REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCRA NO. 151 OF 2019

JWM.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(From the original conviction and sentence of Hon. J.D. Karani (R.M) in Makindu Principal Magistrate's Court PMCR (S.O) No. 38 of 2018 issued on 23rd August, 2019).

JUDGMENT

1. The appellant was charged in the magistrates' court with incest contrary to section 20(1) of the Sexual Offences Act No. 3 of 2006. The particulars of offence were that on 21st May 2018 in Nzaui Sub-county within Makueni County intentionally and unlawfully caused his genital organ namely penis to penetrate into the female genital organ namely vagina of HMM (*name withheld*) who was to his knowledge his sister, juvenile aged 16 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 were that on the same day and place intentionally and unlawfully touched the vagina of HMM a child aged 16 years with his penis.

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

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

> ***1) The trial magistrate erred in law and fact by convicting him on insufficient evidence.***
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> ***2) The trial magistrate erred by dismissing his plausible defence without sufficient reasons.***
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> ***3) The trial magistrate erred in convicting him on uncorroborated and contradictory evidence.***
>
> ***4) The trial magistrate erred by shifting the burden of proof to him.***
>
> ***5) The trial magistrate erred by failing to conduct holistic scrutiny of the whole evidence on record to base his conviction and sentence.***
>
> ***6) The medical evidence testimony was obtained in a manner likely to occasion detriment to the appellant contrary to Article 50(4) of the Constitution 2010.***

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 required to re-evaluate all the evidence on record and come to my own independent conclusions and inferences – see **Okeno –vs- Republic (1972) E. A 32**, which has been followed consistently by courts in Kenya. Applying the reasoning in the above case, in **Odhiambo –vs- Republic (2005) IKLR 564** the court held as follows –

> ***"On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanor."***

7. I have re-evaluated the evidence on record. The prosecution called five (5) witnesses, while the appellant tendered sworn defence

testimony and did not call additional witnesses. In criminal cases the burden is always on the prosecution to prove their case against an accused person beyond any reasonable doubt.

8. The appellant has raised several issues on appeal. This being a case of incest with a child, the first ingredient of the offence which was to be proved by the prosecution was the age of the complainant who should be below 18 years. The second ingredient was whether the complainant and the appellant were a sister and brother. The third ingredient, to be proved is whether penetration of a sexual nature did occur. The fourth and last ingredient to be proved by the prosecution was whether the appellant was the culprit.

9. With regard to the proof of age of the complainant, she testified as Pw1 and stated in evidence that she was 16 years having been born on 8/8/2002. The mother of the complainant Pw2 MM also tendered evidence in court that the complainant was born in August 2002 and relied on a birth certificate which was produced in evidence as an exhibit by Pw5 PC Zena Jeruto – the Investigating Officer. The birth certificate was not contested. In my view, the prosecution proved beyond any reasonable doubt that complainant was 16 years old at the time of the alleged incident.

10. With regard to the second ingredient of the offence whether the complainant and the appellant were a sister and a brother – the evidence on record from the complainant Pw1, the mother Pw3 MM and the appellant is clear on this. There is no dispute that the complainant and the appellant were a sister and brother. I thus find that from the evidence on record, the prosecution proved beyond any reasonable doubt that the complainant and the appellant are and were a sister and brother.

11. With regard to proof of sexual penetration, the evidence on this is that of the complainant Pw1 who stated before the trial court that she was sexually penetrated with a penis that day. Pw2 PNK also tendered evidence in the trial court stating that shortly after the incident on 21/05/2018 at 5pm; she was called on phone by the complainant who told her to send her painkillers which she did. When they met with the complainant near the watering point, the complainant narrated to Pw2 about the incident of sexual penetration and thus Pw2 phoned Pw3 the mother of the complainant and informed her about the incident. In addition, the medical evidence and report produced by Pw4 Dr. Charles Maundu Mutisya was that the complainant was examined on 23/5/2018 and the hymen was broken but not freshly, and though there was no trace of spermatozoa the complainant had earlier on attended medical treatment on 22/5/2018, and was treated for the alleged sexual assault.

12. In my view, though the medical evidence tendered before the trial court was not conclusive on whether there was sexual penetration on 21/5/2018, the totality of the evidence on record from Pw1 the complainant, Pw2, Pw3 and the medical evidence, leads to no other conclusion than that sexual penetration on the complainant did occur on that day since the complainant reported the incident to Pw2 soon after the incident. The evidence of the complainant was believable and was believed by the trial court as envisaged under the provisal to section 124 of the Evidence Act (cap 80.). Thus the prosecution proved beyond any reasonable doubt that sexual penetration occurred on the complainant on the date in question.

13. I now turn to the fourth element, whether the appellant was the culprit. The evidence that connects the appellant to the incident is that of the complainant Pw1 alone. The appellant denied the allegation of the complainant. In sexual offences, under the provisal to section 124 of the Evidence Act, the evidence of a single victim witness of a sexual offence can sustain a conviction even in the absence of corroboration, provided it is believable and is so believed by the trial court on reasons to be recorded in the proceedings. The provisal specifically states as follows –

> **124 .....**
>
> ***Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."***

14. In my view, the evidence of the complainant Pw1 herein is truthful and believable because firstly, she did not stand to benefit anything by implicating her own brother with this serious offence. Secondly, though the appellant stated in his defence that the mother Pw3 MM had a grudge against him, the evidence on record was that the mother was merely informed about the incident by Pw2 PNK. Thirdly, the complainant in a very short span of time after the incident phoned Pw2 and informed her about the incident, and when Pw2 ultimately met the complainant shortly thereafter, the complainant was in distressed condition. All this in my view gives the picture of truthfulness of what the complainant stated about the incident and the culprit.

15. Though the appellant now talks about contradictions in the prosecution evidence, I do not see any material contradiction in the evidence of the prosecution on record.

16. Additionally, though the appellant has complained that the trial court did not consider his defence, that is not the position as the trial court did consider the defence of the appellant but did not believe the same in the following words recorded in the judgment:-

> ***"I also consider the accused defence, as initially stated he maintained his grudge with his mother over the alleged monies. There was no animosity between the victim and the accused at the trial unlike the one between the accused and his mother. Infact, the victim never called the mother but Pw2 her sister in-law to inform her of her pain and there was no evidence of a grudge against Pw2 alluded by the accused person".***

17. I thus find that from the evidence on record, the prosecution proved beyond any reasonable doubt that the appellant was the culprit. I will thus uphold the conviction of the trial court.

18. With regard to sentence, the appellant was sentenced to 15 years imprisonment. The minimum sentence under the Sexual Offences Act where the victim incest is below 18 years is life imprisonment. I note that the appellant was a first offender. However, when asked for his mitigation, the appellant merely said that he would appeal. This in my view, shows that the appellant has no remorse. In addition the threat

on the victim with a knife was an aggravating factor. I note that the victim impact report and the Probation Officer's report also emphasized the seriousness of the conduct of the appellant. Thus in my view the sentence imposed by the trial court was justified in the circumstances of the case. I will thus uphold the sentence.

19. Consequently, and for the above reasons, I find no merits in the appeal. I dismiss the appeal and uphold both the conviction and sentence of the trial court.

DELIVERED, SIGNED & DATED THIS 30TH DAY OF JUNE, 2021, IN OPEN COURT AT MAKUENI.

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GEORGE DULU

JUDGE