REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 3 OF 2015

JAMES MAKOMBE MUKITI…….……...……...APPELLANT

VERSUS

REPUBLIC….....RESPONDENT

(From the conviction and sentence in Kyuso Principal Magistrate's Criminal Case No. 130 of 2014 – B. M. Mararo PM)

JUDGMENT

The appellant was charged in the magistrate's court at Kyuso with defilement contrary to section 8 (1) as read with (3) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on 29th March 2014 at [particulars withheld] in Mumoni District within Kitui County intentionally caused his penis to penetrate the vagina of AMM a child aged 14 years. 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 the offence were that on the said day and place intentionally touched the vagina of AMM a child aged 14 years with his penis.

He denied both offences. After a full trial, he was convicted of the main count of defilement and sentenced to serve 25 years imprisonment.

He was aggrieved with the decision of the trial court and has come to this court on appeal against both conviction and sentence. He also made oral submissions at the hearing of the appeal. He denied committing the offence and stated that while making a phone call on 31st of March 2014, a woman came at his place of work which was a primary school and alleged that she had sent her daughter to the mpesa shop and that the daughter said later that he held her hand and took her to the kitchen of the compassion primary school. He disagreed with the court's finding that he had defiled the girl.

Learned Prosecuting Counsel Mr. Okemwa opposed the appeal and stated that the offence was proved. Age was proved. Penetration was proved by the medical evidence. It was also proved that the appellant was the culprit as he was identified by the complainant Pw1 who knew him before.

This being a first appeal, I am required to re-evaluate all the evidence on record and come to my own conclusions and inferences, but I have to bear in mind that I did not have the opportunity to see the witnesses testify in court to determine their demeanor and give due allowance to that fact. See the case of ***Okeno Vs. Republic [1972] EA 32.***

I have re-evaluated the evidence on record for the prosecution. I have considered the defence of the appellant. I have also perused the judgment of the trial court.

For an offence of defilement three elements have to be proved. Firstly whether the victim is below the age of 18. Secondly whether penetration did occur. Thirdly whether the accused is the culprit.

With regard to age or proof of age I am of the view that the same was proved that the complainant was below the age of 18 years.

With regard to penetration and whether the appellant was the culprit, the evidence on record is that of a minor child Pw1 who was the complainant. Such evidence is admissible and in terms of section 124 of the Evidence Act, it does not necessarily require corroboration. Section 124 of the Evidence Act Cap 80 provides as follows

> "***124. Notwithstanding the provisions of section 19 of the Oaths and Statutory Declaration Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him. Provided that where in a criminal case involving sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth***."

It follows from the above provisions of the law that in sexual offences where the victim is a minor, there is no requirement that the evidence of that victim be corroborated provided that the court is convinced that the victim is telling the truth and records the reasons for so believing.

In the present matter, the complainant Pw1 was not willing to disclose where she slept that night. She was sent by her mother to the mpesa shop but she did not come back. She did not herself complain to her mother that somebody had sexual intercourse with her. Her mother Pw2 asked where she had spent the night, and instead of answering that question she went away to her grandmother's place. She also did not disclose to her grandmother that she had been defiled.

It appears that it was under a lot of pressure that she mentioned the compassion school watchman who was the appellant and said he was the culprit. Was her evidence thus believable as being the truth? In my view it was not and the learned thus erred in relying on such evidence to convict the appellant.

The evidence of her mother and grandmother did not corroborate the evidence of Pw1, as these two people actually coerced Pw1 to say what she said. Their evidence thus does not qualify to be corroborative evidence.

The evidence of the Clinical Officer did not corroborate the evidence of the complainant Pw1. It was said that the appellant was medically examined and noted to have pus cells. The complainant was also medically examined and found to have pus cells. In my view the presence of pus cells on the complainant and appellant is no indication that the two had sexual intercourse. Pus cells are merely dead blood cells which have to be discharged from the body. They can be caused by various factors which have nothing to do with sexual intercourse. They can be found in many people without even the presence of any infection.

On the totality of the evidence on record, I find that the prosecution did not prove its case against the appellant beyond reasonable doubt. The conviction can thus not be sustained. It follows also that the sentence imposed has also to be set aside.

Consequently, I allow the appeal, quash the conviction and set aside the sentence. I order that the appellant be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Garissa this 30th day of August 2016

GEORGE DULU

JUDGE