REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCRA NO. 16 OF 2019

NZIOKA MAINGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original Conviction and Sentence of Hon. Otieno J. (RM) in Makueni Chief Magistrate's Court CMCRC (S.O) No. 22 of 2018 issued on 8th February, 2019).

JUDGMENT

1. The Appellant was charged in the magistrate's 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 the evening of 10th August 2018 in Katangini location, Mbooni East Sub-county intentionally and unlawfully caused his penis to penetrate the vagina of ENK a girl aged 12 years.

2. In the alternative, he was charged with indecent act with a child contrary to section 11(1) of the Sexual Offences Act, whose particulars were that on the same day, time and place, he did an indecent act by touching private parts (*vagina*) of ENK a girl aged 12 years.

3. He denied both counts. After a full trial, he was convicted on the main count of defilement of ENK 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 through counsel M/s Kisongoa & company on the following grounds:-

1) The learned magistrate erred in law and fact in finding that the Prosecution had proved its case beyond reasonable doubt inspite of conflicting evidence of witnesses and the report of the Probation Officer which exonerated the Appellant from the offence.

2) The learned magistrate erred in law and fact by failing to consider the defence of alibi and the accused evidence on oath. Had the magistrate considered this evidence, he would have found the accused innocent.

3) The learned magistrate erred in law and fact in finding that the Complainant had identified the Appellant notwithstanding conflicting evidence of the Complainant and her mother and father who was not called as a witness.

4) The learned magistrate erred in law and fact by holding and relying on unverified document relating to the age of the Complainant as proof of age.

5) The learned magistrate erred in law in failing to appreciate that the clinic card was not properly verified according to law.

6) The learned magistrate erred in law in failing to appreciate that the author of the clinic card was not proved in accordance with the rules of evidence.

7) The learned magistrate erred in law and fact in failing to appreciate that the Complainant was a liar and had been declared a liar by her mother.

8) The learned magistrate erred in law and fact in failing to appreciate that the plea was not unequivocal and thus caused injustice to the Appellant. The learned magistrate erred in failing to appreciate that there was no response to the defence of alibi raised by the accused and therefore erred in law in convicting the Appellant without directing her mind to unchallenged evidence of the accused.

9) The learned magistrate erred in law in failing to evaluate the Prosecution evidence properly or at all.

10) The report of the Probation Officer support the fact that the accused was not identified. Had the magistrate directed her mind to the conflicting evidence of the Complainant on identification, she should have come to the conclusion that the accused was not identified.

11) The trial magistrate failed to note that the accused was not examined to ascertain whether the sperm on the vagina was from his body.

12) The doctor did not find blood stain on the vagina which was unusual with a human being body which is surrounded by blood veins and once cut blood oozes out and stains the surroundings.

13) The findings of the doctor did not connect penetration to the accused person since the Complainant never proved the particulars of the offence as provided in section 3 of the Sexual Offences Act namely the accused *"penetrated his penis into my vagina"*.

14) The learned magistrate erred in law and fact in holding that the words *"he did bad things to me"* meant the Complainant (*should be accused*) penetrated into the Complainant vagina.

15) The P3 form was defective as the doctor confessed that part of the information in the P3 was supplied by the mother of the Complainant who was not an expert.

16) The learned magistrate erred in failing to consider the probation report which expressed doubt on the guilt of the accused.

17) The learned magistrate erred in the evaluation of her evidence.

18) The report of the Probation Officer suggests that the villagers know the offender who is not the accused person and that he is free.

5. The appeal proceeded by way of filing written submissions. The Appellant's counsel Paul Kisongoa filed their written submissions on 9th February 2021 while the Director of Public Prosecutions filed their written submissions on 22nd February 2021. In the submissions, counsel for the Appellant stated that the charge was defective as it referred to the wrong sentencing section of the law. Counsel also argued that the magistrate wrongly relied on the initial purported plea of guilty of the Appellant to convict him.

6. The Appellant's counsel further argued that the age of the Complainant was not proved and penetration was also not proved as the clinical card was produced by the Investigating Officer. Counsel also argued that visual identification of the Appellant as the culprit was not proved.

7. The Director of Public Prosecutions in response submitted that the charge was not defective and argued that the age of the Complainant was proved beyond reasonable doubt to be 12 years, through the Immunization (Clinic) card.

8. On penetration, prosecuting counsel argued that penetration was proved in accordance of the definition under section 2 of the Act as the medical evidence was clear that the hymen of the Complainant was freshly broken. The Prosecution Counsel argued further that there were no material contradictions in the evidence on record, and relied on the case of **Richard Munene –vs- Republic (2018) eKLR**, and argued that the Appellant was positively identified as the perpetrator of the crime.

9. Lastly, the Prosecution counsel argued that there was no existing grudge between the Appellant and the family of the Complainant, and that the defence of alibi was an afterthought and did not shake the prosecution evidence.

10. This being a first appeal, I have to start by reminding myself that I am required to re-evaluate all the evidence on record and come to my own independent conclusion and inferences – see **Okeno –vs- Republic (1972) E.A 32**.

11. I have re-evaluated the evidence on record. The Prosecution called four witnesses and the Appellant tendered sworn testimony and was cross examined.

12. I have perused the charge sheet, and it cites sections 8(1) as read with section 8(2) of the Sexual Offences Act. I note that section 8(2) of the Sexual Offences Act relates to a victim who is 11 years and under, wherein the penalty is life imprisonment. Section 8(3) relates to victims who are 12 years to 15 years with a penalty of 20 years imprisonment. Though there was an obvious mistake in the sentence sub-section cited herein for a victim who was 12 years it did not prejudice the Appellant as the particulars of charge were very clear and the Appellant was not sentenced to life imprisonment. I dismiss the complaint

13. The second issue is whether the age of the Complainant was proved. The Complainant Pw1 said that she was 12 years old. The immunization or clinic card gives the date of birth as in 22-12-2005 while the offence occurred on 10th August 2018 when she was 12 years and some months old. Though the Appellant's counsel argued that the immunization card should not have been produced by the Investigating Officer, in my view there is no law that prohibits an Investigating Officer from producing such card which was an exhibit handed over to him, the card being a normal official document.

14. In my view the Investigating Officer could produce the clinic card as it was a public document under section 79 of the Evidence Act (Cap 80), and was prepared in the course of keeping official record. In any case, it was not objected to at the trial. I dismiss that ground. From the evidence on record, the age of the Complainant was proved to be 12 years.

15. I now turn to the perpetrator. The evidence of involvement of the Appellant in the crime is that of Pw1 the Complainant alone. Such

evidence does not require corroboration in terms of the provisal to section 124 of the Evidence Act if it is believable and so believed by a trial court. The provisal states as to follows:-

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

16. In our present case, this evidence of the Complainant is strengthened by the fact that both the Appellant and Complainant knew each other before. The Complainant described well how they met the Appellant that day and he pulled her to the bush and defiled her. The Appellant also, as stated by his counsel at the trial, wanted a family settlement in the matter which was only declined in court by the mother of the Complainant. Thus though counsel for the Appellant has argued that the magistrate relied on an earlier attempt before trial by the Appellant to plead guilty, the magistrate did not take that plea before trial into account in the judgment. In addition though counsel for the Appellant has emphasized the importance of positive identification in unfavourable circumstances – see the **English case of R –vs- Turbull**, as the time of the incident was 7 pm, in my view there is no doubt that the Complainant positively identified the Appellant as 7pm. In Makueni area in particular it is not pitch dark as to make a person not identify or recognize another especially when they are at close proximity and know each other well as in the present case. The initial reluctance of the Complainant to disclose what had happened to her mother was mere shyness, which did not amount to contradictions.

17. On the alibi defence of the Appellant and the existence of a grudge, the evidence on record clearly puts the Appellant in the vicinity of the incident, and in addition, there is no credible evidence of the existence of a family grudge tendered either from the prosecution or the defence

18. With regard to the Probation Officer's pre-sentence report creating a doubt as to the person who committed the offence, that report was not evidence tendered at the trial, but merely meant to assist the court in sentencing the Appellant. Besides the report was not evidence that was tendered by the maker or any witness who could be subjected to cross-examination. Though I note that the trial magistrate initially wanted the Judge to give directions on its contents, that in my view was a misdirection on the part of the magistrate as the report was only relevant to sentencing and did not affect the main trial evidence. On this score also, it is noteworthy, that though Mr. Kisongoa came on record for the Appellant before the Appellant tendered his defence, but he did not seek for recall or cross-examination of any witnesses who had testified, which in my view meant that defence counsel waived the accused's right to clarify further any evidence of the prosecution. The Appellant was proved to be the culprit.

19. Thus from the evidence on record, in my view the Prosecution proved all the ingredients of the offence of defilement against the Appellant beyond any reasonable doubt. I will thus uphold the conviction.

20. With regard to sentence, the sentence imposed by the trial court is the minimum statutory sentence. Since the Supreme Court decision and directions in the case of **Muruatetu & Another –vs- Republic** however courts have considered mandatory and minimum sentences to be the maximum sentence and meted out lower sentences depending on the circumstances of the case.

21. In the present case, the Appellant was a first offender and asked for leniency. I do not see any serious aggravating facts or circumstances except the fact that the Appellant grabbed the hand of the Complainant and committed the offence in the bush. In my view therefore, sentence of 15 years imprisonment is adequate punishment. I will thus set aside the sentence imposed and replace it with a 15 years' imprisonment term.

22. Consequently, and for the above reasons, I dismiss the appeal on conviction and uphold the conviction of the trial court. As for sentence, I set aside the sentence imposed by the trial court and instead order that the Appellant will serve fifteen (15) years imprisonment from the date he was sentenced by the trial court.

Delivered, signed & dated this 20th day of April, 2021, in open court at Makueni.

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GEORGE DULU

JUDGE