



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO.61 OF 2017

ONK.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from Senior Principal Magistrate Court at Wang'uru SOA Case No. 3 of 2017 delivered by Hon. D. Nyaboke on 31st August 2017)

J U D G M E N T

1. The Appellant **ONK**, was charged with an offence of incest contrary to **Section 20(1) of the Sexual Offences Act** and sentenced to life imprisonment.

The particulars of the offence were that on 7th of June 2017 at [Particulars Withheld] village within Kirinyaga County, the Appellant cause his penis to penetrate the vagina of JWN a child aged 13 years, who was to his knowledge his daughter.

2. The Appellant was dissatisfied with both the conviction and sentence and filed this appeal which raises the following grounds:

That the trial magistrate erred in law and facts in that-

(a) The charges were defective thus violating the right of the Accused under Article 50 (2) of the Constitution.

(b) By relying on the uncorroborated evidence of PW1, PW2 and PW4

(c) By relying on the evidence of the complainant solely

which was not corroborated by the P3 document produced in court and failing to consider Section 124 of the Evidence Act

(d) By considering assumptions as no medical test was done on the spermatozoa specimen against the Appellant.

(e) By convicting the appellant while reasonable doubt exists in the prosecution's case.

The Appellant sought for orders that the appeal be allowed, the conviction quashed, sentence set aside and he be set at liberty.

3. The grounds are in the amended grounds of appeal dated 29th October 2019. The Appellant had initially filed thirteen (13) grounds of appeal on 4th September 2017. The amended grounds were filed together with the written submissions.

4. The appeal was disposed off by way of written submissions.

The appellant submits that-

He pleaded guilty on the 9th June 2017. That he was subjected to unfair trial, where he was denied an adjournment at his hearing on the 12th July 2017 when he claimed to be unwell.

That the complainant was his daughter. He submitted that he was framed and the charges were used as weapon by his wife and sister because of his parent's land that he used to administer.

He also submitted that the medical report was evidence that the complainant had been sexually active more than a year before the alleged incident, with her boyfriend.

That the prosecution failed to call the said boyfriend as a witness.

That this was fatal to the prosecution's case and that there was also inconsistency in the P3 form and the PW1's testimony.

He challenged the prosecution's case which he says was based upon the evidence of one witness, the complainant. On this he gave reference to scripture and submitted that the prosecution failed to prove its case beyond any reasonable doubt.

5. The prosecution relied on the case of *Okeno -vs- Republic (1972) EA 32* where the appellate court set out duties of a first Appellate court. It was held that it is the duty of the appellate court to make its own findings and draw its own conclusion, bearing in mind that the trial court had the advantage of hearing and seeing the witnesses. The state submitted thus appellate court should hold that the case against the appellant for incest with his daughter was proved beyond any reasonable doubt.

The state submitted that the key ingredients of the offence of incest were proved. That is, proof of age of complainant, proof of penetration, proof of parental or familial relationship with the appellant and proof of identification of the appellant as perpetrator of the offence.

The prosecution relied on several case law from Court of Appeal on the issue of medical evidence, these are, *George Kioji -vs Republic Criminal Appeal No.270 of 2012* which held that *medical evidence is not mandatory or the only evidence upon which an accused person can be convicted*. The case of *Mark Oirori Moses -vs- Republic unreported 2013 KLR* that held that many times an attacker does not fully complete the sexual act, thus evidence of spermatozoa is not necessary to prove penetration.

On the issue that there was no corroboration of PW1's testimony the prosecution submits that **Section 124 of the Evidence Act** does not require corroboration of evidence of victims of sexual offences. They also relied on the case of *JWA -vs-R 2014 eKLR* and on **Section 143 of the Evidence Act** and the cases of *Benjamin Mbugua Gitau vs Republic 2011 eKLR* and *Keter vs Republic 2017 EA 135*.

On the issue of inconsistencies alleged by the appellant the prosecution submitted that in the case of *Willis Ochieng Odero -vs Republic 2006 eKLR* the Court of Appeal held that such contradictions in prosecution evidence particularly with regard to date indicated in P3 forms and the date of the offence are not grounds for quashing a conviction. He relies on **Section 382 of the Criminal Procedure Code**.

On sentencing the prosecution submitted that the law provides for life imprisonment for offence under **Section 20 (1) of the Sexual Offences Act**. The State opposed the appeal and prayed for its dismissal.

The brief facts of the case are that the complainant JWN was at the time this offence was committed a girl aged 13 year. She was born on 27th August 2003. A birth certificate which was produced in court as exhibit 1- showed that she was born on 27th August 2003.

6. The appellant who is a step – father of the complainant used to live with the complainant, his wife and other children in the same home. On 7th June 2017 the appellant went home at 9 am and met the complainant at home as she had been chased away from school due to unpaid school fees. The complainant was taking care of her younger brother. The appellant claimed that he could not get a casual job and is the reason he had returned home. The appellant took a panga and said he was going to plant French beans. He told them to call him when the younger child woke up. The appellant called the complainant as she had been directed when the child woke up. The appellant went to the bedroom and called the complainant to go and remove soiled beddings. The complainant complied. Thereafter the appellant kept calling the complainant to the bedroom but she was reluctant. The complainant eventually went to the bedroom when the appellant raised his voice. Once inside the bedroom the appellant told the complainant to hug him. She refused. The appellant called her again to the bedroom and when she went, he pushed her into the bed and removed her clothes, a Kitenge skirt, dress and T shirt. The appellant then removed he pant. The appellant then lay on her. She screamed but the appellant slapped her on the face. The appellant then had penetrative sex with her for almost twenty minutes. The appellant threatened to kill her if she told anybody what he had done. The appellant then told her to go to the farm and harvest beans. The complainant ran away to go and look for her mother. She could not trace her mother so she went to the home of S her aunt and told her what appellant had done. The complainant went to her grandfather's place.

7. S informed the complainant's mother. S, complainant's mother, and brothers of appellants went to where the complainant was and she narrated to them what the appellant had done. The matter was then reported to the police. The complainant was referred to hospital for treatment. She was examined by Doctor Kenneth Munyi (PW4) at Kimbimbi Sub-County Hospital. The doctor found that the hymen was not intact as there had been penetration prior to this incident since the hymen was not freshly broken. There was visible semen on the vaginal carnal. The semen was collected for analysis and the result was that there were epithelial cells and spermatozoa. She was treated with anti biotics, emergency pregnancy pills and PEP- Post Exposure Prophylaxis to prevent H.I.V. He produced the P3 form, exhibit- 1 and laboratory test notes exhibits 2 and 3.

8. The accused was arrested and charged with this offence.

9. PW2 SWC who is an aunt of the complainant and testified that on 7th June 2017 she met the complainant heading to her house and she claimed that she was looking for her mother. On enquiring why she was looking for her mother she started crying and disclosed to her that the appellant had defiled her. She offered to take her home but she refused. She took her to grandmother's place and she narrated what happened. The brothers of the appellant on learning what the appellant did, decided to report the matter to the police. PW2 is the one who informed the complainant's mother what happened. The complainant's mother testified as PW3 and confirmed that at the time of the incident she was thirteen (13) years old. She produced her birth certificate showing that she was born on 27th August 2003. She testified that the appellant was her husband and a step- father of the complainant. She testified that on the material day she went home at about 5. 00 pm and found the appellant with their youngest child. She enquired from the appellant as to where the complainant was. The appellant claimed that he had sent her to harvest beans. PW3 was worried and decided to go and look for her. She did not find her so she returned home.

Later at 8.00 pm PW2 called her and told her to go where the complainant was at her grandmother's home. She proceeded there and the complainant narrated what happened. The appellant was arrested and escorted to Wang'uru Police Station. PW3 denied that the complainant had boyfriend. PW3 maintained that the appellant had alleged that he disciplined the child and sent her to harvest beans.

10. After the complainant testified, the appellant stated that he accepted the charge and that he was drunk. The charge was read to him and he pleaded guilty. He however denied the facts of the case and the full trial was conducted. The trial magistrate ruled that the appellant had a case to answer. The appellant opted to give unsworn defence. He stated that on the material day she saw the complainant coming from a maize field and a boy who had a bicycle. He took a stick and beat her. She threatened to teach him a lesson as he was not her father. Later at 6.30 pm he was arrested by his brothers who took him to the police station. He stated that the case was framed up in an attempt to sell his land.

11. The trial magistrate found that the prosecution had proved their case beyond any reasonable doubts. The appellant has challenged the conviction and the sentence in this appeal. I have analysed the evidence and evaluated it.

As it has been submitted by the prosecution, this court has a duty as the first appellate court to evaluate the evidence tendered before the trial court, analyse it and come up with its own independent finding. The only reservation is that I have to leave room for the fact that unlike the trial court, I had no chance to see the witnesses when they testified and must therefore leave room for that. The appellant has a legitimate expectation that the evidence will be subjected to a fresh evaluation by this court and a finding be made. I have evaluated the evidence tendered. I will consider the grounds of appeal and the submissions.

Issues for Determination:

The issues for determination include;

- (a) Whether the rights of the accused to fair trial were violated
- (b) Whether the charge of incest was sufficiently proved to the required standards.

Analysis/Determination:

(a) Whether the rights of the accused to fair trial were violated

The appellant raises the issue of an unfair trial because the trial magistrate denied his request for adjournment on the hearing date on 12th July 2017 that led to his plea of guilty during cross examination of the complainant, where he admitted to the offence and stated he was drunk. The appellant was not convicted on his plea of guilty. This is because his plea was not unequivocal and so the court reversed the plea to that of not guilty. He was therefore convicted after a full trial upon a plea of not guilty. The trial magistrate did not make any reference to his plea of guilty in the judgment.

The court must balance the necessity of a timely trial and the right to have adequate time for the appellant to prepare for his trial. Section **205 (1) of the Criminal Procedure Code** confers judicial discretion to the court to grant or refuse an adjournment.

The section provides:

“ 205. (1) The court may, before or during the hearing of a case, adjourn the hearing to a certain time and place to be then appointed and stated in the presence and hearing of the party or parties or their respective advocates then present, and in the meantime the court may allow the accused person to go at large, or may commit him to prison, or may release him upon his entering into a recognizance with or without sureties conditioned for his appearance at the time and place to which the hearing or further hearing is adjourned.”

The law is trite that courts discretion must be exercised fairly and judicially. Due consideration must be to the reason given by a party seeking adjournment. Sound reason must be given and must not be on mere allegation or other motives. The trial magistrate stated as follows at page 6 of the record line 5-7

“ I have carefully looked at the demeanor of accused and he does not appear sick and is communicating well with the court- As such I decline to adjourn the matter.”

The adjournment refused not prejudice the appellant's case as he claims and the trial magistrate noting the demeanor of the accused was of the view that he was in good health. At page 10 line 16-17 the accused stated :

“ I have no questions for the witness, she is my child. I cannot ask questions. I accept the charge. I was drunk.”

He never stated that he was unable to cross-examine as he was ailing.

He also claimed that the trial magistrate used consideration outside of the trial, because she gave reference to public interest, and a donation from CUC Kitty to furnish the accused with copies of witness testimonies. The fact that the trial magistrate prioritized the conclusion of the matter because of public interest or supported the accused person to obtain the evidence that would be submitted against him does not amount to a denial of fair trial. **Article 159 (2) (b) of the Constitution** provides:

“50 (2) Every accused person has the right to a fair trial, which includes the right—

(b) to have adequate time and facilities to prepare a defence.”

The trial magistrate cannot be faulted for adhering to the constitutional provisions on the expeditious disposal of cases. The provisions are meant to safe guard the rights of an accused to fair trial. My view is that he was not prejudiced in any way. Article 50(2) of the Constitution provides for right to fair trial.

A raft rights have been provided for. The right to fair trial is a very important principle in Criminal Justice system as it is one of the rights which is none derogable. At **Article 25(c) of the Constitution** it is provided:

“Fundamental Rights and freedoms that may not be limited.” “Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited—

(c) the right to a fair trial.”

The appellant pleaded guilty after he stated that he did not wish to cross-examine the complainant. This had nothing to do with the way the case was handled. The prosecution pleaded with the court to hear the matter as there was a likelihood of interference with the minor complainant. This prompted the trial magistrate to observe the demeanor. It is trite that an appellate court will normally not interfere with the findings of fact by the trial magistrate. In **Okeno -vs- Republic 1972 E.A** where the Court of appeal set out duties of a first appellate court, it stated as follows:-

“ An Appellant on a 1st appeal is entitled to expect the evidence as 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 evidence. The 1st appellate court must itself weight conflicting evidence and draws its own conclusion. (Shantillal M. Ruwala -vs- Republic (1957) E.A 570). It is not the function of a 1st appellate court to hereby scrutinize the evidence to support the lower courts finding and conclusion. It must make its own findings and drew 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 had the advantage of hearing and seeing the witnesses, see Peters -vs- Sunday Post (1958) E.A 424.”

The trial magistrate was satisfied that the appellant was fit to stand trial. This is buttressed by his address to the court after PW1 testified as stated above. The trial magistrate acted fairly to safeguard the testimony of the complainant. Justice is two ways and must be done to all irrespective of status, refer to **Article 159(2)** of the constitution. This court will not fault a trial magistrate who has followed the law. There is nothing on record to show that the right of the appellant to fair trial was violated in anyway. The ground must fail.

The second issue for determination is whether the charge of incest was proved to the required standards:

It is trite that in a criminal trial, the prosecution bears the burden to prove the charge against the accused beyond any reasonable doubts. The appellant submits that the prosecution failed to prove the charge in view of the defence which he tendered. This is based on his assertion that the complainant had a boyfriend who committed the offence and was not called as a witness. The appellant also contends that the prosecution relied on a single witness.

Upon considering the evidence adduced it shows appellant viewed himself as the father of the complainant. The minor also acknowledged him as her father. Thus familial relationship is established even if he was the step-father. The sexual offences Act recognizes a half father and an uncle of the 1st degree as a father in its definition for the purpose of the offence of incest.

Section 22(1) of the Sexual Offences Act provides for the test of the relationship in incest charges it states:-

(1) “In cases of the offence of incest, brother and sister includes half-brother, half-sister and adoptive brother and adoptive sister and a father includes a half father and an uncle of the first degree and a mother includes a half mother and an Aunt of the first degree whether through lawful wedlock or not.”

The step-father relationship falls within the prohibited degrees of consanguinity as was held by **Majanja J** cited with approval in the case of **BNM -vs- Republic [2011] eKLR** (as quoted in **MMM -vs- Republic [2017] eKLR**) where it had held as follows:-

“My own understanding is that ‘half father’ is a term which means exactly the same as ‘step-father’ – it means one who is not a biological father of the child. Therefore, by dint of this Section 22(1) of the Act the appellant being a step-father of the complainant and one who stood in ‘loquo parentis’ can legally be charged and indeed convicted of the crime of incest with her.”

I am persuaded by this holding. The appellant falls within the definition of half father as defined under **Section 22(1) of the Act**. The evidence adduced by PW1, 2 and 3 is that the appellant is a step-father of the complainant. The evidence considered established this relationship beyond any reasonable doubts. The age of the complainant was established as 13 years as at the time of the offence. The third element of the offence of incest was the act of penetration. The medical evidence indicate that the hymen was not intact a year prior and there was presence of semen on the vaginal canal, semen collected showed spermatozoa and epithelial cells, thus proving that penetration had occurred. The report corroborated PW1’s testimony as to the act of penetration by the appellant on the fateful day. The observation of the magistrate after a **voire dire** examination was that PW1 understood the meaning of oath. The trial magistrate observed that and PW1 had a demeanor of betrayal especially the appellant who could not look the complainant in the eye.

One of the ingredients of incest is penetration. As can be seen from the above authorities it is now trite law that medical evidence is not the only way of proving the offence of defilement. All the evidence tendered before the trial court is supposed to be considered. The court of Appeal in George Kionji -vs- Republic Criminal Appeal No.270/2012 U.R cited by the respondent, the court stated:-

“Where available, medical evidence arising from the examination of the accused and linking him to the defilement would be welcome, we however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if is satisfied that there is evidence beyond reasonable doubt that the victim of defilement was penetrated by the accused person.”

“Many times, the attacker does not fully complete the sexual act during the commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed so long as there is penetration whether on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl organ.”

Penetration will not necessarily be proved by medical evidence alone as long as there is evidence proving that there was partial or complete insertion of male genital organ. That is why the 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.”

The Appellant submits that the uncorroborated evidence was relied on. It is now trite that the court can rely on the uncorroborated testimony of a victim of a sexual offence. If the court is satisfied that the witness is telling the truth and gives reasons for believing the witness, the court can safely rely on the testimony of the complainant to convict. The Court of Appeal in J.W.A -vs- Republic (2014) eKLR stated as much when it held that, “We note that the Appellant was charged with a Sexual offence and the provision of Section 124 of the Evidence Act states that corroboration is not mandatory.

Section 124 of the Evidence Act clearly states that;

Section 124 of the Evidence Act (Cap 80 Laws of Kenya) provides:

“ Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him. Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

The appellant has made reference to this section. It permits the court to rely on the uncorroborated evidence of the victim. In her judgment, the trial magistrate found that the complainant was a credible witness and proceeded to rely on the evidence of convict. The ground is without merits. The applicant has quoted the bible in support of his assertion that the testimony of the complainant was not sufficient. He seems to have forgotten that we are dealing with the laws of Kenya and not the commandments in the Bible. The two have boundaries and the bible says that give unto Caesar what belongs to Caesar and to God what belongs to God.

The law which I have quoted above allows a court to rely on the evidence of the victim in Sexual Offence. There is a sad background to the present law where there was a requirement of corroboration and many rapists and defilers used to go scott-free. It dawned on the legislature that these are not offences which are committed on the road side for there to be eye witnesses. The amendment of Section 124 of the Evidence Act brought a new and bright dawn to victims of Sexual Offences. The court was right in accepting the evidence of the complainant and relying on it to convict.

In any case the defence was a mere denial. Secondly medical evidence tendered was sufficient to corroborate the evidence of the complainant. The circumstances of this case are such that there was sufficient circumstantial and material evidence to corroborate her testimony. See Kassim Ali -V- Republic Court of Appeal (2006) eKLR.

The appellant claim that the P3 form did not support the evidence of the complainant, because of her previous sexual experience, was addressed by the trial magistrate as irrelevant to the offence at the material date. The case of SJ -v- Republic [2016] eKLR the Court of Appeal in Mombasa held that;

“The section 34 of the Sexual Offences Act deals with circumstances under which evidence of previous sexual experience or conduct of an accused may be led. In other words, the section deals with the evidence of character and previous sexual exploits of the accused. No such request or application was made by any party to the proceedings in this case, nor was such evidence ever led by the prosecution.”

The charge of incest could still be preferred and proved against irrespective of whether a similar offence was previously committed against her.

The appellant also made reference to his defence of the alleged boyfriend and that no medical tests were performed to verify the spermatozoa specimen found in the complainant belonged to him. The court of Appeal in Malindi in the case of Robert Mutungi Muumbi -vs- Republic

[2015] eKLR held that decisions of this court abound which affirm the principle that medical or DNA evidence is not the only evidence by which commission of a sexual offences may be proved.

According to **Halsbury's Laws of England**, 4th Edition, Volume 17, paragraphs 13 and 14;

“ The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contention which will support a party’s case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court of tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.”

The appellant had raised the ground the charge was defective. **Section 20(1) of the Sexual Offences Act** provides:-

“ (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.”

The prosecution discharged the burden to prove that the appellant was a step-father to complainant. The proper charge in the circumstances was incest not defilement. There was no violation of the rights of the appellant nor was there any prejudice.

The appellant claimed that there was a boyfriend within the premises that particular day. It remained a mere allegation. This did not create doubt in the mind of the court. The prosecution discharged its burden to prove that the appellant was the perpetrator.

Having evaluated the evidence on record and the grounds for appeal, I find there was sufficient evidence to convict the appellant on the charge of incest. On sentencing, the appellant was given an opportunity to mitigate but stated that he had nothing to say. The trial magistrate proceeded to pass the minimum sentence provided under the law and stated that her hands were tied.

In Shadrack Kipchoge Kogo -v- Republic, Criminal Appeal No. 253 of 2003 (Eldoret), Omolo O’Kubasu & Onyango JJA the Court of appeal stated;

“Sentence is essentially an exercise of discretion by 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 that the sentence was so harsh and excessive that an error in principle must be inferred.”

On the issue of sentencing, the appellant was sentenced to life imprisonment as prescribed by the law. The trial court did not exercise any discretion but noted that the sentence was mandatory. The trial magistrate in line with the Supreme Court decision of Francis Karioko Muruatetu vs Republic 2017 eKLR was free to exercise discretion. In the Court of Appeal decision in Dismus Wafula Kilwake vs Republic (2018)eKLR it was held that **section 8(2)** of the **Sexual Offences Act** that gives a sentence of life imprisonment for the offence of defilement, should be interpreted in a manner that it does not take away the discretion of the court. Also Solomon Limangura v Republic [2019] Eklr considered the sentence of life imprisonment for the offence of defilement as excessive they reduced the same to 20 years. In Christopher Ochieng vs Republic 2018 eKLR similarly the Court of Appeal reduced the sentence to 30 years. There is room for this court to interfere with the sentence of the trial magistrate.

For the foregoing reasons, I find that the Appeal on conviction has no merits and is dismissed. On sentencing, I set aside the sentence of life imprisonment and substituted it with a sentence of **Twenty Five (25)** years.

Signed by:

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HON. LADY JUSTICE LUCY GITARI

JUDGE

Dated, signed and delivered at Kerugoya by **HON. LADY JUSTICE J.N. MULWA** this 29TH day of **OCTOBER 2020**.

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J. N. MULWA

JUDGE