



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MAKUENI

HCCRA NO.95 OF 2019

ISAACK MUTUKU MUTIA.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being appeals from the original conviction and sentence of Hon. Patrick Wambugu Mwangi (SRM) in Kilungu Principal Magistrate's Court PMCR Case No. 739 of 2015 pronounced on 11th November, 2016).

JUDGMENT

1. The appellant was charged in the magistrates' court with defilement contrary to section 8(1) (4) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that between 27th and 28th of December 2015 at [Particulars Withheld] market, Ngaamba Location in Mukaa Sub-County within Makueni County intentionally and unlawfully caused his penis to penetrate the vagina of F.MK a child aged 17 years.
2. In the alternative, he was charged with indecent act with a child contrary to section 11(1) of the Sexual Offences Act. The particulars of the charge being that between the same dates and at the same place intentionally and unlawfully touched the vagina of FMK a child aged 17 years.
3. He denied both charges. After a full trial, he was convicted of the main count of defilement and sentenced to 15 years imprisonment.
4. Dissatisfied with the conviction and sentence, the appellant has come to this court on appeal on the following grounds –
 1. **The learned trial magistrate erred in law and fact when she convicted and sentenced him without regard to his basic right for disclosure of the prosecution evidence which was intended to be brought against him as laid down in Article 50(2) of the Constitution.**
 2. **The learned trial magistrate erred in fact and in law in failing to appreciate the entire evidence which did not meet the threshold required by the law which is beyond reasonable doubt in relying on the unreliable evidence of a single minor witness without warning on the danger of convicting on such evidence.**
 3. **The learned magistrate erred in fact and in law in shifting the burden of proof to the appellant and misapprehending and misdirecting herself on the evidence hence arrived at the wrong conclusion.**
 4. **The trial magistrate erred in sentencing him to a harsh and excessive sentence based on the mandatory sentence provided under the Act which was unconstitutional hence contravening the Supreme Court decision in the case of Francis Muruatetu.**
5. The appeal proceeded by way of filing written submissions. I have perused and considered the written submissions of both the appellant and the Director of Public Prosecutions.
6. This being a first appeal, I am duty bound to evaluate all the evidence on record afresh and come to my own independent conclusions and inferences, but bear in mind that I did not have the opportunity to see witnesses testify to determine their demeanor – see **Okeno –vs- Republic (1972) E.A 32.**
7. In proving their case, the prosecution called six (6) witnesses. Pw1 was the complainant who stated that she went to the house of the appellant and slept there for one night and continued to sleep there the following night when the mother Pw2 PB and others came and arrested the appellant. Pw2 produced the birth certificate of the complainant and stated that the complainant was aged 17 years.

8. Pw3 BM was the father of the complainant who was told by Pw2 about the disappearance of the complainant from home, while Pw4 Anthony Muindi Mwatu assisted Pw2 in tracing the complainant in the house of the appellant and arrested the appellant. Pw5 PC Felista Naeku Lenkupai was the Investigating Officer who stated that the report on the matter to the police was made on 29th December 2015 at 7am, while Pw6 Eric Kasyamani a Clinical Officer at Kilungu Sub-District hospital stated that the complainant was found to be pregnant, and produced treatment notes and the medical examination report (P3 form).

9. In his defence, the appellant tendered unsworn testimony claiming that he was arrested by seven (7) people on 29/12/2015 while going to his house, and denied being responsible for the pregnancy of the complainant.

10. Age is one of the most important ingredients in a defilement case. In the present case, in my view, it was proved beyond reasonable doubt by the prosecution that the complainant was 17 years at the time of the incident, as a birth certificate relied upon was not challenged, and the mother Pw2 confirmed the age of the complainant.

11. The second element of the offence was penetration of the sexual nature. In my view, penetration was proved beyond reasonable doubt as the complainant Pw1 stated so and the medical report found a broken hymen, and the complainant was also found in the appellant's house and was sleeping therein for the second consecutive night. Though the DNA test was not done to establish the paternity of the child, in my view, it was not relevant to establish if the complainant had been impregnated by appellant. It was enough that the appellant had sexual intercourse with her that night or those two nights, which in my view was established.

12. As for the culprit, three witnesses that is the complainant, Pw2 and Pw4 all testified to the appellant being the culprit. He was found with her that night by Pw2 and Pw4. There was thus no possibility of mistaken identity. Thus the three ingredients of defilement were proved by the prosecution against the appellant.

13. Having said so as above, I am of the view that the statutory defence under section 8(5) of the Sexual Offences Act is applicable in the circumstances of this case where a 17 year old girl, voluntarily goes to the house of a man during the day, to live there like a wife until her mother ambushes her. In my view, in the circumstances of this case, any reasonable man who does not have special knowledge of the background or specific age of the complainant, would believe that she was an adult, as she chose to behave openly like such adult. On that ground I will allow the appeal.

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 19TH DAY OF OCTOBER, 2021, IN OPEN COURT AT MAKUENI.

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GEORGE DULU

JUDGE