REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCRA NO. E002 OF 2020

REPUBLIC …….……..…....…….. APPELLANT

VERSUS

ELIZABETH NDUNGE NZIOKA …….……..RESPONDENT

(Being an appeal from the judgment of Hon. Sagero in Makueni Chief Magistrate's Court (S.O) Case No.26 of 2018 pronounced on 30th September, 2020).

JUDGMENT

1. This is an appeal by the State against the acquittal of the respondent by the trial court.

2. The respondent 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 July 2018 and the month of August 2018 at [Particulars withheld] Village, Unoa Location, Makueni Sub-County in Makueni County intentionally caused her vagina to be penetrated by the penis of EMM a mentally challenged child aged 14 years.

3. In the alternative, she was charged with committing an indecent act with a child contrary to section 4(1) of the Sexual Offences Act, the particulars of the offence being that on the same diverse dates and at the same place intentionally touched the penis of EMM a child aged 14 years with her vagina.

4. She denied both charges. After a full trial, the court found that the respondent was not guilty of any of the two alleged offences and acquitted her under section 215 of the Penal Code.

5. Aggrieved by the decision of the trial court, the Republic has brought this appeal through the Director of Public Prosecutions on the following grounds –

> ***1) The learned magistrate erred in law and fact in failing to find that the prosecution had discharged its burden of proof as required by law.***
>
> ***2) The learned magistrate failed to consider the provisions of section 124 of the Evidence Act to the detriment of the victim leading to a miscarriage of justice. The reliability of the victim's sole testimony was not put into doubt.***
>
> ***3) The learned magistrate erred in law and fact in holding that in the circumstances of this case, there was need for corroboration.***
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> ***4) The learned magistrate erred in law and fact by failing to distinguish the findings in the case of High Court of Kenya at Makueni Criminal Appeal No. 39 of 2019, John Muteti –vs- Republic from the circumstances of the instant case.***
>
> ***5) The learned magistrate erred in law and fact by failing to appreciate the unique circumstances of the case. His verdict was based on an opinion of a Medical Officer that a high vaginal swab was necessary to construe penetration yet the victim was a boy.***
>
> ***6) The learned magistrate erred in law and in fact in failing to rely on the expert evidence of the doctor which did not dispute defilement.***

6. The appeal proceeded through filing of written submissions. I have perused and considered the submissions of the Director of Public Prosecutions for the appellant and the respondent's submissions.

7. This being a first appeal, as a first appellate court, I am duty bound to re-evaluate all the evidence on record and come to my own independent conclusions and inferences, bearing in mind that I did not have the opportunity to see witnesses testify to determine their demeanor. See **Okeno –vs- Republic (1972) E.A 32.**

8. The prosecution is aggrieved by the acquittal of the respondent. I have re-evaluated the evidence on record. In proving their case, the prosecution called five (5) witnesses. Pw1 Catherine Nduku Maingi stated that she heard the respondent telling the victim Pw3 that he had *"Kapato kubwa"* meaning big buttocks, and also telling the victim *"huyu auntie amekupikia ukanona"*. That is auntie has fed you well and you have grown fat.

9. The above statements caused Pw1 to later inform the mother of the victim about the incident, who then reported the incident to the father of the victim Pw2 SK and Pw2 thus enquired from the victim who then disclosed to him that the respondent had on an earlier occasion, taken him to bed and caused him to have sex with him. A report was then made to the police and the victim, taken to hospital. Medical reports from Makueni hospital were produced by Pw4 Dr. Makau Alex and Pw6 John Njuguna a Clinician at Nairobi Women's Hospital also produced medical reports from that hospital.

10. In her defence, the respondent tendered a sworn defence testimony denying committing the offence. She said that the allegation was a frame up. She called one witness Dw2 Johnson Musau Kilonzo her father in-law.

11. The offence of defilement has three main elements. First, the age of the victim, which has to be below 18 years. Secondly, the penetration of a sexual nature, even if partial. Third, the identity of the culprit.

12. With regard to the age of the victim, in my view same was proved by the prosecution beyond any reasonable doubt. Both the victim Pw3, and the father Pw2 testified to the age and relied on documents. I find that the age of the victim was proved by the prosecution to be 14 years.

13. The second element was penetration of a sexual nature. I note that the mother of the victim, who according to the evidence of Pw1 and Pw2, was the first person to be told about sexual intercourse, was not called by the prosecutor to testify. Secondly, the victim was said to be mentally handicapped, and in my view, might not be reliable in his evidence as such. I in this regard, I note that his description of the sexual act is not consistent, as at one stage he says the respondent lay on him while he faced upwards, and at another point he says that the respondent lay facing upwards and he faced downwards.

14. In addition to the above, the alleged sexual incident was said to have taken place earlier than the date when the respondent talked of the big buttocks of the victim. The evidence on record is merely that the respondent told the victim that he had big buttocks. That statement, though it might be suggestive, in my view is not sufficient evidence of sexual intercourse. Obviously the victim was interrogated by the father seriously, and in his state of mental condition, in my view, he could easily implicate the respondent.

15. Lastly, the medical evidence tendered in court did not establish sexual activity or penetration between the victim and the respondent. Thus the evidence of Pw3, though under the provisal to section 124 of the Evidence Act does not require corroboration to be sustained, in the present case it is not evidence that can lead any reasonable court to believe the same without corroboration as the sexual acts were alleged to have been committed on earlier dates and the victim appears to have been prevailed upon, after the respondent told him that he had big buttocks to implicate the respondent.

16. In my view, the prosecution did not discharge its burden of proving the alleged sexual act or penetration to the required standards that is beyond any reasonable doubt – see **Woolmington –vs- DPP (1935) A.C.** Thus penetration, one element of defilement was not proved.

17. With regard to the culprit, as I have found that the sexual act or penetration was not proved between the respondent and the victim, I also find that the prosecution failed to prove that the respondent was the culprit.

18. I thus find no merits in the appeal herein filed by the State. I dismiss the appeal and uphold the decision of the trial court.

Delivered, signed & dated this 16th day of November, 2021, in open court at Makueni.

…….

George Dulu

Judge