REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCRA NO. 46 OF 2020

AMM .....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. Otieno J. (R.M) in Makueni Chief Magistrate's Court CMCR (S.O) Case No. 36 of 2019 issued on 12th February, 2020).

JUDGMENT

1. The appellant was charged in the magistrates' court with sexual assault contrary to section 5(1) (b) (2) of the Sexual Offences Act No. 3 of 2006. The particulars of offence were that on 1st October 2019 at around 17:30 hours in Kathonzweni Location within Makueni County unlawfully used his fingers to penetrate the vagina of MM a child aged 3 years who to his knowledge was his daughter.

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 the offence were that on the same day and place intentionally touched the vagina of MM a child aged 3 years with his fingers who to his knowledge was his daughter.

3. He denied both charges. After a full trial, he was convicted on the main count of sexual assault and sentenced to serve 12 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 trial magistrate erred in convicting and sentencing him without regard to his basic right for disclosure of the prosecution evidence which was intended to be brought against him as laid down in Article 50(2) (j) of the Constitution.**
>
> **2. The trial magistrate erred in law and facts in failing to observe that the charges were defective and went ahead to convict him with two separate counts premised on the same facts and evidence.**
>
> **3. The learned magistrate erred in law and in fact in failing to appreciate that the entire evidence which did not meet the threshold required by the law which is beyond reasonable doubt and relying on the unreliable evidence of a single minor witness without warning of the danger of convicting on such evidence.**
>
> **4. The learned trial magistrate erred in fact and in law in shifting the burden of proof to the appellant and misapprehended and misunderstood the evidence and arrived at a wrong decision.**
>
> **5. The learned trial magistrate erred in fact and in law by failing to address the inconsistencies pervading the entire evidence and resolve the doubts in favour of the appellant.**

5. The appeal proceeded by way of filing written submissions. I have perused and considered the submissions for both the appellant and the Director of Public Prosecutions.

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.**

7. I have evaluated the evidence on record. To prove their case, the prosecution called five (5) witnesses, and in his defence, the appellant

chose to keep quiet. Pw1was Stella Ndabi Muasya a Clinical Officer who produced the medical examination report (P3 form) and treatment notes for the complainant. She said that the child was brought to her 14 days after the incident, and that the hymen of the complainant was intact but with bruises.

8. Pw2 MP was the mother of the complainant and wife of the appellant. She said that the complainant was born on 22/10/2015 and relied on a birth certificate. It was her evidence also that she had gone back to her parents' home on the day in question and left the children with the appellant, and that later the complainant made a report to her on the incident. She stated further, that when she checked the complainant she found that she was not bleeding. Pw3 RM was the mother of Pw2 who said that she heard the child crying and informed Pw2 about and a report was then made to the police on the incident. Pw4 was the complainant who said that the appellant held her with his fingers, thus the complaint. As stated earlier in his judgment the appellant chose not to say anything in his defence, which was his right.

9. The appellant has complained that he was not availed prosecution evidence to be used at the trial in contravention of Article 50(2)(j) of the Constitution. I have perused the proceedings. I find no record that he asked for information which was not provided. I dismiss that ground.

10. The appellant has complained that the charges were defective and that he was wrongly convicted for two charges. I find no basis for the appellant's complaint. I dismiss that ground.

11. Was age of the complainant proved by the prosecution? In my view with the evidence on record, the prosecution proved the age of the complainant beyond reasonable doubt to be 3 years. This fact was not controverted by the appellant and a birth certificate of the complainant was relied upon by Pw2.

12. Did the prosecution prove sexual assault on the complainant? In my view sexual assault on the complainant was proved as the medical evidence of Pw1 Stella Muasya the Clinical Officer established presence of lacerations in the vagina of the complainant. I find that sexual assault on the complainant was proved.

13. Did the prosecution prove that the appellant was the culprit? The evidence connecting the appellant to the incident is that of the complainant Pw1, a child of 3 years. Such evidence of a single victim witness in a sexual offence does not require corroboration to sustain a conviction in accordance with the provisal to section 124 of the Evidence Act (cap 80), provided that it is believable and is so believed by the trial court, on reasons to be recorded in the proceedings. In the present case, I note that in his defence the appellant chose to keep quiet. However, he cross-examined all the prosecution witnesses, including the complainant. What comes out from the prosecution evidence, in my view is that there was a domestic disagreement between the appellant and the mother of the complainant Pw2. The said mother of the complainant Pw2 (*wife of the appellant*) left the young children behind and proceeded to her home of origin that same day when the complaint was made. The other witness in this regard is the mother of Pw2, who was the first person to allege such sexual assault. These are relatives who could have all reason to implicate the appellant as a revenge.

14. From the totality of the evidence on record, in my view, this case was an attempt by Pw2 and Pw3 to fix the appellant due to a domestic dispute between Pw2 and her husband the appellant. I find that Pw2 and Pw3 are the prime movers of the allegations against the appellant and the evidence of Pw4 the complainant was thus, in my view couched evidence meant to implicate and fix the appellant. I also note from the evidence in chief of Pw4 the complainant, that she did not talk of any sexual assault on her but merely said – ***"I live at kwa daddy. There is nothing I told shosho."***

15. Shosho being grandmother, the above evidence means that the complainant did not tell the grandmother Pw3 that she had been assaulted sexually. In my view, therefore, the sexual assault narrative did not originally emanate from the complainant Pw4, and as such I find that the prosecution did not prove beyond any reasonable doubt that the appellant was the culprit. The conviction and sentence of the trial court herein cannot thus be sustained.

16. Consequently, 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 22ND DAY OF JULY, 2021, IN OPEN COURT AT MAKUENI

…….

GEORGE DULU

JUDGE