REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCRA NO. 25 OF 2020

JM.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence

of Hon. Mayamba C.A. (P.M) in Kilungu Principal Magistrate's

Court PMCR (S.O) Case No. 68 of 2019 issued on 29th October 2019).

JUDGMENT

1. The appellant was charged before the magistrates' court with attempted defilement contrary to section 9(1) as read with section 9(2) of the Sexual Offences Act No. 3 of 2006. The particulars of offence were that on 25th September 2019 at [particulars withheld] Location, [particulars withheld] village in Mukaa Sub-county within Makueni County, intentionally attempted to cause his penis penetrate the vagina of PV a child of 12 years.

2. In the alternative, he was charged with indecent act with a child contrary to section 11(1) of the Sexual Offences Act. The particulars of charge were that on the same day and place intentionally and unlawfully committed an indecent act.

3. He denied both charges. After a full trial, he was convicted on the main count of attempted defilement and sentenced to serve 20 years imprisonment.

4. Dissatisfied with the conviction and sentence, the appellant has come to this court on appeal, relying on the following supplementary grounds –

> **1) That the trial magistrate erred in both law and fact by convicting him but failing to subject him to fair trial as per Article 25(c) and 50(2) (c) and (j) of the Constitution.**
>
> **2) That the trial magistrate erred in law and fact in convicting him without appreciating that essential witnesses were not summoned in court to clear the air on what actually transpired during the time in question.**
>
> **3) The trial magistrate erred in law and fact by disregarding his alibi defence which was plausible and capable of impeaching the entire prosecution case.**
>
> **4) The trial magistrate erred in law and fact by forgetting to uphold and conclude that there existed a grudge between the appellant and Pw2 on matters concerning marriage.**
>
> **5) The magistrate erred in law and fact in failing to find that the medical report as tendered lacked authenticity and thus ought not to have been relied upon to base a conviction.**

5. Both the appellant and the Director of Public Prosecutions filed written submissions to the appeal, 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 the evidence on record afresh and come to my own independent conclusions and inferences – see **Okeno –vs- Republic [1972] E.A 32**.

7. I have re-evaluated the evidence on record. In proving their case, the prosecution called 4 witnesses. Pw1 was the complainant who stated

that, as she was going home from school the appellant who is his father, called her and attempted to defile her, and that the appellant had actually defiled her before. On that day however, she resisted and the appellant left her alone and she went and reported the incident to her mother Pw2 SM. Thereafter, a report was made to the police and the appellant was arrested and charged.

8. In his sworn defence, the appellant denied the charges and said that he merely asked a relative to repair shoes for the complainant. He claimed that Pw2 instigated the charges against him because he had remarried.

9. The elements of attempted defilement are the attempt to have sexual intercourse with the complainant, the age of the complainant, and the identity of the culprit.

10. Was the age of the complainant proved? The complainant said in evidence that she was 11 years old. Pw2 SM – the mother of the complainant did not mention the age of the complainant. In my view, from the details on the age given in evidence by the complainant Pw1, the age of the complainant was proved by the prosecution beyond any reasonable doubt.

11. Was the attempt to defile the complainant proved? The evidence regarding the incident is that of the complainant Pw1 as nobody else testified to this. Such evidence of a single victim witness of a sexual offence, is saved by the provisal to section 124 of the Evidence Act (cap. 80), in that it does not require to be corroborated to sustain a conviction.

12. In my view, though the complainant gave implicating evidence against the appellant on the incident, with the sworn defence of the appellant on record which was not challenged by cross examination, I find that the evidence of the complainant was not believable. From the totality of the evidence on record, it is highly probable in the circumstances of this case, that the narrative given against the appellant was created by Pw2 (wife of the appellant) and fed on the complainant. In addition the story about previous sexual defilements of the complainant by the appellant appears also to be an attempt to further implicate the appellant. The benefit of the doubt has to be given to the appellant. In my view therefore, the alleged attempt to defile the complainant was not proved by the prosecution beyond reasonable doubt.

13. Who was the culprit? Since I have found that there was no proof of attempted defilement on the complainant on that day, I also find that the appellant was not the culprit as alleged. I note also that from the evidence on record, the appellant was infact so shocked by the allegation against him that he even threatened to commit suicide, which is indeed the reaction of a person who felt highly offended by a serious false allegation.

14. I thus find that the prosecution did not prove their case against the accused beyond any reasonable doubt. As such both the conviction and sentence herein cannot be sustained.

15. 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.

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GEORGE DULU

JUDGE