REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIMINAL APPEAL NO. 25 OF 2019

SHADRACK KHAOYA MAKOKHA.....APPELLANT

=VRS=

THE REPUBLIC.....RESPONDENT

(Being an appeal against the Conviction of Hon. Kyanya – RM

Thika in the original Thika Chief Magistrate's Court Sexual Offence No. 39 of 2018)

JUDGEMENT

The appellant was charged with **Defilement contrary to Section 8 (1) as read with Section 8 (3) of the Sexual Offences Act.**

The particulars of the charge are that on 13th May 2018 in Thika West Sub-county within Kiambu County the appellant intentionally and unlawfully caused his penis to penetrate the vagina of AS a child aged 15 years.

The appellant faced an alternative charge of committing an indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act.

In the alternative charge it was alleged that on 13th May 2018 in Thika West Sub-county within Kiambu County the appellant intentionally and unlawfully touched the buttocks, breasts and vagina of AS a child aged 15 years with his fingers.

After hearing the testimonies of four prosecution witnesses taken together with the unsworn statement of the appellant the trial Magistrate came to the conclusion that the charge of defilement had been proved beyond reasonable doubt, convicted the appellant and sentenced him to imprisonment for twenty (20) years.

This appeal is against the conviction and sentence. The appeal is premised on grounds that: -

> **"1. THAT, the pundit trial magistrate erred in law and facts when he convicted me in the present case yet failed to find the age of the complainant was not proved hence sentence unfounded.**
>
> **2. THAT, the learned trial magistrate erred in law and facts when he failed to conduct a voire dire examination of the Pw-3 before taking and accepting her evidence.**
>
> **3. THAT, the learned trial magistrate erred in law and facts when he convicted me in the present case yet failed to find that the evidence of Pw-3 was received through torture and intimidation.**
>
> **4. THAT, the learned trial magistrate erred in law and facts when he convicted me in the present case by shifting the burden of prove wholly against me and not the prosecution shoulders.**
>
> **5. THAT, the learned trial magistrate erred in law and facts when he rejected my plausible and strong defence."**

The appellant canvassed the appeal by way of written submissions to which Counsel for the prosecution responded orally.

As an appeal is in the nature of a retrial I have analysed and re-evaluated the evidence in the court below so as to arrive at my own independent conclusion bearing in mind that I did not see or hear the witnesses who testified **(see Okeno V Republic [1972] EA 32).** I have also considered the submission by both sides fully and I am satisfied that the ingredients of defilement were proved against the appellant beyond reasonable doubt. The said ingredients are **age of the victim, penetration** and **identification of the perpetrator.**

On **the age of the complainant**, it was her evidence that she was 15 years old. Her uncle Pw4 testified that she was 15 years old and in class 7. He explained that they could not produce a birth certificate because the complainant's mother had taken it when she deserted the complainant's father. The doctor and other medics who examined the complainant also determined her age as 15 years and the trial Magistrate also agreed her apparent age was 15 years. It is trite that documentary evidence is not the only means to prove age and the above evidence would also suffice. In **Musyoki Mwakazi V Republic [2014] eKLR** the Court of Appeal stated: -

> ***"…… apart from medical evidence the age of the complainant may also be proved by birth certificate, the victim's parents or guardian and observation or common sense……..."***

I am satisfied therefore that the age of the complainant was proved beyond reasonable doubt.

On **penetration** the complainant narrated how she met the appellant on a date in May 2018 and he invited her to his house to cook for him. Initially she rejected his advances but he pursued her and she ended up going to his house. She testified that she cooked ugali for him and then had sex with him. She vividly described how he went about it not just once but on different days after that until her uncle (Pw4) realized that she was not going to school and confronted her and when she finally owned up to having a sexual relationship with the appellant Pw4 and his siblings apprehended him. Her evidence was consistent, credible, reliable and trustworthy and it establishes penetration beyond reasonable doubt. This court believed her.

On **identification of the perpetrator** the complainant testified that she met the appellant on several occasions and that they were in a **"relationship"** since March 2018. She used to go to his house and after doing some chores for him they would have sex. She testified, and this was corroborated by her uncle Pw4, that at some point she stayed with the appellant for three weeks. It is my finding that the two having encountered each other on several occasions there was no possibility of mistaken identity. I find and hold therefore that the complainant positively identified the appellant as the person who defiled her. The complainant was very consistent in her evidence and for that reason I believed her. Moreover, the evidence of her uncle Pw4 offered corroboration to hers much as it did not require corroboration.

The appellant's defence was that he was framed because he could not pay money which the complainant's family needed to bail out her father who was in custody. He also suggested that the police officers tried to extort him for refusing to bribe them. These were however mere allegations made in an unsworn statement which could not be tested through cross examination and weighed against the very consistent, cogent and credible testimonies of the prosecution witnesses, they cannot stand.

The appellant also contended that his trial was irregular as a voire dire was not conducted before receiving the evidence of the complainant. My finding is that the appellant being 15 years it was not necessary for the court to conduct a voire dire. Contrary to the submission of the appellant, the original record of the proceedings show the trial magistrate merely referred to the complainant as a female but not as an adult. The allegation by the appellant that the trial was irregular and poorly conducted is in my view devoid of merit.

Nothing much turns on Pw4 beating the complainant when she refused to own up on what she had been doing with the complainant. Whether she was beaten or not the fact remains that being a child she was incapable of consenting to sex. Moreover, her testimony does not belie that of a witness who was tortured or intimidated to lie. In court she gave evidence freely and voluntarily and that is what is crucial. I find no merit in the appeal against conviction and as the appeal did not extend to the sentence either in the grounds or submissions and as the sentence is lawful, I shall not disturb it. The appeal is accordingly dismissed in its entirety.

Signed and dated this 23rd day of September 2019.

E. N. MAINA

JUDGE

Dated and delivered in Kiambu this 26th day of September 2019.

C. W. MEOLI

JUDGE