REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCRA NO.57 OF 2020

OMM..APPELLANT

-VERSUS-

REPUBLIC...RESPONDENT

(Being appeals from the original conviction and sentence of Hon. A. Ndungu (S.R.M) in Makindu Senior Principal Magistrate's Court SPMCR Case No. 50 of 2017 pronounced on 19th May, 2020).

JUDGMENT

1. The appellant was charged in the magistrates' court with incest contrary to section 20(1) of the Sexual Offences Act No. 3 of 2006. The particulars of offence were that between 1st and 14th September 2017 at [Particulars withheld] village in Ikangavya Location of Nzaui Sub County within Makueni County being a male person caused his penis to penetrate the vagina of CMM a female juvenile aged 8 years who was to his knowledge his daughter.

2. 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 being that between the same dates and at the same place intentionally touched the vagina of one CMM a child aged 8 years with his penis.

3. He denied both charges. After a full trial, he was convicted of the main count of incest and sentenced to serve 20 years imprisonment.

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

> ***1) That the learned magistrate erred in law and fact when he convicted and sentenced him without regard to his basic rights; including disclosure of the prosecution evidence as provided under Article 50(2) (j) of the Constitution.***
>
> ***2) The learned magistrate erred in law and fact when he convicted and sentenced him without observing that the charges before court were at great variance with the evidence on record and hence defective in nature.***
>
> ***3) That the learned magistrate erred in fact and in law in shifting the burden of proof on the appellant, misapprehending and misdirecting himself on the evidence hence arriving at the 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 considering that there was no evidence to prove penetration without which the prosecution could not prove the offence of defilement to the required standard in law beyond any reasonable doubt.***
>
> ***5) The learned 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 without applying section 333(2) of the Criminal Procedure Code.***

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

6. This is a first appeal. As a first appellate court, I am duty bound to re-evaluate all the evidence on record and come to my own conclusions and inferences, and in doing so bear in mind that I did not have the opportunity to see witnesses testify to determine their demeanor and give due allowance to that fact. See **Okeno –vs- Republic (1972) E.A 32**, and **Shantilal M. Ruwala –vs- Republic (1957) E.A 570**.

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

8. In proving their case, the prosecution called 5 witnesses. Pw1 Stella Mbaka Musembi was the Chief of Ikangarwa Location while Pw3 BMW was the headteacher of [Particulars withheld] Primary School where the complainant or victim Pw2 was schooling. The evidence of the prosecution was that on 14/9/2017 Pw3 saw the complainant being assaulted by other pupils near the toilet and on asking her what the problem was she said that she was finding it difficult to walk because of injuries in the head, which were visible.

9. Pw3, being a male teacher, then asked a female senior teacher RM to assist and they took the complainant to hospital for treatment. Pw3 was then called on phone by the Assistant Chief to join a meeting at the Assistant County Commissioner's Office. On arrival there, he learnt that there was a report that the complainant had been defiled.

10. When put on his defence, the appellant gave unsworn testimony. He denied committing the offence and said that the complainant was his step daughter and that he worked as a Chef at Sultan Hamud away from home. He claimed that the allegations against him were a frame up by the head teacher Pw3, as they had an issue over land use.

11. The appellant has raised technical and substantive grounds of appeal. He first of all said that the charge is defective as the dates do not tally with the dates testified to in evidence. In my view, such cannot be a defect on the charge sheet, as the charge sheet is a mere allegation which has to be proved through the evidence. If there is a variation of the dates of occurrence of the offence in the witness evidence, all it means is that the allegation in the charge is not proved, not that the charge is defective. I find no defect in the charge. That ground is dismissed.

12. The appellant has raised a ground that his trial was not fair, in violation of Article 50 of the Constitution. He said that he was not supplied with witness statements. Having perused the record, I find no time when he asked to be supplied with prosecution documents or witness statements. He infact participated in the trial and comprehensively cross-examined witnesses. I dismiss that ground.

13. The appellant has also complained that the trial court shifted the burden of proof to him contrary to the requirements of the law. This ground in my view, relates to the proof of the prosecution case against the appellant beyond reasonable doubt. This is a substantive ground.

14. In my view, the prosecution failed to prove their case against the appellant herein beyond any reasonable doubt. The first reason is that when Pw3 asked the complainant about her problem, the complainant said she was finding it difficult to walk because of injuries on her head, which were visible. There was no allegation of sexual assault.

15. Secondly, when the complainant was taken to hospital she was found with no injuries in her sexual organs, thus it cannot be said that the limping of the complainant was caused by sexual assault. In this regard, the evidence of Pw5 Dr. Stephen Musembi was clear as follows –

> "***She was limping and apprehensive. Examination of genitalia, labia, minora, majora and vagina was normal. Cervix and vagina wall was normal there were no bruises. The vagina could allow a finger to go through thus there was penetration. Hymen was broken but not fresh***."

16. With the above medical evidence on record, there was no single injury in the genital organs that could cause the complainant to limp. Broken hymen are not necessarily caused by sexual intercourse, and in any case, the broken hymen herein was not fresh and could not in my view, cause the complainant to limp.

17. The other reason why the prosecution did not prove its case against the appellant was failure to call crucial witnesses. The senior female teacher who handled the girl and who would have given first hand evidence on what she said was not called to testify. The Assistant Chief Pw1, who claimed to have received the information of defilement or incest, was relying on hearsay evidence as the person who informed him about the incident was not called to testify. The failure of the prosecution to call key witnesses caused a huge gap and the benefit has to be given to the appellant.

18. Also, though the evidence of a single victim witness in sexual offences does not require corroboration under the provisal to section 124 of the Evidence Act to found a conviction, in my view the evidence of the complainant Pw2 herein was not believable. This is firstly because she initially said that she was limping due to the injuries on the head. Her change of the story was thus highly suspect. Secondly, the medical evidence does not support her later allegation that she was limping because of injuries in her reproductive organs, as the medical evidence

was that she suffered no fresh injuries in her reproductive organs.

19. I thus find that the prosecution failed to prove their case against the appellant beyond reasonable doubt for the offence of incest. The appeal on conviction will thus be allowed and the conviction quashed. As a consequence, the sentence will also be set aside.

20. 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 4TH DAY OF NOVEMBER, 2021, IN OPEN COURT AT MAKUENI.

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GEORGE DULU

JUDGE