REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCRA NO. 64 OF 2019

NNM.....APPELLANT

-VERSUS-

REPUBLIC .....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. C.A Mayamba (S.R.M) in Kilungu Senior Principal Magistrate's Court SPMCR (S.O) Case No. 55 of 2018 issued on 31st October, 2018).

JUDGMENT

1. The appellant was charged in the magistrate's court with incest contrary to section 20(1) of the Sexual Offences Act No. 3 of 2006. The particulars of offence were that on16th June 2018 in [particulars withheld] village, Wathini Sub-location in Mukaa Sub-county within Makueni County being a male person caused his penis to penetrate the vagina of AMN (*name withheld*) a female person who was to his knowledge his daughter.

2. He denied the charge. After a full trial, he was convicted of the offence and sentenced to life imprisonment.

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

> ***1) That the trial magistrate erred in law and fact by failing to find that the intermediary evidence relied to prove the prosecution case did not follow the laid down statutory safeguards.***
>
> ***2) The trial magistrate erred in law and fact by failing to find that key ingredients of the offence i.e. penetration by the accused person was not conclusively established by the evidence on record.***
>
> ***3) The trial magistrate erred in law and fact by failing to find that the prosecution evidence was so inconsistent and contradictory and thus could not sustain conviction.***
>
> ***4) The trial magistrate erred in law and fact by rejecting the cogent defence case which reasonably exonerated him from wrong doing.***
>
> ***5) The learned magistrate erred when he meted an extremely harsh and disproportionate sentence.***

4. The appeal proceeded by way of filing written submissions. I have perused and considered the submissions of both the appellant and the Director of Public Prosecutions.

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

6. This being a criminal case also, the burden was on prosecution to prove all the ingredients of the offence beyond any reasonable doubt – see **Woolmington –vs- DPP [1935] AC** – an English case.

7. In proving their case the prosecution called 5 witnesses. I note that the mother of the complainant MN (Pw2) was also the intermediary of the victim Pw1. On his part, the appellant tendered an unsworn defence testimony denying the offence.

8. I have re-evaluated the evidence on records both for the prosecution and the defence. The appellant has raised a number of grounds of appeal.

9. Indeed section 31 of the Sexual Offences Act and Article 50(7) of the Constitution of Kenya 2010, provide for the appointment of an intermediary through whom a vulnerable witness can testify. The appellant has complained that the evidence tendered purportedly for the victim (*vulnerable witness*) was that of the intermediary and not that of the victim because of the use of the words "intermediary through the witness".

10. In my view, that complaint of the appellant is misplaced, as the recording by the trial court arose from the type of questions asked by the prosecutor to the intermediary. However, in my view, there was a bigger problem in the proceedings because the intermediary was the victim's mother Pw2, who was also a key witness and tendered her own evidence on what happened to her mentally challenged daughter.

11. In adopting such a procedure, in my view, no fair trial was conducted as if fair trial was to be conducted then the court should have appointed another person to be intermediary, not Pw2 a key witness. The consequence was that the tenets of fair trial under Article 50 of the Constitution were not satisfied, as the mother Pw2 could have crafted her own story, told it to court as the intermediary, and at the same time confirmed it as the key witness in the trial. This will be akin to Pw2 purporting to corroborate her own evidence, or the evidence of the victim tendered in court which she had prior knowledge of. Both situations would result in unfair trial.

12. On that account, I find an error committed by the trial court which rendered the conviction unsustainable as the proceedings were fatally irregular and on that ground the appeal will succeed as there was a mistrial.

13. With regard to the age of the victim, it was not contested, and I find that the prosecution proved beyond any reasonable doubt that the victim was 15 years of age.

14. The next element of the offence to be proved by the prosecution was penetration on the alleged dates. Though the appellant has argued that a broken hymen is not conclusive evidence of sexual penetration and relied on the case of **David Mwingirwa –vs- Republic [2017] eKLR,** which I agree with, I am of the view that in the present case sexual penetration must have occurred on this girl, who had grown from infancy up to age 15. I find however, that there was no evidence to prove that penetration of a sexual nature occurred on the alleged date in question.

15. With regard to the identity of the culprit, the appellant has complained about inconsistent prosecution evidence. On my part, I do not see any material contradictions in the prosecution evidence. The complaint of the appellant that the evidence of the victim (Pw1) was only that the appellant lay on her with no evidence of sexual penetration, does not help the appellant, as section 20 of the Sexual Offences Act defines indecent acts as constituting incest. Thus if it was proved that the appellant lay on the victim, this would satisfy the requirements for commission of the offence of incest.

16. At the risk of repetition, I will emphasize that the major issue in this appeal is on the credibility of the evidence of Pw1 tendered through her mother the intermediary who testified as Pw2, and the credibility of the evidence of Pw2.

17. As I said earlier, MN(Pw2) who was the intermediary of Pw1, was the prime mover and key prosecution witness in this case. As such with the dual role she undertook, her credibility and reliability of the evidence she tendered both for Pw1 and herself was in question, and it was unsafe to rely upon her evidence to found a conviction. In this regard, I refer to the case of **Kimani Ndungu –vs- Republic [1979] IKLR** whereto the Court of Appeal stated as follows –

> ***"The witness upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straight forward person or raise suspicion about his trustworthiness."***

18. As the evidence of Pw2 who was also the intermediary of Pw1 raises a reasonable amount of doubt, it would be unsafe to sustain a conviction of the appellant on the same.

19. 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 21ST DAY OF SEPTEMBER, 2021, IN OPEN COURT AT MAKUENI.

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GEORGE DULU

JUDGE