REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCRA NO. 19 OF 2020

TITUS KITHEKA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence of Hon. T. A Sitati (P.M) in Makindu Senior Principal Magistrate's Court SPMCR (S.O) No. 38 of 2019 issued on 8th November, 2019).

JUDGMENT

1. The Appellant was charged in the magistrates' court with attempted defilement contrary to section 9(1) of the Sexual Offences Act. The particulars of offence were that on 19th March 2019, at Nguu location in Nzaui sub-location within Makueni County, intentionally and unlawfully attempted to cause his penis to penetrate the vagina of HNS (*name withheld*) a child aged 9 years.

2. After a full trial, he was convicted of the offence and sentenced to ten (10) years imprisonment.

3. Dissatisfied with the decision of the trial court, the appellant has come to this court on appeal. He filed initial grounds of appeal, but relied on the following subsequent grounds of appeal -

> ***1. That he wanted the court to consider his stay at remand custody for a period of 9 months under section 336(2) of the Criminal Procedure Code.***
>
> ***2. That before his arrest and subsequent conviction, he was the sole breadwinner of his family and 5 grandchildren.***
>
> ***3. That he is now fully rehabilitated and remorseful due to the effect of the stay in prison.***
>
> ***4. That he is a very old man aged 65 years suffering behind bars.***
>
> ***5. That he was convicted and sentenced without pleading guilty.***

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

5. 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 – see **Okeno –vs- Republic (1972) E.A 32.**

6. I have re-evaluated the evidence on record. I note that the prosecution called three (3) witnesses including the complainant, and the appellant tendered a sworn defence statement and did not call additional witnesses.

7. The burden is always on the prosecution in a criminal case to prove their case against the accused person beyond any reasonable doubt. An accused person does not have a burden to prove his innocence – see **Woollmington –vs- DPP (1935) AC 462.**

8. In order to prove their case against the appellant, the prosecution was required to prove the age of the victim, as the offence of attempted defilement can only be committed when a victim is below 18 years. Secondly, the prosecution was required to prove that indeed there was an attempt to have sexual intercourse with the complainant. Thirdly, the prosecution was required to prove that the appellant was the culprit. All three elements had to be proved beyond any reasonable doubt.

9. Was the age of the complainant proved? A birth certificate was produced by the prosecution and relied upon. There was no dispute on it or

its contents either from the prosecution or the defence. The entry on the date of birth of the complainant is reflected as 20/8/2009 – which means the complainant was 9 years and some months when the incident occurred in March 2019. In my view, the prosecution proved the age of the complainant beyond any reasonable doubt.

10. Did the prosecution prove that there was an attempt to have sexual intercourse with the complainant as alleged? The evidence on the alleged incident is only that of the victim (*complainant*) as no other witness testified on this. Such evidence of a single sexual offence victim witness does not require corroboration to sustain a conviction in accordance with the provisal to section 124 of the Evidence Act (*cap 80*), which states as follows –

> ***"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."***

11. Having re-evaluated and considered the totality of the evidence on record, I am of the view that there is no clear pointer that the complainant (Pw2) was saying the truth. First, she stated that the appellant smeared his penis with saliva, but admitted that such action was done in darkness. The question is how did she see that act of smearing saliva? Secondly, though the complainant was with other two named girls in the same room, none of them testified in court, nor was there any reason given by the prosecution for such omission. Thirdly, the complainant said that a cousin who slept in an adjacent room W gave food to the appellant before he went to the girls bedroom, (*which was his usual bedroom*) and that she (*complainant*) and the other two girls later moved to W's room after the incident, and informed him of the incident and slept there. Again W was not called by the prosecution to testify nor was any reason given by the prosecution for such omission.

12. In addition to the above evidence relating to where the father of the complainant said, who did not testify, was hearsay evidence, and could not be considered by the trial court in making findings in the case.

13. The above evidence, taken together with the sworn defence testimony of the appellant, in which he said that the father of the complainant was trying to take the children to Tanzania which the appellant refused, in my view shows that the complainant was not telling the truth against the appellant who appears to have been taking care of five grand children whose parents had no means to do so, and who was preventing the father from taking the complainant to Tanzania.

14. I thus find that the complainant was not telling the truth with regards to the occurrence of the incident, and on that account the appeal will succeed.

15. I also find that the complainant was not saying the truth regarding the appellant being the culprit of the alleged offence. I note that the entries in the birth certificate show that the appellant was recorded as the father of complainant which agrees with the appellant's testimony that the complainant was taken care of by grandparents (including the appellant) as the biological parents were physically away. In my view, the truthful version is that of appellant and not the complainant. I thus that the appellant was not the culprit.

16. Consequently and for the above reasons, I find merits in the appeal. I 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 15th day of June, 2021, in open court at Makueni.

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GEORGE DULU

JUDGE