REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCRA NO.61 OF 2020

TITUS MARK KYALO .....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.15 of 2019 pronounced on 21st February, 2020).

JUDGMENT

1. The appellant was charged in the magistrates' court with defilement 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 diverse dates between 22nd December 2018 and 28th December 2018 at [particulars withheld] Village, Makindu Sub-County within Makueni County intentionally and unlawfully caused his penis to penetrate the vagina of N.M. a child aged 15 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 which being that within the same dates and at the same place touched the vagina of N.M a child aged 15 years with his penis.

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 of the trial court, the appellant has come to this court on appeal on the following grounds –

1) That the learned trial magistrate erred in law and facts in convicting and sentencing him with prosecution evidence none of which corroborated to meet (standards) for conviction and sentencing in defilement cases.

2) The learned trial magistrate erred in law and facts by convicting and sentencing him on unproved evidence of the prosecution.

3) The learned magistrate erred in law and facts by convicting and sentencing him by a stage managed case wherefore no proof of the case of defilement.

4) The trial magistrate erred in law and facts by basing his finding and conviction on prosecution evidence that was full of inconsistencies, contradictions and loopholes and no eye witness evidence was brought forward therefore shifting the burden of proof to the appellant.

5) The learned trial magistrate erred both in law and facts in shifting the burden of proof to the appellant in effect requiring the appellant to prove innocence and the prosecution case was never proven beyond reasonable doubts and indeed left reasonable doubts that ought to be resolved in appellant's favour.

6) The learned magistrate erred in law and facts while convicting him using evidence adduced selectively in order to arrive at a decision.

7) The learned trial magistrate erred in law and facts by not considering proper findings in the medical report section (c) that there was no spermatozoa cells isolated and there must be independent in material particular to corroborate evidence given in sexual offences in order to convict.

8) The trial magistrate erred in law and in facts by not considering the time the complainant claims she was defiled and the time she went for treatment.

9) The learned magistrate erred in law and facts when he did not consider the appellant's defence by concluding that the defence did not shake the prosecution evidence which was not proved beyond reasonable doubt.

10) The trial magistrate erred in law an facts as the appellant was not examined and the trial court erred by not looking keenly at the medical report that there was a claim of having been defiled but even with the labia minora swollen, the medical officer did not consider that it was forced defilement.

11) The learned trial magistrate erred in law and facts by using the evidence that was not proved and made a harsh sentence.

12) The trial magistrate erred in law and facts when making findings of facts and laws not supported by evidence adduced.

5. The appeal proceeded through filing written submissions. I have perused and considered the submissions of both the appellant and the Director of Public Prosecutions.

6. This being a first appeal, as a first appellate court, I have to start by reminding myself that I am duty bound to evaluate the evidence on record afresh, and come to my own independent conclusions and inferences, see **Okeno –vs- Republic (1972) E.A 32.**

7. I have re-evaluated the evidence on record. The prosecution called five (5) witnesses to prove their case, while the appellant in his defence tendered unsworn defence and called one defence witness.

8. For the prosecution, Pw1 was the alleged victim, while Pw2 DN was her grandmother, and Pw3 NMD was a son of Pw2. Pw4 PC Ndenda was the Investigating Officer and Pw5 Dr. Dorcas Kavuli Musyoka was a medical practitioner, who testified and produced the medical examination report (P3 form) on the victim filled by Kelvin Kiio a Medical Officer, who could not attend court. The appellant on his part denied the offence and said that he on his own accord went to the police station where he was arrested. Dw2 AKM a cousin of the appellant said that they grazed livestock the whole day but later got information that the appellant had been arrested.

9. This being a defilement matter, the prosecution was required to prove each of the three elements of the offence beyond any reasonable doubt. The said three elements are first, the age of the complainant (victim) who should be below 18 years, secondly, penetration of a sexual nature even if partial, and thirdly the identity of the culprit.

10. With regard to the age of the victim, Pw1 the victim in her evidence said that she was 15 years old. I note that the grandmother Pw2 DN did not testify on the age of the complainant, and Pw3 NMD the uncle of the victim also did not tender evidence on the age of the complainant. However, Pw4 PC Ndenda produced a birth certificate in the name of MN issued on 5th June 2018, in which it is entered that the child was born on 28/3/2003.

11. From the evidence on record, I find it very curious that the victim Pw1 and her grandmother Pw2 never referred to a birth certificate but the Investigating Officer Pw4 who testified as the second last witness, suddenly came up with a birth certificate but he didn't disclose the name of the person who handed it over to him. Instead he said *"I took a certificate of birth in the name of MND as the father and the victim is called NM*." The statement gives the impression that he was the person who procured the birth certificate from the Registrar.

12. In addition, neither the father nor the mother of the victim testified in court and no reason was given by the prosecution for that omission. These crucial witnesses would certainly have clarified the age of the victim. Further, the said birth certificate was a recent document issued on 5th June 2018, the same year of the alleged incident, and the person who issued the same from the Registrar's office, was not called to testify as to how he or she came to establish the actual date of birth of the victim.

13. From the above evidence on record, in my view, there are glaring gaps in the prosecution evidence regarding the age of the victim. Thus in my view the prosecution did not prove the age of the victim beyond any reasonable doubt. Thus a crucial element of the offence of defilement was not proved.

14. With regard to penetration, in my view the evidence of the victim Pw1 that they engaged in sexual activities with the appellant in those 5 days in which they lived together, as husband and wife cannot be faulted. That evidence is believable, and in terms of the provisal to section 124 of the Evidence Act (cap.80) does not require corroboration to sustain a conviction. Just like the trial magistrate, therefore, I find that sexual penetration was proved beyond any reasonable doubt.

15. With regard to the culprit, again I find that there was no possibility of mistaken identity. The victim was found at the home of the appellant where she had lived for several days as a "wife". Though the appellant has talked of contradictions in the prosecution evidence, I find none. I find that the prosecution proved beyond any reasonable doubt that the appellant was the culprit.

16. I will only add that, in addition to the fact that the age of the victim Pw1 was not proved by the prosecution, the conduct of the victim at her age in taking a bicycle and riding on her own to the home of the appellant and offering to live there as a "wife" in my view availed to the appellant the defence provided under section 8(5) of the Sexual Offences Act. In my view with the alleged age of the victim of 15 years, any reasonable person would not know that she was below 18 years, unless she or he knew her age background. The victim's conduct herein betrayed her clearly and portrayed her as an adult, and thus give rise to the defence under the section which states as follows –

"8(5) It shall be a defence to a charge under this section if –

a) It is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and

b) The accused reasonably believed that the child was over the age of eighteen years."

17. For the above reasons, I find merits in the appeal. 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 30TH DAY OF NOVEMBER, 2021, IN OPEN COURT AT MAKUENI.

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GEORGE DULU

JUDGE