REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCRA NO.72 OF 2020

DANIEL SHUKURANI KAHINDI.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal from the original judgment of Hon. T.A Sitati in Makindu

Senior Principal Magistrate's Court SPM (S.O) Case No.76 of 2019

pronounced on 18th October, 2019).

JUDGMENT

1. The appellant was charged in the magistrates' 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 offence were that on 4th July 2019 at [Particulars Withheld] village, Kibwezi Sub-county within Kibwezi County intentionally and unlawfully caused his male genital organ namely penis to penetrate the vagina of SM a girl aged 11 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 day and at the same place intentionally and unlawfully caused his male genital organ namely penis to touch the vagina of SM a girl aged 11 years.

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

4. Dissatisfied with the decision of the trial court, the appellant has come to this court on appeal on the following grounds –

> ***1) The trial magistrate erred in law and facts by not considering the whole evidence as required by law.***
>
> ***2) The learned magistrate erred in law and facts in dismissing the defence of the appellant without enough reasons yet the same was comprehensive and casted enough doubts which would have to be overturned by the prosecution.***
>
> ***3) The sentence was excessive.***

5. The appeal was canvassed through written submissions. I have perused and considered the submissions of the appellant and those of the Director of Public Prosecutions.

6. This being a first appellate court, 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. I have reconsidered the evidence on record. In proving their case, the prosecution called 6 witnesses. Pw1 was the victim, who testified that she had gone to buy vegetables at 4:00pm and the appellant who was a farm worker of the seller of the vegetables who was absent, forced her into a room and defiled her. She was 11 years old.

8. Pw2 MKM the mother of Pw1 testified that she sent Pw1 the victim to buy vegetables, only for the victim to come home crying and claiming that she had been defiled. Pw3 Naomi Ndola Mbono was the first person to be informed by Pw1 about the incident, while Pw4 Francis Ndavi Nguki a *"nyumba kumi"* elder assisted in arresting the appellant.

9. Pw5 Dr. Anthony Masila treated the victim and filled the medical report (P3 form) on the victim, and Pw6 Pc Kithome Michael was the Investigating Officer of the case. These were the prosecution witnesses.

10. On his part the appellant tendered sworn defence testimony. In his sworn defence, the appellant denied committing the offence and stated that the case was a fabrication because his employer one Daniel Peter had refused to pay him for his 18 months service.

11. This being a case of defilement the prosecution was required to prove all the elements of the offence of defilement beyond any reasonable doubt. The first element is the age of the victim. In my view, with the evidence of Pw1 and Pw2 MKM as well as the birth certificate produced in evidence as an exhibit, the prosecution proved beyond any reasonable doubt that the victim was 11 years old.

12. The second element to be proved by the prosecution was sexual penetration of the victim, even if partial in nature. The incident occurred on 4th July 2019 after 4:00pm, and the victim Pw1

reported the incident straight away. She was taken to hospital without delay and the medical evidence of Pw5 Dr. Anthony Masila was clear that the hymen of the victim was freshly broken, and that there were other visible swellings noted in the vagina of the victim. Inner wear of the victim also had blood stains. In my view therefore, the prosecution proved beyond any reasonable doubt that penetration of a sexual nature did occur on the victim.

13. Was the appellant the culprit? The evidence connecting the appellant to the offence was that of the victim Pw1. The detailed description about the incident as given by the complainant herein was very clear and believable. Also the incident occurred in broad daylight and there was no possibility of mistaken identity. In addition, the victim Pw1 and all the civilian witnesses who testified that is Pw2 MKM, Pw3 Naomi Mbono and Pw4 Francis Nguki knew the appellant before as a worker where he was alleged to have committed the offence. Though the appellant claimed to have been maliciously implicated by his employer Daniel Peter, that Daniel neither gave evidence, nor does he appear to have any involvement in this case. The home where the appellant was did not belong to Daniel Peter.

14. On the basis of the evidence on record thus, like the trial magistrate, I find that the prosecution proved beyond any reasonable doubt that the appellant was the culprit. The appeal against conviction will thus be disallowed.

15. With regard to sentence, as the victim was 11 years old, the life imprisonment sentence imposed was lawful. I will thus also uphold the sentence as the appellant was an adult, though a young adult.

16. 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 16TH DAY OF DECEMBER 2021, IN OPEN COURT AT MAKUENI.

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GEORGE DULU

JUDGE