REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCRA NO. 160 OF 2019

MWENDWA MUTHIANI MUTUNGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. J.O Magori (S.P.M) in Makindu Senior Principal Magistrate's Court PMCR Case No. 473 of 2015 issued on 6th September, 2019).

JUDGMENT

1. The appellant was charged before 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 17th and 18th March 2015 within Makueni County intentionally and unlawfully caused his penis to penetrate the anus of MK (*name withheld*) a child aged 14 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 which were that on the same days and place willfully and unlawfully committed an indecent act by touching the anus of MK a child aged 14 years with his penis.

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

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

> *1. The trial magistrate erred in law and fact when he failed to invoke the provisions of section 214(1) and (2) of the Criminal Procedure Code after the amendment of the charge.*
>
> *2. The learned magistrate erred in law and fact when he considered that a report was made to the police without proper finding that the evidence was contradictory.*
>
> *3. The learned magistrate erred in law and fact when he failed to call all essential witnesses provided by provisions of section 150 Criminal Procedure Code.*
>
> *4. The learned trial magistrate erred in law and facts by convicting him in reliance on unsupported evidence from those who arrested him.*
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> *5. The learned magistrate erred in law and fact when he considered the medical evidence P3 form, the PRC form which was produced in a manner that violated his fundamental rights.*
>
> *6. The learned trial magistrate erred in law and fact when he held that the prosecution had proved their case beyond reasonable doubt.*
>
> *7. The learned trial magistrate erred in law and facts by placing the burden of proof on the defence.*

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 duty bound to evaluate all the evidence on record afresh and come to my own independent conclusions and inferences – see **Okeno –vs- Republic (1972) E.A 32**.

7. In proving their case, the prosecution called 4 witnesses. Pw1 was the complainant who stated that on 17/03/2015 while coming from school in the afternoon, the appellant lured him to his home and had sex with him through the anus. On the next day, as he went to buy tea leaves at 10am, the appellant again pulled him into a bush and had sexual intercourse with him through the anus. According to the complainant, due to pain he asked Mumo Kitambuko to inform his father and a report was thus made to the police.

8. Pw2 was AMK the grandmother of the complainant who testified that she was informed on 18/03/2015 by the complainant about the defilement. Pw3 was Dr. Nzioki Meshack of Makindu Sub-county hospital who produced the medical examination report (P3 form) on the complainant.

9. The appellant on his part gave an unsworn defence statement and denied the offence and said that the case was a frame up due to an existing family dispute.

10. The appellant has raised a number of issues in the appeal. The first is that when the charge was amended, the trial court violated the law that is section 214 of the Criminal Procedure Code. I have perused the proceedings. On 31/03/2016 the charge was indeed amended to read Sexual Offences Act 2006, instead of 2010. The trial court then called upon the appellant to plead to the amended charge which he did by denying the charge. It cannot thus be said that section 214 of the Criminal Procedure Code was not complied with by the trial court.

11. The appellant has complained that the trial court violated section 150 of the Criminal Procedure Code by not calling crucial witnesses. In my view, it is not the function of the court to call witnesses to testify, as that was the function of the Director of Public Prosecutions. The court may only call such witnesses that it requires for clarification of issues that the court has identified. I find no fault on the part of the trial court in this regard.

12. The elements of defilement required to be proved by the prosecution were firstly, the age of the complainant, secondly, whether there was penetration, thirdly the identity of the culprit.

13. In all criminal cases, the burden is always on the prosecution to prove all the elements of the offence against an accused person beyond any reasonable doubt. An accused person has no burden to prove his innocence – see **Woolmington –vs- DPP [1935) AC**.

14. Was the age of the complainant proved beyond any reasonable doubt? The complainant Pw1 said in evidence that he was aged 14 and was a standard 5 pupil. He did not give his date of birth, nor rely on any documentary evidence. The grandmother of the complainant Pw2 AMK also said that the complainant was aged 14 years. She also did not give the date or year of birth of the complainant. Though an age assessment report was referred to in evidence, what was produced in court as exhibit was the Post Rape Care report (PRC) as exhibit 1 and the medical examination report (P3 form) as exhibit 2. The age assessment report was not produced by any witness thus it could not be relied upon by the magistrate to found a conviction.

15. From the evidence on record, I find that the prosecution did not prove the age of the complainant beyond any reasonable doubt to be 14 years.

16. With regard to penetration, the evidence of the complainant Pw1 was clear that he was penetrated twice through the anus. The medical evidence tendered by Pw3 Dr. Nzioki Meshack was also clear that there were lacerations in the anal region of the complainant. I find that the prosecution proved beyond any reasonable doubt that there was penetration into the anus of the complainant.

17. Who was the culprit? The evidence that connects the appellant to the alleged offence is that of the complainant Pw1. 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, provided it is believable and so believed by the trial court, on reasons to be recorded in the proceedings. I note that in his evidence in chief, the complainant stated as follows about the incident –

> ***"He undressed me and had sex with me again. I left feeling pain and went and told Mumo Kitambuko to tell my father and tell him that I am sick. I was taken to hospital. I also reported the incident at Makindu police station. I was taken by my mother to hospital".***

18. From the foregoing testimony of the complainant Pw1, it is clear to me that there were crucial witnesses herein who should have been called by the prosecution or at least some of them, in order to make the evidence of the complainant believable. These were Mumo Kitambuko the first person to whom the complainant Pw1 reported the incident. There was also the father of the complainant and the mother of the complainant who took him to hospital. None of these were called by the prosecution to testify.

19. In the absence of the prosecution calling any of these witnesses, in my view there was no convincing reason for the trial court to believe the evidence of the complainant Pw1 that the appellant was the culprit. I find that the prosecution did not prove beyond any reasonable doubt that the appellant was the culprit. On that ground also the appeal will succeed.

20. 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 13TH DAY OF JULY, 2021, IN OPEN COURT AT MAKUENI.

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GEORGE DULU

JUDGE