REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCRA NO.41 OF 2020

FRANCIS MAUNDU MATELI.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal from the original judgment of Hon. C.A Muchoki in Tawa

Senior Principal Magistrate's Court SPM (S.O) Case No.10 of 2017

pronounced on 5th April, 2018).

JUDGMENT

1. The appellant was charged in the magistrates' court with defilement of a child contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act No. 3 of 2006. The particulars of offence being that on 4th August 2017 at [Particulars Withheld] Village, Kisau Location within Makueni County intentionally and unlawfully caused his penis to penetrate the vagina of NN a child aged 13 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 at the same place intentionally and unlawfully did an indecent act to NN a girl aged 13 years by touching her private parts namely vagina with his penis.

3. He was also charged with a second count of assault causing actual bodily harm contrary to section 251 of the Penal Code, the particulars of which being that on the same date and at the same place unlawfully assaulted NN thereby causing her actual bodily harm by strangling her.

4. He denied all the charges. After a full trial, he was convicted of the main count of defilement as well as for assault causing actual bodily harm. He was sentenced to serve 10 years imprisonment for defilement, and fined Kshs.30,000/= and in default to serve 6 months imprisonment for assault causing actual bodily harm.

5. 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 he was convicted and sentenced to serve 10 years and 6 months when there was no plea of guilty entered.

2. That the identification by Pw1 was not enough to give efficient evidence.

3. That the doctor's report was not given enough consideration in determination of the judgment.

4. That he begs the sentence to begin from the date of arrest.

5. That he prays for leniency, if found guilty to be sentenced to non-custodial sentence or set at liberty.

6. That he is too young to serve all these years in custodial imprisonment

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

7. This being a first appeal, I am required 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.**

8. In proving their case, the prosecution called five (5) witnesses. Pw1NN was the victim whose evidence was that she was a 13 year old girl in class 7 and knew the appellant as a neighbour. It was her evidence that on 4/8/2017 at 8pm, the appellant entered their house with a "leso" strangled her with it, and then took her out of the home to the nippier grass where he defiled and assaulted her and she fainted. She came back to her senses at 5pm and realized that she had been injured and was bleeding. She then went and reported the incident to her mother (Pw2).

9. Pw2 FNN was the mother of the victim, whose evidence was that she went for a party that day leaving the children behind and came back on 5/8/2017 at 11am when the victim aged 13 told her what had happened and she thus reported the incident to the Sub-chief.

10. Pw3 was SM a 9 year old girl and sister of the victim, whose evidence was that at 8pm that night someone came into the house, opened the door put a "leso" on the victim's neck and dragged her out of the house. In the morning the victim (Pw1) told them what had happened.

11. Pw4 was Pius Musyoka a Clinical Officer at Kisau Sub-County hospital who examined the victim and found neck bruises, clothes soaked in blood and perineal tear in the victim's private parts. Pw5 Cpl Mwaka from Mbumbuni Police Station, on the other hand, was the Investigating Officer of the case.

12. When put on his defence, the appellant tendered a sworn defence. He denied committing the offence and said that on 5/8/2017 he was in Nairobi with his father and brother. According to him they went to their rural home for dowry ceremony at 2:30 pm when the Assistant Chief requested him to see him, only to be arrested.

13. Being a case, with a main count of defilement the first element of the offence for the prosecution to prove beyond reasonable doubt was the age of the complainant. On this, the victim Pw1 N.N stated that she was 13 years old. The mother Pw2 FN also stated that the victim was 13 years old. An age assessment report was also done, and the report of the assessment was that the victim was 13 years old. I find that the victim was 13 years old.

14. The second element of the offence was penetration. With regard to this element, the victim Pw1 stated that she was penetrated sexually and she fainted and lost consciousness. The medical evidence by Pw4 Pius Musyoka the Clinical Officer, clearly established injuries in the vagina of the complainant, thus confirming penetration. In my view, the prosecution proved beyond any reasonable doubt that penetration of a sexual nature did occur on the victim.

15. The last element on the defilement charge was the identity of the culprit. The evidence of the prosecution witnesses Pw1 the complainant and Pw3 her young sister, is that the incident occurred at night around 8pm. There is no evidence of light except that the victim Pw1 stated that the culprit used a torch from a mobile phone. Pw1 however, did not say that she saw his face or identified him physically. Pw3 SM who was also in the same house, did not say that she identified the culprit physically.

16. The victim Pw1 was however, recalled by the appellant, and on being cross examined further, stated that she identified the appellant by voice. There is no doubt from the evidence on record that the appellant was a neighbour. The victim was also consistent in stating all through that it was the appellant that was the culprit. Voice identification can be sufficiently reliable to prove a case. See **Karani –vs- Republic (1985) KLR 290**. In the present case the victim Pw1 stated that she knew the voice of the appellant as a neighbour for long. Though the exact words used by the appellant were not given, the victim in my view was truthful, and is covered by the provisal to section 124 of the Evidence Act (cap.80).

17. The above aside, the defence of the appellant, gives more credence in my view to the victim's version, in that though the appellant said in his defence that he was in Nairobi with his father that day, his whole story appears to be an afterthought and false. One can ask if he was in Nairobi why did he not mention that to anybody or even cross-examined witnesses on that until the time of his defence. He also did not say whose dowry ceremony he was going to attend on coming from Nairobi on 5/8/2017. In my view, his defence was a sham and lies, thus it strengthens the evidence of Pw1 the victim. I find that the prosecution proved that the appellant was the culprit as he was identified positively by voice by Pw1.

18. Being the culprit of the defilement, charge herein, the appellant was also the culprit of the assault charge, as the two offences were committed by the same culprit and on the same victim. I will thus dismiss the appeal on conviction.

19. With regard to sentence, the State gave a notice of enhancement of sentence. I will however not enhance the sentence as I see no reason not do so in the circumstances of this case, though this court has powers to do so.

20. For the above reasons, I dismiss the appeal of the appellant and uphold both the conviction and the sentences 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