REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCRA NO. 61 OF 2019

PETER MUNYAO NDUNDA.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(From the original conviction and sentence of Hon. E. Muiru (RM)

in Makindu PMCR No. 398 of 2015 delivered on 12th November, 2015).

JUDGMENT

1. Peter Munyao Ndunda the Appellant herein was charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act. The particulars were that the Appellant on the 7th day of March in Kibwezi district within Makueni county intentionally and unlawfully caused his male organ namely penis to penetrate the vagina of MMM a child aged fourteen 14 years.

2. He faced an alternative count of indecent act with a child contrary to section 11 of the Sexual Offences Act No. 3 of 2006. The particulars being that the Appellant on the 7th of March 2015 intentionally and unlawfully touched the vagina of MMM a child aged 14 years.

3. He further faced a second count of being in possession of cannabis contrary to section 3(1) (2) of the Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994. The particulars were that the Appellant on the 8th day of March 2015 in Kibwezi district within Makueni county found in possession of cannabis sativa (bhang) to wit fifty grammes which was not in medical preparation with a street value of Kshs.1,000/=.

4. He denied all charges and the matter proceeded to full hearing with the prosecution calling five witnesses. The Appellant gave an unsworn statement of defence and called no witness. He was finally convicted on count 1 and acquitted on count 2.

5. Upon conviction he was, sentenced to serve twenty (20) years imprisonment. Being aggrieved he filed this appeal against the judgment citing the following grounds:

> **a. That,** the trial Magistrate erred both in law and facts by failing to note that the charge sheet was defective for non-conformity with the evidence adduced.
>
> **b. That,** the trial Magistrate erred both in law and facts by failing to notice the ingredients of the offence as charged were not proved beyond reasonable doubt.
>
> **c. That,** the learned trial Magistrate erred both in law and facts by failing to observe, analyze and evaluate the entire evidence to convict.
>
> **d. That,** the learned trial Magistrate erred both in law and facts by failing to find that the medical report relied on did not prove the defilement charges as per evidence on record.
>
> **e. That,** the learned trial Magistrate erred both in law and fact by failing to note that the case was not investigated as it is required by the law.

6. A summary of the prosecution case is that the complainant (MMM) who testified as Pw1 was aged 14 years. On 7th March 2015 at 1:00

pm which was a Sunday she was at home when the Appellant came there. He told her to carry her uniform and go with him. She complied and they went to his home. Just before leaving for the market where they were to sleep her mother (Pw2) arrived. She had hidden under the bed but her mother found her and got her out. As at that time the Appellant had not done anything to her.

7. She was taken to the police station then to Kibwezi for treatment. A P3 form (EXB10) was issued to them. In her evidence she said she was 13 years old having been born in 1999. She identified a birth certificate (MFI 2) to that effect but the same was never produced.

8. Besides the 7th March 2015, the witness said on an unknown earlier date, the Appellant had lured her into having sex with him in the forest. He had promised to give her Kshs.50/= which he did not give her. She did not mention this incident to anybody. In cross-examination she said the Appellant had come for her on this day at night when the mother was sleeping. She denied having gone to open the Appellant's chicken that day and nor going for money at his house.

9. Pw2 **JNN** the complainant's mother said after supper on 7th March 2015 she went to sleep. However, on asking about Pw1's whereabouts she was told by her sister that she was outside. She went out with a torch to check on her but only found foot prints and /or tyre marks which she followed up to the Appellant's house. She heard the voices of Pw1 and the Appellant, in the latter's house.

10. She went and called a neighbor (Pw3) and the village elder (Pw4) who came with her to the Appellant's house. The Appellant opened the door for them and that's how Pw1 was found.

11. Pw3 **Beth Mwikali Musyoka** and Pw4 **Nathan Kioko** confirmed having been called by pw2 on the material night. They also confirmed having found Pw1 in the appellant's house. Pw4 arrested the Appellant whom he took to Kativani AP post.

12. Pw5 **Dr. Kelvin Mwau** testified that he examined Pw1 who was aged 14 years. He found her hymen to have been broken. The vagina could accommodate two (2) adult fingers. He also found her to have a whitish vaginal discharge. The rest of the tests were negative. He found evidence of penetration of the vagina.

13. The investigating officer did not testify after several adjournments to accommodate him.

14. The Appellant in his unsworn defence denied the charge. He blamed his trouble on Pw2 who wanted to be rearing the chicken, yet she was asking him for more money than agreed. She continued demanding for money and even asked him to sell a portion of his land and he refused. He was later arrested and charged.

15. In his written submissions the Appellant contends that the evidence adduced was not sufficient to found a conviction. The main reason being that the evidence of Pw1 was that nothing happened at the Appellant's house on 7/3/2015. He found the doctor's (Pw5) evidence to contradict Pw1's evidence.

16. Mrs. Owenga learned counsel for the Respondent conceded the appeal. In her written submissions she states that the investigating officer's failure to testify and Pw1's denial of any occurrence of sexual intercourse on the night in question was a failure to the prosecution case. She concludes that the evidence did not meet the evidential threshold to warrant a conviction.

17. This being a first appeal this court has a duty to re-consider and re-analyse the evidence adduced and arrive at its own conclusion. An allowance ought to be given since this court did not see or hear the witnesses. The Court of Appeal emphasized on this duty in the case of **David Njuguna Wairimu –vs- R (2010) eKLR** when it stated:

> ***"The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision."***

18. I have duly considered the evidence on record, the grounds of appeal and submissions by both parties. The main issue which I find falling for determination is whether there was sufficient evidence to sustain any conviction. This has been covered very well by both the Appellant and the Respondent in their submissions.

19. For a case of defilement to be proved the following ingredients must be established:

i. Age of the complainant.

ii. Whether there was penetration of the complainant's genitalia.

iii. Whether the perpetrator was identified as the person accused.

Issue (i) ***Age of the complainant***.

20. Proof of age in a case of defilement is key since age determines the sentence to be meted out incase of a conviction. In this case the charge sheet shows the complainant's age as 14 years.

21. In her evidence (MMM) stated that she was born in 1999 and she was 13 years old when she was testifying on 14/4/2015. My limited mathematics shows me that if the girl was born in 1999 then she ought to have been 16 years old or thereabout and not 13 years when she testified. It's also indicated that a birth certificate was shown to the court and identified as MFI2. Her exact date of birth is not shown. The said birth certificate is not in the court file as it was not produced allegedly because the investigating officer did not testify.

22. Pw2 who is MMM's mother never said anything about MMM's age. MFI 2 was not even shown to Pw2 for identification and/or production. My finding is that there was never any birth certificate in respect of Pw1 before the trial court.

23. The learned trial Magistrate in her judgment stated that even the doctor who did the P3 (EXB1) found Pw1 to be aged 14 years. That is not correct because the doctor did not assess Pw1's age. What he wrote on the P3 was information given to him by Pw1(MMM). On this issue I find that the age of Pw1 (MMM) was never ascertained as there was no evidence adduced before the court to support it.

24. On the next two issues, the evidence was that Pw1 picked her from her home at 1:00 pm which was broad light. Later in cross examination she says the Appellant came when Pw2 was sleeping and it was at night. So which is which?

25. The Appellant was accused of defiling MMM on 7/3/2015. In her evidence she stated this of the said date:

"Nothing happened at the accused's house."

She however added that the Appellant had sex with her on another day which she could not remember. Further she never told anybody about it.

26. The learned trial Magistrate relied on the P3 form to find the Appellant guilty of defiling MMM on 7/3/2015. This is what she says at page 5 of her judgment:

> "*The complainant testified that the accused person had defiled her on a date that she could not remember. She however identified him as the assailant. The age of injuries as per the P3 form was 2 days meaning that the incident had taken place recently. The complainant being a child could have been confused and/or traumatized by the whole ordeal that she was unable to relay the sequence of events clearly. The evidence of Pw2, Pw3 and Pw4 further corroborated the complainant's testimony and linked the accused person to the offence as the minor was found with the accused person at his house at night.*

27. The doctor examined MMM on 9th March 2015. There were no treatment notes produced to show when and for what MMM had been treated. No PRC forms were filled upon treatment. Out of nowhere and without any background to the matter Pw5 **Dr. Kelvin Mwau** filled the P3 form. How did he know she had been defiled two days earlier when Pw1 herself stated otherwise?

28. It is not clear how the earlier occurrence (*if true*) was connected to the finding of MMM in the Appellant's house hence forming the basis of the conviction. Pw1 said the Appellant had not done anything to her when she was found in his house.

29. I have gone through the record and I see nowhere noted what MMM's demeanor was when she was testifying. The notes in the judgment on confusion and trauma of MMM by the trial court are not therefore supported by the record.

30. The State does not support the conviction and sentence for the reason that the evidence by the prosecution did not meet the evidential threshold.

31. After analyzing the evidence on record, I find that the case against the Appellant was not proved beyond reasonable doubt and so the appeal is meritorious. I allow it, with the result that the conviction is quashed and the sentence set aside.

32. The Appellant shall be released forthwith unless otherwise lawfully held under a separate warrant.

Orders accordingly.

Delivered, signed & dated this 8th day of May 2020, in open court at Makueni.

.....

H. I. Ong'udi

Judge