



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CRIMINAL APPEAL NO. 214 OF 2014

EM.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the judgement of Hon. I.G. Ruhu, RM, dated 16th December, 2019

in the PM's Court at Kimilili, in Criminal No.13 of 2019, Republic v EM)

JUDGEMENT

In his petition of appeal, the appellant has appealed against his conviction and sentence of twenty five (25) years imprisonment in respect of the offence of defilement contrary to section 8(1) as read with section 8 (2) of the Sexual Offences Act No. 3 of 2006.

In this court the appellant has raised six grounds of appeal in his petition of appeal.

The grounds of appeal as follows.

In ground 1 the appellant has faulted the trial court in failing to find that the prosecution failed to prove its case beyond reasonable doubt.

In ground 2 the appellant has faulted the trial court in failing to find that there was no exhibit found in his possession.

In ground 3 the appellant has faulted the trial court in failing to inform him of his right to legal representation by an advocate.

In ground 4 the appellant has faulted in failing to find that the evidence of Pw 1 and Pw 2 was not truthful because it was based on speculation and conjecture.

In ground 5 the appellant has faulted the trial court that the prosecution failed to call vital witnesses to testify.

In ground 6 the appellant has faulted the trial court in convicting the appellant on insufficient evidence.

The appellant also filed written submissions, which I find unnecessary to consider the grounds and the appellant's submissions for reasons that will appear below in this judgement.

The submissions of the respondent

The prosecution filed written submissions in support of their case. They urged the court to dismiss the appellant's appeal in its entirety.

I find unnecessary to consider the respondent's submissions for reasons that will appear below in this judgement.

Findings of the court.

The evidence of the 8 year old complainant (Pw 1- her name is withheld) is that the appellant is her uncle. She testified that her uncle defiled her.

Furthermore, the mother of the complainant namely LN (Pw 3) testified that the appellant is her elder brother and that the complainant is her blood daughter.

Additionally, Pw 3 testified that her daughter told her what her brother had done to her.

As a first appeal court, I am required to re-evaluate the entire evidence. I have done so. I find that the complainant is the niece of the appellant; since the mother of the complainant is a younger sister of the appellant.

In the circumstances, I find that the evidence discloses the offence of incest contrary to section 20 (1) of the Sexual Offences Act No. 3 of 2006.

It therefore follows that the trial of the appellant was fatally defective. In other words, it was a mistrial.

In the premises, I find that the appeal of the appellant has succeeded. I therefore quash his conviction and sentence.

The only issue for consideration is whether I should order a re-trial. In this regard, one of the main considerations is whether the potentially admissible evidence if believed might result in a conviction. See *Braganza v R* (1957) EA 152. The other consideration is the period the appellant has been in custody namely both pre-trial and post judgement custody.

I also find that the victim is an eight year old niece of the appellant.

Additionally, the appellant has been in both pre-trial and post judgement custody for about a period of two years and two months.

After taking into account all of the foregoing matters into account I find that it is in the interests of justice to order a re-trial which I hereby do pursuant to this court's power's under section 354 (3) (a) (i) of the Criminal Procedure Code (Cap 75) Laws of Kenya.

In the premises, the appellant is hereby remanded in custody to be produced in the Chief Magistrate's court at Bungoma as soon as practicable for re-trial purposes.

JUDGEMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THROUGH VIDEO CONFERENCE THIS 25TH DAY OF FEBRUARY 2022.

J M BWONWONG'A

JUDGE

In the presence of:-

Mr. Kinyua: Court Assistant

The appellant – Present in prison

Mr. Mukangu for the Respondent