REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCRA NO. 51 OF 2020

RAMADHANI MBALUKA KIVINDU.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(From the original Judgment of Hon. E. Muiru (SRM) in Kilungu Senior

Resident Magistrate's Court CMCRC No. 638 of 2018 issued on 29th April , 2020).

JUDGMENT

1. The appellant was charged in the magistrates court with sexual assault contrary to section 5(1) (a) (i) (2) of the Sexual Offences Act. The particulars of the offence were that on 5th December 2019 at about 2250 hours in Mukaa sub-county within Makueni county unlawfully used his fingers to penetrate the anus of JWM(*name withheld*).

2. He denied the charge. After a full trial, he was convicted of the offence and sentenced to 12 years imprisonment.

3. Dissatisfied with the conviction and sentence, the appellant has come to this court on appeal through counsel D. Muinde and Associates on the following grounds:

> **1)** The learned trial magistrate erred in law and fact in not informing the appellant of his right to legal representation hence prejudicing his right to fair trial as provided for under Article 50(2)(g) of the Constitution of Kenya 2010.
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> **2)** The learned trial magistrate erred in law and in fact in not evaluating the evidence on record properly hence convicting and sentencing the appellant when there was no evidence to support the charge.
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> **3)** The trial magistrate erred in law and fact in failing to conduct voire dire examination before allowing the Complainant to testify in order to determine whether the child understood the nature of an oath.
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> **4)** The trial court erred in law and fact by convicting and sentencing the appellant on inconsistent, doubtful, contradicting and insufficient evidence.
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> **5)** The trial court erred in law and fact by convicting and sentencing the appellant by relying on the evidence of the prosecution alone and failing to consider the appellant's evidence and mitigation.
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> **6)** The trial court erred in law and fact by holding that the prosecution had proved its case against the appellant beyond reasonable doubt.

4. The appeal proceeded through filing of written submissions. Both the appellant's counsel and the Director of Public Prosecutions filed their submissions, citing several legal authorities. I have perused and considered the written submissions on both sides.

5. This being a first appeal, I am required to evaluate all the evidence on record afresh and form my own independent conclusions and inferences, but bearing in mind that I did not have the opportunity to see the witnesses testify to determine their demeanor, and give due allowance to that fact – see **Okeno –vs- Republic (1972) E.A 32**.

6. I have re-evaluated the evidence on record. To prove their case, the Prosecution called four witnesses. Pw1 was the Complainant who testified that he was 12 years old and that on 5/12/2019 as he headed for work with his mother C, the mother met a friend and stopped, but he went ahead and met Baba K who asked him if he wanted work and when he agreed, he gave him a portion of land to plough, and told him

that he would pay him later. Later in the day he paid him Kshs.100/= from which he bought vegetables and went home. Next day he returned to the same Baba K and was again given ploughing work. In the evening, Baba K asked him if his mother would accept him giving her a piece of land and then told him to sleep at his home in a room at 7pm, and he accepted.

7. The next day he asked him to accompany him to the mosque and he did so, only to be told by him to convert to Islam which he did and called him Yusuf. At night the appellant Baba Ktold him to sleep in his house and while in the room, Baba K touched him, removed his underwear, took him to the bed and inserted his middle finger in his anus. The witness then stayed in that house for a week, then returned home, later went back with his brother and they slept at the home of the appellant.

8. After spending the night with his brother, the appellant took him alone to the Mosque, then promised to ask his mother to allow him to stay with him for him to go to the Mosque, and thus the witness attended Islamic teachings and then the appellant promised to take him to the Middle East for further teachings. It was his evidence that while he slept at appellant's house the appellant inserted his finger in his anus several times, and told him that he wanted to marry his mother as a second wife but she had declined.

9. According to him, when the mother (Pw2) became aware of the fact that he was attending the Mosques, she caned him to disclose what was going on, and though he told her that Baba K had taken him to the Mosque, he did not tell her what he had done to him, and his mother took him to pastor DK to whom he disclosed everything.

10. Pw2 was CMM the mother of the Complainant (Pw1), who stated that when the Complainant came back home on 11/12/2019 she interrogated him on why he had never been at home, caned him and he disclosed that he met a man who took him to the Mosque to convert to Islam. It was also her evidence that the Complainant told her that at night that man inserted his finger in his anus at his house. It was her further evidence that the Complainant revealed such information when she took him to the pastor.

11. It was also her evidence that one day, the appellant came to her home with the Complainant and he warned him not to associate with her child, because she had noticed that he was giving her child money.

12. Pw3 was Eric Kasiamani a Clinical Officer at Kilungu sub-county hospital who produced the medical examination report (P3) form on the Complainant. He did not observe any injuries or unusual appearances in the anus. He also produced the and outpatient card as an exhibit.

13. Pw4 was Pc Veronica Khayola of Salama Police Station – the Investigating Officer whose evidence was that a report was made at the Police station on 19/12/2019 by a woman, a boy child, and a brother of the woman. The Complaint was that the boy had been sexually assaulted. She took the child to Kilungu sub-county hospital and on 22/12/2019 and arrested the appellant. She produced the birth certificate of the complainant as an exhibit.

14. When put on his defence, the appellant gave a sworn defence testimony and said that the Complainant's mother was her lover in 2017 and her children became familiar with him. In 2018 she asked him twice to sell his land and relocate to the market but he declined. On that refusal, she left him and went to live at the market and when he tried to persuade her to return, she threatened to make a report to the police. It was his evidence that on 23/12/2019 while asleep, the door was knocked and he was arrested on a charge which he was framed.

15. On the above evidence, the trial court found that the Prosecution had proved the charge against the appellant beyond reasonable doubt, and convicted and sentenced him. Therefrom arose this appeal.

16. I start by reminding myself that this being a first appeal, I am required to re-evaluate the evidence on record and come to my own conclusions and inferences – see **Okeno –vs- Republic (1972) E.A 32.**

17. The appellant has raised a number of issues for determination through counsel in the grounds of appeal. The first is that the trial court did not inform the appellant about his right to legal representation under section 50(2)(g) of the Constitution thus violating his right to a fair trial and causing him prejudiced.

18. Article 50(2)(d) of the Constitution provides as follows –

> **50(2) Every accused person has the right to a fair hearing which includes the right –**
>
> ***(g) to choose, and be represented by an advocate, and to be informed of this right promptly.***

19. Having perused the trial court record, I have not seen any record that the trial court did inform the accused of his right to legal representation. However, there is no indication anywhere on the record or even from counsel who represents the appellant on appeal that the appellant was ignorant of his right to legal representation. Though an accused person has a right to legal representation, and to be so informed, he or she can still choose to act in person. In my view, the failure of the trial court to inform the appellant about his right to legal representation did not prejudice him and deny him fair trial as he participated fully in the case by extensively cross-examining the prosecution witnesses. I dismiss that ground.

20. The 2nd and 5th grounds of appeal are that the trial magistrate did not evaluate the evidence on record and failed to consider the appellant's evidence and mitigation. Having perused the evidence on record, I find that the magistrate did consider and evaluate both the evidence of the prosecution, the defence and the mitigation of the appellant. Whether that evidence was consistent or adequate, is another matter. I dismiss those complaints.

21. The 3rd ground of appeal relates to alleged failure of the trial court to conduct a voire dire examination of the Complainant (Pw1) who was 12 years before taking his evidence on oath. Indeed the Complainant was 12 or 13 years at the time of testimony in court. Though the Children Act defines a child of tender years as a child who is below 10 years, courts have held, that the requirement of voire dire examination imposed by the Oaths and Statutory Declaration Act is for different purposes from that Under the Children Act. Courts have thus retained the earlier precedents and reasoning that tender years is below 14 years. See **Samuel Karimi –vs- Republic Nyeri Criminal Appeal No. 168 of 2014**. Thus in my view, the trial court should have conducted a voire dire examination of Pw1 herein, before taking his evidence on oath.

22. However, in my view, that failure of the trial court to conduct voire dire examination of the Complainant herein before taking his evidence, did not in any way prejudice the appellant. I thus dismiss that ground, as the appellant could still cross –examine him to ascertain the truth of his sworn evidence. I dismiss that ground

23. Under ground 4, of the appellant alleges that the conviction and sentence was founded on inconsistent and insufficient evidence. In my view, this ground has substance. Though the Complainant stated that he did not know the appellant before, in my view that was highly unlikely; firstly because if it were so it is not believable that he would go and stay with him at his house for a number of days and even take his brother there. Secondly, the mother Pw2, said clearly that the appellant actually went to her home with the Complainant (Pw1) and was not happy only because he was giving the Complainant a young man money. Her only complaint in this case was that the Complainant had converted to Islam. She did not say he was a stranger. In my view this was a sufficient contradiction that would vitiate the conviction as it is not clear if any of the two witnesses said the whole truth to justify a conviction.

24. In addition, the allegation by the Complainant about the appellant inserting his finger in his anus was also not voluntary, as Pw2 the mother caned him before taking him to the pastor, to whom he is said to have revealed the offence. The pastor to whom the Complainant was said to have informed about the anal penetration, did not testify, thus the evidence of Pw2 on the sexual assault was hearsay evidence which was worthless and not admissible. It is also of note that the medical evidence was that there was nothing unusual in the anus of the Complainant. Thus it is clear to me that both Complainant and his mother (Pw2) were substantially untruthful.

25. Additionally, the evidence of anal penetration is that of a single witness, the Complainant. I appreciate that such evidence does not require corroboration under the provisal to section 124 of the Evidence Act (Cap. 80) which 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.***

26. In my view, due to the inconsistency of the evidence of the Complainant and his mother (Pw2), the fact that the pastor did not testify, and medical evidence did not support the Complainant's allegation of several penetrations, though the charge was for only one penetration, the evidence of the Complainant herein cannot be said to be saved by the provisal to section 124 of the Evidence Act, as it is not believable. The appeal will succeed on that account.

27. The 6th ground of appeal is that the trial court erred in believing that the Prosecution had proved its case against the appellant beyond reasonable doubt. In view of what I have stated above, this ground has merits and thus the appeal will also succeed on this account.

28. Consequently, and 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 5TH DAY OF MAY, 2021, IN OPEN COURT AT MAKUENI.

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GEORGE DULU

JUDGE