



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCRA NO. 60 OF 2020

MWANZIA NDIVO.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(From the original judgment of Hon. E. Muiro (SRM) in Kilungu Senior Magistrate's Court

SRMCRC (S.O) No. 84 of 2019 issued on 3rd June, 2020).

JUDGMENT

1. The Appellant was charged in the magistrates' court at Kilungu with defilement contrary to section 8(1) (3) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on 25th and 26th August 2018 at [particulars withheld] village Kithembe location in Kilungu Sub-county within Makueni county intentionally and unlawfully caused his genital organ to penetrate into the genital organ of YNE(*name withheld*) a child aged 12 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 the charge were that on the same dates and place unlawfully and intentionally committed an indecent act with YNE (*name withheld*) a child aged 12 years by touching her genitalia.

3. He denied both charges. After a full trial, he was convicted on the main count of defilement and sentenced to serve 20 years imprisonment.

4. Dissatisfied with the decision of the trial court, the Appellant has come to this court on appeal on the following grounds:-

1) *That there existed a grudge on land between him and the Complainant's father.*

2) *That there was an accusation of stealing money that ignited the Complainant's father to attempt a cover up.*

3) *That the defilement accusation arose from the family framing him to cover up for the Appellant's demand for his father's money from the Complainant's father.*

4) *That he was only 43 years of age which was a tender age and should not serve behind bars.*

5) *That he wanted the court to consider the period he spent in custody under section 333(2) 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 have to start by reminding myself that this court is bound to reconsider the evidence on record independently and come to its own independent conclusions and inferences – see **Okeno –vs- Republic (1972) E.A 32**, in which the earlier case of **Pandya –vs- Republic (1957) E.A 336** was cited.

7. I have re-evaluated the evidence on record as is required of a first appellate court. In proving their case, the prosecution called four (4) witnesses. Pw1 was SK aged 16 years in 2020 a neighbour and friend of the Complainant (Pw2), who stated that on 26/8/2018 at 6 pm the Complainant proceeded to the Appellant's house to pick her skirt, and on enquiry, informed her that she had been defiled by the Appellant and she informed the brother of the Complainant Peter.

8. Pw2 was the Complainant who stated that she was 13 years in 2020 and that on 26/8/2018 a Sunday, the Appellant signaled her to go to his house which she did and the Appellant had sexual intercourse with her. Pw3 was SME who testified that on 26/8/2018 when the Complainant came back home she noted that she only wore the trousers but no skirt, and when the witness pointed that out, the Complainant went back to collect the skirt, only to be told later by Peter that the Complainant had been seen in the Appellant's house and had been defiled. Pw4 was Eric Kasiamani a Clinical Officer who produced the medical examination (P3) form.

9. When put on his defence, the Appellant gave unsworn defence testimony denying the offences and claiming that there was an existing land dispute between the Complainant's father and him and that the Complainant's father had secretly collected the work benefits of the Appellant's father from Nairobi.

10. Having considered the evidence on record, I find that there was indeed sexual intercourse between the Appellant and the Complainant. The evidence of Pw2 the Complainant is very clear about the details of the incident. The evidence of Pw1 and Pw2 is very clear on where the Complainant went to pick her skirt, which was in the Appellant's house. All the happenings were during daybreak.

11. Though the Appellant raised the defence of an existing grudge, in my view such was an afterthought as no single question was put to witnesses on the existence of such a grudge. The evidence from the Clinical Officer Pw4 was that the Complainant's hymen was missing which supports the allegation of sexual intercourse.

12. In my view therefore the Prosecution proved beyond reasonable doubt two important ingredients of the offence of defilement, that is penetration, and the perpetrator.

13. I now turn to the third element of the offence – the age of the Complainant. Under our law defilement can only be committed if the victim is below 18 years of age. The evidence on the age of the Complainant is from Pw1 who estimated her own age to be 12 years. The Complainant herself said in 2020 that she was 13 years when the incident had occurred in 2018. She did not say when she was born nor rely on any documentary proof.

14. Pw3 SME, presumably the Complainant's mother but did not say so, was silent on the age of the Complainant and the date or year of birth.

15. The trial court in determining the age of the Complainant relied heavily on the entry in the P3 form and stated that the entry in the P3 form was from a birth certificate wherein the date of birth was entered as 7/8/2006.

16. In my view, since the birth certificate was not produced or relied upon in evidence, the information about its contents was hearsay evidence and it was wrong for the magistrate to rely on or give weight to the same, as it was inadmissible.

17. I thus find that the prosecution failed to prove the age of the Complainant beyond any reasonable doubt. On that account the conviction cannot stand.

18. Consequently, as the Prosecution did not prove the age of the Complainant the appeal on conviction is allowed and the sentence cannot stand.

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

DELIVERED, SIGNED & DATED THIS 4TH DAY OF MAY, 2021, IN OPEN COURT AT MAKUENI.

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GEORGE DULU

JUDGE