



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

(CORAM: R. MWONGO, J.)

CRIMINAL APPEAL NO. 24 OF 2019

MMM.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Background

1. This as an appeal against the appellant's conviction and sentence of life imprisonment for incest under **Section 20(1) of the Sexual Offences Act** No.3 of 2006. The particulars of the Offence were that the appellant on diverse dates between the month of January 2017 and 6th February, 2018 at [Particulars Withheld] village in Kipipiri sub-county within Nyandarua County being a male person, caused his penis to penetrate the anus of SMM a male aged 13 years who was to his knowledge his son.

2. The appellant's appeal is on the following grounds:

- 1. That the learned trial magistrate erred in law and fact in that the charge of incest was not proved beyond reasonable doubt, given that witnesses were not credible*
- 2. That the doctor who examined PW1 was not summoned to court to testify in chief*
- 3. That the age of PW1 was not proven beyond any reasonable doubt.*
- 4. That there were discrepancies in the application of the law and policy on sentencing.*

3. The role of this court in its appellate jurisdiction is to review all the evidence and to make its own conclusions being careful to note that it did not itself hear the testimony or see the demeanour of witnesses (**Okeno v R [1972] EA 32**).

Facts

4. The brief facts are that SMM, testified as PW1 after being found able to give sworn testimony following a *voir dire* examination. He testified that he lived with his father and grandmother after being abandoned by his mother. He stated that someone had told him what to say, he was taken to hospital, was not told of the court dates and the police subsequently came for him at school

5. The DPP then informed the court that the witness had turned hostile; and PW1 was declared a hostile witness. Testifying in cross examination as a hostile witness, PW1 was shown his statement and he agreed he lived with his father in January 2017; that his father used to hug him and push his penis into PW2's anus; that the accused threatened him with a panga; that the sodomy went on for a long time until he became sick and was taken to hospital by EW. That during that time the accused had threatened him with a panga; and that it was his Aunt SW who told him to say what he was saying; and that his father had not threatened him.

6. In further examination, PW1 confirmed that he was taken to hospital where he was examined and treated; and that the person who defiled him was the accused in court, namely his father.

7. In cross examination by the accused, PW1 stated that the accused had never done anything to him, that his small mother is the one who told him what to say; that the husband of his small mother was the accused's brother; that he had never been sodomised; that his parents separated when he was ten years old; and that he was examined at hospital.

8. PW2 SWM testified that SMM is her husband's nephew; that she lived with SMM for the previous three years after SMM's mother run away; that his mother took him away when the case started; that SMM's father worked at daytime and at night he took SMM to his house; that when SMM complained about not being able to sit down and that the accused did bad things to him on his buttocks at night, she organized to take him to hospital; that she took SMM to Mawingo hospital where they were referred to Engineer hospital; that the doctor at Engineer examined SMM and diagnosed that he had been sodomised and was stressed; that she went to Miharati Police station where a P3 form was issued and that the accused was later arrested.

9. She further testified that after the arrest, relations broke down with her husband and SMMs mother; that she had been threatened with divorce if she testified in court; that her husband cautioned SMM from testifying because accused would be jailed for life. In cross examination she testified that she had physical custody of SMM; that she was not the cause of the family separation; that she had no enmity against the accused.

10. PW3 Dr Ntwiga, was in charge of Engineer District hospital. He produced a P3 form in respect of SMM filled by Dr Rotich who had been in court but had to rush to attend to an emergency. The accused having no objection, the report was produced. Dr Ntwiga stated that the report showed that SMM had been sodomised for over one year; that the last incidence was on 6/2/2018; that SMM was withdrawn emotionally; that there had been penile anal penetration; that he had a scar at around 6.00 O'clock and a laceration at 3.00 O'clock in his anal orifice. He produced P Exhibit the P3 form, P Exhibit 2 a treatment form from Mawingo Hospital, and P. Exhibit 3 the PRC Form filled by Dr Rotich.

11. The reports showed that SMM had no discharge or pus cells or spermatozoa in anal swab, and no abnormalities in urinalysis. However his sphincter was loose and had reduced tone. SMM was scheduled for trauma counselling.

12. In cross examination by the accused PW3 stated that SMM was accompanied to hospital by his uncle, and that the hospital's role was merely to examine and report on the examination of SMM.

13. The state's last witness was PW4 PC Johnson Thike of Kipipiri Police station. He was the Investigating Officer. He stated that SMM was brought to the station by his uncle DM and aunt SWM (PW2). He took them to Manunga health centre where SMM was treated and then issued them with a P3 form. It was filled by the doctor at Engineer hospital. He then visited the accused's home where he confirmed the accused was SMM's father and that he had chased away SMM's mother in 2016. That the accused slept in the same room with SMM. That he ascertained SMM was 13 years old from a baptismal card, that from January 2017, the father started hugging and caressing SMM and defiled him on several occasions telling SMM that that is how fathers loved their sons.

14. In cross examination, PW4 stated he was not the arresting officer, that he did not know where the arrest was effected; that the complainant had initially been hidden but he, PW4 managed to trace him; that accused's brother also went into hiding as the family were trying to assist the accused; that the complainant was coached to deny his statement by the accused's relatives.

15. DW1, the accused, in an unsworn statement, testified that he was SMMs father; that on 9/2/2017 he was working in Miharati when he was called by his brother who told him to go home as there was a problem; that when he got home he learnt of the allegations against him; that he was upset because this was not the first time he was accused; that he reported at mawingu AP camp where he was told to report to Kipipiri police station; that he tried to extricate himself from the issue but was not heard; that he was then charged; that the complaint was a set up against him by his brother and the wife; that they had threatened to frame him; and that his brother then refused to come to court and went underground.

16. DW2 EW, SMM's mother, also testified through an unsworn statement. She stated that the accused was arrested when she was in church; that the accused did not sodomise their son; that Daniel, the accused's brother and him are in good relations; that although Daniel assaulted the accused, they had reconciled; but that Daniel and his wife wanted the accused jailed.

Issues for determination

17. The issues arising for determination based on the appeal grounds are as follows:

1. What are the ingredients for proof of incest and whether incest was proved in the instant case?
2. Probative value of the medical evidence.
3. Proof of the age of the complainant/victim.
4. Whether the sentence was lawful and proportionate

Analysis and Determination

18. **Section 20** of the **Sexual Offences Act** deals with incest by males. It provides as follows:

“incest by male persons

20. (1) 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.

(2) If any male person attempts to commit the offence specified in subsection (1), he is guilty of an offence of attempted incest and is liable upon conviction to a term of imprisonment of not less than ten years.

(3) Upon conviction in any court of any male person for an offence under this section, or of an attempt to commit such an offence, it shall be within the power of the court to issue orders referred to as “section 114 orders” under the Children’s Act and in addition divest the offender of all authority over such female, remove the offender from such guardianship and in such case to appoint any person or persons to be the guardian or guardians of any such female during her minority or less period.”

19. Further, **Section 21** of the **Sexual Offences Act**, which deals with incest by females, provides as follows:

“Incest by female persons

The provisions of [section 20](#) shall apply mutatis mutandis with respect to any female person who commits an indecent act or act which causes penetration with a male person who is to her knowledge her son, father, grandson grandfather, brother, nephew or uncle.

20. The charge sheet in this case specified the offence as *“incest contrary to section 20(1) of the Sexual Offences Act”*. At the conclusion of the trial, the trial Magistrate court found and concluded as follows:

“...Prosecution has proven their case beyond reasonable doubt; I find the accused guilty as charged for the offence of incest contrary to Section 20(1) of the Sexual Offences Act and I accordingly convict him under Section 215 CPC”

21. To recap, the evidence of SMM who was declared a hostile witness was that captured in his statement. Before he was declared hostile, he said he was told what to say. But he also said he did not know that happened. After being declared hostile and on being cross-examined by the prosecutor, he said his father used to hug him, that they used to sleep together and that his father used to push his penis into SMM’s anus. He told the police that his father threatened him with a panga, and that the sodomy took a long time. He also said the person who defiled him is seated in court and gestured towards the accused.

22. The evidence of PW2 was that SMM had told her he was injured in his legs and could not sit down; and that his father did bad things (bad manners) on him in his backside at night; on his buttocks. PW2 also testified that she was threatened with divorce if she pushed forward with the case.

23. The medical evidence adduced through PW3 Dr. Ntwiga confirmed that SMM had been sexually assaulted: he had anal injuries, a gaping anus and painful hip joint whilst walking.

24. In **Abel Monari Nyanamba & 4 others v Republic [1996] eKLR**, it was stated as follows concerning the evidence of a hostile witness:

“The evidence of a hostile witness is indeed evidence in the case although generally of little value. Obviously, no court could found a conviction solely on the evidence of a hostile witness because his reliability must itself introduce an element of reasonable doubt.” (Emphasis added)

25. Here, there is evidence of PW2 and the medical evidence which corroborates and highlights the commission of an offence in which SMM had his anus penetrated. In addition there is the incontrovertible medical evidence of sexual assault involving penetration of SMM’s anus.

26. It is clear from the evidence that what the accused is alleged to have done may constitute an indecent act or sexual assault which are defined below:

“Indecent act” under **Section 2** of the **Sexual Offences Act** means:

“any contact between any part of the body of a person with the genital organs, breast or buttocks of another but does not include an act that causes penetration.”

Equally under **Section 5** of the **Sexual Offences Act** the offence of **“Sexual Assault”** arises when:

“(1) Any person unlawfully penetrates the genital organs of another person with any part of the body of another or that person; or with an object object manipulated by another or that person except where such penetration is carried out for proper and professional hygienic or medical purposes. (Emphasis added)

“Genital Organs” are defined in the Sexual Offences Act to include:

“the whole part of the female or male genital organs and includes the anus” and;

“Penetration” is defined as:

“The partial or complete insertion of the genital organ of a person into the genital organs of another person.”

27. As already stated, whilst incest generally concerns sexual relations between people who are deemed closely related within a family, under Kenyan law, the offence of incest falls under **Sections 20 and 21** of the **Sexual Offences Act**. By statutory definition, incest can only be committed by a person of one sex against a person of the opposite sex.

28. Thus, incest under **Section 20(1)** of the **Sexual Offences Act** can only be committed with or against a *female by a male person*. Here, the facts and evidence show that the act committed by the accused was committed with his son, a male. There is no evidence that the accused did commit the offence with which he was charged, and since the facts show the complainant was male, he cannot therefore be guilty of incest under **Section 20** of the **Sexual Offences Act**.

29. That being the case, no purpose will be served in delving into the parties arguments about the charge as the proceedings amount to a mistrial. That notwithstanding, it is clear that an offence was committed and the accused should have been tried for it in accordance with the law.

30. This court has original jurisdiction to sentence the accused for the offence committed.

31. In **HC Criminal Appeal No. 54 of 2018 JKM v Republic [2020] eKLR**, the court handled on similar case as follows:

“The complainant is a male person and does not fall within the above category listed in Section 20(1). Section 20(1) is clear that, a male person must commit the incest with a female relative. There is no provision in the Sexual Offences Act where a male is deemed to commit incest with male relative. An offence of incest was not disclosed as no such offence exists under Section 20(1) of the Sexual Offences Act. I hereby acquit accused of the said offence as charged. The evidence in record however, discloses an offence of defilement under Section 8(1) as read with Section 8(2) of the Sexual Offences Act. The trial court committed a serious error in convicting and sentencing the appellant under Section 20(1) of the Sexual Offences Act. I however, find the appellant guilty of the offence of defilement contrary to Section 8(1) as read with Section (2) of the Sexual Offences Act.”

32. In the light of the foregoing, the appeal succeeds partially to the extent that the offence with which the accused was charged was not proved. The conviction and sentence are therefore hereby set aside.

33. The evidence, particularly the medical evidence as I have already said, is incontrovertible. The child, SMM, had tears and lacerations in his anal orifice. He had loose sphincter with reduced tone. This occurred over a long period during which SMM was in the care of the accused, his father.

34. I am satisfied that SMM underwent the ordeal he described. His shifting testimony causing him to be declared a hostile witness is, in my view, attributable to his fear of reprisals due to the threats he received from his father who he lives with. Consequently, he has also suffered an unfortunate psychologically withdrawal due to the trauma incurred for which he is required to undertake treatment.

35. I find that the appellant committed the offence of defilement contrary to **Section 8 (1)** as read together with **Section 8 (3)** of the **Sexual Offences Act** in that the offence was committed with a child aged between 12 and 15 years old. He is liable to imprisonment for a term of not less than 20 years.

36. Accordingly, I sentence the appellant to twenty (20) years imprisonment. The period served in remand shall be taken into account.

Administrative directions

37. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Teams tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Executive Officer, Naivasha.

38. A printout of the parties’ written consent to the delivery of this judgment shall be retained as part of the record of the Court.

39. Orders accordingly.

DATED AND DELIVERED IN NAIVASHA BY TELECONFERENCE THIS 24TH DAY OF SEPTEMBER, 2021.

R. MWONGO

JUDGE

Attendance list at video/teleconference:

1. Ms Maingi for the State
2. MMM - Appellant present in person at Naivasha Maximum Prison
3. Court Assistant – Quinter Ogutu