



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCRA NO. 36 OF 2020

MUTISO MWANGANGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence of Hon. Mayamba C.A (P.M) in Makindu Principal Magistrate's Court PMCR (S.O) No. 110 of 2019 issued on 5th December, 2019).

JUDGMENT

1. The appellant was charged in the magistrates' 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 on 29th August 2018 at [particulars withheld] market in Kibwezi Sub-county within Makueni County intentionally and unlawfully caused his male 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 offence being that on the same day and place intentionally and unlawfully caused his male organ namely penis to touch the vagina of AM a child aged 17 years.

3. He denied both counts. After a full trial, he was convicted of the main count of defilement and sentenced to 15 years imprisonment.

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

1. That the magistrate erred in law and fact when he convicted and sentenced him without regard to his basic right for disclosure of the prosecution evidence which was intended to be brought against him as laid down under Article 50(2) (j) of the Constitution.

2. The magistrate erred both in law and fact by failing to observe that one of the ingredients establishing the offence of incest (should be defilement) i.e. penetration was not proven by the prosecution beyond reasonable doubt as required by law.

3. The trial magistrate erred in law and fact by convicting him without observing that he was prejudiced when substantial injustice occurred in his case and the trial court failed to observe the provisions of section 214 Criminal Procedure Code.

4. The trial magistrate erred in law and fact by failing to observe that one of the ingredients of offence of incest (should be defilement) i.e. penetration was not proved by the prosecution beyond reasonable doubt. (This is duplication of ground 2 above).

5. The trial magistrate erred in sentencing him to a harsh and excessive sentence based on the mandatory sentence under the Act which is unconstitutional hence contravening the Supreme Court decision in the case of Francis Muruatetu.

6. The trial magistrate erred in law and fact by dismissing his defence without giving cogent reasons.

5. Both the appellant and the Director of Public Prosecutions filed written submissions to the appeal which I have perused and considered.

6. This being a first appeal, I am duty bound to evaluate all the evidence on record afresh and come to my own independent conclusions and inferences, but 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.**

7. I have also to bear in mind that in all criminal cases, the burden is always on the prosecution to prove their case against an accused person

beyond any reasonable doubt. An accused person has no burden to prove his innocence – see **Woolmington –vs- DPP (1935) A.C** - an English case which has been consistently followed by courts in Kenya.

8. In proving their case herein the prosecution called 6 witnesses. The appellant on his part tendered a sworn defence testimony, and did not call any other witness. The appellant has raised several grounds of appeal. I will start with the technical grounds.

9. The appellant has complained that his rights to fair trial under Article 50 of the Constitution were violated in that he was not availed prosecution evidence before such evidence was brought against him. I have perused the trial court record and nowhere did the appellant ask for provision of any information. I note also that the appellant cross-examined prosecution witnesses at length. It cannot thus be said that he was denied any information or denied a chance to cross examine witnesses. In my view therefore the complaint of the appellant in this regard is an afterthought. I find that the appellant was not unfairly tried or prejudiced on that account. There was thus no violation of Article 50 of the Constitution.

10. The appellant has complained that he was prejudiced in the trial, as the charge was amended but the provisions of section 214 of the Criminal Procedure Code (cap. 75) were not complied with.

11. Having perused the record of the trial court proceedings, I note that after the close of the prosecution evidence, the prosecutor requested to amend the charge for the date of offence to read “*night of 29/08/2018 to 30/08/2018*” instead of 29/08/2018. After a response from the appellant in which he said that there was no proof that the offence occurred on 29/08/2018 the trial court allowed the amendment of charge, but did not ask the appellant to plead to the amended charge and give him an opportunity to say whether he requires recall of any witness, and proceeded to allow the prosecution close their case. The court then called upon the appellant to defend himself.

12. The relevant parts of section 214 of the Criminal Procedure Code (cap.75) provide as follows –

“214(1) where, at any stage of the trial before the close of the case for the prosecution it appears to the court that the charge is defective either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case.

Provided that:

(i) Where the charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge.”

13. Considering the above provisions of the law above, two errors were committed by the trial court with regard to the amendment of the charge. First, the charge should have been amended before the close of the prosecution evidence and not after the last prosecution witness had been called and concluded his testimony as happened in this case. The second mistake of the trial court was the failure to comply with the mandatory provisions of the law which commanded the trial court to call upon the accused person to plead to the amended charge. In my view, the above two errors of the trial court rendered all the proceedings conducted after the purported amendment of charge to be totally defective. On that account, the appeal has to succeed on a technicality as the trial proceedings have to be treated as a single complete package, and cannot be separated into two separate segments.

14. Coming to the substantive grounds of appeal, in my view the age of the complainant was proved by the prosecution beyond reasonable doubt. The birth certificate of the complainant was identified by the complainant Pw1, and the mother of the complainant Pw2 FKM also confirmed in her testimony that the complainant was born on 21/06/2001. The birth certificate which was produced in evidence as an exhibit by Pw6 PC Francis Musyoki who took over investigations in the case, confirmed in writing the age of the complainant. In my view therefore, the age of the complainant was proved by the prosecution beyond any reasonable doubt.

15. I now turn to the issue on whether penetration of a sexual nature did occur. This turns on the evidence of the complainant Pw1 and the medical evidence tendered by Pw5 Dr. Anthony Masila. I note that from the medical evidence tendered in court, the hymen of the complainant was broken but not freshly and no spermatozoa were noted. The complainant’s evidence was however detailed with regard to the renting of the lodging room and the sexual intercourse activity which she appeared to have indulged into willfully. In my view therefore, sexual intercourse on that night was proved by the prosecution beyond any reasonable doubt.

16. The next issue is whether the appellant did have sexual intercourse with the complainant that day or in other words that he was the culprit. In this regard the complainant Pw1 described in detail how she met the appellant, with whom they had food together bought by the appellant, and the two went to appellant’s friend’s house, before proceeding to the lodging where the appellant booked a room in which they slept and indulged in sexual intercourse. In addition to the above testimony of the complainant, Pw3 Ambrose Musyoka Kasyoki who was manning the lodge that night, testified that at 10:30 pm Mutiso (*the appellant*) went and asked for a room and he hired him room No. 9 in the lodgings. Pw3 further testified that towards the morning at 4:00am, responding to sounds of an opening door, he saw a woman standing outside the room, who later walked out of the lodge, and then came back. Thus the appellant is squarely put at the scene of the incident, and was the person who booked the room No. 9 where the incident occurred. I find that the appellant was proved by the prosecution beyond reasonable doubt to have had sexual intercourse with the complainant, as he had the opportunity and reason to indulge in sexual intercourse with the complainant, with whom they were together that day.

17. Having said as above, section 8(5) of the Sexual Offences Act provides a specific defence in case of defilement. It states as follows –

8(5) It is a defence to a charge under this section if –

(a) 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 18 years.

18. In the present case, though the appellant has not specifically raised the above defence that he was misled by the conduct of the complainant into believing that she was above 18 years, the evidence of the prosecution on record clearly says it all. The prosecution evidence on record is that the complainant, a girl above 17 years, was explicitly acting like an adult by going for dates with men, taking meals with them, and willingly going to sleep with them in lodgings. In my view, therefore any reasonable man in the circumstances of the appellant as disclosed in the prosecution evidence herein would have no reason to suspect that the complainant was below 18 years. In my view, the defence under section 8(5) applies in this case. On that account also this appeal will succeed, as the complainant misled the appellant by her explicit adult conduct and behavior towards the appellant by behaving clearly like an adult woman in as far as her sexual relationships were concerned.

19. Consequently, for the above reasons, 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 30TH DAY OF JUNE, 2021, IN OPEN COURT AT MAKUENI.

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GEORGE DULU

JUDGE