



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CRIMINAL APPEAL NO. 52 OF 2019

SOO.....APPELLANT

-VERSUS-

REPUBLIC....RESPONDENT

(Being an Appeal from the Judgment of Hon C.L. Yalwala (PM) delivered at Maseno in Senior Resident Magistrate's Court in Criminal Case No 47 of 2018 on 10th September 2019)

JUDGMENT

INTRODUCTION

1. The Appellant herein was tried and convicted by Hon C. L Yalwala, Principal Magistrate for the offence of incest and committing an indecent act with a child contrary to Section 20(1) the Sexual Offences Act No 3 of 2006 respectively. The Learned Trial Magistrate had also found that the Prosecution proved its case beyond reasonable doubt in respect of the alternative charge of committing an indecent act with a child contrary to Section 11(1) of the said Act. He was sentenced on the main charge and given thirty (30) years imprisonment.
2. The particulars of the Offence are that the accused person SOO, on diverse dates between July 2017 and 16th July 2018 in upper Kombewa sub-location, Seme sub-county within Kisumu county being a male person caused his penis to penetrate the vagina of MAO a juvenile aged 17 years who was to his knowledge his daughter.
3. The alternative charge was for the offence of committing indecent act with a child contrary to Section 11(1) of the Sexual Offences Act and the particulars of the offence are that on diverse dates between July 2017 and 16th July 2018 in upper Kombewa sub-location, Seme sub-county within Kisumu County he intentionally touched the vagina of MAO a child aged 17 years.
4. Being dissatisfied with the said Judgement, on 10th September, 2019 he preferred this appeal. The Appellant's undated Petition of Appeal was filed on 26th September, 2019.
5. The Appellant's undated Written Submissions were filed on 21st January, 2021 while the State's Written Submissions dated 12th January, 2021 were filed on 18th January, 2021.

LEGAL ANALYSIS

6. This being a first appeal, it is the duty of this court to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.
7. This was aptly stated in the cases of **Selle vs Associated Motor Boat Company Ltd[1968] EA 123** and **[1985] EA 424** where in the latter case, the court therein rendered itself as follows:-

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”

8. Having looked at Appellant's and State's Submissions, it is my considered view that the issues that have been placed before this court for determination are:-

a. Whether or not the Prosecution had proved its case beyond reasonable doubt.

b. Whether or not, in the circumstances of this case the sentence meted upon the Appellant by the Trial Court was lawful and or warranted.

9. The court dealt with the two (2) issues under the following distinct and separate heads.

I. PROOF OF PROSECUTION'S CASE

10. The Appellant submitted that the ingredients forming the offence were not conclusively proven because it was not clear whether the genitalia organ of the Complainant came into contact with his or whether there were any injuries meted on the Complainant's genitalia prior to penetration.

11. He also contended that her age was not established through the medical evidence because there were no injuries and that PW 3 testified that there were no injuries on the internal and external genitalia and that if the hymen had been freshly broken, the delay in ferrying the Complainant to hospital relatively affected the medical evidence.

12. He added that he was not positively identified by the Complainant and that there was no independent evidence to that effect. He questioned why the Complainant did not inform neighbours, the school head teacher and fellow mates what had befallen her or flee from him as they were known to each other.

13. He pointed out that there were discrepancies relating to the alleged offence prior to the diverse dates of 16th July 2017 and 2018 which showed that PW 5 was "micro-managed"(sic) as she never visited the Complainant's home.

14. It was his further submission that the investigations that were carried out were shoddy and that his defence was never considered by the Learned Trial Magistrate and in this regard, he placed reliance on the case of **Sekitoleko vs Republic Uganda** (sic) Court.

15. It was his further submission that the Learned Trial Magistrate failed to consider his mitigating aspects and placed reliance on the case of **Simon Kipkirui Kimoni vs Republic [2019] eKLR**.

16. On the other hand, the State submitted that the case was proved to the required standard. It pointed out that the evidence was adduced showing that the Appellant was the Complainant's father, that she was born on 13th May 2001 and that the DNA Report showed that he was the father of the Complainant's child. It was categorical that the offence of defilement was proven.

17. Section 20(1) of the Sexual Offences Act provides that:

“Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years.

Provided that, if it is alleged in the information or charge and proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person.”

18. To establish a case under the above Section, the Prosecution must prove the elements of the offence. There must be an indecent act or an act which causes penetration. Further, the victim must be a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother.

19. The Complainant was PW1. She testified that the Appellant was her father. Her testimony was that her mother left her with her father and got married to another man leaving her with her father, siblings and step mother. After her step mother left, the Appellant, while naked and armed with a panga, would come to the kitchen-house where she used to sleep, take her to the main house and defile her. Her evidence was that he defiled her three (3) times before she got pregnant and delivered and twice after she delivered. It was her further evidence that she reported the matter at Kombewa Police Station.

20. Her evidence was corroborated by Christabel Ombok, the Chief, (hereinafter referred to as "PW2") who testified that she was notified of the matter on 17th July 2018 by a member of community policing. She told the Trial Court that she knew the Appellant and that she took him and the Complainant to the police station and thereafter took the Complainant to the Children's Office and wrote a letter for her placement at the Children's Rescue Center.

21. Fredrick Ochieng Ogolla (hereinafter referred to as "PW3") testified that based on the examination findings he could not prove with certainty that defilement had occurred due to the duration it took for the complainant to be presented for the said examination. He adduced in evidence the P3 Form and hospital treatment notes.

22. Polycap Nduta Kweyu, the Government Analyst, Kisumu Government Laboratory, (hereinafter referred to as "PW 4") testified that the DNA analysis and profile showed that the Appellant was the father of the child, GO, born of the Complainant to the extent of 99.99%. He tendered in evidence the Exhibit Memo that was marked as Exhibit P3.

23. No 105954 PC Gladys Limo (hereinafter referred to as "PW5") was the Investigating Officer. Her testimony was that the Complainant's

Birth Certificate showed that the Appellant was her biological father and that the Complainant was born on 13th May 2001. She adduced in evidence the Birth Certificate Exhibit P5 in this regard.

24. The Appellant gave sworn statement. In his defence, he testified that he was not aware of such allegations and that he was changing his Identity Card at the Registration's Office when he was arrested. He denied ever having committed the offences. He did not call any witness in his defence.

25. Having carefully scrutinised the evidence adduced on trial, it was evident that the Appellant did not rebut the Complainant's evidence that he was her biological father. In fact, he acknowledged that fact during his cross-examination. The issue of the Complainant's paternity was therefore not in contestation. What was contested was whether or not the Appellant had sexual relations with the Complainant herein. It was one's word against the other.

26. Whilst PW 3 could not ascertain whether or not the penetration had occurred which he attributed to the long duration of presentation for the medical examination, PW 4 was emphatic that the Appellant was the Complainant's father and also father of the Complainant's child, known as GO.

27. Whether he penetrated the Complainant's vagina or not was a different matter as it could not be established due to the long period it took for the Complainant to have been presented for medical examination. In the case **GMB V Republic [2018] e KLR**, the court therein acknowledged that in an offence of incest, penetration was not a necessary ingredient.

28. In the case herein, there was no better evidence that could have been presented by the Prosecution than the DNA Report which the Appellant did not controvert and/or rebut. It was irrespective that he disagreed with the said Report on the ground that the person who presented the said Report in evidence was different from the person who examined him. The fact that a child was born out of the incestuous relationship with the Complainant herein was proof that the Appellant committed the offence of incest.

29. The Prosecution's evidence consistent, trustworthy and clear. There were no contradictions which if resolved in the Appellant's favour would create a doubt in the Prosecution case. On the contrary, the Defence offered by the Appellant did not cast doubts in the Prosecution case as it was a mere denial. This court was therefore satisfied that the Prosecution proved that the Appellant was guilty of the offence of incest beyond reasonable doubt.

30. In the premises foregoing, Grounds of Appeal Nos (1), (2), (3) and (4) were not merited and the same be and are hereby dismissed.

II. SENTENCE

31. The Appellant submitted that the sentence of thirty (30) years imprisonment that was imposed upon him was harsh and urged this court to review the same.

32. However, the State's position was that the Trial Court considered his mitigation and the fact that the offence carried a life imprisonment.

33. Notably, the Appellant did not raise issue of the sentence that was meted against him being harsh as a ground of Appeal. Be that as it may, this court deemed it prudent to address the same as both he and the State had submitted on the same.

34. As seen hereinabove, the Birth Certificate showed that Complainant was born on 13th May 2001. The offences were said to have been committed on diverse dates between July 2017 and July 2018. This means that by May 2017 the Complainant was (16) sixteen years old and by May 2018 she was seventeen (17) years of age.

35. In sexual offences, the age of a victim is an important ingredient to be considered when deciding the penalty to be meted out to an accused person. This was reinforced by the Court of Appeal in **Kaingu Elias Kasomo vs Republic Criminal Case No. 504 of 2010** as was cited in **NNC vs Republic [2018] eKLR** when it had this to say:-

“Age of the victim of sexual assault under the Sexual Offences Act is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim.”

36. Notably, under Section 20(1) of the Sexual Offences Act, if it is alleged in the information or charge and proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life. The use of the term “**liable**” implies that a person may be sentenced for any number of years until life imprisonment.

37. In such a case, the term of imprisonment to be imposed would be at the discretion of the trial court. However, such discretion must be exercised judiciously and not capriciously. The trial court must be guided by the evidence and sound legal principles. The appellate court would be entitled to interfere with the sentence imposed by the trial court if it was demonstrated that the sentence imposed was not legal or was so harsh and excessive as to have amounted to miscarriage of justice and/ or that the court acted upon wrong principles or the discretion was exercised capriciously.

38. In his mitigation, the Appellant prayed to be given a non-custodial sentence to enable him take care of his children who he had left at home. A Pre-Sentencing Report was presented to the Trial Court. The said Report concluded that the Appellant herein was not suitable for a non-custodial sentence.

39. It was correct as the State submitted that the Learned Trial Magistrate considered his mitigation, acknowledged that the offence of incest attracted upto life imprisonment and sentenced the Appellant to thirty (30) years imprisonment.

40. It was therefore the finding of this court that the sentence imposed on the Appellant by the Learned Trial Magistrate was not harsh and/or excessive warranting any interference and/or disturbance by this court.

DISPOSITION

41. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was lodged on 26th September 2019 was not merited and the same be and is hereby dismissed. The conviction and sentence be and are hereby affirmed as it is safe to do so.

42. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 23RD DAY OF MARCH 2021

J. KAMAU

JUDGE