REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCRA NO.53 OF 2020

FKM.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being appeals from the original conviction and sentence of Hon.

C. A Mayamba in Makindu Senior Principal Magistrate's Court

SPMCR Case No. 75 of 2019 pronounced on 4th November, 2019).

JUDGMENT

1. The appellant was charged in the magistrates' court with attempted incest contrary to section 20(2) of the Sexual Offences Act No. 3 of 2006, the particulars of which being that on diverse dates between 23rd June 2019 and 6th July 2019 at [Particulars withheld] village, Ngumo location in Makindu sub-county of Makueni County unlawfully and intentionally attempted to cause his penis to penetrate the vagina of MWK who was to his knowledge his daughter, a child aged 9 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 which being that between the same dates and at the same place unlawfully and intentionally touched the vagina of MWK a child aged 9 years with his penis.

3. He denied both charges. After a full trial, he was convicted of the main count of attempted incest and sentenced to 20 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 learned trial magistrate erred both in law and facts by failing to find that the key ingredients of the offence i.e. attempted penetration was not established against the accused person.***
>
> ***2) The trial magistrate erred both in law and fact by holding that Pw4 was a credible witness worth of belief whereas her evidence was greatly uncorroborated and full of explicit inconsistencies and contradictions that impugned on the overall burden of proof.***
>
> ***3) The learned trial magistrate erred both in law and fact by failing to meet the overall burden of proof that was expected in a case of such magnitude thereby leaving the accused person's defence un rebutted.***
>
> ***4) The learned trial magistrate erred in law and fact by rejecting the cogent defence case which reasonably exonerated him from any wrong doing.***

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

6. This is a first appeal. As a first appellate court, I have a duty 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 re-evaluated the evidence on record. In proving their case, the prosecution called five (5) witnesses. Pw1 was Dr. Dorcas Kavuli Musyoki of Makindu Sub-District hospital, who produced the medical examination report (P3 form) prepared by Dr. Ndubi, in which it was

recorded that the victim was limping. On the genitalia, no injuries were detected, but there was bleeding from introitus with whitish vaginal discharge. The P3 form was filled on 18/7/2019, and was based on findings made by Dr. Diana Ateko entered in treatment notes filled on 6/7/2019 when the victim was seen. The hymen was intact. The doctor produced treatment notes, the P3 form and the birth certificate of the victim as exhibits.

8. Pw2 was MM the grandmother of the victim, whose evidence was that it was reported to her on 5-7-2019 that there was an issue with the victim, in that it was reported that she had been defiled by the father. She proceeded there and on examining the vagina of the child (*victim*) she found her genitals to be reddish.

9. Pw3 was FM who stated that on 24/6/2019 as she washed clothes, she noted blood stains in the clothes of the victim (M). Though she enquired from the child what the problem was the child (victim) just walked away and went to play. She then called the grandmother Pw2 who confirmed that the child (victim) aged 9 years, who lived with the father (*the accused*), had been defiled.

10. Pw4 was the complainant who stated that she used to sleep with her father on the same bed, and that sometimes the father, had formed the habit of sleeping on top of her and that at one time he even removed her inner wear. It was her evidence that her father did so on three occasions.

11. Pw5 was PC Gladys Santa who took over investigations from CPL. Festus Ngakotha. It was her evidence that a report was made to police on 6-7-2019 regarding this matter.

12. When put on his defence, the appellant tendered a sworn defence statement denying the offence. He stated that F Pw3 a sister in law had a disagreement with her due to a land issue. He stated that though he lived with his children, he did not sleep on the same bed with the victim.

13. The appellant having been convicted of attempted defilement of a child, penetration was not required to be proved by the prosecution. It was however, necessary to prove the age of the victim and the attempt by the appellant to defile the victim.

14. In my view, the age of the victim was proved beyond reasonable doubt. Though her mother was deceased and did not testify, the victimPw3 and the grandmother Pw2 stated that she was 9 years old. The birth certificate produced in court was not disputed or doubted by the appellant or his counsel. I find that the complainant was proved beyond reasonable doubt by the prosecution to be a child of 9 years at the time of the alleged offence.

15. I now turn to the issue whether the prosecution proved beyond reasonable doubt that the appellant attempted to defile the victim.

16. Though the trial court relied on the bleeding of the victim to be evidence of attempted sexual penetration, in my view, that was a mistake. In my view, bleeding from the vagina can be caused by many factors other than sexual penetration. In addition, the incident according to Pw3 FM occurred before she noticed blood in the clothes of the victim on 24/6/2019, while the incident was reported on 6/7/2019 and medical treatment was commenced that day. Thus the blood allegedly found on the complainant in hospital was so found more than 10 days after the incident. The connection with the alleged incident is thus in doubt.

17. Secondly, the evidence on the medical findings was secondary and not direct evidence, as the person or persons who treated the victim and made the treatment notes did not testify in court. That evidence is of little weight as the doctor who entered that information in the P3 form was not the person who treated the complainant and noted the blood in her private parts.

18. Though the evidence on the attempt to defile was that of the victim alone, which under the provisal to section 124 of the Evidence Act (cap.80) does not require corroboration, in my view it is not believable in the present circumstances.

19. It is not believable because with regard to the limping of the victim, she stated in cross examination that she was pricked by a thorn. With regard to the allegation that the appellant attempted to defile her, the victim did not tell her aunt FMthat story. However, the said F insisted that the grandmother of the complainant Pw2 should come and ask the girl and the grandmother only saw reddening of the genital organs. Thus the evidence of the victim tendered in court was likely to have been under duress.

20. Further, with the above weakness in the prosecution evidence, the appellant tendered a sworn defence statement denying committing the offence, and the prosecutor did not put any question in cross-examination which means that the defence of the appellant remained unshaken or undoubted.

21. With the legal principle in criminal cases that the burden is always in the prosecution to prove their case against an accused person beyond any reasonable doubt – see **Woolmington –vs- DPP (1935) AC** (*an English case*) – any shade of a reasonable doubt has to be given to an accused person, and the magistrate should have done so.

22. In the present case, I find that the evidence of the victim is very shaky in view of the unchallenged sworn defence of the appellant, and come to the conclusion that the prosecution did not prove beyond reasonable doubt that the appellant attempted to defile the complainant. On that account, the appeal will succeed.

23. 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 19TH DAY OF OCTOBER, 2021, IN OPEN COURT AT

MAKUENI.

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George Dulu

Judge