



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCRA NO.148 OF 2020

AMK.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence

of Hon. Mwaniki J. in Makueni Chief Magistrate's Court

CMCR (S.O) Case No.23 of 2019 pronounced on 29th October, 2019).

JUDGMENT

1. The appellant was charged in the magistrates' court with sexual assault contrary to section 5(1)(b) as read with section 5(2) of the Sexual Offences Act No. 3 of 2006. The particulars of offence were that on 25th June 2019 at [Particulars Withheld] Village Kilala Location within Makueni County unlawfully manipulated his penis so as to cause penetration of his penis by the mouth of SMK a child aged 10 years.

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 on the same day and at the same place unlawfully and intentionally did compel SMK aged 10 years to touch his penis and ejaculated in his mouth.

3. He denied both charges. After a full trial he was convicted of the main count of sexual assault and sentenced to serve 12 years imprisonment.

4. Dissatisfied with the conviction and sentence, the appellant has come to this court on appeal, and relied on the following amended two grounds of appeal –

1) The magistrate erred in convicting him on a defective charge sheet.

2) The magistrate erred in law and fact by unlawfully shifting the burden of proof to him.

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

6. This being a first appeal, I am duty bound 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.**

7. In proving their case the prosecution called five (5) witnesses. The appellant on his part tendered a sworn defence and was cross examined

8. Though the appellant has claimed on appeal that the charge sheet was defective, I find no defect in the charge. His complaint on the main count has more to do with proof of the offence of sexual assault under section 5(1)(b) rather than its defect. I thus find that the charge is not defective.

9. On the second ground of alleged shifting of the burden of proof, this goes to the proof of the offence convicted beyond any reasonable doubt.

10. In this regard, the evidence of the victim Pw1 is clear that he was called into the room by the appellant who made him suck his penis until he ejaculated. The evidence of Pw3 Michael M also called K is also very clear that he peeped through the window of the room and witnessed the incident of sucking. It was in broad daylight. Pw3 called other people and informed Pw4 EMN the mother of the victim about the incident.

11. Like the trial magistrate, I find no doubt that the prosecution proved the commission of the offence by the appellant beyond any reasonable doubt, as the appellant himself in his evidence admitted that he was with the victim in the room that day.

12. With regard to sentence, I do not consider the sentence to be excessive in view of the medical evidence that the appellant was actually under HIV treatment.

13. Consequently, I 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 1ST DAY OF DECEMBER 2021, IN OPEN COURT AT MAKUENI.

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George Dulu

Judge