REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CRIMINAL APPEAL NO. E010 OF 2021

SETH MONG'ARE MOKOROMI.....APPELLANT

VS

REPUBLIC.....RESPONDENTS

JUDGEMENT

The appellant was charged with the offence of Attempted Defilement Contrary to Section 9(1) as read with Section 9(2) of the Sexual Offences Act but after the trial he was convicted for the offence of Sexual Assault contrary to section 5(1)(a) (i) as read with section 5(2) of the Sexual Offences Act and sentenced to five years imprisonment. Being aggrieved by the conviction and sentence he preferred this appeal.

The grounds of Appeal are that:-

1. The learned trial magistrate erred in law and in fact in convicting the Appellant of the offence of sexual assault basing his judgment on assumptions and not on proper and credible evidence.

2. The learned trial magistrate erred in law and in fact in convicting and sentencing the Appellant of sexual assault despite the prosecution's failure to prove beyond reasonable doubt that the ingredients for the offence were present in the case.

3. The learned trial magistrate erred in law and in fact by finding that the Appellant penetrated PW1's anus a position disputed by the medical report produced in court (Exhibit 1)

4. The learned trial magistrate erred in law and in fact in convicting and sentencing the Appellant without establishing the exact age of the complainant (PW1) as actual evidence of the age of the complainant (PW1).

5. The learned trial magistrate erred in law and in fact in relying on the glaring contradictions and inconsistencies in the prosecution's case to convict and sentence the Appellant.

6. The learned trial magistrate erred in law and in fact in convicting and sentencing the Appellant despite the inconsistences in the evidence given by the prosecution witnesses PW1 and PW2 in whether the penetration was in the vagina or in the anus as PW2 testified to have held the Appellant's penis and removed it from PW1's anus.

7. The learned trial magistrate erred in law and fact in convicting and sentencing the Appellant despite the glaring inconsistencies and contradictions of PW1 and PW2's testimony adduced in court in which they testified that the Appellant penetrated PW1's anus while in the statement recorded with the Investigating Officer, they stated that the Appellant unsuccessfully tried to defile PW1 but only ejaculated on her thighs.

8. The learned trial magistrate erred in law and fact in closing his mind to inconsistencies of PW1 and PW2's testimonies which contradicted the testimony adduced by PW4 the Investigating Officer.

9. The learned trial magistrate erred in law and fact in convicting and sentencing the Appellant without any proper medical examination being done on PW1.

10. The learned trial magistrate erred in law and fact in disregarding the Investigating Officer's testimony that relied upon the medical report to prefer the charges of attempted rape against the Appellant.

11. The learned magistrate erred in law and fact in disregarding and declaring as inconsequential PW1's medical report a key and crucial exhibit which found PW1's hymen intact and genitalia normal.

12. The learned magistrate erred in law and fact in failing to consider PW1's medical report which failed to capture the Appellant's sperms on PW1's thighs as recorded in PW2 and PW1's statements before the Investigating Officer.

13. The learned trial magistrate erred in law and fact in closing his mind to the glaring lapses by the investigating officer, examining doctor and the prosecution.

14. The learned magistrate erred in law and fact in failing to consider the Investigating officer's testimony and failure to collect, preserve, test and match the key evidence being the alleged sperms allegedly ejaculated on PW1's thighs.

15. The learned magistrate erred in law and fact in disregarding and failing to consider the Appellant's testimony that he was only watching a video/movie with PW1 which testimony was corroborated by PW2.

16. The learned trial magistrate erred in law and fact in failing to consider the conduct/demeanour of PW1 who was watching a video/movie on the Appellant's phone when the alleged sexual assault took place.

17. The learned trial magistrate erred in law and in fact in convicting the Appellant of sexual assault and sentencing the Appellant based on the sole fact that the Appellant could not be guilty of attempted defilement due to the belief that there was penetration, a claim which was in fact never proved beyond any reasonable doubt by the prosecution.

18. The learned trial magistrate erred in law and in fact in finding that the prosecution proved its case beyond reasonable doubt despite the fact that there was no tangible evidence to prove that the complainant (PW1) was indeed sexually assaulted.

19. The learned magistrate erred in law and fact in convicting and sentencing the Appellant of Sexual Assault despite the prosecution's failure to satisfy the ingredients needed for the conviction of Sexual Assault.

20. The learned trial magistrate erred in law and fact in failing to consider PW1's demeanour (the concept of demeanour evidence) a key component in establishing such offences.

21. The learned trial magistrate erred in law and in fact in finding that the prosecution had proved its case beyond reasonable doubt.

22. The learned magistrate erred in law and fact in lowering the threshold required to warrant conviction in a criminal case.

23. The learned trial magistrate erred in law and fact by misdirecting himself on the law by substituting the charges and convicting the Appellant of a lesser/cognate offence.

24. The learned trial magistrate erred in law and in fact in closing his mind to the possibility that the Appellant was framed.

25. The conviction was unwarranted and the sentence illegal under the circumstances as the same were note based on any evidence to connect the Appellant to the offences.

26. The conviction and sentencing are a miscarriage of justice hence the same should be quashed and set aside.

By this appeal this court is urged to quash the conviction and set aside the sentence imposed by the trial court and set the appellant at liberty forthwith. On 8th June 2021 this court gave directions that the appeal would proceed by way of written submissions but by the time of writing this judgment only those of the appellant had been received. This despite Senior Prosecution Majale's assurance that his submissions were ready and all he had to do was to file the same.

Submitting on each ground separately learned counsel for the appellant contended and cited precedents to support his arguments that firstly, the offence of Sexual Assault is not a lesser cognate offence to the offence of attempted defilement and the trial magistrate therefore erred when he convicted the appellant for that offence. Secondly that, the offence of Sexual Assault was in any event not proved beyond reasonable doubt and that the appellant could not have been properly convicted for the offence when it had not been proved. Thirdly that the evidence adduced by the prosecution could not sustain a conviction as it was insufficient, inconsistent, contradictory and full of gaps; That, the age of the victim was not ascertained; That the learned trial magistrate wrongly excluded medical evidence adduced by the prosecution merely because it did not favour the prosecution's case and further that the trial magistrate ignored the demeanor of the victim. Counsel further submitted that the conviction and sentence meted on the appellant are a miscarriage of justice and the same should be quashed and the appellant set at liberty.

As a first appellate court my duty is to reconsider and evaluate the evidence in the court below so as to arrive at my own independent conclusion while bearing in mind that did not hear or see the witness **(see Okeno v Republic (1972) EA 32).** I have also considered the very detailed submissions of counsel for the appellant and the cases cited therein.

The appellant in this case was charged with the offence of Attempted Defilement contrary to section 9 (1) as read with section 9 (2) of the Sexual Offences Act. The particulars of the charge were that on 17th December 2019 at Nyakore village, the appellant intentionally and unlawfully attempted to cause his genital organ to penetrate the genital organ namely vagina of GYM a child aged eight years. At the trial the child's mother who testified as PW2 was emphatic that the child was born on 23rd April 2010. It is trite that the age of a victim of a sexual offence need not always be proved by a birth certificate and that the evidence of the mother would suffice. I am therefore satisfied

that the age of the child was proved to the required standard and counsel's submission that the age was not ascertained cannot hold.

The girl gave evidence that the appellant defiled her when she went to her grandmother's house. She stated that she found the appellant and another of her cousins, one F, in the house but the two were left alone when the said F went to hear why their grandmother was calling him. She stated that the appellant undressed and then pulled her and sat her on his thighs and inserted his genital organ into her anus. She stated that he only stopped because her mother found him in the act and screamed thereby attracting her grandmother. Her mother (PW2) testified that she caught the appellant red handed and that it was she who as a matter of fact got hold of his genital organ and pulled it out of the child. This evidence appears to have been sufficient to sustain a charge of defilement but it was explained in the trial court that when the child was examined by a doctor there was no evidence of penetration hence the charge of attempted defilement. Indeed in his judgment the trial magistrate referred to the medical evidence that was adduced and found that it was inconsequential since it referred to the vagina yet the evidence of the victim and her mother was that the appellant penetrated her anus. It is however instructive that in the charge sheet the appellant was accused of penetrating the vagina of the victim but not the anus. The charge was never amended and clearly neither the testimonies of the victim and her mother nor the medical evidence supported the charge, something which should have been taken in favour of the appellant rather than being ignored as inconsequential by the trial court. In my considered view, the victim and her mother may have changed their evidence to say penetration was into the anus but not the vagina because the medical evidence would not support their case. Whatever their motivation was their evidence ended up being inconsistent, contradictory and untrustworthy and hence unreliable and I do not agree with the trial magistrate's finding that there was overwhelming evidence to prove penetration. This is more so because in the particulars of the charge the allegation against the appellant was that he penetrated the vagina of the appellant. While medical evidence may not be the only way of proving penetration as the evidence of a victim of a sexual offence is sufficient in itself **(**see section **124 of the Evidence Act)** it is unfair and unjust for a court to ignore or exclude medical evidence that is adduced by the prosecution but which favours the accused and absolves him of the crime charged. In this case the medical evidence adduced by the prosecution contradicted the testimonies of the victim and her mother and it should not have been ignored. The trial magistrate despite the contradictory medical evidence went ahead to find that penetration of the anus had been proved beyond reasonable doubt and then proceeded to convict the appellant of the offence of sexual assault. It is my finding that he erred for two reasons. Firstly, there was no allegation and no evidence that the appellant had used any other part of his body other than his genital organ to penetrate the child hence there was no evidence to support the offence of Sexual Assault. Secondly, Sexual Assault is not a minor or cognate offence of the offence of attempted defilement. This is because the two offences attract the same punishment more or less. My so saying finds support in the decision of the Court of Appeal in case of JMM V Republic (2016)eKLR where the court held:-

> ***"In the case of Francis Kahindi Mwaiha v Republic (2015) Eklr this court considered a situation where a conviction for the offence of defilement of a girl contrary to Section 8(3) of the SOA was quashed on appeal and substituted with a conviction for the offence of administering a substance with intent contrary to Section 27 of the SOA which the evidence on record elicited. Upon such conviction, the same sentence which had been imposed for the initial offence of defilement was retained. In allowing the appeal, the court stated as follows:-***
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> > ***"The emphasis here therefore appears to be that before a court invokes the provisions of Section 179 of the Criminal Procedure Code to substitute the initial charge with another, the court must be satisfied first of all that the evidence tendered does not disclose or support the offence charged but instead proves the commission of a lesser offence of the same genus. In other words, the substituted offence must be both a minor and cognate offence to the one charged. As it were, section 179 looks downwards to lesser offences than that charged.***
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> > ***In the circumstances of this case, the offence for which the appellant was called upon to defend himself attracted a sentence of ten (10) years. The substituted charge similarly attracted a sentence of not less than ten (10) years. As can readily be seen, both offences attracted the same penalty. Accordingly, it cannot be said that the offence for which the appellant was subsequently convicted of by the High Court was minor nor cognate to the offence for which he was called upon to defend himself initially. It is instructive that Mr. Musyoki admitted in his submissions that based on the sentence imposed, the substituted charge was neither a minor or cognate offence. Indeed, we would go further and state that the offence was totally different and even fell under a different specie. Accordingly, the learned Judge fell into error when she undertook the course aforesaid."***
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> ***And so it is in the case before us. Sexual assault is a substantive offence under SOA which has serious consequences: as serious as the offence of incest and attracting similar sentence.***
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> ***The appellant was prepared to meet the charge of incest which he successfully did. No notice or particulars were given to him to prepare for another equally substantial charge of sexual assault which in our view was neither minor nor cognate to the offence of incest as the elements of the offences are not shared, except that they both fall under the SOA. The trial court and the High Court therefore fell into error in convicting the appellant for the offence of sexual assault, and we so find."***

In the upshot I find that the conviction for the offence of sexual assault cannot stand as that offence was also not proved by the facts of this case. In the upshot therefore I find the appeal merited. The conviction is quashed and the sentence is set aside and unless he is otherwise lawfully held the appellant shall be set at liberty forthwith.

It is so ordered.

SIGNED, DATED AND DELIVERED ELECTRONICALLY THROUGH MICROSOFT TEAMS THIS 7TH DAY OF OCTOBER, 2021.

E.N. MAINA

JUDGE