REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCRA NO. 62 OF 2019

JOHN MWANGANGI NDILI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. Mayamba (P.M) in Kilungu Principal Magistrate's Court PMCR (S.O) Case No. 75 of 2019 issued on 18th December, 2019).

JUDGMENT

1. The appellant was charged in the magistrates' court with defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act No. 3 of 2006. The particulars of offence were that on 5th September 2018 at 19:00hrs in Makueni county intentionally caused his penis to penetrate the vagina of MN (*name withheld*) a child aged 15 years.

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 were that on the same day and at the same place intentionally touched the vagina of MN (*name withheld*) a child aged 15 years.

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

4. Dissatisfied with the decision of the trial court, the appellant has come to this court on appeal relying on the following amended grounds of appeal –

> ***1. That the conviction was based on a defective charge and thus unsafe.***
>
> ***2. That the burden of proof was not discharged.***
>
> ***3. That the mandatory nature of sentence imposed under the Sexual Offences Act has been declared unconstitutional pursuant to the Court of Appeal decision in Evans Wanjala Wanyonyi –vs- Republic – Criminal Appeal No. 312 of 2018 – Eldoret.***
>
> ***4. That on the sentence imposed, the requirement under Article 50(2)(i) of the Constitution and section 133(2) of the Criminal Procedure Code was not factored yet the same was in force by the time of sentencing.***

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.

6. This being a first appeal, I am required to re-evaluate the evidence on record 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 proving their case, the prosecution called 6 witnesses. The appellant on his part tendered a sworn defence and did not call additional witnesses.

8. This being a case of defilement, the prosecution had to prove the age of the complainant, penetration and the identity of the culprit.

9. The appellant has raised technical points on appeal which I will deal with first. First, the appellant has complained that the charge sheet was defective. In his submissions he has not referred to any defect on the contents of the charge, but refers to variance of the allegations in the charge and the evidence tendered, thus resulting in failure of the prosecution to prove their case especially with regard to the age of the complainant and penetration. Such variation in my view is not the same thing as a defect of a charge but merely a failure of the prosecution to prove the allegations in the charge. I find no defect in the charge.

10. The appellant has complained that the prosecution did not discharge the burden of proof as required by law. This leads me to considering the three elements of the offence. Starting with the age. In defilement cases the age of the victim is an important element of the offence, as the age does not just determine whether the offence has been committed, but also determines the sentence to be imposed.

11. In the present case, the complainant Pw1 said that she was 15 years and attending [Particulars Withheld] Primary School. She did not mention her date or year of birth. She relied on an age assessment report prepared during investigations herein. Her mother Pw2 MKN did not also state the date or year of birth of the complainant. She did not rely on any document. She only referred to the complainant as a child. Pw6 Eric Kasiamani a Clinical Officer at Kilungu County Hospital referred to a P3 form in which the complainant was recorded to be 12 years old. He also relied on an age assessment report produced as Exhibit 2. I note that the age assessment report merely says that some molars had not erupted and as such it was concluded that she was "below 16 years, probably 15 years".

12. In my view, with the evidence on record, the prosecution did not prove beyond reasonable doubt that the complainant was below 18 or that she was 15 years of age – in that it does not state when each specific tooth is expected to erupt, to show that it is a scientific examination. In my view also the mother should have said when the girl was born, and if she was going to school, the school records would also have assisted. I find that the prosecution did not prove the age of the complainant beyond any reasonable doubt.

13. Did sexual intercourse occur that day? From the evidence on record, in my view, though the medical evidence only established a broken hymen, sexual intercourse did occur. The evidence of the complainant Pw1 on the incident, the time of the alleged incident, as well as the description of the alleged scene all lead to one conclusion that sexual inter-course did occur on the complainant that evening. In totality, the evidence of the complainant is believable in terms of the povisal to section 124 of the Evidence Act (*cap 80*).

14. Was the appellant the culprit? Again, the evidence against the appellant being the culprit is that of the complainant. In my view, the evidence of this single sexual offence witness is believable and falls within the provisal to section 124 of the Evidence Act. It is believable because of the time of the alleged incident, the fact that shortly thereafter the appellant went to demand for his mobile phone from the complainant, the fact that the complainant ended up handing over Kshs.100/= to the appellant which he took without question. Also the fact that the complainant took the mother Pw2 to the scene, and with the assistance of the torch of Pw2 they found the mobile phone of appellant. All this puts the appellant and complainant in a close personal relationship or encounter that day. In my view, the complainant and appellant must have forgotten the phone of the appellant at the scene of their sexual encounter. I find that the prosecution proved beyond any reasonable doubt that the appellant was the culprit.

15. I thus agree with the trial magistrate that the defence of the appellant was an afterthought meant to divert attention from the real issues for decision. Thus though the prosecutor made the mistake of not cross-examining to challenge the sworn defence testimony of the appellant, the other evidence on record proved that the appellant was actually the culprit.

16. However, because I have found that the prosecution failed to prove the age of the complainant beyond reasonable doubt the appeal will succeed.

17. Consequently, and for the above reasons, 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 JULY, 2021, IN OPEN COURT AT MAKUENI.

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GEORGE DULU

JUDGE