REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCRA NO.E011 OF 2020

VKW .....APPELLANT

-VERSUS-

REPUBLIC .....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. C.A Mayamba in Kilungu

Principal Magistrate's Court (S.O) Case No.4 of 2020 pronounced on 24th September, 2020).

JUDGMENT

1. The appellant was charged in the magistrates' court with incest by a male contrary to section 20(1) as read with section 22(1), subsection (2) of the Sexual Offences Act No. 3 of 2006. The particulars of offence were that on various occasions during 2019 December holiday at [Particulars withheld] village, Kauti Sub-location in Kilungu Sub-location within Makueni County intentionally and unlawfully did an act which caused penetration by inserting his genital organ into the genital organ of ANK (*name withheld*) a child aged 8 years 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 25 years imprisonment.

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

a) The learned magistrate erred in both law and facts and misdirected himself by holding that the case for the prosecution was proved to the required standards whereas on the basis of record the burden of proof was not discharged indeed left reasonable doubts that ought to have been resolved in the appellant's favour.

b) That the trial magistrate erred both in law and fact by wholly relying on prosecution witnesses' testimony yet in the circumstances the case ought to have been backed by evidence linking him to the defilement.

c) The honourable magistrate preferred a harsh and excessive sentence to the appellant.

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

5. This is a first appeal. As a first appellate court, I have an obligation to evaluate all the evidence on record afresh and come to my own independent conclusions and inferences – see **Okeno –vs- Republic (1972) E.A 32**.

6. In proving their case, the prosecution called seven (7) witnesses. Pw1 the complainant stated that she was 7 years old and was defiled by her father. Pw2 PM the mother of Pw1 stated that the complainant reported to her that the appellant was doing bad manners to her but she initially ignored that information until 27/1/2020 when she was summoned by the headteacher [Particulars withheld] Primary School. Pw3 Mrs. Euphamia Mbithi, who informed her that Pw1 had disclosed same information to her.

7. Pw3 Mrs. Mbithi Euphamia on her part, testified that when she saw the complaint limping and enquired from her she disclosed the incestuous acts against her father the appellant. On the other hand, Pw4 Leonard Muema Kioko and Pw5 Philomena Mutua who testified for the prosecution, said that they did not know about the incident. Pw6 was Pc John Mbevo Mutie investigated the matter, while Pw7 Eric Kasiamani a Clinical Officer at Kilungu hospital filled the medical report (P3 form) for the complainant and produced the report as an exhibit. He also examined the appellant.

8. The appellant on his part, tendered a sworn defence statement, denied committing the offence and said that Pw3 fabricated the offence against him because of a land dispute.

9. Having re-evaluated the evidence on record, I am of the view that the prosecution proved beyond any reasonable doubt that the appellant and the complainant (Pw1), were a father and daughter. Though the birth certificate did not indicate that the appellant was the father of the complainant, Pw2 explained the reasons for that omission, which was not disputed by the appellant. I find that the relationship of father and daughter was proved.

10. With regard to the age of the complainant, a birth certificate was relied upon, which again was not challenged. I find that the age of the complainant was proved by the prosecution to be 8 years at the time of the incident, to the required standards in criminal cases.

11. With regard to penetration, it is of note that the complainant (Pw1) gave the details of the sexual relations between the appellant and herself. According to her, the appellant penetrated her a number of times, and told her not to tell anybody about it. She however informed her mother Pw2 her mother about the sexual assault though Pw2 initially ignored the information. This evidence was also confirmed by Pw2. In addition, Pw1 informed the headteacher Pw3 about the sexual assault on her by the appellant and that is when the incident was reported to Government authorities and the appellant charged with the offence. The medical report confirmed that the hymen of the complainant was broken.

12. In my view, the evidence of the complainant (Pw1) which is evidence of a single sexual offence victim witness on penetration is believable and is covered by the provisal to section 124 of the Evidence Act. It does not require corroboration to be sustained. Like the trial magistrate therefore, I believe her evidence and hold that penetration was proved.

13. Was the appellant culprit? The appellant and the complainant knew each other well before. They are father and daughter. There is no doubt that they lived together for many years. There is no possibility of mistaken identity. I find that the appellant was the culprit. I will uphold the conviction.

14. With regard to sentence, the appellant was sentenced to 25 years imprisonment. The maximum sentence for the offence is life imprisonment. The complainant being a child of 8 years, in my view, the sentence imposed by the magistrate is not harsh and excessive. I will uphold the sentence.

15. I find no merits in the appeal. I dismiss the appeal and uphold both the conviction and sentence.

Right of appeal explained.

DELIVERED, SIGNED & DATED THIS 16TH DAY OF NOVEMBER, 2021, IN OPEN COURT AT MAKUENI.

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GEORGE DULU

JUDGE