



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CRIMINAL APPEAL NO. 73 OF 2019

PMN.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the judgment and sentence of Honourable C A Ocharo- PM dated 24th August, 2016 in Machakos Chief Magistrate’s Criminal Case No. 907 of 2014)

BETWEEN

REPUBLIC.....COMPLAINANT

VERSUS

PMNACCUSED

JUDGEMENT

1. The appellant, **PMN**, was charged in the Machakos Chief Magistrate’s Criminal Case No. 907 of 2014 with the offence of incest contrary to section 20(1) of the **Sexual Offences Act. No. 3 of 2006**. The particulars were that the appellant, on the 29th day of May, 2014 in Iluvya Sub-location in Machakos County, intentionally caused his penis to penetrate the vagina of **NM**, a child aged 13 years who was to his knowledge his daughter. He also faced an alternative charge of indecent act with a child contrary to section 11(1) of the same Act based on the same facts.

2. In support of its case the prosecution called 6 witnesses.

3. PW1, **Jackline Wavinya Muema**, testified that she was a village manager and on 29th May, 2014 at about 2.30 pm she was at home when she was called on phone by the Assistant Chief, Anthony, who asked her to go to his office. On arrival, she found the complainant, her neighbour, who ran to her crying and informed PW1 that she did not have a pant. PW1 stated that the complainant lived with her grandmother. It was her evidence that the complainant’s father was mentally ill while the mother got married elsewhere. The complainant informed her that she had been defiled by the appellant and that the incident occurred when the complainant was on her way to school whereat she met the appellant who took her to a drain somewhere, gave her two donughts, removed her pants and defiled her then used a cloth to wipe her after which he threw her pants away. According to PW1, the complainant informed her that the appellant started defiling her when she was in standard 2 but at the time of the incident in question she was in standard 3.

4. PW1 testified that in the company of a police officer, Lorna, they took the complainant to hospital for treatment and went home. The following day, when PW1 returned to the hospital, she spoke to the complainant who had whitish substance on her thighs and on the clothes she had on the day of the incident. PW1 stated that she had known the appellant since he got married to the complainant’s mother and that the appellant had no issues in the village.

5. In cross-examination, PW1 stated that from the place the complainant lived was not far from the appellant’s and since the complainant used to go to school every day, she would meet the appellant. It was her testimony that the appellant took the complainant to a secluded trench where he covered her mouth with his hand resulting into a swelling in her mouth. She denied that the complainant was taken to the Hospital after two weeks and insisted that she took the complainant to the Hospital the same dat. It was her evidence that she was unaware that the complainant’s grandmother disliked the appellant.

6. In re-examination she explained that when she met the complainant at the Assistant Chief's office, she was in uniform which had dried whitish substances as well as on her body. According to her the complainant was very unsettled and wanted to run away and her clothes were soiled.

7. In voir dire examination, the complainant stated that she used to attend church but stopped a year earlier. She knew about God and was aware of the need to tell the truth that she had forgotten what happens to people who tell lies. Nevertheless, the court found that she appreciated the essence of telling the truth and directed that she be sworn.

8. According to the complainant, PW2, who believed that she was 14 years old, she was in Standard 4. It was her evidence that she was staying with her grandmother and she identified the appellant as one of her parents. According to her, her mother got married to another person. She testified that on 29th May, 2019, a Wednesday, she was going to look for her books from the bush where she had hidden them the previous day which was sports day when she met the appellant in a thicket who defiled her and threatened to beat her if she disclosed the same to anyone. It was her evidence that she was in school uniform and had her panties on which the appellant told her to remove after which the appellant removed his penis and penetrated her vagina. The appellant then gave her Kshs 20/-. It was her evidence that she did not scream due to the threats by the appellant.

9. After the incident she saw some whitish substance which were left in her though her clothes were not stained. She then used her handkerchief to wipe herself. It was her evidence that her pants got lost at the scene though she did not see the appellant carrying them. It was her testimony that she did not report to anyone and it was not the first time being defiled by the appellant as the appellant had done it severally before even when she was in standard 3 though due to the threats by the appellant she did not disclose to anybody. After that she was taken to a hospital in Machakos and the following day reported the incident at the police station. She identified the accused as her father and stated that she had no grudge against him.

10. In cross-examination, she stated that she was unable to tell the distance from her grandmother's to where the appellant lived. She stated that she used to meet with the appellant at the same place almost daily and that on that day nobody saw them together. It was her evidence that she was not injured because she was used to the defilement. According to her the place is in a thicket so no one can see. She stated that they had some kind of agreement to meet every morning at the said place. The complainant testified that it was seven years since they stopped living with the appellant. On the day of the incident, the appeal was wearing white shirt, black trousers, black belt and black shoes. She however admitted that the appellant and her grandmother were not in good terms and that her grandmother told the appellant that she would teach the appellant a lesson that the appellant would never forget. She however denied that her testimony was the lesson her grandmother talked about and denied that her grandmother told her to lie against the appellant. She insisted that she was telling the truth.

11. In re-examination she stated that she was taken to the Assistant Chief after the incident where they met with PW1.

12. Pw3, **Anthony Muasa Munyao**, the Assistant Chief testified that on 29th May, 2014 at about 2pm he received a call from one Michael **Wamboi**, a resident who informed him that he found a child along the road crying and it appeared something had happened to her. PW3 asked the said person to take the child to him which he did and upon talking to the complainant who was trembling and crying, the complainant disclosed the names of her grandmother and father as **WPM** and **PMN** respectively. PW3 then called PW1 since the complainant was saying that she had been defiled by her father. After PW1 arrived the complainant disclosed that the father had defiled her severally and gave her two queen cakes and Kshs 20/- and threatened to beat her if she disclosed the incident. PW3 identified the complainant and the accused in court. It was his evidence that there was sperm like substance on her uniform and her hair was soiled.

13. PW4, **WPM**, the complainant's grandmother testified that on 29th May, 2014 at about 6.30pm she received a call to go to Katoloni where the complainant had been taken to the chief. In the company of the village elder, **Wavinya Muema**, PW1, she proceeded to the chief where she was informed that the complainant had been defiled by the appellant, her father. Upon examining the complainant, she found that she did not have an inner pant and in her private parts were sperm like fluid. The complainant confirmed that it was the appellant who defiled her. According to PW4, the complainant was suffering from mental illness and wanders a lot. It was her evidence that the appellant was married to her daughter and admitted that they had a case before the Chief and the appellant was told to go and live in his home while PW4 would live with the complainant.

14. In cross-examination PW4 stated that the appellant took the complainant and hid her but she went for her when she realised that her health was not good. According to her, the complainant is not a young child and the appellant went to report to the chief that PW4 was always taking the children from him after the appellant realised that the children were grown up and made the eldest child his wife.

15. PW5, **Dr John Mutunga**, was called to produce the P3 form filed by his colleague **Dr Muange**. According to the P3 form the complainant was examined after two weeks and upon examination, the complainant had blood stained clothes and soil. She had normal female genitalia with no marks, scars or bruises noted but her hymen was broken. The lab tests however revealed no spermatozoa. According to him, the complainant was seen on 29th May though the P3 form was filled in after two weeks.

16. PW6, **Sgt Lorna Kamau**, the investigations officer recalled 29th May, 2014 at around 5.30pm when she was called by the OCS who told her he had received a call from the area Chief that a child had been defiled by the father. Upon conducting investigations, she decided to prefer the charges.

17. Upon being placed on his defence, the appellant testified that on 29th May, 2014, he woke up at 8.00 am and proceeded to work in Katoloni at **Josua Mutisya's** home where he was burning bricks and at 4.00pm he went home and slept. At 10.00pm he heard a knock on his door and when he came out he found he found his mother in law, the Assistant Chief and a police officer and was arrested and taken to Machakos Police Station. According to him the offence was a set up by his mother in law due to the monies he used to send her for his wife's treatment. It was his evidence that the case was made up by his mother in law so as to stop him from demanding for his wife and children.

18. In her judgement, the learned trial magistrate found that there was no doubt that the complainant was the appellant's daughter. From the

medical evidence as well as the evidence of PW2 she found that the complainant's hymen was broken confirming penetration. That evidence was consistent with the complainant's evidence that she had been defiled on previous occasions by the appellant. It was her finding that the complainant appeared truthful and was calm in her testimony and hence her testimony was believable. She concluded that the case against the appellant was proved beyond reasonable doubt and convicted the appellant on the main charge. In her sentence, she found that the law provided for mandatory minimum sentence and sentenced the appellant to life imprisonment.

Determination

19. I have considered the grounds of appeal, the evidence, the submissions and authorities relied upon.

20. This is a first appellate court. As expected, I have analysed and evaluated afresh all the evidence adduced before the lower court and have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. See **Okeno vs. Republic [1972] EA 32** where the Court of Appeal set out the duties of a first appellate court as follows:

“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) EA. (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) EA. 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 vs. Sunday Post [1958] E.A 424.”

21. Similarly in the duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in **Pandya -vs- Republic [1957] EA 336** is as follows:-

“On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen.”

22. It was therefore appreciated by the Court of Appeal in **Kiilu & Another vs. Republic [2005]1 KLR 174**, that:

1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.

2. 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 findings and 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.

23. The appellant contended that the *voir dire* examination was not properly conducted since there was no finding that the complainant understood the importance of giving evidence on oath. It is true that the complainant in *voir dire* examination stated that she had forgotten what happens to those who tell lies. However, in her testimony she stated that she knew that telling a lie is a sin. In **Macharia vs. Republic [1976] KLR 209**, it was held by **Kneller & Platt, JJ** (as they were) that:

“It [*voir dire*] must be a preliminary examination of a witness by the magistrate in which the witness is required “to speak the truth” with respect to questions put to him, or her, so that the magistrate can discover if he, or she, is competent (e.g. she is not too young, or she is not insane) to give evidence and should be sworn or affirmed (according to whether or not she is a Christian, or of any other, or no, faith, and understands the nature and obligation of an oath to tell only the truth). A finding on these points after the person of tender years has testified will not do. The irregularity is not fatal. These girls were aged thirteen and twelve years, attending a primary school and in standard VII. Their answers to questions were coherent and revealed that they were intelligent. They were competent.”

24. It was however appreciated in Court of Appeal decision in **Maripett Loonkomok vs. Republic [2016] eKLR** that:

“It is firmly settled that not in all cases that *voir dire* is not administered or is not administered properly the entire trial would be vitiated. This Court sitting at Nyeri has recently reiterate what has been said many times before that that question will depend on the peculiar circumstances and particular facts of each case. See **James Mwangi Muriithi v R, Criminal Appeal No.10 of 2014. Section 19 of the Oaths and Statutory Declarations Act is concerned with the reception and admissibility of evidence of a child of tender years. The section starts by declaring that where the child does not, in the opinion of the court understand the nature of an oath, his evidence may nonetheless be received though not given upon oath. But that evidence shall only be received if, again in the opinion of the court the child is possessed of sufficient intelligence to justify the reception of the evidence and also if, the child understands the duty of speaking the truth. So long as that**

evidence, though not on oath, is taken down in writing, it amounts to a deposition under section 233 of the Criminal Procedure Code. The Code does not prescribe the precise manner of ascertaining and determining whether the child witness understands the nature of the oath or is possessed of sufficient intelligence or even his or her ability to understand the duty of speaking the truth. *Voir dire*, a latin phrase (*verum dicere*) for saying “what is true”, “what is objectively accurate or honest” has been used in most Commonwealth jurisdictions and in some instances in the United States of America, as “a trial within a trial”, a hearing to determine the admissibility of evidence or the competency or qualification of a witness or juror. See Duhaime, Lloyd. “*Voir Dire definition*” *Duhaime’s Legal Dictionary*. But the origin of the rule on *voir dire* examination of a child witness as we know it today was first applied in the ancient yet landmark English case of *R v Braisier* (1779) 1 Leach Vol. I, case XC VIII, PP 199 – 200, which incidentally was a case involving sexual assault on a girl under 7 years of age. The twelve Judges in that case stated, in part, that; “.. an infant, though under the age of seven years, may be sworn in a criminal prosecution, provided such infant appears, on strict examination by the court, to possess a sufficient knowledge of the nature and consequences of an oath... for there is no precise or fixed rule as to the time within which infants are excluded from giving evidence” (our emphasis)

Although this decision, through section 19 of Oaths and Statutory Declarations Act underpinned the legal practice in relation to children’s testimony in Kenya, we reiterate that the format and procedure of testing the intelligence, and sufficient knowledge and nature of the oath has been varied. For instance, in the past the courts insisted that voir dire examination must be in the form of a dialogue, with the trial court recording questions posed to the child and the child’s answers nearly verbatim in the first person before drawing its conclusion on the question of suitability of the child. See Johnson Muiruri v R (1983) KLR 447. The courts today accept both the question and answer format and the recording of the child’s answers only. See James Mwangi Muriithi (supra). What is constant is that, whatever format the court adopts it must be on record. It is equally settled that by dint of sections 208 and 302 of the Criminal Procedure Code, the law allows cross-examination of a witness who does not give evidence on oath. See Nicholas Mutua Wambua and another v Msa Criminal Appeal No.373 of 2006.”

25. In this case considering the evidence in its totality, I am not satisfied that the proceedings were vitiated by the brief finding made by the learned trial magistrate.

26. Section 20 of the *Sexual Offences Act* provides as follows:

(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.

27. In explaining the distinction between the offence of defilement and incest, **Majanja, J** in **F O D vs. Republic [2014] eKLR** held that:

“While in the case of incest, the prosecution was only required to prove either penetration or an indecent act, in defilement the prosecution was required to prove penetration. The additional element of the relationship between the accused and the child is what makes the offence incest.”

28. It is therefore clear that in order to prove incest the evidence must prove that the accused committed an indecent act or an act which causes penetration. In other words, once there is evidence of indecent act, penetration is not necessary. Section 2 of the *Sexual Offences Act* defines “penetration” as:

the partial or complete insertion of the genital organs of a person into the genital organs of another person.

29. “Indecent act” on the other hand means an unlawful intentional act which causes-

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

(b) exposure or display of any pornographic material to any person against his or her will.

30. What it means is that even in the absence of penetration as legally defined under the *Sexual Offences Act*, where there is evidence of contact between any part of the body of the accused with the genital organs, breasts or buttocks of the complainant, the other ingredients of the offence being satisfied, commission of sexual offence may still be proved. In this case the complainant’s evidence was that the appellant, who was her father, took her to a trench removed her pants, removed his trousers and inserted his penis into her vagina. Prior to this date the appellant had defiled her on several occasions.

31. In the submissions before me, the appellant raised the issue of fabrication of the case against him. While it is admitted that there was bad blood between him and his mother in law, PW4, the evidence is clear that PW4 became aware of the incident from a third party. Accordingly, the totality of the evidence does not support this allegation. In D W M vs. Republic [2016] eKLR, the Court of Appeal expressed itself as hereunder:

“The learned Judge concurred with the learned trial magistrate’s rejection of the appellant’s assertions on fabrication of charges because there was no suggestion in his cross-examination of his wife that the two had any prior differences. In his defence, the appellant only mentioned that he quarrelled with his wife on 23rd September, 2010 when she left but there was nothing to suggest that R s’ evidence was motivated by malice as R only repeated in her testimony what the complainant had narrated to her. On that account the learned judge affirmed the trial magistrate’s finding that there was nothing on the record that would suggest that the complainant and her mother R acted in concert to make up a case against the appellant.”

32. In this case the appellant did not allude to any differences that existed between him and the complainant. Dealing with similar circumstances the Court in Tito Kariuki Ngugi vs. Republic [2008] eKLR expressed itself as follows:

“I am satisfied and I agree with Mr. Mugambi that the allegation of a frame up is an afterthought. The Appellant’s own daughter especially did not have any reason to frame up her father.”

33. As regards the sentence, the learned trial magistrate seems to have been of the view that the offence provides for a penalty which has no option. With due respect that is not the correct legal position. That section states **“shall be liable to imprisonment for life”**. Sir Henry Webb C.J. in Kichanjele S/O Ndamungu versus Republic (1941) 8 EACA 64 had this to say on the proper construction of the words **“liable to”**:

“The wording used throughout the code is “shall be liable to” but a consideration of the various sections shows in our judgment, that the use of the words “shall be liable to” does not import that the sentence mentioned in any particular section in which these words occur is merely a maximum and that the court may impose any lesser sentence below the limit indicated.”

34. The predecessor of the court went further in Opoya versus Uganda [1967] EA 752 at page 754 where Sir Clement DeLestang V.P. picked up the conversation *inter alia* thus:

“It seems to us beyond argument that the words “shall be liable to” do not in the ordinary meaning require the imposition of the stated penalty but merely express the stated penalty which may be imposed at the discretion of the court. In other words they are not mandatory but provide a maximum sentence only and while the liability existed, the court might not see fit to impose it.”

35. A similar position was adopted in D W M vs. Republic (supra) where the Court held that:

“As for the sentence the 1st appellate court properly addressed its mind to the operative words in Section 20(1) of the Sexual Offences Act that the offender “Shall be liable to imprisonment for life” means that imprisonment for life was the maximum sentence for an offence under the section. A lesser sentence could be imposed considering that the appellant was a first offender though the offence was said to be prevalent, serious and most importantly that the appellant who was supposed to be the complainant’s protector turned out to be her tormentor and perpetrator of the defilement. The judge however deemed it proper to substitute the sentence for life imprisonment with that of twenty (20) years imprisonment and it was within his powers to do so. The resulting sentence was within the limits permitted by law and we find no reason to interfere with the exercise of that discretion.”

36. That the life sentence is not mandatory appears from the sentence meted in Tito Kariuki Ngugi vs. Republic (supra) where the Court held that:

“The appeal against sentence has also no merit. The Appellant defiled his own daughter and caused her trauma which she will have to live with for the rest of her life. The 20 years he was given against life imprisonment provided for by the section under which he was charged cannot in the circumstances of this case be said to be harsh.”

37. Therefore, bearing the totality of the above principles in mind, it is my view that the use of the words **“shall be liable to imprisonment for life”** in section 20(1) of the *Sexual Offences Act* gave room for the exercise of judicial discretion. The court below fell into error when it took the words **“liable to”** to mean that only the maximum sentence could be meted out against the appellant. In Shadrack Kipchoke Kogo vs. Republic Eldoret Criminal Appeal No. 253 of 2003 the Court had this to say:-

“Sentence is essentially an exercise of the trial court and for this court to interfere, it must be shown that in passing the sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of those the sentence was so harsh and excessive that an error in principle must be inferred.

38. In this case, the offence facing him was a serious offence and this Court cannot lose sight of the fact that the alleged culprit here was the complainant’s father who ought to have been in the forefront in protecting the complainant. Instead of doing so, it is alleged that he took it upon himself to be the instrument through which the complainant would be traumatized.

39. Accordingly, I find no merit in the appeal and confirm the conviction.

40. On sentence, I quash the life imprisonment imposed on the appellant, and substitute therefor a sentence of sixteen years imprisonment from the date of his incarceration on 31st May, 2014. To this extent only does the appeal succeed but is otherwise dismissed.

41. Orders accordingly.

42. This Judgement is delivered online through Skype video link due to the circumstances occasioned by the prevailing restrictions resulting from Corona Virus Disease 19 (COVID 19) pandemic, the Appellant having consented to that mode of delivery.

Read, signed and delivered in open Court at Machakos this 30th day of April, 2020.

G V ODUNGA

JUDGE

In the presence of:

Ms Njeru for the State

Appellant in attendance through skype

CA Geoffrey