REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCRA NO. 67 OF 2020

ALEXANDER MUTUKU NZOMO.....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

SPMCR (S.O) Case No. 98 of 2019 pronounced on 13th January, 2020).

JUDGMENT

1. The appellant was charged in the magistrates' court with two counts of sexual assault contrary to section 5(1) (b) of the Sexual Offences Act No. 3 of 2006. The particulars of **count one** were that on 16th September 2019 in Nzaui Sub-County within Makueni County intentionally put his penis in the mouth of MM (*name withheld*) a child aged 5 years and forced him to suck so as to cause penetration.

2. The particulars under **count two** that on the same day and place, intentionally put his penis in the mouth of JMM (*name withheld*) a child aged 4 years and forced him to suck so as to cause penetration.

3. He denied both charges. After a full trial, he was found to be a minor in conflict with the law on both counts. However, after receipt of the Probation Officer's report and age assessment, report the court on 13/1/2020 found the appellant to be an adult, and sentenced him to serve ten (10) years imprisonment.

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

1) That he is a first offender and too young to be behind bars.

2) That he was framed by the complainant's mother.

3) That the children were too young to understand what they narrated to court.

4) That the doctor did not give a report on spermatozoa in the mouth of the complainants.

5) That he prays to this court to reduce the sentence.

5. The appeal proceeded through written submissions. In this regard, I have perused and considered the submissions of both the appellant and those of the respondent.

6. This being a first appeal, I am duty bound 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. The prosecution evidence on record, which connects the appellant to the offence, is that of two minors who were the victims, one aged 5 and the other aged 4. These were Pw1 and Pw2, who, according to the evidence, reported the alleged incident to their mother Pw3 EN by informing her that the appellant had told them to suck his penis, which they did and in return he offered them a sweet.

8. I note that, appellant in his sworn defence denied committing the offences, though not directly, in that he merely said that the children had been told what to say by the mother Pw3, but did not specifically say that he did not commit the offences. He asked for forgiveness though.

9. Having re-evaluated all the evidence on record, I find that though the complainants were very young children, aged 4 and 5 they were talking the truth, I thus agree with the magistrate that the prosecution proved beyond reasonable doubt that the two offences were committed by the appellant. His defence on the other hand was shaky and merely evasive.

10. I also find that the two children had nothing to gain by implicating the accused, and the same applied to the mother of the children Pw3. I am guided by the fact that proof beyond reasonable doubt is not proof beyond any doubt. Such proof is satisfied if the evidence is so forceful against a man to leave only a remote possibility in his favour – see **Miller –vs- Minister of Pensions (1942) AC per Lord Dening.** In the present case the evidence on record is sufficiently forceful against the appellant, thus the Prosecution discharged its burden of proof. Though the appellant was initially treated as a minor, the finding of the trial court was the same as a conviction for an adult, which he was.

11. Turning to the sentence, the sentence imposed by the trial court, was that minimum statutory sentence for the offences. In addition, the offence was committed against very young children of very tender years. No doubt such occurrence or incident will linger in their minds for the rest of their lives.

12. I note that in the trial court, the appellant pleaded for leniency, and has pleaded for leniency before this court also. However, I find no legal basis on which this court can interfere with the sentence imposed, as there is great need to protect the young and vulnerable.

13. I thus find no merits in the appeal. I dismiss the appeal and uphold both the conviction and sentence of the trial court.

DELIVERED, SIGNED & DATED THIS 6TH DAY OF OCTOBER, 2021, IN OPEN COURT AT MAKUENI.

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George Dulu

Judge