REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCRA NO. 7 OF 2020

VINCENT MUMO.....APPELLANT

-VERSUS-

REPUBLIC ..... RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. T.A Sitati (P.M) in Makindu Senior Principal Magistrate's Court SPMCR Case No. 70 of 2019 issued on 8th November, 2019).

JUDGMENT

1. The appellant was charged in the magistrate's court with defilement contrary to section 8(1) as read with section 8(4) of the Sexual Offences Act No. 3 of 2006. The particulars of offence were that between 27th and 29th August 2018 at [Particulars Withheld] village in Kibwezi Sub-county within Makueni County intentionally and unlawfully caused his male genital organ namely penis to penetrate the vagina of AM (*name withheld*) a girl aged 17 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 alternative charge were that between the same dates and at the same place, intentionally and unlawfully caused his male genital organ namely penis to touch the vagina of AM a girl child aged 17 years.

3. He denied both charges. After a full trial he was convicted of the main count of defilement and sentenced to serve 15 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 the learned magistrate erred in both law and fact when she convicted and sentenced him without regard to his basic constitutional rights in that the appellant was tried too speedily, in a way that equally undermined his sound conception of criminal justice, hence detrimental to the defence case.**
>
> **2. The trial magistrate erred by failing to observe that the appellant's case falls within the ambit of the defence in section 8(5) of the Sexual Offences Act because the circumstances of the case clearly shows that it was the complainant who went to the appellant's house to have sex.**
>
> **3. The learned trial magistrate erred both in law and fact by convicting him without considering that there was no evidence to prove the offence of defilement to the required standards.**
>
> **4. The learned trial magistrate erred both in law and fact by failing to apply section 124 of the Evidence Act to observe that the prosecution case was full of contradictions and inconsistencies which rendered the prosecution case unbelievable.**
>
> **5. The learned trial magistrate erred in law and facts when he dismissed the appellant's sworn defence without giving cogent reasons and hence arrived at his conclusion in judgment without complying with the law under section 169 of the Criminal Procedure Code.**

5. The appeal proceeded by way of filing written submissions. I have perused and considered the submissions of both the appellant and the Director of Public Prosecutions.

6. This being a first appeal, I have to start by reminding myself that 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**.

7. I have re-evaluated the evidence on record. In proving their case the prosecution called 6 witnesses, including the complainant who testified as Pw2. The appellant on his part tendered sworn defence testimony denying committing the offence.

8. The appellant has raised technical and substantive grounds of appeal. I will start with technical grounds. Though the appellant complains that the criminal trial was rushed, there is no such evidence from the record of a hurried trial. Additionally, the appellant did not at any time during trial ask to be given more time to prepare for trial. I also have to mention here that since Constitution of Kenya 2010 under Article 50 gives one of the attributes of a fair hearing as expeditious disposal of cases, the appellant cannot without more state that expeditious trial was unfair to him unless he points out the particulars of unfairness. In particular Article 50(2) provides –

> **50(2) every accused person has the right to fair trial, which includes the right –**
>
> **(e) to have the trial begin and conclude without unreasonable delay.**

I thus dismiss that ground.

9. I now turn to the substantive grounds, which relate to the proof of the charge. This being a case of defilement, the prosecution was required to prove beyond reasonable doubt the age of the complainant, which is an important element of the offence. In this regard, birth certificate was relied upon, and produced as an exhibit by Pw2 Francisca Michael which was not contested. I thus find that the age of the complainant was proved beyond any reasonable doubt to be 17 years.

10. The second element of the offence of defilement was penetration, which was also to be proved by the prosecution beyond any reasonable doubt. I note that evidence from the medical reports relied upon, did not establish recent penetration, but only that the hymen was broken, with no indication that the hymen of the complainant was broken, on the alleged days. Though the evidence of sexual penetration by the appellant on record is only that of the complainant Pw2, under the provisal to section 124 of the Evidence Act (Cap.80) such evidence of a single victim witness in sexual offences does not require corroboration to found a conviction, provided it is believable and so believed by a trial court for reasons to be recorded. The provisal states as follows –

> **124 …..**
>
> **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. From the evidence on record herein, I find that the complainant did not stand to gain anything by saying that she was sexually penetrated by the appellant. In my view, the two nights she spent with a man provided a perfect opportunity for sexual activity. In my view therefore, though the medical evidence was not conclusive, sexual penetration was proved by the prosecution beyond any reasonable doubt.

12. I now turn to the third element of the offence that is the identity of the culprit. Was the appellant the culprit? Again, from the evidence on record, I find that the prosecution proved beyond any reasonable doubt that the appellant was the culprit. This is because, other than the complainant's evidence, there was evidence from an independent witness Pw5 Ambrose Musyoki who stated that the appellant booked a lodging room which he shared with the complainant. This witness does not stand to gain anything by implicating the appellant. I thus find that the prosecution proved beyond any reasonable doubt that the appellant was the culprit.

13. Having found as above, I find that from the evidence on record, the defence under section 8(5) of the Sexual Offences Act is available to the appellant. This is because firstly, the complainant was 17 years, thus nearly 18 years of age and her looks could as well portray those of an adult, unless someone knew her actual age. Secondly, she left her home and went out specifically to have sexual affairs with a man in a lodging. In that regard therefore, she behaved like an adult, and in my view, misled the appellant, whom I consider to be a reasonable man, to believe that she was an adult. For the avoidance of doubt, the section 8(5) specifically provides as follows –

> **8(5) It is a defence to a charge under this section if -**
>
> **a. as it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence, and**
>
> **b. the accused reasonably believed that the child was over the age of eighteen years.**

On that account only, I will allow the appeal as I am convinced that any reasonable man in the circumstances would have believed that the complainant herein was an adult.

14. Consequently, 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 23RD DAY OF SEPTEMBER, 2021, IN OPEN COURT AT MAKUENI.

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GEORGE DULU

JUDGE