



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCRA NO.16 OF 2020

BERNARD KING'OO MOONIAPPELLANT

-VERSUS-

REPUBLICRESPONDENT

(Being an appeal from the original conviction and sentence of Hon. E.K Too in Makindu Senior Principal

Magistrate's Court PMCR (S.O) Case No.53 of 2019 pronounced on 6th December, 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 the offence were that on diverse dates between May 2018 and 24th April 2019 at [Particulars Withheld] Village, Nguumo Location Makindu Sub-County intentionally and unlawfully caused his penis to penetrate the vagina of MN (*name withheld*) a child aged 8 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 diverse dates and at the same place intentionally touched the vagina of MN (*name withheld*) a child aged 8 years with his penis.
3. He denied both charges. After a full trial, he was convicted of the main count of defilement and sentenced to serve 10 years imprisonment.
4. Dissatisfied with the conviction and sentence of the trial court, the appellant has come to this court on appeal on the following grounds –
 - 1) ***The trial court failed in both law and fact by admitting the evidence of Pw2, Pw3 and Pw4 who are relatives.***
 - 2) ***The trial court failed in both law and fact by failing to make sure that the prosecution side supplied the accused person with all the statements, P3 form and PRC.***
 - 3) ***The trial court failed to accord his sworn defence adequate consideration.***
5. The appeal was canvassed through written submissions. I have perused and considered the submissions filed by the appellant and those filed by the Director of Public Prosecutions.
6. This being a first appeal, 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. In proving their case, the prosecution called five (5) witnesses. The appellant on his part tendered sworn defence testimony and called no other witness.
8. This being a case of defilement, the first element of the offence which was to be proved by the prosecution beyond any reasonable doubt, was the age of the victim, who was to be below 18 years at the time of the alleged incident.
9. With regard to age, the victim who testified as Pw2 stated in evidence that she was 8 years old and in standard 3. Her grandmother Pw4 JMM on her part, stated that the victim was born in 2011. A medical age assessment report was also relied upon. It was produced and dated 26/4/2019, in which the victim's age was entered as 8 years and was signed by Dr. Macharia a Dental Officer. The age assessment report was not controverted, thus with the evidence on record, I find and hold that the prosecution proved beyond any reasonable doubt that the victim

was aged 8 years at the time of the alleged incident.

10. The second element of the offence that the prosecution was required to prove beyond reasonable doubt, was penetration even if partial. In this regard, Pw3 JN saw the appellant and the victim in bed on that 24/4/2019 at 7pm. She entered the house and found both naked in the lower parts of their bodies, and the appellant lay on top of the victim. The victim Pw2 on her part, testified that the appellant penetrated her sexually that day. In addition, the medical evidence through the reports produced by Pw1 Dr. Nicholas Ndombi confirmed that the hymen of the victim was broken. In my view therefore, sexual penetration was proved by the prosecution beyond any reasonable doubt.

11. The last element of the offence is the identity of the culprit. In this regard, the victim Pw2 testified that the culprit was the appellant. Pw3 also met the victim and the appellant in bed. All the three knew one another well. Pw3 in particular, knew the appellant well and testified that she caught the appellant in bed red handed with the victim. The appellant in his defence also stated that Pw3 entered the house without knocking and found them therein. It is thus not controverted that the appellant and the victim were found in the house together that night.

12. In my view, from the evidence on record, the prosecution proved without any shadow of doubt that the appellant was the culprit.

13. I note that the appellant has raised technical grounds of appeal. Though he complains that he was not supplied with prosecution witness statements and copy of P3 form, the trial court record does not show that he asked for these documents, nor did he complain about them. Again, though he complains that the court wrongly admitted the evidence of Pw2, Pw3 and Pw4 who were relatives, the law does not prohibit the admission of evidence of relatives.

14. Finally, though the trial court rendered a fairly short judgment, in my view, the trial court took into account the defence of the appellant and disbelieved the same. Thus the appellant is not justified in stating that this cogent defence was not considered.

15. Lastly, I wish to state that the appellant was lucky to have got away with a lenient sentence, and I will say no more on that.

16. Consequently, and for the above reasons, I dismiss the appeal and uphold both the conviction and the sentence of the trial court.

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

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GEORGE DULU

JUDGE