REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCRA NO. 125 OF 2019

DNM.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the judgment of Hon. A. Ndungu (SRM) in Makindu Senior Principal Magistrate's Court SPMCR Case No. 722 of 2015 issued on 7th August, 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 offence were that on 11th May 2015 at Kikumini Location, Nzaui District within Makueni County, intentionally and unlawfully caused his male genital organ namely penis to penetrate into the female genital organ namely the vagina of N.N (*name withheld*) a child aged 10 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 offence being that on the same day and at the same place, willfully and unlawfully touched the genital organ namely vagina of (N.N) a child aged 10 years using his penis.

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

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

> ***1) That he is a first offender.***
>
> ***2) That the magistrate erred in law and facts by relying on contradictory and inconsistent evidence to convict him.***
>
> ***3) That the magistrate erred in law and facts in dismissing his plausible and firm defence contrary to section 169(1) of the Criminal Procedure Code.***
>
> ***4) That he was a poor man who prior to arrest had worked tirelessly to support himself and family and had potential if given another chance.***

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

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

7. In proving their case, the Prosecution called 5 witnesses and on his part the appellant opted to tender unsworn defence testimony, and did not call any other witness.

8. On the Prosecution side, Pw1 was the complainant whose testimony was not on oath, but was cross examined by the appellant. It was her evidence that the appellant being a distant relative called her during the day then gave her some Kshs.100/= and defiled her in the bush. Next day, when she displayed the money to classmates in school, and the teacher and Deputy Head teacher; asked about it, she disclosed the incident to the teachers and was then taken to Makindu hospital and a report made to the police.

9. **Pw2 Susan Mwikali Mutisya** the Deputy head teacher N Primary School to whom the incident was initially reported, stated in evidence that after the disclosure by Pw1 and when the appellant was contacted through phone, he agreed that he had given the complaint the Kshs.100/= and stated that the money was meant for purchasing mobile phone credit.

10. Pw3 whose name was not disclosed in the trial court's record, testified that he was the Assistant Chief of Muthumani Sub-location Ithumba Location – employment No. 200704607, to whom a report on the incident was made on the phone by a cousin one NK. On receipt of the report he, instructed that the victim and appellant be taken to the Administration Police camp which was done, and the appellant was later taken to Emali Police Station.

11. Pw4 Cpl Edward Mwaura who was the Relief Investigating Officer after the initial Investigating Officer Pc (W) Lilian Amondi was transferred gave a summary of the investigations. Pw5 Dr. Nicholas Mbugua produced the P3 (*medical report*) form filled by Dr. Mibei who had proceeded for further studies. I note that, according to the medical report, there were noticeable laceration in the vagina of the victim about 3 days old, and the hymen was broken.

12. In his unsworn defence, the appellant denied committing the offence, and said that he was taking care of the victim whom according to him, was couched by her grandmother who had a grudge against him. That was the evidence for the Prosecution and the defence.

13. The elements of the offence of defilement are first age, as the victim has to below 18 years; second, penetration of a sexual nature, even if partial. Thirdly, the identity of the culprit.

14. In our present case with regard to age, a child Health Care card was relied upon and produced in evidence. I note from the copy produced in court that on the name Ndindi the last two letters *"di"* were overwritten and no explanation for this overwriting was given by the Prosecution. There is also no indication that medical age assessment was done on the complainant, the entry of age of the victim in the P3 form, being only that by the police on the front page. I note also that, though the complainant Pw1 said that she was 10 years old, the Deputy Head teacher Pw2 did not mention her age according to school records and the mother of the complainant, who would have testified to her age, did not testify. In those circumstances, I am not satisfied that the age of the complainant was been proved by the Prosecution beyond reasonable doubt to be 10 years.

15. I now turn to proof of penetration. From the evidence on record it is my finding that sexual penetration did occur on the day alleged, as there were visible fresh lacerations in the complainant's vagina, and the hymen was broken.

16. With regard to the culprit, the evidence is that of the victim Pw1 alone. Such evidence can be a basis for a conviction if believable without any need for corroboration, in terms of the provisal to section 124 of the Evidence Act. I find that Pw1 was truthful and thus the culprit was proved to be the appellant.

17. However, due to the failure of the prosecution to prove the age of the complainant, I find that the prosecution failed to prove the offence of defilement against the appellant beyond any reasonable doubt.

18. The appellant however, in my view committed the offence of incest under section 20(1) of the Sexual Offences Act being an uncle who was even caring for the victim as stated by the appellant himself. Since I found that the prosecution did not prove that the victim was below 18 years, I find that she was an adult, and convict the appellant for incest with an adult.

19. I thus quash the conviction for defilement herein, and set aside the life prison sentence imposed. I however, substitute therefore a conviction for incest with an adult contrary to section 20(1) of the Sexual Offences Act, and sentence the appellant to 10 years imprisonment from the date he was sentenced by the trial court.

DELIVERED, SIGNED & DATED THIS 6TH DAY OF OCTOBER, 2021, IN OPEN COURT AT MAKUENI.

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GEORGE DULU

JUDGE