REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCRA NO. 104 OF 2019

DANSON MWANZIA KAMOSU.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(From the original Conviction and Sentence of Hon. Otieno J. (RM) in Makueni

Chief Magistrate's Court CMCRC (S.O) No. 42 of 2018 issued on 14th May , 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 24th November 2018 at around 3:30 pm at [particulars withheld] village, Kalawa sub-location, Mbooni East Sub-county, of Makueni County defiled a 6 year old girl named EM (*name withheld)* in a bush near his house.

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 which being that on the same day, time and place intentionally and unlawfully did indecent act by touching private parts namely vagina of EM. (*name withheld*) a girl aged 6 years using his penis.

3. After a full trial, the appellant was found not guilty of both the main and alternative charges preferred, but was convicted of sexual assault contrary to section 5(1)(a)(i) as read with section 5(2) of the Sexual Offences Act and sentenced to 12 years imprisonment.

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

> ***1)*** *That the magistrate erred in both fact and law when she convicted and sentenced him without observing that the procedure to conduct voire dire evidence was contravened.*
>
> ***2)*** *The magistrate erred in law and fact when she convicted and sentenced him without regard to his basic right for disclosure of the prosecution evidence which was intended to be brought against him as laid down in Article 50(2) (j) of the Constitution.*
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> ***3)*** *The magistrate erred both in law and fact by failing to observe that one of the ingredients establishing the offence of defilement i.e. penetration was not proved by the prosecution beyond reasonable doubt as required by law.*
>
> ***4)*** *The trial magistrate erred both in points of law and fact when she failed to observe that the prosecution evidence was untenable, unworthy, contradictory, inconsistent and full of lies hence not capable to pass the test of credibility.*
>
> ***5)*** *That his conviction based on the evidence on record was manifestly unsafe.*

5. The appeal proceeded by way of filing written submissions. Both the appellant and the Director of Public Prosecutions filed their submissions which I have perused and considered. The appellant relied on a number of decided court cases.

6. This being a first appeal, I am duty bound to evaluate all the evidence on record afresh and come to my own conclusions and inferences – See **Okeno –vs- Republic (1972) E.A 32**.

7. I have re-evaluated the evidence on record, and have also perused the charge sheet. In proving this case, the prosecution called five

witnesses. Pw1 was Stella Ndambi Muasya a Clinical Officer who filled the medical report (P3) form. She relied on treatment notes made by Dr. Ndeve who could not attend court. The findings were that there was a fresh tear in the hymen and bleeding when the Complainant was first medically examined on the 24/11.2018, and blood clots on outer genitalia and inner thighs. She produced the P3 form and treatment notes (PRC form) as exhibits.

8. Pw2 was IM the mother of the Complainant who stated that when she arrived home from work on 24/11/2018, she found that the children had gone to the poshomill and when she noted that they had taken long, she alerted their father who promised to go for them. On the way the said father met the grandmother of the witness who described that she had noted that one child was walking with a strange gait. Thus this witness examined the genitals of the child, and found her vagina bleeding; and on the inquiry the child said the assailant was Mwanzia. They then proceeded to Mwanzia's house but before reaching there, the child pointed out the footpath where Mwanzia had sexually assaulted her. They reported the matter to the Chief Kalawa location and to the Police station Kalawa and took the complainant to Makueni referral Hospital. She stated that the Complainant was born on 09/05/2012 and relied on child clinic card, which she produced as an exhibit.

9. Pw3 was PM the grandmother of Pw5 (the Complainant), who stated that on 24/11/2018 she met the Complainant and noted that she had teary eyes, and walking in a strange way. On enquiring about what the matter was, the Complainant said that there was no problem. She later met the father of the Complainant on the way, and they proceeded together home and she requested the mother of the Complainant to examine her and after the examination the Complainant revealed that the assailant was Mwanzia and they thus called the Chief.

10. Pw4 was Cpl John Aleka one of the two Investigating Officers – who received the report at 8pm at the Police station. He took possession of the clothes said to have been worn by the Complainant and produced them as exhibits. The pant was stained and the pullover and skirt were full of sand. He charged the appellant in court.

11. Pw5 was the Complainant who was initially stood down as she broke down crying. She testified but not on oath that the appellant grabbed her hand and dragged her to a bush, laid her on the ground and inserted his fingers into her genitals. According to her, the appellant whom he knew before the incident finished that act and merely told her to leave and she left.

12. In his defence, the appellant tendered unsworn testimony and said that on the material date, he proceeded to the family farm and worked the whole day and on arrival home at 4 pm neighbours told him that he had defiled a minor. He stated that the family of the Complainant had previously falsely accused him of stealing so that they could trespass and graze his land.

13. Dw2 was Dorcas Mwende Mwanzia the wife of the appellant, who said she worked with the appellant on the farm until 6pm then went home, only to find neighbours who said that at 4pm a child had been defiled on a path and the Complainant's father stated that the culprit was the appellant.

14. Faced with their evidence, the magistrate found that the offences charged were not proved. She found however, that the offence proved was sexual assault, convicted the appellant for sexual assault, and sentenced him to serve 12 years imprisonment therefrom, arose the present appeal.

15. I note that the appellant was charged with defilement but convicted of sexual assault, which is a totally different offence. Such conviction in sexual offences is however, allowed under section 186 of the Criminal procedure Code, which provides as follows –

> ***186. When a person is charged with the defilement of a girl under the age of fourteen years and the court is of the opinion that he is not guilty of that offence but that he is guilty of an offence under the Sexual Offences Act, he may be convicted of that offence although he was not charged with it.***

16. Thus though the appellant was charged with defilement but convicted of sexual assault, the trial court had such powers to so convict even if the offence of conviction was not a lesser offence. In the circumstances of the case, I also see no prejudice occasioned to the appellant.

17. The appellant has challenged the procedure adopted in the voire dire examination of the complainant. I have perused the trial court record, and note that the Complainant answered specific questions asked by the trial magistrate and the trial magistrate ruled that the complainant was intelligent to testify but not on oath, and she did so. I find no fault in the voire dire procedure adopted by the trial court.

18. With regard to the complaint that the appellant was not provided with Prosecution witness evidence, indeed Article 50(2) (j) requires such disclosure by the State. However, in the present case the record does not show any instance when the appellant asked for such information. Thus he cannot on appeal come and say that he was denied any prior information on prosecution witness evidence.

19. With regard to the grounds of appeal that the ingredients of the offence of defilement in particular, penetration was not proved, the medical evidence was clear that indeed the hymen of the Complainant was freshly broken and there was bleeding. The evidence is also that such penetration was done using the finger, which made the trial court convict for a different offence under the Sexual Offences Act. I dismiss that ground.

20. With regard to the ground that the Prosecution evidence was untenable, unworthy, contradictory, and inconsistent, my perusal and consideration of the evidence on record does not disclose such inconsistency or contradictions. I dismiss that ground of appeal. Thus it cannot be said that he evidence was not credible nor that the conviction was unsafe.

21. I note that the charge sheet does not disclose in the particulars of the offence how the defilement was committed. Thus there is no mention of penetration and by what means, either penile or by finger. In my view the charge is defective. The appellant has however not complained that he did not understand the charge. Though in my view, the charge was defective for failure to describe the mode of the defilement; such defect did not prejudice the appellant and thus is not a sufficient reason to quash the said charge and the proceedings, as the charge was not fatally defective. I rely on the case of **Benard Ombuno –vs- Republic eKLR** – that minor defect to a charge cannot vitiate

conviction if the accused person has not been prejudiced.

22. With regard to sentence, in view of the fact that the Complainant was aged 6 years and a few months at the time of incident, the sentence imposed in my view was neither harsh nor excessive.

23. I thus find no merits in the appeal which is hereby dismissed.

Delivered, signed & dated this 4th day of May, 2021, in open court at Makueni.

GEORGE DULU

JUDGE