REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCRA NO. 05 OF 2020

FELIX MBITHI KALOLA .... APPELLANT

-VERSUS-

REPUBLIC ....RESPONDENT

(From the original conviction and sentence of Hon. T. A. Sitati (P.M) in Makindu Principal Magistrate's Court PMCR

(S.O) No. 72 of 2020 issued on 8th November, 2019).

JUDGMENT

1. The appellant was charged in the magistrates' court with rape contrary to section 3(1) (a) (b) as read with section 3 of the Sexual Offences Act No. 3 of 2006. The particulars of offence were that on 21st February 2019 at (*name withheld)* Primary School in Makindu Sub-county, intentionally and unlawfully caused his penis to penetrate the anus of KSK (*name withheld*) without his consent.

2. In the alternative, he was charged with indecent act with an adult contrary to section 11(8) of the Sexual Offences Act. The particulars of offence were that on the same day and place intentionally touched the anus of KSK (*name withheld*) with his penis against his will.

3. He pleaded not guilty to both counts. After a full trial, he was convicted of the main count of rape, and sentenced to serve fifteen (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) The learned trial magistrate erred both in law and fact when she convicted and sentenced him without observing that the charge sheet was defective due to the way the charges were framed and the sections of law used in the charge sheet which rendered the same to be duplex charges.

> ***2) The learned trial magistrate erred in law and fact by convicting him without considering that there was no evidence to prove the offence of defilement (rape) to the required standards in law beyond reasonable doubt.***
>
> ***3) The learned trial magistrate erred in law and fact by failing to consider that there was no evidence to prove the alternative count of indecent assault (should be act) hence erred by convicting him on the basis of extraneous evidence which was motivated by his own opinion without relying on evidence on record.***
>
> ***4) The learned trial magistrate erred in both law and fact by failing to observe that the prosecution case was full of contradictions and inconsistencies, coupled with poor police investigations, which rendered their case unbelievable.***
>
> ***5) The learned trial magistrate erred in law and fact when he dismissed his sworn defence which alleged the possibility of being framed up due to an existing grudge without giving cogent reasons as provided under section 169 Criminal Procedure Code.***

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

6. This is a first appeal. As a first appellate court, I am required to examine the evidence on record afresh and come to my own independent conclusions and inferences – see **Okeno –vs- Republic (1972) E.A 32** in which the Court of Appeal stated as follows –

> ***"An appellant in a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh exhaustive examination (Pandya –vs- R [1957] E.A 336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh the conflicting evidence and draw its own conclusions (Shantilal M. Ruala –vs- R [1957] E.A 570).***

7. It is also important to mention here that in all criminal cases, the burden is always on the prosecution to prove the guilt of an accused person beyond any reasonable doubt. An accused person has no burden to prove his innocence – see **Woolmington –vs- DPP (1935) A.C 642** an English case. Which has been consistently followed by courts in Kenya.

8. I have re-evaluated the evidence on record. The prosecution herein called 4 witnesses. The appellant tendered a sworn defence statement and did not call additional witnesses.

9. The appellant has complained that the charge was defective due to the sections of the law cited, and thus it was duplex. I have perused the charge sheet. The sections cited in the main charge of rape on which the appellant was convicted were section 3(1) (a)(b) and section 3 of the Sexual Offences Act. Thus there appears to be a repetition of the main section 3 without any reason at all. This was a defect. Did that defect make the charge fatally defective? In my view, though there was a mistake of repetition of section 3 on the face of the charge sheet, the appellant was not misled or prejudiced in any way. As such, the charge was not fatally defective. On this, I rely on section 134 of the Criminal Procedure Code (cap. 75) which provides as follows –

> ***"Every charge or information shall contain and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information on to the nature of the offence charged."***

10. In my view therefore, since the offence charged exists under section 3 of the Sexual Offences Act, and the particulars of offence were clear, the charge sheet was proper and not fatally defective. I dismiss that ground.

11. The appellant has complained under ground 3 that there was no evidence to prove the alternative charge of indecent act. Since he was not convicted of that alternative count, this ground of appeal is superfluous. I dismiss that ground.

12. The appellant has complained that the trial magistrate erred in convicting him on evidence that was full of inconsistencies and contradictions. Having perused the evidence on record, I do not see contradictions or material contradictions in the prosecution evidence. It is also not any minor contradictions in a prosecution case that will vitiate a conviction. Such is the position as stated in **Richard Munene –vs- Republic (2018) eKLR** where the Court of Appeal stated as follows:

> ***"It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witnesses that will be fatal to a case."***

I dismiss this ground.

13. I now turn to the major ground on the sufficiency of evidence to prove the offence. As stated above, the burden was on the prosecution to prove their case against the appellant beyond any reasonable doubt. The evidence connecting the appellant to the alleged offence is that of the complainant Pw1. Under the provisal to section 124 of the Criminal Procedure Code (cap 75) such evidence in sexual offences does not require corroboration, provided it is believable, and is so believed by a trial court on reasons to be recorded by the trial court.

14. In the present case, the complainant Pw1 did not tell anybody about the incident for several days. He was prompted to make allegations against the appellant by Muoki's mother who did not testify in court. Thus the evidence about what Muoki's mother said was hearsay evidence. The complainant Pw1 also said that he informed a friend Muoki Sila about the incident, but Muoki Sila was not brought by the prosecution as a witness to testify in court, and no reason was given by the prosecution why he was not so brought. The evidence of the prosecution was also that a number of school pupils were victims of the appellant's sexual misdeeds. Again, none of those pupils was called to testify. The incident was also reported long after the alleged occurrence and the medical report contains no evidence of sexual assault on the complainant.

15. In view of the above therefore, the evidence of the single witness victim of a sexual offence Pw1, was shaky and left a lot to be desired and was not believable. It has to be mentioned also that the place where the incident was alleged to have occurred in the school staffroom in broad daylight, was a highly unlikely scene of such an act. I thus find that the evidence of the complainant connecting the appellant to the incident is not believable and cannot be saved by the provisal to section 124 of the Evidence Act.

16. Secondly, the fact that very scanty evidence was tendered by the prosecution and crucial witnesses were not called to testify raises the inference alluded to in the case of **Bukenya –vs- Uganda (1972) E.A 549** where it was held that the court is entitled to infer – that the evidence of the crucial witnesses not called, would have been adverse to the prosecution version. I make such adverse inference, and in my view the trial court should have made such an inference and given the benefit to the appellant by acquitting him.

17. Lastly, in my view, the trial court did not weigh the evidence of the prosecution against the defence of the appellant. Had the trial court weighed the evidence of the prosecution against the defence as required under section 169 of the Criminal Procedure Code, and taking into account that the appellant did not have the burden to prove his innocence, the trial court would not have dismissed the appellant's alibi defence as an afterthought, as the prosecution could have called the school headmaster if they wanted to shake sworn the defence of the appellant but did not do so.

18. Consequently, I find that the appeal has merits, as the prosecution did not prove their case against the appellant beyond reasonable doubt. I thus 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 29TH DAY OF JUNE, 2021, IN OPEN COURT AT MAKUENI.

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GEORGE DULU

JUDGE