



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 76 OF 2018

KGY.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal arising out of the conviction and sentence of Hon. R. K. Ondieki, SPM delivered on 30.11.18 in Kilifi in Criminal Case No. 19 of 2018)

JUDGMENT

1. KGY, the Appellant herein was charged with the offence of incest contrary to Section 20 of the Sexual Offences Act. The particulars of the offence are that on 15.2.18, at [Particulars Withheld] village, Kilifi County, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of BK, (the Complainant), a child of 15 years, who was to his knowledge, his step-daughter. The Appellant also faced the alternative charge of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act. The particulars of this offence are that on the same day and in the same place, the Appellant intentionally and unlawfully touched the vagina of the Complainant.

2. The facts of this case according to the prosecution are that the Appellant, did on the night of 15.2.18 ask the Complainant, his 15 year old stepdaughter, to fix the mosquito net over the bed on which her siblings slept. As she did so. The Appellant suddenly struck her and while covering her mouth, defiled her. Upon completion of the act, the Complainant went to the village elder and spent the night there. The matter was reported to the police station and the children's office the following morning. The Appellant was thereafter arrested. and charged.

3. The Appellant was charged in Court and denied the charges. In the ensuing trial, the prosecution called 4 witnesses. At the close of the prosecution case, the learned Magistrate found that the Appellant had a case to answer and placed him on his defence. The Appellant made an unsworn statement. In her judgment of 30.11.18, the learned Magistrate found the main charge proved against the Appellant. She proceeded to convict and sentence him to 11 years imprisonment.

4. Aggrieved by both the conviction and sentence, the Appellant preferred the Appeal herein. The summarized grounds as set out in his amended grounds of appeal are that the trial Magistrate erred in fact and in law in that she:

- i. failed to consider that the Appellant was denied his rights of information disclosure prior to taking plea in breach of Articles 50(2) (a), (b), (j) and (m) of the Constitution of Kenya, 2010.
- ii. placed reliance on an unreliable and inconclusive medical report as the only source of corroborative evidence to prove the alleged offence.
- iii. did not record the demeanour of the prosecution witnesses thus contravening Section 199 of the Criminal Procedure Code.
- iv. failed to consider that there was a grudge between the victim and the Appellant.

5. The Appellant urged the Court to allow the Appeal and quash the conviction and sentence.

6. Both parties filed their written submissions which I have considered. I have also subjected the evidence adduced before the trial Magistrate to a fresh analysis and evaluation while giving due allowance for the fact that I neither saw nor see the witnesses. In this regard I am guided by the holding in the case of Okeno v. Republic [1972] EA 32 where the Court of Appeal stated:

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya Vs. Republic (1957) E.A. (336) and the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, See Peters V. Sunday Post, (1958) E.A. 434”

7. On the first ground, the Appellant contends that he was not supplied with witness statements prior to taking plea. Consequently, his constitutional rights to information disclosure were violated. Further, he was also not supplied with the P3 form and had to ask for the same. As such, the charges were not fully explained to him in sufficient detail. The Appellant further submitted that there was no interpreter when the charges were read to him which further violated his right to a fair trial.

8. The Appellant’s right to a fair trial cannot be gainsaid. To this end, the Appellant was entitled to the rights guaranteed under article 50(2) of the Constitution during the trial. The Appellant alleged violation of the following rights as guaranteed under Article 50(2) of the Constitution:

- (a) to be presumed innocent until the contrary is proved;**
- (b) to be informed of the charge, with sufficient detail to answer it;**
- (c) to have adequate time and facilities to prepare a defence...**
- (j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence...**
- (m) to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial;**

9. I have looked at the entire record. I note that prior to taking plea on 7.3.18, the Court stated:

“Charges read over and every element thereof explained to the accused in Swahili, a language he understands.”

In response to both charges, the Appellant stated:

“It’s not true”

10. In Adan vs. Republic (1973) EA 445, the Court of Appeal set out the steps to be followed by a court when taking plea as follows:

- (i) the charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands;**
- (ii) the accused’s own words should be recorded and if they are an admission, a plea of guilty should be recorded;**
- (iii) the prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts;**
- (iv) if the accused does not agree with the facts or raises any question of his guilt his reply must be recorded and change of plea entered;**
- (v) if there is no change of plea a conviction should be recorded and a statement of the facts relevant to sentence together with the accused’s reply should be recorded.”**

11. The record clearly shows that the charges were read and explained to the Appellant in Kiswahili, a language he understands and he responded to the same. The accused own words **“It’s not true”** were recorded in respect of both charges. There is nothing on record to show that the Appellant did not understand Kiswahili. Further, at no time did he inform the Court that he does not understand the language used in Court.

12. Did failure to have an interpreter amount to a violation of the Appellant’s right under Article 50(2)(m)? The record shows that charges were read and explained to the Appellant in Kiswahili, a language that he understands. The record further shows that the entire proceedings were conducted in the same Kiswahili language. Indeed the Appellant cross examined the witnesses and made his own unsworn statement in the same language. Given that the Appellant understood the language used throughout the proceedings, there was no need for an interpreter. Article 50(2)(m) of the Constitution only applies where an accused person cannot understand the language used at the trial.

13. Following his plea of not guilty, the Court set down the matter for hearing and directed that the Appellant be supplied with witness statements. The Appellant takes issue with the fact that the witness statements were supplied to him after taking his plea. According to him, this violated his right to adequate information to take his plea. Section 207(1) of the Criminal Procedure Code provides:

The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he pleads not guilty, guilty or guilty subject to a plea agreement.

14. At the stage of taking plea, the requirement is that the substance of the charge be stated and explained to the accused person in a language he understands. The record shows that the charges were both read and explained to the Appellant. The fact that witness statements were given to the Appellant after taking plea did not in any way violate his right to full information or at all. The statements were supplied to him before the commencement of the hearing, thus according him sufficient time to prepare his defence and safeguarding his right to a fair trial.

15. As regards the P3 form, the Appellant did on 27.7.18 inform the Court that he was not ready to proceed with the hearing as he had not received the form. The Court, no doubt recognizing the importance of the Appellant having the said form, did not proceed with the hearing but postponed the same to 13.8.18 and directed that the P3 form be supplied to the Appellant. As such, the trial Court ensured that the Appellant's right to a fair trial in this regard was secured.

16. In the end, I am satisfied that the proceedings in the trial Court were conducted in a manner that is consistent with a fair trial as envisaged in Article 50(2) of the Constitution. Accordingly I find ground 1 of the Appeal lacking in merit.

17. As regards the second ground, the Appellant submitted that the P3 form was unreliable and inadmissible as it was not produced by the maker and no explanation was given as to why the maker was not available to testify. He contended that the P3 form could only be produced after the witness identified the signature of the maker as provided for in Section 77 of the Evidence Act.

18. The Evidence Act allows the production as evidence in criminal proceedings, of a report authored by a government official, by another person. Section 77 of the Evidence Act as follows:

1. In criminal proceedings any document purporting to be a report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.

2. The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it.

3. When any report is so used the court may, if it thinks fit, summon the analyst, ballistics expert, document examiner, medical practitioner, or geologist, as the case may be, and examine him as to the subject matter thereof.

19. Under the foregoing provision, the Court may presume that the signature in such report as well as the credentials of the maker are genuine. The Court may in its discretion summon the maker of such report. The fact that the Court in the present case, allowed a witness other than the maker to produce the P3 form, does not render the production thereof unlawful. The Court acted within the discretionary power conferred upon it by Section 77 of the Evidence Act. Further, the Appellant did not make an application to cross examine the maker of the document. As such, he cannot be heard to raise the issue at this stage.

20. Section 33 of the Evidence Act enumerates the exceptions to the hearsay rule in instances where a witness is dead, unavailable or can otherwise not be procured to give evidence. The provision allows the production of documents or expert evidence whose maker is dead, cannot be found, or has become incapable of giving evidence, or whose attendance cannot be procured, without an amount of delay or expense or at all. Such evidence must however be produced by a witness who is an expert in the same field and capable to competently tender the evidence and answer any questions put to them either by the Court or by parties. In the present case, the P3 and PRC forms were produced by PW3, Dr. Sheila Mkale, a medical doctor at Kilifi County Hospital. She testified that she had worked with Dr. Suchira, the maker thereof, for 3 years. In the premises, I am satisfied that the imperatives of Sections 33 and 77 of the Evidence Act were met.

21. It was further argued by the Appellant that after the alleged incest the Appellant walked without difficulty, meaning that she had habitual sexual experience with other men. He further contended that there was no independent evidence from a neighbor or mother of the Complainant to corroborate her evidence. The Appellant further submitted that the child was not asked whether her hymen was broken as a result of sexual intercourse or by other means. To the Appellant therefore, penetration was not proved. In this regard, he placed reliance on the case of P.K.W v Republic [2012] eKLR to support his assertion.

22. Section 2 of the Sexual Offences Act defines penetration thus:

“penetration” means the partial or complete insertion of the genital organs of a person into the genital organs of another person;

23. From the foregoing definition, even the slightest insertion of the genital organs of one person into the genital organs of another is sufficient to establish a sexual offence. In her testimony in the trial Court, the Complainant stated that on the fateful night, as she fixed the mosquito net over the bed as directed by the Appellant, he entered the room, locked the door, held her by the neck, struck her with his fist, covered her mouth and forced her to have sex with him on the mattress. When the Appellant was through with her, he locked the room from the outside. Upon hearing her cry, the Complainant's mother opened the door for her whereupon she went to PW2's house. PW2 confirmed that the Complainant went to her house at 9.00 pm and told her that the Appellant had followed her to the bedroom and held her by the neck. The matter was reported to the village elder and to the area chief. The Complainant was too ashamed to disclose the fact that her stepfather had defiled her and only did so at the Children's office. PW2 stated that the Complainant was examined a week later and P3 and PRC forms were completed. PW3 who produced the P3 and PRC forms stated that the Complainant's hymen was broken.

24. In Erick Onyango Ondeng' v Republic [2014] eKLR the Court of Appeal had this to say about penetration:

“...even partial penetration of the female genital by male genital will suffice to constitute the offence. In *TWEHANGANE ALFRED VS UGANDA* (*supra*)

M. THANDE

JUDGE

SIGNED and DELIVERED in MALINDI this 28th day of February 2020

NJOKI MWANGI

JUDGE

In the presence of: -

..... **for the Appellant**

..... **for the Respondent**

..... **Court Assistant**