



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCRA NO.E015 OF 2020

MUTUNGI NZIOKI NDAISI.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being appeals from the original judgment of Hon. C. A Mayamba (P.M) in Kilungu

Principal Magistrate's Court PMCR Case (S.O) No. 41 of 2020

pronounced on 22nd October, 2020).

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 diverse dates between the month of March 2020 and June 2020 at [Particulars Withheld] village, Sultan Hamud Sub-Location in Makueni County intentionally caused his penis to penetrate the vagina of JMM a child aged 15 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 No. 3 of 2006. The particulars of the offence were that on the same diverse dates and in the same place intentionally touched the vagina of JMM a child aged 15 years with his penis.

2. He denied both charges. After a full trial, he was convicted on the main charge of defilement and sentenced to 15 years imprisonment.

4. Dissatisfied with the conviction and sentence, the appellant has come to this court on appeal relying on the following grounds –

1. The learned trial magistrate erred in law and fact and misdirected himself by holding that the case for the prosecution was proved to the required standard, whereas on the basis of record the burden of proof was not discharged and indeed left reasonable doubts that ought to have been resolved in appellant's favour.

2. The learned trial magistrate erred in law and fact by wholly relying on prosecution witnesses' testimony which was fabricated and riddled with lies that could not be corroborated.

3. The virtual trial proceedings was marred with plenty of hitches which led to misinterpretation of his intended questions to the accused person (should be prosecution witnesses) by the court clerk.

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

6. This being a first appeal, I start by reminding myself that I am duty bound to evaluate the evidence on record afresh and come to my own independent conclusions and inferences, but bear in mind that I did not have the opportunity to see witnesses testify and give due allowance to that fact – see **Okeno –vs- Republic (1972) E.A 32.**

7. In proving their case, the Prosecution called five (5) witnesses. Pw1 was the complainant/victim who stated that she was born on 9/1/2005 and was in primary school class 8. She stated that in March 2020 as she herded cattle with her sister Agnes Mutungi the appellant approached her, gave her bananas and requested her for sex which she did not decline. They two then engaged in sex. She testified also that she had sex

with him in June 2020, and also had sex with another man. She became pregnant and was then referred to hospital and later went to Sultan Hamud police station and the appellant whom she knew before as a person from her local area was arrested.

8. Pw2 was Frank Musembi a Clinical Officer who testified that the complainant was referred to him for medical examination. According to him, the complainant stated that she had sexual encounter with five (5) different men.

9. On examination the hymen was broken, and she was pregnant and the complainant pointed at the appellant as her most regular sexual partner. He produced the medical examination report (P3 form) as an exhibit.

10. Pw3 was Stephen Kinyungulo an Assistant Chief of Kalembwani who on 3/8/2020 phoned the complainant's mother Pw4 VN and informed her that a member of the Nyumba Kumi Charles Kyalo had informed him that the complainant was associating with men.

11. Pw4 VN testified that she was the mother of the Complainant whose evidence was that she was informed by the Assistant Chief that the complainant was having an affair with the appellant. On enquiring from the complainant, she admitted and on taking her to hospital, the complainant was found to be pregnant. She testified that the complainant was born on 9/1/2005, and produced the birth certificate as an exhibit.

12. Pw5 was Corporal Agnes Tartai Lepeless the Investigating Officer who received the report of the defilement incident on 31/7/2020, conducted investigations and charged the appellant in court.

13. When put on his defence, the appellant tendered unsworn testimony. He stated that he was arrested on 8/8/2020 while coming from the posho mill. He said that the case against him was fabricated and that he had found the Assistant Chief twice with the complainant.

14. The burden is always on the Prosecution in criminal cases to prove their case against the accused person beyond any reasonable doubt. An accused person does not have the burden of proving his innocence. See **Woolmington –vs- DPP (1935) AC** – an English case.

15. There are three important ingredients to be proved by the prosecution in a criminal case. First, the age of the complainant, who has to be below 18 years, second, penetration, even if partial, third, is the identity of the culprit.

16. The appellant has raised an issue about misinterpretation at the trial during the virtual hearing. The record does not show that the appellant complained at any point about translation. I find no basis for that ground and same is dismissed.

17. Was the age of the complainant proved by the prosecution? The complainant who testified as Pw1 gave her date of birth. The mother Pw4 VN also gave the date of birth as 9/1/2005 and produced the birth certificate of the complainant in court as an exhibit.

18. With the above evidence on record, in my view the age of the complainant was proved by the prosecution beyond any reasonable doubt to be 15 years as at the time of the incident.

19. With regard to penetration, in my view, penetration of a sexual nature was proved by the prosecution beyond any reasonable doubt, as the hymen was broken and the complainant was also found to be pregnant which confirms sexual penetration of the complainant by male genital organ, the penis. This does not however prove that penetration was by the appellant on the alleged dates. I thus have to go to the third element of the identity of the culprit.

20. The third element of the offence to be proved was the identity of the appellant as the culprit. It is clear from the evidence on record that the appellant and complainant knew each other well. The complainant said in evidence that the appellant came from their area of residence while the appellant said in his defence that he had seen the complainant previously with the Assistant Chief Pw3 Stephen Kinyungulo a number of times. All this evidence on both sides shows that they knew each other well, and there would be no possibility of mistaken identity.

21. The complainant also testified that she had sexual intercourse with five (5) men, including the appellant, who was the more common sexual partner. The appellant, on the other hand said that he did not have such sexual intercourse with her and that he was an old sickly man, with swollen testicles and had separated with his wife thus could not perform the sexual act.

22. The evidence on record herein, as to the appellant having penetrated the complainant sexually was only that of a single victim witness, the complainant Pw1. In accordance with the provisos of section 124 of the Evidence Act (cap 80), such evidence does not require corroboration to found a conviction, provided it is believable and so believed by the trial court on reasons to be recorded.

23. Having re-evaluated the evidence of the complainant on the identity of the appellant as being the culprit, and the denial of the appellant, I find like the trial magistrate that the complainant was a believable witness. The two knew each other before. There was no existing grudge and the incidences occurred in broad daylight, and were repeated.

24. Though the appellant says that crucial witnesses were not called by the prosecution, as there was no suggestion that any of those witnesses witness saw the two engaging in the sexual act, I find no basis of making an adverse inference on the prosecution. Though the complainant said that she had sexual relationship with a total of five (5) men also that does not exonerate the appellant from commission of the offence even if the four (4) others were not charged in court.

25. In my view, with the evidence on record, the prosecution proved beyond any reasonable doubt that the appellant was the culprit, and his appeal on conviction will fail.

26. The sentence of 15 years imprisonment is within the law, as the minimum sentence. I will thus uphold the sentence.

27. Consequently, I find no merits in the appeal. I thus dismiss the appeal and uphold both the conviction and sentence of the trial court.

DELIVERED, SIGNED & DATED THIS 2ND DAY OF NOVEMBER, 2021, IN OPEN COURT AT MAKUENI.

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GEORGE DULU

JUDGE