REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCRA NO. 11 OF 2020

MESHACK MUINDE KASIOKI.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. M.K Mutegi (S.R.M) in Tawa Senior Resident Magistrate's Court SRMCR Case No. 4 of 2017 pronounced on 26th November, 2019).

JUDGMENT

1. The appellant herein was charged in the magistrate's court with defilement contrary to section 8(1) as read with subsection (2) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge were that on 11th August 2017 within Makueni County intentionally and unlawfully caused his penis to penetrate the vagina of JSK(*name withheld*) a child aged 6 years.

2. In the alternative, he was charged with indecently touching the vagina of JSK with his penis a child aged 6 years.

3. He denied both charges. After a full trial, he was convicted on 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, through counsel M/s Kamolo & Associates on the following grounds –

> ***1. The learned magistrate erred both in law and fact when he sentenced the accused to life imprisonment on contradictory testimony.***
>
> ***2. The learned magistrate erred both in law and fact when he failed to take directions under section 200 of the Criminal Procedure Code prejudicing the appellant and led to a miscarriage of justice.***
>
> ***3. The learned trial magistrate erred both in law and fact when he failed to comply with section 31(3) of the Sexual Offences Act.***
>
> ***4. The learned magistrate erred in law and fact when he failed to explain to the appellant the severity of the charge and the need to have legal representation.***
>
> ***5. The learned magistrate erred both in law and fact when he commenced the trial without giving the appellant documents and statements to be tendered by the prosecution.***

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

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

7. Having perused and considered the evidence on record and the grounds of appeal, I note that the appellant raised both technical and substantive grounds of appeal. I will first deal with the technical grounds.

8. The appellant has complained that the trial magistrate erred in not giving directions under section 200 Criminal Procedure Act (cap.75). In my view, that ground has no basis as the whole trial was presided over by M.K Mutegi Senior Resident Magistrate with trial magistrate, L.K Mwendwa Senior Resident Magistrate, and C.A Muchoki Resident Magistrate only mentioning the case. Thus the requirements of the provisions of section 200 Criminal Procedure Code did not apply to this case.

9. With regard to the complaint that the magistrate did not comply with section 31(3) of the Sexual Offences Act, I also see no basis for that complaint as, in addition to allowing the complainant who was a child, to testify through an intermediary, the magistrate allowed cross-examination of the witness, and the appellant asked the complainant one question which was responded to through the intermediary.

10. With regard to the complaint that the magistrate did not explain to the appellant the severity of the charge and his right to legal representation, the record actually shows that the magistrate informed the appellant about his right to legal representation. In my view, the court could not force him to engage a lawyer. There was also no point of the magistrate warning the appellant on the severity of the sentence, as the appellant did not plead guilty to the charge. I dismiss these grounds.

11. With regard to the complaint that the trial commenced without the court giving the appellant prosecution documents and statements, that obligation in my view, was on the prosecution and not the court. In addition, the appellant not having complained to the court at any time during trial about the issue, he cannot bring such a complaint on appeal, as it is on record that he confirmed that he was ready for the hearing. This ground is thus likewise dismissed.

12. With regard to the main ground that the appellant was convicted and sentencing on contradicting evidence, I find no contradictions in the prosecution evidence. I also find that the age of the complainant was proved beyond any reasonable doubt through the production of a birth certificate which was not contested. Thus the first element of the offence was proved, that the complainant was 6 years old.

13. The second element of the offence was penetration. In my view, penetration was proved by the prosecution through the medical treatment notes and medical report (P3 form), which confirmed the presence of lacerations in the vagina of the complainant, as well as a broken hymen. It is also instructive to note that the report to the police and medical treatment of the complainant, occurred very soon after the incident. Thus there is no doubt in my mind that penetration occurred.

14. With regard to the identity of the culprit, the evidence on record was that of a single victim witness, the complainant (Pw1), who testified through an intermediary, Ruth Kamene Ndawa a Probation Officer. The complainant did not have anything to gain by implicating the appellant and there is no suggestion that anybody else including the mother Pw2 SMM, had anything to gain from implicating the appellant with such a serious offence.

15. In addition, such evidence of a single victim witness in sexual offence cases, does not require corroboration to sustain a conviction under the provisal to section 124 of the Evidence Act (Cap.80) which states as follows –

> ***124. 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."***

16. Thus, just like the trial court, I find that the evidence of the single victim witness herein (Pw1) was believable, and hold that the prosecution proved beyond any reasonable doubt, that the appellant, who elected to say nothing in his defence, was the culprit. I will thus uphold the conviction.

17. On sentence, the sentence of life imprisonment might appear justified in view of the very tender age of the complainant, and courts need to protect the public from such beastly acts. However, in view of the relatively young age of the appellant whom was just 21 years old, and in view of the reasoning of the Supreme Court in the Muruatetu case, I will reduce the sentence to 25 years imprisonment.

18. Consequently, I dismiss the appeal on conviction. With regard to sentence, I set aside the sentence imposed and order that the appellant will instead serve 25 years imprisonment from the date he was sentenced by the trial court.

DELIVERED, SIGNED & DATED THIS 22ND DAY OF SEPTEMBER, 2021, IN OPEN COURT AT MAKUENI.

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GEORGE DULU

JUDGE