REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCRA NO. 18 OF 2020

JOHN MUTUKU MWONGELA.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being appeals from the original judgment of Hon. A . Ndungu (S.R.M) in Makindu

Senior Principal Magistrate's Court SPMCR *Case (S.O) No. 3 of 2017*

pronounced on 23rd October, 2019).

JUDGMENT

1. The appellant was charged in the magistrates' court with two main counts of defilement, contrary to section 8(1) as read with section 8(4) of the Sexual Offences Act No. 3 of 2006, and two alternative counts of indecent act with a child contrary to section 11(c) of the Sexual Offences Act.

2. The particulars of the offence of **count I** were that on 22nd February 2017 at [Particulars withheld] village in Kibwezi Sub County within Makueni County, intentionally caused his penis to penetrate the vagina of MM (*name withheld*) a child aged 6 years.

3. In the alternative, he was charged with committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act, the particulars of which were that on the same day and place intentionally caused his penis to penetrate the vagina of MM (*name withheld*) a child aged 6 years.

4. The particulars of **count II** were that on 22nd February 2017 at [Particulars withheld] village in Kibwezi Sub County within Makueni County intentionally caused his penis to penetrate the vagina of MM (*name withheld*) a child aged 7 years.

5. In the alternative, he was charged with committing indecent act with a child contrary to section 11(1) of the Sexual Offences Act. The particulars of the offence being that on 22nd February 2017 at [Particulars withheld] village in Kibwezi Sub-County within Makueni County intentionally caused his penis to touch the vagina of MM (*name withheld*) a child aged 7 years with his penis.

6. He denied all the charges. After a full trial, he was convicted on the two main counts of defilement contrary to section 8(1) as read with section 8(4) of the Sexual Offences Act. He was sentenced to serve 15 years imprisonment on each of counts I and II, sentences to run concurrently.

7. Aggrieved by the decision of the trial court, the appellant has come to this court on appeal relying on the following grounds –

> **1. The trial magistrate erred in law and fact when he convicted and sentenced him without observing that the charges before court were defective both for being at great variance with the evidence on record and for use of the wrong section of the law to charge him.**
>
> **2. The trial magistrate erred both in law and fact by convicting him without considering that there was no evidence to prove penetration without considering which the prosecution could not prove the offence of defilement to the required standard in law beyond reasonable doubt.**
>
> **3. The learned magistrate erred in fact and in law in shifting the burden of proof to the appellant, misapprehending and**

misdirecting himself on the evidence hence arriving at a wrong conclusion, by failing to observe that the prosecution evidence was untenable, unworthy, contradictory, inconsistent and full of lies, which required him to resolve the doubts in favour of the appellant.

4. The learned magistrate erred in points of law and fact by convicting him without properly applying section 124 of the Evidence Act and for using the same to establish identification of the appellant which was not a contentious issue during trial.

5. The trial magistrate erred both in law and fact when he dismissed his sworn defence which alleged the possibility of being framed up due to an existing grudge without giving cogent reasons and sentencing him to serve consecutive charges (should be sentences) yet the offences were the same transaction without applying section 333(2) of the Criminal Procedure Code.

8. 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.

9. This being a first appeal, I have to start by reminding myself that I am duty bound to consider the evidence on record afresh and come to my own independent conclusions and inferences, bearing in mind however that I did not have the opportunity to see witnesses testify to determine their demeanor and give due allowance to that fact – **Okeno –vs- Republic (1972) E.A 32; See also Pandya –vs- Republic (1957) E.A 336**.

10. It is also trite that in criminal cases, the burden is always on the prosecution to prove the case against the accused person beyond any reasonable doubt. An accused person has no burden to prove his innocence.

11. In the present case, the prosecution called 7 witnesses to prove their case. The appellant on the other hand gave a sworn defence statement and did not call any witness.

12. Pw1 and Pw3 were the complainants, who were primary school girls, and who testified that the appellant defiled them on a number of occasions in 2017. They revealed that to Pw4 FM the mother of Pw1 in February 2017 who in reaction relayed the information to Pw2 JSM the mother of Pw2 who was employer of the appellant, as a farm and domestic worker.

13. Thereafter, the incident was reported to the police and medical examination conducted on both the two complainants and the appellant; who was then charged with the offence. Pw7 Hellen Mutie a Clinical Officer filled the medical examination reports (P3 forms) and produced the same as exhibits.

14. On his part, the appellant tendered a sworn defence testimony denying the offences, and alleging that Pw4 FM had given her casual job to build her house and failed to pay her, while Pw2 JSM his employer, had made sexual advances on him and he had declined. He alleged that the allegations leveled against him herein were a frame up.

15. The appellant was convicted of two counts of defilement. The offence of defilement has three necessary ingredients. First, the age of the complainant or victim who has to be below 18 years. The second element is penetration of a sexual nature, even if partial. The third element is the identity of the culprit.

16. With regard to the age of the complainants who were said to be age 6 and 7 respectively, in my view the age of both complainants was proved by the prosecution beyond any reasonable doubt. In this regard, the age of Pw1 was proved, as a birth certificate was relied upon and produced in court as an exhibit. With regard to Pw3 a child clinic attendance card was relied upon and produced as an exhibit in court. Besides, the mothers of the complainants Pw2 JSM, and Pw4 FMM testified to the ages of their respective daughters. I thus agree with the trial court that the respective ages of the complainants was proved beyond any reasonable doubt.

17. Was penetration of a sexual nature proved on each of the two complainants? The evidence of sexual penetration is that of the complainants and the medical report. I note that from the evidence on record, there is no specific date given by the complainants about the sexual penetration. There was no evidence that penetration occurred on the date of complaint. The medical report found nothing unusual in the genital organs of the two complainants except that the hymen of each was missing and that the perforation of the hymen was not recent. As has been said by courts before – the hymen or vaginal membrane is not only raptured by sexual intercourse, and some girl infants are even not born by the same.

18. In the present case, though the medical evidence was that the hymen of both the complainants was missing there was no evidence that same was raptured through sexual penetration. I thus find that penetration of a sexual nature was not proved.

19. Was the appellant the culprit? The evidence against the appellant that he was responsible for the sexual penetration of the complainant was the evidence of the two minors. Indeed, under the provisal of section 124 of the Evidence Act, such evidence does not require corroboration for it to found a conviction provided it is believable and so believed by the trial court on reasons to be recorded.

20. Taking into account the totality of the prosecution evidence against the sworn defence of the appellant, in my view the evidence of the complainants is not believable. Firstly, there was nothing from the medical evidence to indicate recent sexual penetration of the complainants, though their evidence suggested recent penetration. Then the evidence on record talked of penetration in 2016 when the appellant might not have been an employee of Pw2. Thirdly, the defence of the appellant was long and candid, and was not seriously challenged, and thus stands unshaken. I note that the trial court struggled a lot to save charge and contradictions in evidence of the prosecution. The sections of the Act cited were erroneous, and the evidence contradictory and all the benefit of this should have been given to the appellant.

21. Taking into consideration the principle in criminal law that the burden is always on the prosecution to prove an accused person guilty beyond any reasonable doubt, it follows that the benefit of any reasonable doubt standing in the evidence has to be given to an accused person, as an accused person has no burden to prove his innocence. I give the benefit of the doubt created by the prosecution to the appellant.

22. In the circumstances of this case, and with the evidence on record, I find that the magistrate erred in not giving the benefit of doubt to the appellant. I will thus allow the appeal on conviction.

23. With regard to sentence, same cannot stand once the conviction is quashed.

24. 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 3RD DAY OF NOVEMBER, 2021, IN OPEN COURT AT MAKUENI.

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GEORGE DULU

JUDGE