REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCRA NO. 91 OF 2019

KIOKO MUSENYA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence of Hon. J. N. Mwaniki (SPM) in Makueni Chief Magistrate's Court CMCR No. 337 of 2015 delivered on 26th July, 2019).

JUDGMENT

1. The Appellant was charged in the magistrates' court with defilement of a child contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on 12th June 2015 at [particulars withheld] village Kiangini Sub-location in Kathonzweni district within Makueni County intentionally and willfully caused his penis to penetrate the anus of MK (*name withheld*) a child aged 13 years.

2. In the alternative, he was charged with indecent assault of a child contrary to section 11(1) of the Sexual Offences Act, the particulars of offence being that on the same day and place willfully and unlawfully assaulted MK (*name withheld*) by touching his private parts.

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

4. Dissatisfied with the decision of the trial court, the Appellant has come to this court on appeal relying on five (5) grounds as follows –

a. That the learned magistrate erred in law and fact in convicting him despite inconsistent, insufficient as well as contradictory evidence.

b. The learned trial magistrate erred both in law and facts by convicting him relying on medical evidence which was indeterminable and professionally disfunctional.

c. The credibility of the Complainant's evidence was questionable and doubtful.

d. The trial magistrate erred in both law and fact by convicting him without considering that there was a grudge between him and the mother of the Complainant.

e. The learned trial magistrate erred in both law and fact by not considering his sworn defence.

5. The appeal proceeded by way of filing written submissions. Both the Appellant and the Director of Public Prosecutions filed written submissions, which I have perused and considered.

6. In proving their case, the prosecution called four (4) witnesses. Pw1 was the Complainant who stated that he was aged 13 at the time of the incident and that on the 12/06/2015 the Appellant, whom he knew before as a neighbour, came to their home and asked for a phone battery. The Complainant was alone and the Appellant then pulled him by the hand to the kitchen, pulled down the pair of shorts he wore and inserted his penis into the Complainant's anus. The Complainant then tried to phone his father but did not get through. He then phoned his mother Pw2 who came and took him to the police and later to hospital, and the Appellant was then charged with the offence. He was medically treated and P3 form issued.

7. Pw2 was EMK the mother of Pw1, who testified that the Complainant, who was the seventh of her ten children was born on 6/2/2002 and relied on a birth notification form. She stated further that on 12/6/2015 at 10:30 am the Complainant phoned her to say that he had been defiled by the Appellant Kioko Musenya whom he knew as a herdsboy. She then asked for permission from her workplace and met the

Complainant at Kiangine market. The two then reported the incident to the Assistant Chief and then to Makueni Police Station where they were issued with a referral note to the hospital where a P3 form was filled on 15/6/2015.

8. Pw3 PKK, the father of the Complainant stated that on 12/6/2015 he was called on phone at 4pm and informed about the incident. Pw4 Paul Makundi was the Assistant Chief who stated that a report on the incident was made to him at 12 noon by MK(Pw2).

9. The last witness for the prosecution was Pw5 Dr. Emmanuel Loiposha who testified on behalf of Dr. Kibore who filled the medical P3 form on the Complainant and produced the same as an exhibit, in which the findings recorded were that the Complainant had tender a anus which had healing bruises. This witness also produced the Complainant's treatment note as an exhibit.

10. When put on his defence, the Appellant tendered sworn testimony. He stated that he knew the Complainant on a neighbour, and that on 12/6/2015 as he was grazing animals the police emerged from bushes and arrested him because a woman had complained that he had defiled her child.

11. This being a first appeal, I have to start by re-evaluating the evidence on record and come to my own independent conclusions and inferences – **Okeno -vs- Republic (1972) EA 32.**

12. Having re-evaluated the evidence on record. I have to start by stating that in a criminal case, the burden is always on the prosecution to prove their case against an accused person beyond any reasonable doubt. The accused person carries no burden to prove his innocence. See **Woolmington –vs- DPP (1935) AC.** The prosecution is duty bound to prove all the elements of the offence charged beyond any reasonable doubt.

13. This being a defilement case the first issue is whether the prosecution proved beyond any reasonable doubt that the Complainant was 13 years as alleged since in a defilement case the age of the Complainant is an important element as it has to be below 18 years, and determines the sentence to be imposed.

14. The Appellant, who testified as Pw1, stated in evidence that he was 13 years at the time of the incident. His mother Pw2 EMK stated that the Complainant was born on 6/2/2002 and relied on a birth notification (immunization) form. The said birth notification form was however not produced in evidence by the Investigating Officer as he did not testify but was produced by Pw5 Dr. Emmanuel Loiposha. The father of the Complainant Pw3 PKK stated that the Complainant was 14 years in 2016 – the following year.

15. In my view, the consistent oral evidence of Pw1, Pw2 and Pw3, and the birth notification (immunization) card produced by Pw5 established beyond any reasonable doubt that the Complainant was aged 13 years at the time of the incident. I thus find that the prosecution proved that the Complainant was aged 13 when the incident occurred.

16. The second issue is whether penetration of the anus of the Complainant did occur on the alleged date. In this regard, I note that after the alleged incident, the Complainant went to hospital for medical treatment and examination. The treatment notes and medical examination (P3 form) were produced as exhibits by Pw5 Dr. Emmanuel Loiposha. The finding was that the anus of the Complainant was tender. It is thus clear to me from the medical (expert) findings, that there was penetration of the Complainant's anus on the alleged date of the offence.

17. The last issue on conviction is whether the Complainant was penetrated by the Appellant. In this regard, I note that the Complainant and the Appellant knew each other well. They were neighbours. Both confirmed in their evidence in court that they knew each other well. While the Complainant stated that the Appellant penetrated him sexually through the anus that day, the Appellant maintained that he was in the field herding animals the whole day where he was arrested.

18. It is clear from the record that the evidence on the connection of the Appellant to the defilement of the Complainant is that of a single witness. The weight to be given by the court to such evidence is covered by the provisions of the provisal to section 124 of the Evidence Act (Cap 80), which states as follows –

> **124 …….**
>
> ***Provided that where is a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence the court shall record 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"***

19. The alleged victim herein Pw1, was quite candid that it was the Appellant whom he knew well before, who came home that morning, took him to the kitchen and defiled him through the anus. The Complainant immediately phoned his mother Pw2 and informed her of the incident. From the evidence on record, there is no evidence of any existing grudge between the Complainant and the Appellant or between the family of the Complainant and the Appellant. The Appellant infact said in cross-examination that he was the Complainant's Sunday school teacher. In my view, the Complainant was truthful and the trial court was thus correct in finding that the Appellant was the culprit.

20. Though I note that the trial was conducted in part by three different magistrates, I find that the prosecution proved that the Appellant was the culprit. I thus uphold the conviction.

21. With regard to sentence, the Appellant was sentenced to 20 years imprisonment which was the minimum sentence under the Sexual Offences Act. He was a first offender and said nothing in mitigation. That being so however, I am of the view that there are no other serious aggravating factors that would justify handing down the minimum sentence, and in view of the recent Supreme Court reasoning in the case of **Muruatetu –vs- Republic** (2015) eKLR, the sentence was harsh and excessive. I will thus reduce the sentence to ten (10) years imprisonment for 19/06/2015 the starting date determined by the trial court.

22. Consequently, ***I dismiss the appeal on conviction, and uphold the conviction of the trial court. With regard to sentence, I set aside the sentence imposed and instead order that the Appellant will serve ten (10) years imprisonment from 19/06/2015 the date for commencement of sentence that was set by the trial court.***

DELIVERED, DATED AND SIGNED THIS 17TH DAY OF MARCH 2021 IN OPEN COURT AT MAKUENI.

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GEORGE DULU

JUDGE