REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCRA NO. 14 OF 2020

ABEDNEGO MUTISYA MULI.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(From the original Judgment of Hon. A. Ndungu (SRM) in Makindu

Senior Principal Magistrate's Court SPMCRC No. 763 of 2016

issued on 26th February , 2019).

JUDGMENT

1. The Appellant was charged in the magistrates' court with two counts. Count 1 was for attempted defilement contrary to section 9(1)(2) of the Sexual Offences Act No. 3 of 2006. The particulars of offence were that on 10th June 2016 at Mtito Andei Township in Kibwezi sub-county within Makueni county intentionally attempted to penetrate the vagina of EM a child aged 15 years.

2. In count 2, he was charged with assault causing actual bodily harm contrary to section 251 of the Penal Code. The particulars of offence were that on the same day and place assaulted EM (*name withheld*) thereby occasioning her actual bodily harm.

3. He denied both charges. After a full trial he was convicted on both charges and sentenced to serve 10 years imprisonment for attempted defilement, and 3 years imprisonment for assault causing actual bodily harm the sentences to run concurrently.

4. Dissatisfied with the conviction and sentence, the appellant has come to this court on appeal, relying on the following grounds –

1. *That the Prosecution case was not proved beyond reasonable doubt.*

2. *That his rights guaranteed in Article 50(g)(h) of the Kenya Constitution 2010 were violated.*

3. *That the trial court failed to note that the charge sheet was defective and there were contradictions and inconsistencies in the evidence tendered by the Prosecution side.*

4. *The trial court violated the provisions of section 33(2) of the Criminal Procedure Code plus section 216 and 329.*

5. *The trial magistrate failed in totality to note that vital witnesses were not called to testify.*

6. *The subordinate court blatantly violated the provisions of section 124 of the Evidence Act.*

7. *The learned trial magistrate failed to make a specific finding on the issues.*

8. *There was violation of section 214 of the Criminal Procedure Code.*

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

6. This being a first appeal, I am required to evaluate all the evidence on record afresh and come to my own independent conclusions and inferences but taking into account the fact that I did not have the opportunity to see witnesses testify to determine their demeanor – see **Okeno –vs- Republic (1972) E.A 32.**

7. I have re-evaluated the evidence on record. In proving their case, the prosecution called 4 witnesses. The appellant on his part tendered an unsworn defence and did not call other witnesses.

8. Pw1 was the complainant who stated that she was a form two student at M secondary school and that on 10/6/2016 at 5:30 am as she walked to school a person walked towards her from behind. She named that person as Abednego, who got hold of her waist, put his hand on her mouth and laid her on the ground, injured her face and leg but she struggled and rescued herself and ran away leaving him holding her school bag and sweater. She screamed but he ran towards her again and held her but she pulled herself free and luckily a lorry appeared with light on. She described the assailant as having dreads locked hair. According to this witness, other students who were walking at a distance told her to report the incident to the school Principal which she did and the Principal advised her to report the incident to the police and informed her mother.

9. It was her further evidence that on 16/6/2016 as she was coming from school at 5:45, she saw the accused sitting near Topline Hotel Mtito Andei town, and the accused told her to accept to do what he wanted and her mind then flashed back and she realized that this was the person who had attempted to defile her. She got terrified and later that day as she went to the butchery she again saw Abednego (the *accused*) sitting and pointing at her. She then called her mother who came but their attempt to arrest him with her mother and the school Principal did not succeed. Later he was arrested on 18/6/2016 by police in the company of her mother, because she had identified him to her mother as the culprit.

10. She said that she was born on 16/2/2000 and relied on the birth certificate. She identified the accused in court.

11. Pw2 was JNM the mother of Pw1. It was her evidence that on 10/6/2016 the Principal of M secondary school informed her that her daughter had been injured by a person who wanted to rape her. She later met her daughter (the Complainant) Pw1 who informed her about the incident and they made a report to the police. She later learnt from the Principal of M secondary school that the culprit was an employee of Nthenya. According to this witness, though the Complainant pointed to her the culprit who was standing near a semi constructed building at Mtito Andei town, the culprit disappeared, and this was on 16/6/2016. She described him as a person who had partly shaved dreadlocks. She said that she had been seeing the appellant before walking at Mtito Andei town, and that her daughter became a boarding student after the incident. She said that the Complainant was aged 16 on 11/4/2017, when the witness testified.

12. Pw3 was Peter Kiilu a Clinical Officer at Mtito Andei sub-county hospital who filled the medical examination report (P3) form for the complainant, which he produced in court as an exhibit. His evidence was that the maroon skirt of the complainant was torn along the hip but the blouse was not torn. There were bruises on the entire body of the Complainant especially soft tissue bruises along the knee joint, both hips and palm of the hand and on the face, which were classified as harm. Genitalia was normal, hymen intact. According to this witness the complainant was treated at the sub-county hospital on 10/6/2016.

13. Pw4 was Pc Jackline Kajuju of Mtito Andei police station, the Investigating Officer, who received a report on 10/6/2016 at 11 am – from the school girl (complainant) and school Principal that at 5:45 am that someone grabbed had the complainant near a bridge on her way to school, pulled her to the ground but she managed to free herself. The complainant said that she could recognize the culprit. According to this witness, on 16/6/2016 the complainant saw the man, who tried to talk to her and she reported that to the mother (Pw2). The person who was identified by the complainant was then arrested by Pc Kisingo. This witness visited the scene of incident and it was her evidence that it was a murram road and one could see signs of struggle on the ground. He produced the birth certificate of the complainant as an exhibit and stated that she was aged 15 years at the time of incident

14. When put on his defence, the appellant gave sworn testimony and did not call witnesses. It was his evidence that he was an employee of Kenya Garage Standard Railway (perhaps Standard Gauge Railway). According to him, on the day of arrest, he went to work at 6am until 11 am when he returned to Mtito Andei for lunch and met a woman called Nthanze Mwania at Top Life Hotel who asked him to pay for the water he fetched from her place. He paid her Kshs.250/= and she asked for Kshs.1,000/= loan. When he said that he did not have that money presently, she told him that she would not talk to him again. He then went back to work and thereafter came back to Mtito Andei town at 4 pm, and at 6:45 pm as he went to the market, he met two people on a motorbike who arrested him and took him to the police station. He stated that he was charged with an offence he knew nothing about.

15. The appellant has raised a number of grounds of appeal. I will deal first with the technical grounds. He states that Article 50(g) (h) of the Constitution was violated. The Article deals with the requirements of fair trial. From the record of the proceedings, I find no violation of Article 50 of the Constitution by the trial court. I dismiss that ground.

16. The appellant under ground 3 stated that sections 333(2), 216 and 329 of the Criminal Procedure Code (cap. 75) were violated by the trial court. I find no violation of any of the sections by the trial court from the record of the proceedings. I dismiss that ground.

17. The appellant also under ground (6) says that the trial court violated section 124 of the Evidence Act (cap. 80). I see no violation of this section from the record of the proceedings. I thus dismiss that ground.

18. Underground (8) the appellant complains that section 214(1) of the Criminal Procedure Code (cap.75) was violated by the trial court. Again, from the record, I find no violation committed by the trial court. I dismiss that ground.

19. With regard to the ground on contradictions and defect of the charge sheet, my perusal of the charge sheet does not disclose any material defect. If there be a defect, it is a matter of form cured under section 382 of the Criminal Procedure Code. With regard to contradictions also, I do not discern any material contradiction in the evidence of the Prosecution witnesses. Minor contradictions which do not go to the root of the case cannot vitiate a conviction. I dismiss that ground.

20. I now go to the substantive ground on whether the Prosecution proved their case against the appellant beyond any reasonable doubt.

21. The burden in criminal cases is always on the Prosecution to prove their case against an accused person beyond reasonable doubt. The accused has no burden to prove his innocence. See the English case of **Woolmington –vs- DPP (1935) AC** followed consistently in Kenya.

22. The prosecution relied on the evidence of four (4) witnesses. From the medical evidence it is clear that the Complainant was injured and the injuries were classified as harm. The other evidence is that her skirt was torn. The question however is whether each of the two offences charged were proved beyond reasonable doubt.

23. With regard to the offence of attempted defilement, the age of the complainant is an important ingredient which has to be proved beyond reasonable doubt as the age does not only relate to conviction but also sentence. In this regard, all the prosecution witnesses maintained that the complainant was 15 years, however, the magistrate found that she was 16 years at the time of the alleged offence. In my view, since the complainant was born in February 2000 and the offence occurred in June 2016 the complainant was actually aged 16 years and a few months, at the time of the alleged offence. The magistrate was thus correct in the finding on age. Since that finding did not prejudice the appellant in any way, I uphold that finding and find that the age of the complainant was proved beyond reasonable doubt to be 16 years, on the basis of the entry in the birth certificate.

24. The second element to be proved was the identity of the culprit.

25. The evidence that connects the appellant to the commission of the alleged offence is that of the complainant alone. Such evidence is covered by the provisal to section 124 of the Evidence Act (cap 80), and does not require corroboration if it is believable, and is believed by the trial court on reasons to be recorded.

26. The complainant did not describe the appearance of the culprit to anybody after the incident. She merely told the investigating police officer Pw4 Jackline Kajuju that if she saw him again she could identify him. Thus her identification of the appellant visually in my view does not satisfy the test of proof to remove the possibility of error. However, the appellant talked of her on 16/06/2016 and told her that he wanted her to concede to what he wanted to do. In my view, that was an admission by the appellant that he was the culprit in the incident that occurred on 10/6/2016. That disclosure by the appellant to the complainant, in my view, was sufficient to prove that he was the culprit. I thus find that the prosecution proved the identity of the appellant as the culprit beyond any reasonable doubt by the admission words of the appellant to the complainant, but not through visual identification.

27. The other elements of the offence of attempted defilement were proved by the complainant's evidence and the medical evidence that is her evidence of grabbing, knocking her down to the ground, tearing the skirt, the medical findings of injuries to her thighs and face in an attempt to penetrate her sexually. I agree thus with the trial court that the prosecution proved count 1 beyond reasonable doubt.

28. With regard, to count 2, with the injuries found on the complainant at the hospital on the date of incident, I find that the offence of assault causing actual bodily harm was proved by the Prosecution to the required standards.

29. The appellant has raised a ground that crucial witnesses were not called to testify. Indeed in **Bukenya –vs- Uganda,** the court held that where crucial witnesses are not called by the prosecution, the court is entitled to infer that their evidence would be adverse to the Prosecution case. However, in the same case, the court held that it is not expected that the prosecution will call a multiplicity of witnesses, and that the adverse inference will be made by the court only where the evidence of the prosecution is weak. In my view in the present case, the Prosecution evidence against the appellant is candid, straight forward and clear, thus even if the school Principal was not called to testify, there was no gap so created to invite an adverse inference. I dismiss that ground.

30. The sentences imposed are within the law, and the circumstances herein, justify the sentences imposed. I will thus uphold the sentences imposed.

31. Consequently, I find no merits in the appeal. The appeal is hereby dismissed.

DELIVERED, SIGNED & DATED THIS 6TH DAY OF MAY, 2021, IN OPEN COURT AT MAKUENI.

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GEORGE DULU

JUDGE