REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCRA NO.65 OF 2020

BENJAMIN MUTHAMA KIMILU.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. A. Ndungu

in Makindu Senior Principal Magistrate's Court PMCR (S.O) Case No.25 of 2017

pronounced on 9th October, 2019).

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. The particulars of the charge were that on 2nd May 2017 at [Particulars Withheld] Village within Thange Sub-location in Kibwezi Sub-county within Makueni County intentionally and unlawfully caused his male organ namely penis to penetrate the vagina of GMW (*name withheld*) a child aged 14 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 the offence were that on the same date and at the same place intentionally and unlawfully touched the vagina of GMW aged 14 years with his penis.

3. He denied both charges. After a full trial, he was convicted of attempted defilement contrary to section 9(1) as read with section 9(2) of the Sexual Offences Act, and sentenced to 8 years imprisonment.

4. Aggrieved by 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 while there was no plea of guilty.

2) That he asks that his sentence should commence from the date of arrest per section 333(2) of the Criminal Procedure Code.

3) That he is a first offender and needs leniency.

4) That he is too young to spend time behind bars.

5) That the evidence adduced before the trial court was not enough proof to base a conviction.

6) That he prays for leniency the sentence be reduced to the time served or substituted with non-custodial sentence.

7) That he is ready to comply with any opinion that court may deem fit.

5. The appeal proceeded through filing of written submissions. In this regard, I have perused and considered the written submissions filed by both the appellant and the Director of Public Prosecutions.

6. This being a first appeal, I start by reminding myself that I am duty bound to evaluate all the evidence on record afresh and come to my

own independent conclusions and inferences. In doing so, I have to bear in mind that I did not have the opportunity to see witness testify to determine their demeanor. See **Okeno –vs-Republic (1972) E.A 32.**

7. In proving their case, the prosecution called 5 witnesses. Pw1 was the alleged victim who stated that as she was going to church at 10 am, the appellant caught her arm and pulled her to his room where he removed her skirt and inner wear laid her down on the floor and inserted his penis into her. According to her, shortly, a young man came, knocked the door, asked if she was in there but the appellant denied her presence, and also did not open the door.

8. Pw2 DW the mother of the alleged victim, testified that she was told about the incident by Kimeu Musyoki and on enquiring from the victim she confirmed the incident, thus a report was made to the village elder and the police. She produced a child immunization medical card showing the age of the victim.

9. Pw3 was KAM, a 12 years old boy whose evidence was that he was told by Munguti that the victim had been taken to a house by the appellant. He then proceeded to the house and called the victim four times but she did not answer. He then called the appellant (Kadave) four times, and appellant responded by asking him what he wanted and on informing him that he was looking for the victim, the appellant denied that the victim was in the house. This witness stated further that as he walked home, he met the victim on the way crying, and on asking what Kadave had done to her, she did not tell him anything. He however, proceeded and informed the victim's mother about the incident.

10. Pw4 was Dr. Ahthony Masila of Kibwezi Sub—County hospital who filled the medical examination (P3) form on the victim on 29/5/2017. He noted that the hymen was broken but not freshly, and there was no sign of trauma in the genitalia of the victim.

11. Pw5 was PC Collins Aoko who took over investigations from PC Luchera who was on transfer. His testimony was that the Investigating Officer conducted the investigations herein and charged the appellant in court.

12. When put on his defence, the appellant tendered unsworn defence statement. He denied committing the offence, and stated that he had gone to Usalama to visit his grandmother, spent the night and in the morning, two people approached him at his work place and told him to accompany them which he did, only to be charged with an offence he did not know about.

13. I note that the appellant was charged with a main count of defilement and an alternative count of indecent act. He was however convicted of a minor cognate offence to the main charge which was an attempt. In my view, though section 179 of the Criminal Procedure Code (cap. 75) allows a trial court to convict for another minor cognate offence, where a person has been tried of a main charge and an alternative charge, the practice of convicting him or her for a minor cognate offence which was not one of the charges preferred should be avoided. In my view, such a practice will easily cause prejudice to the accused person, as his focus in his line of defence would only be directed to the main charge and the alternative charge preferred. Thus in such case, being convicted for a minor offence he did not have the opportunity to defend himself to, in my view is prejudicial.

14. I now turn to the elements of the offence on which the appellant was convicted and sentenced. With the evidence on record, Pw2 DW testified on the age of the victim. A child immunization card was relied upon. It was not disputed. Pw2 was the mother of the victim. I find that the prosecution proved beyond any reasonable doubt that the victim was 14 years old at the time of the incident.

15. What constitutes an attempt to commit a crime is defined under section 388(1) of the Penal Code. Was the attempt to defile proved? In my view the attempt to defile the alleged victim herein was not proved the prosecution beyond reasonable doubt. The first reason was that Pw3 who reported the alleged incident to the mother of the complainant Pw2 did not see the victim anywhere near the appellant's house. The victim also did not respond when she was called by Pw3 at the appellant's house nor did the victim tell Pw3 anything about the incident when Pw3 asked her about the incident when they met on the road. Thus the evidence of Pw3 connecting the victim to a sexual encounter, and her presence in the appellant's house that day was hearsay evidence as Munguti who informed Pw3 that the victim was led into that house did not testify in court.

16. The second reason why the attempt to defile the alleged victim was not proved was that the victim talked of sexual intercourse having actually taken place, while the medical evidence in the report shows no sign of sexual activity. Thus the evidence of the victim, not being consistent with the medical evidence, is thus not believable, and cannot thus be saved by the provisal to section 124 of the Evidence Act (cap.80). In my view also, the fact that a girl is led into a room alone, does not prove either sexual intercourse or an attempted sexual intercourse taking place.

17. Thus I find that the prosecution failed to prove an act or acts constituting attempt to defile beyond reasonable doubt.

18. With regard to the appellant being the culprit, the only evidence on record was that of the victim Pw1, as the evidence of Pw3 on the issue is hearsay evidence from Munguti who did not testify.

19. Since I have already found above that the evidence of Pw1 was not believable evidence and cannot be saved by the provisal to section 124 of the Evidence Act (cap 80), I am bound to give the benefit of doubt to the appellant. I find that the prosecution did not prove beyond any reasonable doubt that the appellant was the culprit, if indeed there was a culprit. Thus both the conviction and consequent sentence of the trial court herein cannot be sustained.

20. For the above reasons, therefore, I allow the appeal, quash the conviction and set aside the sentence imposed by the trial court. I order that the appellant be set at liberty unless otherwise lawfully held.

DELIVERED, SIGNED & DATED THIS 8TH DAY OF FEBRUARY, 2022, IN OPEN COURT AT MAKUENI.

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GEORGE DULU

JUDGE