REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCRA NO. 49 OF 2020

PETER MUTUA.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(being an appeal from the original conviction and sentence of Hon. E. M Muiru (R.M)

in Makindu Principal Magistrate's Court PMCR (S.O) Case No. 969 of 2014

issued on 26th July, 2016).

JUDGMENT

1. The appellant was charged in the magistrates' court with defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on the 29th May 2014 at [particulars withheld] village intentionally and unlawfully caused his male genital organ namely penis penetrate the female genital organ namely vagina of J W a child aged 2 ½ 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 offence being that on the same date and place intentionally and unlawfully touched the vagina of JW a child aged 2 ½ 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 life imprisonment.

4. Dissatisfied with the decision of the trial court, the appellant has come to this court on appeal, relying on the following grounds –

1) The evidence relied upon by the trial court as a basis for his conviction was not sufficiently trustworthy to have been used as a basis for his conviction.

2) The entire case of the prosecution was not proved beyond reasonable doubt.

3) His defence statement was not considered in light of section 169(1) of the Criminal Procedure Code.

4) The trial court erred in law by failing to observe that medical evidence was unsatisfactory.

5) The magistrate dismissed his entire defence in which he had told the court the truth about what transpired.

5. The appeal proceeded by filing written submissions and I have perused and considered the submissions of the appellant and those of the Director of Public Prosecutions.

6. This being a first appeal, I am required to re-evaluate all the evidence on record and come to my own conclusions and inferences – see **Okeno –vs- Republic [1972] 32.**

7. In proving their case, the prosecution called 3 witnesses. The appellant on his part tendered a sworn defence testimony and did not call any defence witnesses.

8. I note that the complainant did not testify in court either in person, nor through an intermediary. Pw1 JT was the mother of the

complainant who was married to the appellant who was not the biological father of the complainant. She testified that, during that morning, the appellant went to the house of the grandmother of the complainant, and thus he was the culprit as the complainant lived in that house. The appellant in his short sworn defence denied committing the offence and was not cross – examined. This was the evidence of the prosecution and the defence with regard to what happened that morning.

9. The elements of the offence of defilement were firstly the age of the complainant. Though no birth certificate was relied upon, I have no doubt that the complainant was aged 2 ½ years which was not challenged by anybody. I find that the prosecution proved beyond reasonable doubt that the complainant was a child 2 ½ years old.

10. With regard to proof of the second element of penetration, the medical evidence was not challenged. Physical injuries were noted in the genital organs of the complainant. They were documented in the medical examination form (P3 form) prepared by Dr. Kavuli but produced by Pw3 Dr. Mibei under section 77 of the Evidence Act (cap.80). In my view the prosecution proved beyond any reasonable doubt that there was penetration of the genital organs of the complainant based on the lacerations noted in the medical report.

11. I now turn to the culprit. Was the appellant the culprit? I note that the complainant did not testify either in person or through an intermediary under section 31 of the Sexual Offences Act. There is also no evidence even from Pw1 JT that the complainant indicated in any form at all to her that the appellant was the culprit. The evidence on record is that Pw1 merely said that because the appellant entered the house of the grandmother of the complainant, then he must have been the culprit. That in my view can only be suspicion or conjecture, or an assumption.

12. In addition to the above, the grandmother of the complainant who lived with her was not called to court by the prosecution to testify, and no reason was given by the prosecution for the failure to call this crucial witness in whose house, the allegedly serious offence was committed. This obviously brings into the picture the adverse inference that a court of law is entitled to draw in line with the reasoning in the case of **Bukenya –vs- Uganda [1972] E.A.**

13. Lastly, the appellant tendered a sworn defence which was not contested through cross examination. As such the sworn defence of the appellant denying the offence stood unchallenged.

14. In the above circumstances in my view, had the trial court applied the requirements of section 169(1) of the Criminal Procedure Code (cap.75), to weigh the prosecution evidence against the defence, the court would not have come to the conclusion that the prosecution proved beyond any reasonable doubt that the appellant was the culprit. I find that the prosecution did not prove beyond reasonable doubt that the appellant was the culprit, as the evidence on record against him is evidence of suspicion, which however strong, cannot be the basis of founding a conviction in a criminal case – see **Sawe –vs- Republic (2003) KLR.** The conviction and sentence herein cannot thus be sustained.

15. I thus 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 15TH DAY OF JULY, 2021, IN OPEN COURT AT MAKUENI.

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GEORGE DULU

JUDGE