



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MAKUENI**

**HCCRA NO. 4 OF 2020**

**FELIX KALOLA MBITHI .....APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

*(From the original conviction and sentence of Hon. C.A Mayamba (P.M) in Makindu Principal Magistrate’s Court PMCR (S.O) No. 71 of 2019 issued on 4<sup>th</sup> November, 2019).*

**JUDGMENT**

1. The appellant was charged in the magistrates’ court with causing an indecent act contrary to section 6(1) of the Sexual Offences Act No. 3 of 2006. The particulars of offence were that on diverse dates between January 2018 and 25<sup>th</sup> May 2019 at [Particulars withheld] Primary school in Makindu Sub-county intentionally and unlawfully caused MK to suck his penis against his will an act which is indecent.
2. He pleaded not guilty to the charge. After a fully trial, he was convicted of the offence and sentenced to nine (9) years imprisonment.
3. Dissatisfied with the decision of the trial court, the appellant has come to this court on appeal. Initially he came to this court through counsel O. N. Makau & company but later elected to act in person. He relied on the following grounds of appeal –

***1) The learned magistrate erred both in law and in fact by failing to find that the key ingredients of the offence were not established against the accused person.***

***2) The learned magistrate erred both in law and in fact by holding that Pw1 was a credible witness whereas the evidence therein was greatly uncorroborated and was full of explicit inconsistencies and contradictions that impugned on the overall burden of proof.***

***3) The learned trial magistrate erred both in law and in fact by failing to find that critical witnesses were not called up to corroborate the prosecution case thereby leaving waging gaps in the case.***

***4) The learned trial magistrate erred both in law and fact by shifting the burden of proof on the accused person thereby prejudicing him greatly.***

***5) The learned trial magistrate erred both in law and in fact by rejecting the cogent defence case which reasonably exonerated him from any wrong doing.***

4. The appeal proceeded by filing written submissions. Both the appellant and the Director of Public Prosecutions filed their written submissions which I have perused and considered.

5. I will start by reminding myself that this being a first appeal, I am required to evaluate 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 –

***“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya –vs- Republic (1957) E.A 336 and the appellate court’s own decision on the evidence. The appellate court must itself weigh conflicting evidence and draw its own conclusions”.***

6. I also have to bear in mind that in a criminal case, 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 a burden to prove his innocence – see **Woolmington –vs- DPP (1935) AC** – an English case which has been consistently applied by courts in Kenya.

7. I have re-evaluated the evidence on record. Though the Director of Public Prosecutions has argued that the first element of the offence to be proved was the age of the Complainant that was not the case as there was no reference to age in the charge sheet, nor was this an offence of defilement.

8. In my view, what was required to be proved by the prosecution was the occurrence of the alleged incident, and secondly, the identity of the culprit.

9. The evidence on the incident and also the evidence on the connection of the appellant to the offence was that of a single witness Pw1 the complainant. In accordance with the proviso to section 124 of the Evidence Act (cap 80), such evidence does not necessarily require corroboration for it to sustain a conviction. The said proviso states as follows:

***“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”.***

10. In the present case, though the complainant Pw1 stated that the appellant touched his genitals in January 2018, and that again on 25/5/2019, he licked his genitals, it was the mother of M who instigated the allegations. Again, though the complainant said that M and K raised similar complaint against the appellant, the two were not called by the prosecution to testify, nor did the investigating officer Pw3 I.P Faith Chesire, or the prosecutor give an explanation as to why the two were not called as witnesses to testify in court.

11. This means that the source of the information about the incident was not established since it was established that the complainant was unduly influenced by others who did not testify to tender incriminating evidence against the appellant. In addition to the above, the evidence of Pw2 DMK – the mother of the complainant was hearsay evidence, as she was merely given information about the allegation by MMS, MS and KK who did not testify. Thus the evidence of Pw2 the mother of the complainant being hearsay evidence was inadmissible and should not have been considered by the trial court.

12. In those circumstances, I find that the evidence of the single witness victim of the alleged sexual offence herein Pw1 was not truthful and should not have been believed by the trial court, both in regard to the occurrence of the incident, and with regard to the identity of the culprit. The charge was thus not proved beyond reasonable doubt. On that account the appeal will succeed.

13. I thus find merits in the appeal. 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 17<sup>th</sup> day of June, 2021, in open court at Makueni.**

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**GEORGE DULU**

**JUDGE**