REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCRA NO.48 OF 2020

NYAMAI MUTISYA.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal from the original judgment of Hon. J.D Karani in Makindu

Senior Principal Magistrate's Court PMCR (S.O) Case No.40 of 2018

pronounced on 14th February, 2020).

JUDGMENT

1. The appellant was charged with attempted defilement contrary to section 9(1) as read with section 9(2) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on 25th May 2018 at Kyumani Village Kibwezi Sub-County within Makueni County intentionally and unlawfully attempted to cause his penis to penetrate the vagina of C. M a child aged 15 years.

2. In the alternative, he was charged with committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act, the particulars of which being that on the same date and place intentionally touched the vagina of C.M a child aged 15 years with his penis.

3. He denied both charges. After a full trial, he was convicted on the main count of attempted defilement and sentenced to 10 years imprisonment.

4. Dissatisfied with the conviction and sentence of the trial magistrate, the appellant has come to this court on appeal and relied on the following grounds –

1) The magistrate erred both in law and facts by failing to follow the law on the issue of voire –dire.

2) The learned magistrate erred both in law and in fact by failing to analyse and re-evaluate the evidence before the trial court thus arriving at an erroneous conclusion on uncorroborated evidence.

3) The learned trial magistrate erred both in law and in fact by failing to appreciate that the prosecution evidence was grossly uncorroborated and full of explicit inconsistencies and marred with contradictions that impugned on the overall burden of proof and hence also erred by shifting the burden of proof on the accused person thereby prejudicing him greatly.

4) The learned trial magistrate erred both in law and fact by failing to find that critical witnesses were not called up to corroborate the prosecution case thereby leaving numerous gaps in the case especially on the mode of arrest.

5) The learned trial magistrate erred both in law and in fact by failing to appreciate that the alleged recovered phone and shoes were not produced in court as exhibits to prove the existence of the alleged facts.

6) The learned trial magistrate erred both in law and facts by rejecting the cogent defence case which reasonably exonerated him from any wrong doing and ignoring the alibi defence put forth which led to the trial magistrate's failure to comply with section 169 of the Criminal Procedure Code.

5. The appeal was canvassed through filing of 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 – see **Okeno –vs- Republic (1972) E.A 32.**

7. In proving their case, the prosecution called five (5) witnesses. In his defence, the appellant tendered an unsworn defence and did not call any additional witness.

8. Pw1 was the alleged victim whose evidence was that on the material day she asked the appellant to carry her on a motorbike at a fee to school for a function, and the appellant instead, diverted the motor bike into a sisal farm and on realizing this, the victim jumped off the motor-bike to escape, but the appellant followed her grabbed and tried to rape her. In the process a woman who was nearby saved her.

9. Pw2 Janet Mbithi Kioko the mother of the victim testified to the age of the victim. It was also her evidence that she was called to school and informed that her daughter (the victim) had been attacked by someone on her way to school.

10. Pw3 Regina Ndunge testified that she saw a man chasing a woman in the sisal plantation as she herded cows and on following the two saw the appellant remove the innerwear of the victim and attempting to rape her. After noticing that he had been seen, the appellant jumped on to his motor cycle and rode away.

11. Pw4 PC Herbert Wekesa was the Investigating Officer to whom the incident was reported, while Pw5 Joel Mutuku Mathama was a teacher of Makutano Primary School where the victim was a pupil.

12. When put on his defence, the appellant described how he carried a girl on his motor-bike that day who asked to be taken to Kibwezi for Kshs.250/= but had not paid him. When he insisted that he should be paid, the girl jumped from the motor bike and that when he stopped the motor bike, a lady who was at that place, asked what was happening and then later, he was arrested for no reason.

13. I note that the appellant has raised several grounds of appeal. With regard to his complaint on voire dire examination, indeed the trial court did not strictly follow the rules of practice to conduct voire dire examination of Pw1 as the questions asked by the court were not recorded. However, in my view voire-dire examination is only strictly required with regard to children of tender years. Under the Children Act, only those children below 10 years are of tender years. The victim herein being 15 years old, there was no strict need for conducting voire dire examination.

14. In any case, for a girl of 15 years, the answers obtained by the trial magistrate on record which led the trial court decide to swear the witness, were adequate to establish whether the witness knew the importance of saying the truth. The result was that the witness (Pw1) testified on oath and the appellant had an opportunity to cross-examine her. Thus no injustice was visited upon the appellant.

15. In this regard, I rely on the case of **Haro Guffil Jillo –vs- Republic (2014) eKLR** wherein the Court of Appeal stated – ***"Pw2 was aged 17 years. She gave sworn evidence; the age of seventeen cannot by any stretch of imagination be regarded as a child of tender years. The true purpose of a voire dire examination is to establish whether a child of tender years understands two things: the nature of an oath and the need to tell the truth."***

Thus I find no fault committed by the magistrate herein that would affect the conviction.

16. The main issues on appeal in my view are two. First, whether there was an attempted defilement and second, whether the appellant was the culprit.

17. With regard to the issue of an attempt to defile, the evidence of Pw1 the victim and that of Pw3 Regina Ndunge was clear. It was during the morning hours in broad daylight in the sisal plantation, when someone left his motor bike and chased Pw1, caught up with her knocked her down and removed her lower innerwear and was about to lie on her and defile her, when Pw3 intervened, and the person rose, jumped back onto his motor bike and rode away. In my view, that was clear evidence of an attempt to defile in terms of section 388(1) of the Penal Code, as there was both *mens rea* and *actus reus*. The prosecution proved thus the attempt to defile herein.

18. Was the appellant the culprit? Again Pw1 the victim testified that she knew the appellant by appearance before as a familiar boda boda rider. Pw3 Regina Ndunge also knew his appearance as neighbour and even knew him by name. Both these witnesses had no reason to implicate the appellant maliciously or without cause. Though the appellant in the grounds of appeal talks of an alibi defence and that the trial court did not consider his defence, there was no an alibi in his defence. All the appellant did in his defence, was to give a version of having carried a woman on his motor bike that day but on a different mission, than that descried by Pw1 and Pw3. In my view, the woman carried by the appellant was Pw1, and the circumstances were those described by both Pw1 and Pw3, and not what was stated by the appellant in his defence. In my view the appellant was merely creating a different version of what happened to confuse the trial court.

19. Like the trial court, I find that the prosecution proved that the appellant was the culprit. I will thus uphold the conviction.

20. The sentence imposed by the trial court is the minimum sentence for the offence. I will uphold the same.

21. Consequently, I find no merits in the appeal. I dismiss the appeal and uphold both the conviction and sentence of the trial court.

Delivered, signed & dated this 30th day of November, 2021, in open court at Makueni.

.....

George Dulu

Judge