



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCRA NO. 45 OF 2020

HENRY NDAMBUKI MBATHA.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(From the original conviction and sentence of Hon. J. O

Magori (SRM) in Makindu Senior Principal Magistrate's

Court SRMCRC No. 1237 of 2015 delivered on 12th February, 2020).

JUDGMENT

1. The Appellant was charged in the magistrates' court at Makindu with defilement contrary to section 8(1) as read with section 8(4) of the Sexual Offences Act No. 3 of 2006. The particulars of offence were that on 4th August 2018 at [Particulars Withheld] village Nguumo location in Makueni county intentionally and unlawfully caused his male genital organ namely penis to penetrate the female genital organ namely vagina of PKP (*name withheld*) a child aged 17 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 offence were that on the same day and place intentionally and unlawfully touched the vagina of PKP a child aged 17 years.

3. He denied both charges. After a full trial he was convicted of the main count of defilement and sentenced to 15 years imprisonment.

4. Dissatisfied with the decision of the trial court, the Appellant has come to this court on appeal through counsel Isika and Associates on the following grounds –

- 1) The learned magistrate erred in both law and fact in convicting the Appellant on uncorroborated evidence of the Complainant.***
- 2) The learned magistrate erred in both law and fact in failing to take into account that the Complainant's evidence was procured under duress.***
- 3) The learned magistrate erred in both law and fact when he believed the Complainant's untruthful evidence.***
- 4) The learned magistrate erred in both law and fact in failing to consider the current prevailing judicial decisions and precedents attendant to the nature of the offence and the circumstances under which it was committed.***
- 5) The learned magistrate erred in both law and fact in convicting the Appellant on an offence whose essential elements were not proved to the required standard.***
- 6) The learned magistrate erred in law and fact by failing to consider inconsistencies in the prosecution evidence.***
- 7) The learned magistrate erred in both law and fact in convicting the Appellant on crafted charges aimed at settling scores between the Appellant and the Complainant's family.***
- 8) The learned magistrate erred in both law and fact by failing to consider the Appellant's defence.***
- 9) The sentence meted out against the Appellant was harsh and excessive.***

5. The appeal proceeded through filing of written submissions. Both the Appellant's counsel and the Director of Public Prosecutions filed written submissions which I have perused and considered. A number of legal authorities were cited in the written submissions.
6. In proving their case, the Prosecution called 6 witnesses. Pw1 was the Complainant who stated that she was a secondary school student in form four (4) and that on 03/08/2015 later changed to 04/08/2015, Mbatha her teacher came to their home and asked whether she had seen his chicken. They proceeded to the aviary and her mother (Pw2) confirmed and showed him the chicken. This was around 7 pm, and at 8 pm the Appellant came back, knocked the gate and when Pw1 opened he asked Pw1 whether she had seen his chicken. As the two were going to the aviary, the Appellant grabbed her by the collar of her blouse and pulled her out of the compound.
7. According to Pw1, the Appellant carried her in his hands to his house store, undressed and wrested her to the ground and raped her on a mat for 45 minutes. She then left her biker and underpants in the store, and on arrival back home on persuasion by the mother (Pw2), she disclosed the incident to her mother Pw2 and they proceeded to the Appellant's home, then to the Makindu Hospital and also to the Police.
8. Pw2 was FKP the mother of Pw1, whose evidence was that on 4/8/2015 at 8pm, Pw1 and another young boy Pw3 (M) were studying at home. Pw2 went to take a birth and on return, the Complainant was not present. As Pw2 warmed herself near charcoal cooker, she heard the sound of someone running and the Complainant calling "mum mum". The Complainant then said she had been defiled by a teacher, whose name she did not know. Pw2 however stated that she knew it was Ndambuki – the Appellant and in the company of a neighbour (Kalili) Pw4 and Pw1 they proceeded to the house of the Appellant, and Pw2 demanded from him Kshs.1,000/= to take the Complainant to hospital, but later changed her mind and did not take the Kshs.1,000/= from the Appellant.
9. Pw6 was Dr. Nicholas Mbugua who produced a medical examination report (P3 form), on behalf of Dr. Kariuki who was no longer working at Makindu hospital. According to the treatment notes and the P3 form entries, the hymen of the Complainant was freshly broken, and there were noticeable lacerations on her labia minora.
10. When put on his defence, the Appellant tendered a sworn defence and called one defence witness Dw2 Teresia Nduko Kyania his wife. He stated that he was a neighbour of the Complainant's family a distance of about 150 meters away. He stated that on 3/8/2015 and 4/8/2015 he went to teach at [Particulars withheld] Primary School, which was his teaching station. He denied going to look for chicken from the Complainant's mother's home. He said that he had bought land from same vendor with Pw4 Kalili, but Kalili later created a dispute on the land by blocking the common path.
11. This being a first appeal, I have to start by reminding myself that I am required to re-evaluate all the evidence on record and come to my own independent conclusions and inferences – see **Okeno –vs- Republic (1972) E.A 32**.
12. This was a defilement case. That being so, the prosecution was bound to prove the age of the Complainant, penetration even if partial, and lastly if the accused was the culprit.
13. Was the age of the Complainant proved by the prosecution? Pw1 the Complainant, did not say how old she was nor did she state her date or year of birth. She merely said that she was in Form Four (4) at [Particulars Withheld] Secondary School in 2015. She did not also refer to any document on her age. Pw2 FKP her mother, said she did not know when Complainant was born. She said also that she did not know how to read. She was not referred to any document, nor did she say that there existed a birth notification or birth certificate for the Complainant.
14. A birth certificate of the Complainant was however produced by Pw5 I.P Faith Chesire the succeeding Investigating Officer, after it was initially objected to by the defence but she was later recalled. I note that the birth certificate is in the name of PK (Pw1) and was issued on 12th January 2011. However, it is quite telling that the Complainant who claimed to be a Form Four (4) student never mentioned the existence of a birth certificate, nor was she told to identify the document as her birth certificate. Secondly though the Investigating Officer Pw5 said that the said birth certificate was availed to her by the Complainant, she did not say when it was so availed and why the Complainant was not called to identify the document and inform the court when and how she delivered the birth certificate to the Police.
15. The rule against hearsay evidence applies to both oral and documentary evidence. In my view, the magistrate was wrong in admitting the birth certificate and relying on the same in determining the age of the Complainant Pw1. It was not identified or supported by the Complainant to lay a foundation for it being evidence to be relied upon. I find that the procedure adopted by the Prosecution in producing the birth certificate rendered the birth certificate produced as hearsay evidence and thus worthless for proof of the Complainant's age. I find that the Prosecution did not prove the age of the Complainant Pw1 beyond reasonable doubt to be below 18 years.
16. That the Complainant had her hymen missing, the medical report says it all, and I have no reason to doubt the medical findings. It was proved that penetration of the vagina of the **Complainant had occurred. The Prosecution proved penetration.**
17. Was the Appellant the culprit? In my view it was not proved beyond reasonable doubt that the Appellant defiled the Complainant. This is firstly, because the evidence on record is that it was Pw2 the mother of the Complainant who mentioned the name Ndambuki (*the Appellant*) not the Complainant. From the version of her evidence, the Complainant (Pw1) knew the Appellant very well as her teacher and he came twice to their home that day 04/08/2015. So in my view it should have been easy for Pw1 to mention his name or lead the mother Pw2 to his house. As it happened it was the mother Pw2 who mentioned the Appellant's name and even led to his house. Thus the Appellant was not identified by the Complainant Pw1 as the culprit.
18. Even if the Complainant had mentioned the Appellant's name in the present case, in my view her evidence would not be protected by the *provisal* to section 124 of the Evidence Act (*Cap 80*) because of contradictions between her evidence and that of the mother Pw2. According to Pw1 – the Complainant what puts the Appellant at the scene and gives him the opportunity to defile her, are the two visits of the Appellant to their home to look for his chicken. The mother (Pw2) whom the Complainant (Pw1) stated that shown the Appellant the chicken on the other hand does not mention about the Appellant coming to that home that day. Pw2 had a totally different story that excluded the Appellant from coming to look for chicken that day.

19. The Complainant (Pw1) cannot thus be said to be a believable witness, whose evidence should have been believed by the trial court.

20. For the above reasons, I find that the conviction against the Appellant cannot be sustained.

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

Delivered, signed & dated this 11th day of March, 2021, in open court at Makueni.

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GEORGE DULU

JUDGE