REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCRA NO. 55 OF 2020

BENSON KATUMA KAMALA ..... APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(From the original judgment and sentence of Hon. E.M. Muiru (S.R.M) in Kilungu Principal Magistrate's Court PMCR (S.O) No. 2 of 2020 issued on 27th May, 2020).

JUDGMENT

1. The Appellant was charged in the magistrates' court with defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act No. 3 of 2006. The particulars of offence were that on 13th August 2019 at [Particulars withheld] village, Mukaa sub-county within Makueni County unlawfully and intentionally committed an act which caused penetration of his genital organ to the genital organ of DMM (*name withheld*) a child 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 unlawfully and intentionally committed an indecent act with DMM (*name withheld*) a child aged 16 years by touching her genital organ.

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

4. Dissatisfied with the decision of the trial court, the appellant has come to this court on appeal through counsel M/s J.T. Nzioki & company on the following grounds:

> ***i. The learned magistrate erred in law and fact by delivering a judgment which was not reflective of the facts presented by the parties.***
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> ***ii. The learned magistrate erred in law and fact by failing to appreciate the law as it relates to burden of proof required in proof of criminal cases.***
>
> ***iii. The learned magistrate erred in law and fact by failing to find a doubt in favour the appellant on the face of glaring contradictions of prosecution witnesses.***
>
> ***iv. The learned magistrate erred in law and fact by failing to appreciate the lack of sufficient evidence in regard to the medical (sic) against the appellant.***
>
> ***v. The learned magistrate erred in law and fact by failing to appreciate that the offence of defilement had not been proved beyond reasonable doubt against the appellant.***
>
> ***vi. The learned magistrate erred in law and fact by failing to consider the appellant's defence.***
>
> ***vii. The learned magistrate erred in law by shifting the burden of proof to the appellant.***
>
> ***viii. The learned magistrate erred in law and fact by convicting the appellant on insufficient evidence.***

5. The appeal proceeded by filing written submissions. Both the appellant's counsel and the Director of Public Prosecutions filed written submissions which I have perused and considered.

6. This being a first appeal, I have to start by reminding myself that I am required to evaluate all the evidence on record afresh and form my own independent conclusions, inferences and findings but make allowance for the fact that I did not have the opportunity to see the witnesses testify to determine their demeanor – see **Okeno –vs- Republic (1972) E.A 32 and Pandya –vs- Republic (1975) E.A 336**.

7. Secondly, I have to bear in mind that in criminal cases, the burden is always on the prosecution to prove their case against an accused person beyond any reasonable doubt. An accused person does not have any burden to prove his innocence – see **Woolmington –vs- DPP (1935) AC 462,** an English case which has been consistently followed in Kenya.

8. In proving their case, the prosecution called five (5) witnesses. The appellant on his part tendered a sworn defence statement and did not call additional witnesses.

9. This being a case of defilement, the prosecution was required to prove the age of the complainant, secondly whether there was penetration and thirdly whether the appellant was the culprit.

10. With regard to proof of age, a birth certificate was produced and relied upon. The date of birth of the complainant entered therein as 22 nd August 2003, which means that the complainant was 16 years old when the alleged offence occurred in August 2019. I thus find that the prosecution proved the age of the complainant beyond any reasonable doubt to be 16 years.

11. Did the prosecution prove penetration of the complainant of a sexual nature? I note that at the time of the case hearing, the complainant was about 6 months pregnant – in accordance with the medical report tendered by the Clinical Officer Pw4 Eric Kasiamani. That evidence not being controverted in any way, in my view, the prosecution proved beyond any reasonable doubt that penetration of a sexual nature occurred through the genital organ of the complainant.

12. I now turn to the third element, whether the prosecution proved that the appellant was the culprit. In this regard, I must state that the evidence on whether the appellant was the culprit was that of a single witness, the complainant alone.

13. Under the provisal to section 124 of the Evidence Act (cap 80), such evidence of a single victim witness of a sexual offence, does not require corroboration to sustain a conviction if the said evidence is believable and is so believed by the trial court. In this regard, the appellant's counsel strongly contends that the trial court failed to evaluate the evidence of the prosecution against the sworn defence testimony and in the process shifted

the burden of proof to the appellant thus wrongly convicting him on insufficient evidence.

14. After evaluating the evidence on record, both for the prosecution and the defence, I find that the appellant and the complainant knew each other well before as neighbours. The appellant said in his defence that they had occasion to communicate and associate with the complainant and the complainant also says so. The appellant said that the complainant had family issues and complainant wanted the appellant to assist her. The complainant, on the other hand, said that their association was of a sexual relationship wherein she ended up being pregnant. It cannot be doubted that the two were familiar with each other and had a social relationship.

15. In my view, taking into account the totality of the evidence both for the prosecution and the defence in this case, one cannot say that, the evidence of the complainant that the appellant had sexual intercourse with her was not believable as these were next door neighbours who had associated closely for sometime. I find no basis for the contention that the magistrate shifted the burden of proof or that he did not consider the defence. I thus find that indeed the appellant was the culprit, and I will uphold the conviction of the trial court.

16. The appellant was sentence to 15 years imprisonment which was the minimum statutory sentence. However, since the Supreme Court decision in the now famous FRANCIS MURUATETU petition, courts in Kenya have held that

mandatory and minimum sentences, be taken to be the maximum sentences and that mitigation factors should be considered in determining the appropriate sentence in each case.

17. The appellant was a first offender and relatively young at 29 years. He claimed to be the breadwinner of his parents and siblings. There were also no aggravating factors to the offence except the pregnancy. I will thus vary the sentence and order that the appellant will serve six (6) years imprisonment from the date he was sentenced by the trial court.

18. Consequently, I dismiss the appeal on conviction and uphold the conviction of the trial court. I however set aside the sentence and order that the appellant will instead serve six(6) years imprisonment from the date he was sentenced by the trial court.

DELIVERED, SIGNED & DATED THIS 15TH DAY OF JUNE, 2021, IN OPEN COURT AT MAKUENI.

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GEORGE DULU

JUDGE