REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCRA NO. 154 OF 2019

JOSEPH MUTUA NZIVI.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence of Hon. T.A. Sitati (PM) in the

Principal Magistrate's court at Makindu, Criminal (S.O) case No.87 of 2019,

delivered on 18th October 2019).

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 the offence were that on diverse dates between 1st February 2019 and 31st March 2019 at [particulars withheld] village, Kibwezi Sub-county in Makueni county intentionally and unlawfully caused his male genital organ namely penis to penetrate the vagina of CM (*name withheld*), a girl aged 16 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 between the same dates and at the same place intentionally and unlawfully caused his male organ namely penis to touch the vagina of CM (*name withheld*), a girl child aged 16 years.

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

4. Dissatisfied with the trial court's conviction and sentence, the Appellant has come to this court on appeal through counsel Edith A. Onyango on the following grounds of appeal –

> ***1) The trial magistrate misdirected himself when evaluating the evidence on record occasioning a miscarriage of justice.***
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> ***2) The trial magistrate erred in fact and law by failing to note that the prosecution had not proved its case beyond reasonable doubt.***
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> ***3) The trial magistrate erred by sentencing the Appellant without considering the circumstances surrounding the case and relying on circumstantial evidence which was never proved beyond reasonable doubt.***
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> ***4) The trial magistrate erred in fact and law by convicting on insufficient evidence.***
>
> ***5) The trial magistrate erred in fact and law by failing to offer the Appellant adequate time to prepare for his defence and call for evidence, having denied the Appellant's request for a DNA test on the Complainant who allegedly was 5 months pregnant.***
>
> ***6) The trial magistrate erred in both law and fact by failing to observe properly that the prosecution did not affirmatively prove its case against the Appellant beyond all reasonable doubt.***

5. The appeal proceeded by way of filing written submissions. Both the Appellant's counsel and the Director of Public Prosecutions filed their written submissions which I have perused and considered.

6. This being a first appeal, I will start by stating that I am required 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. I have re-evaluated the evidence on record. In order to prove their case, the prosecution called six (6) witnesses. The Appellant on his part when given a chance to tender his defence chose to keep quiet, and though it is not on record, the trial court in the judgment acknowledged that he had asked for a DNA examination of the unborn child to be conducted which was not done.

8. The Complainant testified as Pw1 and stated that, the Appellant who was great friend of her grandfather, enticed her with Kshs.50/= several times while going to school in the mornings and defiled her over a period of three months in 2019. She conceived and the mother Pw3 EMM was called from her work place by the Complainant's grandmother Pw2 JM, and on enquiry the Complainant disclosed the sexual relationship with the Appellant. Both witnesses, Pw2 and Pw3 explained their relationship with the Complainant and stated that indeed they interrogated the Complainant regarding her pregnancy leading to the disclosure. Pw3 added that the Complainant was born on 01/01/2003 and relied on a birth certificate. The Complainant was also in standard 8 in primary school.

9. The evidence of the prosecution was that the matter was reported to the police and the Complainant attended medical examination and was confirmed to be 22 months pregnant in August 2019 and P3 form signed by Dr. Lucy Ongele was produced by Pw4 Dr. Anthony Masila in which pregnancy of the Complainant was confirmed. The Appellant was thus arrested.

10. As stated above in this judgment, the Appellant when put on his defence chose to keep quiet.

11. This is a case of defilement and each element of the offence has to be proved by the prosecution beyond any reasonable doubt. I am aware that the Appellant's counsel has raised several grounds of appeal.

12. The first element to be proved by the prosecution was the age of the Complainant. On the age, the mother Pw3 EM said that the Complainant was born on 1/1/2003. The birth certificate relied upon No.[…] also shows that she was born on 1/1/2003. In my view, the prosecution proved beyond any reasonable doubt that the Complainant was 16 years old when the alleged offence occurred in early 2019.

13. The second element of the offence was penetration. Such sexual penetration is sufficient even if it is only partial penetration. From the medical evidence on record, the hymen of the Complainant was missing. She was also pregnant as per the medical (P3) report produced by Pw4 Dr. A Masila. In my view penetration of the Complainant sexually by a male person was proved beyond any reasonable doubt.

14. The third element of the offence of defilement to be proved by the prosecution was whether such sexual penetration was by the Appellant. In this regard, the evidence of penetration by the Appellant is that of the Complainant alone. The Appellant did not tender any defence to the prosecution evidence, but asked for DNA examination of the Complainant which was not done. Counsel for the Appellant has taken the failure to order DNA test by the court, claiming that the trial court denied the Appellant a chance to call evidence.

15. In my view, DNA examination of the Complainant would not serve any purpose as the child was still unborn when the Prosecution case was closed. There is also nothing on record to show that the Appellant asked for an adjournment to wait for the birth of the child when the case closed in October. In any event in my view, the fact that the Appellant was not the biological father of the unborn child could still not exonerate him from the offence if indeed, he had sexual intercourse with the Complainant because the prosecution case was not that he was the only person capable of having sexual intercourse with the Complainant.

16. The issue whether the Prosecution proved on the evidence on record that the Appellant had sexual intercourse with the Complainant herein is dependent on the evidence of a single witness, the Complainant. Such evidence of a single witness victim of a sexual offence is governed by the *proviso* to section 124 of the Evidence Act, and does not require corroboration if believable and is believed by the trial court on reasons to be stated. The provisal states as follows –

> ***124 ……***
>
> ***Provided that where in a criminal case involving a 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.***

17. Was the evidence of the Complainant Pw1 (*the victim*) believable? In my view it was. She had no reason to implicate the Appellant as there was no existing grudge between them or their families. Secondly, she had no possible material benefit to derive from implicating this old man who was a friend of her grandfather. In my view therefore the magistrate was correct in believing the Complainant. I find that the Appellant had sexual intercourse with the Complainant and will thus uphold the conviction.

18. With regard to sentence, the magistrate handed down the minimum sentence provided under the Sexual Offences Act. The sentence is not unlawful. However, considering the age of the Appellant at 69 years, though the offence is serious, in line with the developing jurisprudence on sentencing following the Supreme Court decision in **Muruatetu & Others –vs- R** (2016) eKLR, I am of the view that the sentence imposed was harsh and excessive. I will thus vary the sentence imposed and reduce it to seven (7) years imprisonment from the date the Appellant was sentenced by the trial court.

19. To conclude, I dismiss the appeal on conviction. I however, set aside the sentence imposed by the trial court, and instead order that the Appellant will serve seven (7) years imprisonment from the date he was sentenced by the trial court.

DATED AND DELIVERED AND SIGNED THIS 10TH DAY OF MARCH 2021, IN OPEN COURT AT MAKUENI.

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GEORGE DULU

GEORGE.