She stated in her unsworn evidence that the Appellant called her at about 1.00 p.m. when she was on her way to collect a mobile phone for her father, and defiled her. This is the evidence of a single witness who is alleged to be the victim of a sexual offence.

9. Indeed under the provisal to Section 124 of the Evidence Act (Cap 80) cited by the trial court, such evidence does not require corroboration in order to found a conviction, as follows:-

> 124……Provided that where in a criminal case involving a sexual offence the only evidence is that for the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the person if, for reasons to be recorded in the proceedings the court is satisfied that the alleged victim is telling the truth.

10. Thus whether the victim of a sexual offence is an adult or a minor if the only evidence to support commission of the alleged offence and the connection of the accused to the offence is that of the said victim, then a conviction can be well founded even if there is no independent corroboration. However, the evidence of such victim has to be believable and the court has to be satisfied on reasons recorded in the judgment that it is so satisfied about its truth.

11. The first issue is with regard to age of the complainant. The victim (Pw1) stated that she was 7 years old and in standard 1 at Primary School. The mother **Pw3 FM** did not mention anything in evidence about the age of the victim nor say when she was born. No medical age assessment report or birth certificate was produced. The trial court saw the victim in court, and did not doubt the tender age mentioned in the charge sheet allowed her to tender unsworn evidence.

12. In my view, though ideally the mother of the Complainant (Pw3) FM should have testified on the age or date of birth of the Complainant in the absence of documentary evidence, I do not see anything that would lead me to doubt the age of the Complainant. I am sure that if the Complainant had reached puberty it would be difficult to determine her age based on her appearance, but since in the present case she was so young, I am of the view that the prosecution proved the age of the Complainant beyond any reasonable doubt and the magistrate was correct in so finding.

13. The second issue is with regard to proof of penetration or partial penetration of the vagina of the Complainant. The medical report (P3 Form) produced by **Pw5 Eric Kasiamani** the Clinical Officer at Kilungu has an entry indicating that the hymen of the Complainant was missing. The said P3 form was filled on 03/03/2018, three days after the alleged incident.

14. In my view, at the tender age of the Complainant the missing hymen is proof of penetration. However in my view, such penetration might be caused even by a finger, not necessarily a male sexual organ. I find that the prosecution proved beyond reasonable doubt that penetration of the vagina of the Complainant had occurred.

15. The most crucial issue herein is with regard to whether the Appellant was the culprit that is he was the person who caused the penetration of the vagina of the Complainant on the date alleged.

16. In my view, the evidence of the victim on this is scanty and cannot be believable. The Appellant gave sworn testimony and called two witnesses on his movements covering 28/02/2018 to the date he was arrested on 03/03/2018. There is no evidence on record that he was being sought from 28/02/2018 immediately the incident is alleged to have occurred. The father of the Complainant who would have been a key witness to confirm that he sent her for a mobile phone on 28/2/2018 when the incident is said to have occurred was not called to testify in support thereof. The Assistant Chief who would have clarified when and how the Appellant was sought before he was arrested did not testify. No explanation was given by the prosecution why these two crucial witnesses were not called to testify creating a reasonable doubt on the truthfulness of the prosecution allegations. As was stated in **Bukenya –vs- Uganda (1972) E.A 549**, the benefit of the doubt has to be given to the Appellant as the inference would be that the evidence of the two crucial witnesses would contradict the other prosecution evidence.

17. The sum total of the failure to call those crucial witnesses in my view, means that the trial court did not have reasonable grounds to believe the evidence of Pw1 the Complainant on whether the Appellant, who claimed to have been in Machakos town on the date of incident, was the culprit. The trial court, in my view should have given the Appellant the benefit of the doubt, as he had raised an *alibi* defence, and the prosecution should also have called additional evidence under section 309 of the Criminal Procedure Code to discredit him, which they did not, thus the defence of the Appellant should have been believed and upheld by the trial court.

18. To conclude, I find that the prosecution did not prove beyond reasonable doubt that the Appellant was the culprit or was connected to the alleged offence. On that account, I will allow the appeal.

19. Consequently, 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 11th day of February, 2021, in open court at Makueni.

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GEORGE DULU

JUDGE