



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MAKUENI**

**HCCRA NO.52 OF 2020**

**PMD.....APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

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

***in Kilungu Principal Magistrate's Court PMCR Case No.71 of 2012***

***pronounced on 27<sup>th</sup> February, 2020).***

**JUDGMENT**

1. The appellant was charged in the magistrates' court with attempted incest contrary to section 20(2) of the Sexual Offence Act No. 3 of 2006. The particulars of offence were that on diverse dates between 19<sup>th</sup> and 20<sup>th</sup> June 2012 at [Particulars Withheld] village in Makueni County attempted to cause his penis to penetrate the vagina of RMM aged 6 years knowing that she was his daughter.
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 diverse dates and at the same place unlawfully and intentionally caused his penis to touch the vagina of RMM a girl aged 6 years.
3. He denied both charges. After a full trial, he was convicted of the main count of attempted incest and sentenced to serve 30 years imprisonment.
4. Dissatisfied with the conviction and sentence of the trial court, the appellant has come to this court on appeal through counsel on the following grounds –

***1) The trial magistrate erred in law and in that having determined that Pw1 was a child of tender years, failed to make a finding under section 19 of the Oaths and Statutory Declarations Act Cap 15 Laws of Kenya to establish whether the child was competent enough to give evidence and in particular failed to determine whether Pw1 was possessed of sufficient intelligence to justify reception of the evidence and understood the duty of speaking the truth.***

***2) The learned trial magistrate erred in law and in fact in failing to do proper voir dire examination pursuant to section 19 Cap. 15 in respect of Pw2, a child witness aged 11 years in compliance with the provisions and the principles in the collaborated case of Francisco Mato –vs- R (1961) E.A.***

***3) The learned trial magistrate erred in law and in fact in his interpretation of section 124 of the Evidence Act, Chapter 80 Laws of Kenya in convicting the appellant on the uncorroborated evidence of Pw1, yet Pw1 did not give evidence as the evidence was given through an intermediary appointed pursuant to section 31(2)(a), (4) and (5) of the Sexual Offences Act 2006 and therefor requiring corroboration within the meaning of section 31(10) of the Sexual Offences Act 2006.***

***4) The trial magistrate erred in law and in fact in inviting and accepting the submissions from the prosecution when the circumstances the prosecution did not have a right of reply in accordance with section 161 Criminal Procedure Code.***

***5) The learned trial magistrate erred in law and in fact in failing to appreciate irreconcilable contradictions manifest in the prosecution case both in regard to whether or not the offence was actually committed, and the relevant circumstances obtaining***

*thereto.*

**6) The learned trial magistrate erred in law and in fact in failing to find and appreciate that both Pw1 and Pw3 were unreliable witnesses and therefore lacked credibility.**

**7) The learned trial magistrate erred in law and in fact in that though accepting the uncorroborated evidence of Pw1, failed to comply with the provisions of section 124 Cap 80 Laws of Kenya.**

**8) The learned trial magistrate erred in law and in fact manifest in his judgment, and clearly failed to appreciate the facts in the case before him.**

**9) The learned trial magistrate erred in law and in fact in shifting the burden of proof to the appellant and in the end demonstrated clear bias against the appellant.**

**10) The learned trial magistrate erred in law and in fact in finding that the appellant had “the opportunity” to commit the offence in the circumstances of the facts on record.**

**11) The learned trial magistrate erred in law and in fact in failing to give the consideration to the defence tendered and trivialized the defence proffered.**

**12) The learned trial magistrate erred in law and in fact in sentencing and the sentence imposed was excessive taking into account the circumstances and miscarriage of justice was occasioned.**

5. The appeal was canvassed through filing of written submissions. I have perused and considered the written submissions and supplementary submissions of the counsel for the appellant Andrew Makundi & Company, and those of the Director of Public prosecutions. Both sides relied on case authorities.

6. This being a first appeal, I am required to re-examine, and reconsider the evidence on record and come to my own independent conclusions and inferences – see **Ruwala –vs- R (1957) E.A 370, Okeno –vs- Republic (1972) E.A 32.**

7. I have perused and considered the evidence on record. In proving their case, the prosecution called six (6) witnesses. Pw1 was the alleged victim whose evidence was given initially and intermediary ALM. The evidence was that the victim was a nursery school pupil, and that they lived with the father (appellant), after the appellant chased away the mother. She was then stood down and later testified on her own and stated that she was together with her two other siblings when the appellant put her on the bed, removed her skirt, and penetrated her sexually. That the other children MN and M were in the same room when this happened and she cried. She was cross examined.

8. Pw2 was NNM the mother of the victim and estranged wife of the appellant. It was her evidence that the victim was 8 years old. She testified that on 19/05/2012 she disagreed with the appellant and proceeded to her home of origin, and on 24/5/2012 she returned to pick clothes when she found appellant, his mother and father but not M. She demanded to be given the children which was granted but on the way, she noted that the victim could not walk, and on enquiry the victim said that the appellant had sex with her. She then took her to the Health Centre, made a report to the police and later took the victim to Nairobi Women’s Hospital.

9. Pw3 was MN a standard 2 pupil who stated that his father, the appellant placed the victim on his bed at night in the dark, and though the victim cried she was told by the appellant to shut up. Next day, after cooking, the appellant slept with the victim again, but that he did not report the incident to anybody.

10. Pw4 was Margaret Bitok the Investigating Officer, whose evidence was that a report was made to the Kilome Police Station on 25<sup>th</sup> May 2012 at 1pm and she led the victim to Kilungu Sub District Hospital and issued her with a P3 form. Pw5 Erick Kasiamani was a Clinical Officer at Kilungu, who filled the P3 form for the victim, and relied on treatment notes. According to him, the hymen of the victim was intact but inflamed. The victim also had swollen inflamed labia.

11. Initially, after the close of the prosecution case, the appellant was acquitted by the trial court on no case to answer. However, the High Court later directed a finding for case to answer, and ordered the trial to proceed before another magistrate.

12. In his defence, the appellant tendered sworn testimony. He stated that they had a disagreement with his wife on her infidelity. He denied committing the offence. He said that his wife (Pw2) had threatened to do something to him when she left for her parents’ home, thus this allegation against him. He was cross-examined.

13. This being a case of attempted incest, the biological relationship of the appellant and the victim had to be proved by the prosecution. It is not in dispute that the victim was a daughter of the appellant. The appellant admits as much. I find that the prosecution proved beyond any reasonable doubt that the appellant was the father of the victim.

14. The second element to be proved by the prosecution, as it will affect the sentence, is the age of the complainant. She was said to be 6 years of age and in nursery school. Again, there is no dispute on the age of the victim. I find that the prosecution proved beyond any reasonable doubt that the victim was aged 6 years.

15. The third element of the offence is the act of physical attempt to commit the incest. The prosecution relied on the evidence of three witnesses the victim Pw1, Pw2, Pw3 and the medical evidence of Pw5.

16. I note that from the evidence of both the victim Pw1 and that of her brother Pw3 MN, they said that the appellant actually had sexual intercourse with the victim and infact twice. The medical evidence is however, that the hymen was intact though inflamed and that from the nature of the inflammation, such could be caused by continuous rubbing. This was a serious contradiction on the prosecution evidence. This serious contradiction affects the credibility of these very crucial two witnesses. In my view it is quite possible that they were couched.

17. It is also true that Pw2 had a disagreement with the appellant and had gone to her home. She testified that on the day she got information about the incest, she had gone back to collect clothes but ended up demanding for the children whom she was given. I note that though Pw3 Muuo Ndinda stated that he informed the mother (Pw2) about the incident on her arrival, the evidence of Pw2 was that she suspected the sexual act on the road as they walked away with the girl as the girl could not walk. This was also a serious contradiction in the prosecution evidence.

18. The offence is very serious, and has to be treated with the seriousness it deserved. In my view, the above contradictions and the contradictions between the evidence of the complainant Pw1 and the medical evidence are adequate to create sufficient doubt about the illegal incident. If, as the complainant Pw1 had said, sexual penetration had occurred twice, there was no way in my view, the hymen would be intact on such a young girl of 6 years. Thus the whole evidence of the complainant Pw1 was not believable.

19. Taking into account also that Pw2 the mother of the victim had just taken the children after a disagreement and had at the time met both the appellant and his parents, one would expect that she would first have reported the incident to the parent of the appellant, which she did not, creating a further doubt.

20. Weighing the prosecution evidence against the defence of the appellant as required under section 169 of the Criminal Procedure Code (cap. 75) therefore, I am of the view that the prosecution did not prove beyond reasonable doubt that the appellant committed the incestuous act he was convicted of. The benefit of doubt has to be given to the appellant and I do so. On that account the appeal will succeed.

21. As for proof of the culprit of the offence, as I have found that the occurrence of the incestuous act complained of by the prosecution was not proved beyond any reasonable doubt, I will not go into making a finding on the culprit.

22. Consequently, and for the above reasons, I allow the appeal, quash the conviction and set aside the sentence. I order that the appellant be set at liberty unless otherwise lawfully held.

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

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**George Dulu**

**Judge**