



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CRIMINAL APPEAL NO. 17 OF 2018**

**JMK .....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(An appeal from the original conviction and sentence of Hon. P.K. Mutai, Resident Magistrate, delivered on 29<sup>th</sup> August, 2017 in Kwale Chief Magistrate's Court Criminal Case No. 93 of 2016).*

**JUDGMENT**

1. The appellant was convicted for the offence of incest contrary to Section 20(1) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge were that on the 26<sup>th</sup> day of September, 2016 at [Particulars withheld] village in Mvumoni location of Kwale County within Coast region being a male person, caused his penis to penetrate the vagina of FKM [name withheld] a female person who was to his knowledge his daughter. He was sentenced to serve 10 years imprisonment.

2. On 6<sup>th</sup> November, 2017 the appellant filed a petition and grounds of appeal. He later amended his grounds of appeal, with leave of the court. They are to the effect that:-

(i) The learned Trial Magistrate erred in law and fact by sentencing the appellant to serve 10 years imprisonment without considering that he was not positively identified as the perpetrator of the heinous crime;

(ii) The learned Trial Magistrate erred in law and fact by failing to consider that the prosecution's case was marred by massive contradictions and variances, thus a conviction could not have been attained;

(iii) The learned Trial Magistrate erred in law and fact by failing to consider that the key witness, PW1, whose evidence was relied upon was an untruthful witness;

(iv) The learned Trial Magistrate erred in law and fact by failing to consider that Section 21 of the Criminal Procedure Code was not complied with thus violating the appellant's rights to a fair trial;

(v) The learned Trial Magistrate erred in law and fact by convicting the appellant on a wrong provision of the law;

(vi) The learned Trial Magistrate erred in law and fact by failing to consider the period the appellant spent in remand prior to being convicted and sentenced.

3. In his written submissions, the appellant claimed that the victim (PW1) could not have been able to identify or recognize the person who defiled her as the offence occurred at night. He contended that the intensity of light from the spotlight which PW1 said she used was not stated and its position in relation to the person who defiled her.

4. The appellant wondered how PW1 got hold of the spotlight yet she testified that the person who defiled her was on top of her at the time she got the spotlight. He submitted that he was mistakenly identified and that PW1 was coached to implicate him. He also stated that PW1 did not scream to alert her sister about the incident.

5. On the issue of identification, the appellant relied on the case of **R v Turnbull** [1976] 3 ALL ER 549. He also cited decisions in **Mary Wanjiku v Republic** Criminal Appeal No.17 of 1988 (unreported) and **Joan Chebichi Sawe v Republic** [2003] eKLR, to demonstrate that suspicion however strong cannot provide a basis of conviction but the prosecution must prove its case beyond reasonable doubt.

6. The appellant submitted that there was a contradiction on the date the offence occurred. In that whereas PW1 said that she was defiled on 26th September, 2016, her grandmother (PW2) said that the former visited her on 9<sup>th</sup> March, 2016 and narrated to her what had happened.
7. The appellant stated that PW1's mother (PW3) also said that on 9th March, 2016 she was told that there was an issue. The appellant claimed that due to the inconsistency, the charge was framed up against him. He relied on the case of **Moses Mudavadi Kadenge v Republic** [2018] eKLR, to illustrate that he should benefit from the contradictions in the evidence of prosecution witnesses.
8. The appellant contended that PW1 was an untruthful witness because when she realized that she had been defiled and blood was coming out of her private parts she did not do anything such as screaming to alert her sister about the incident. The appellant further stated that when PW1's mother went back home on 27<sup>th</sup> September, 2016 which was on the day after the incident, she did not inform her about the defilement. Further, that PW1 disclosed about the defilement to her grandmother when she asked her why she was complaining of pain in her lower limb.
9. The appellant submitted that there was no evidence to suggest that he was the only one who could have defiled PW1.
10. The appellant stated that the Trial Magistrate did not read to him the charge once again before he was put on his defence. In his view non-compliance with the provisions of the Criminal Procedure Code affected his right to a fair trial as provided in Article 25(c) of the Constitution. He contended that failure by the Trial Magistrate to read the substance of the charge to him at defence stage prejudiced him as he would probably have decided to call a witness in support of his defence.
11. He claimed to have been convicted under Section 215 of the Criminal Procedure Code which makes no reference to the offence of incest.
12. On 7<sup>th</sup> August, 2020 the Office of the Director of Public Prosecutions through Ms Mwangeka, Prosecution Counsel, filed written submissions. She stated that for an offence of incest contrary to Section 20(1) of the Sexual Offences Act to be proved, it must be shown that an act causing penetration was done and that the appellant and the victim were related within the prohibited degrees of affinity or consanguinity.
13. Ms Mwangeka submitted that the relationship between the appellant and the victim was not in dispute as PW1 in her evidence said that the appellant was her father. The Prosecution Counsel further stated that PW3 testified to the fact that the appellant was the biological father of PW1 and that the appellant in his defence confirmed that he was the father of PW1.
14. On the issue of whether there was penetration, the Prosecution Counsel stated that the Trial Court held that the evidence of PW1 was clear, consistent and unshaken as to what happened.
15. On the issue of the contradiction pointed out by the appellant as to the date when the offence occurred, Ms Mwangeka submitted that PW1 said that it happened on 26<sup>th</sup> September, 2016 and that the same date is reflected on the PRC form. Further, that she told her grandmother about the ordeal on 9th October, 2016 and she was taken to Msambweni Hospital for medical examination on 11<sup>th</sup> October, 2016 as per the treatment notes and PRC form.
16. In regard to the date of 9<sup>th</sup> March, 2016 which PW3 said was when PW1 went to her grandmother, Ms Mwangeka attributed it to a typographical error and asked this court to disregard the same as a minor contradiction. She also said that it did not affect the veracity of the prosecution's case.
17. It was submitted by the prosecution that Section 211 of the Criminal Procedure Code was complied with and the appellant opted to give unsworn evidence and to call no witnesses. She also stated that on 27th July, 2017 when the case came up for defence hearing, the appellant stated that he was ready to proceed, thus he was accorded a fair hearing.
18. In regard to the argument that the appellant was convicted on the wrong provisions of the law, Ms Mwangeka stated that was not the correct position as he was charged, tried and convicted for the offence of incest. She urged this court to dismiss the appeal for lack of merit.
19. The appellant filed a rejoinder to the respondent's submissions on 10th August, 2020. The same are repetitive of his initial submissions, there is therefore no need to reiterate the said submissions once again in this Judgment.

#### **THE EVIDENCE ADDUCED BEFORE THE LOWER COURT**

20. A synopsis of the evidence tendered by prosecution witnesses in the lower court was that on 26<sup>th</sup> September, 2016 the victim (PW1), FMK [name withheld], was at home with her father (appellant) and her younger sister. Her mother had gone for a funeral ceremony.
21. PW1's evidence was that on the said night at 8:00p.m., while she was sleeping alone in her bedroom, she found a person on top of her. She felt his weight and some pain. She took a spotlight and was able to see that the person who was on top of her was the appellant. PW1 stated that by then he had removed her clothes. That when she asked him what he was doing, he blocked her mouth. She then saw blood coming out of her private parts. She noticed that she had been defiled. She stated that he asked her not to tell anybody. She went outside the house and left him inside her room and that he later went to his room. She went back to her room and slept.
22. It was PW1's evidence that on 9<sup>th</sup> October, 2017 she informed her grandmother who in turn informed her mother and the incident was reported to the police. She was taken to Msambweni Hospital for medical examination. She stated she was 15 years old and relied on her Child Health Card as proof of her age. She indicated that she was born on 5<sup>th</sup> August, 2001 and that the appellant was her father.

23. PW2 was ZR [name withheld]. She stated in her evidence that on 9th October, 2016 while she was at her house, PW1 and other children went there to visit her. That she asked PW1 what was happening and after she told her that she was having pains on her lower limbs.

24. She further stated that on interrogating PW1, she told her that she had been defiled by her father when her mother was away. PW2 called PW1's mother and told her what PW1 had told her.

25. PW3 was HB [name withheld]. She was PW1's mother. She recounted of how on night of 26<sup>th</sup> September, 2016 she went for a funeral and that the appellant, who was her husband, escorted her and then went back home. She stated that she left her children at home.

26. She indicated that on 9<sup>th</sup> March, 2016, PW1 went to her grandmother's place. That PW2 (PW1's grandmother) called and told her that there was an issue. She then told PW3 that PW1 had been sexually molested on 26<sup>th</sup> September, 2016. She took PW1 to Msambweni Hospital and then to Msambweni Police Station where they reported the incident. She indicated that a P3 form was issued and duly filled. PW3 also stated that the appellant was PW1's biological father. She disclosed that she and the appellant usually had domestic differences.

27. PW4, was No. 67565 Sergeant Shukri Ali Adan of Msambweni Police Station. He was the Investigating Officer. He indicated that on 12<sup>th</sup> October, 2016 at 8.00a.m., he found that a matter had been reported at the said Police Station the previous day. He called the people who had reported the case and PW1 explained to him that she had been defiled by her father on 16<sup>th</sup> September, 2016. He issued them with a P3 form which was filled and showed that PW1's hymen was absent. He indicated that PW1's Child Health Card indicated that she was born on 5<sup>th</sup> August, 2001 and that she was 15 years old. He further indicated that the said card showed that the appellant was her father. PW4 produced the said Child Health Card as an exhibit. He further stated that the appellant escaped but he was later arrested by members of the public.

28. PW5, Philip Kibet Chebii, a Clinical Officer at Msambweni Hospital examined PW1 and found out that her hymen was absent. He confirmed that she had had penetrative sexual act. He produced PW1's P3 form duly filled and laboratory reports.

29. The appellant gave an unsworn defence of how he was arrested on 13<sup>th</sup> October, 2016 when he was going home from a shopping Center. That on asking to be informed of the reason for his arrest, he was told that he would be told in court. He stated that he was charged on false allegations as his wife, his brother and in-laws wanted to sell his land but they did not manage.

30. He also stated that his wife wanted him to pay dowry for her but he told her that he was not ready to do so. He claimed that his wife took away all his properties apart from his piece of land which she did not manage to sell.

#### **ANALYSIS AND DETERMINATION**

31. The issues for determination are:-

**(i) If there were contradictions and discrepancies in the prosecution's case;**

**(ii) If the prosecution proved its case beyond reasonable doubt;**

**(iii) If the appellant was convicted on the wrong provisions of the law;**

**(iv) If failure to read out the charges to the appellant before the defence case contravened his rights under Section 211 of the Criminal Procedure Code; and**

**(v) If the sentence imposed on the appellant can be regarded as being either harsh or excessive.**

**If there were contradictions and discrepancies in the prosecution's case.**

32. The appellant pointed out a contradiction with regard to the date when the victim (PW1) went to PW2's home. In that PW2 said that PW1 went there on 9<sup>th</sup> March, 2016. It must be noted that PW2 in her examination-in-chief said that PW1 went to her home on 9<sup>th</sup> October, 2016. It was during cross-examination that she stated that PW1 went to PW3's home on 9<sup>th</sup> March, 2016. The above date is not attributable to a typographical error as it was captured in the original handwritten proceedings.

33. Another inconsistency on the date is in the evidence of PW1 as to the date she reported the incident to her grandmother. The date is given as the 9th October, 2017. The same date is captured in the handwritten proceedings. When PW1 was cross-examined, she indicated that she informed her grandmother about the ordeal on 9<sup>th</sup> October, 2016. Save for the said inconsistencies, the evidence of PW1 was clear on when the incident she complained of happened. She gave the same information to her grandmother (PW2) that she was defiled by her father on 25<sup>th</sup> September, 2016. She informed the same to her mother (PW3) and to the Clinical Officer (PW5), who examined her in hospital.

34 In the case of **Phillip Nzaka Watu v Republic** [2016] eKLR, the Court of Appeal addressed the issue of contradictions and discrepancies as follows-

***"In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter."***

35. In this case, apart from the evidence of the victim, the PRC and P3 forms clearly gave the date the offence was committed as 26<sup>th</sup> September, 2016. It is also clear from the evidence that PW1 informed PW2 about the defilement on 9<sup>th</sup> October, 2016. It is this court's finding that the discrepancies which were pointed out by the appellant did not affect the veracity of the evidence tendered by prosecution witnesses.

**If the prosecution proved its case beyond reasonable doubt.**

36. The prosecution proved that the appellant was PW1's biological father. PW1's mother adduced that evidence. The Child Health Card produced in evidence shows that PW1's father was JK (appellant) and her mother was PW3. The appellant in his defence stated that PW1 was his daughter. The appellant and PW1 were therefore related within the prohibited degree of consanguinity and the law disallows any acts of sexual intercourse between a father and daughter.

37. The appellant claimed that he was mistakenly identified by PW1, as the offence was said to have happened at night. The evidence of PW3 was that she went for a funeral ceremony on the night of 26<sup>th</sup> September, 2016. Her husband (appellant) escorted her and went back home. She left her children at home. One of them was PW1, who in her evidence said that she went to sleep but did not close the door. She was awakened by the feeling of a heavy weight on her body and pain between her legs. She took a spotlight and shone it. She saw her father on top of her. He had undressed her. She asked him what he was doing but he covered her mouth and told her not to tell anyone about it.

38. In the case of **Wamunga v Republic** (1989) KLR 424, the Court of Appeal stated as follows on the issue of identification -

***“It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction.”***

40. It is not lost to this court that when the act of incest happened, PW1 and the appellant were in close proximity, as the appellant was on top of her. With the aid of light from the spotlight, PW1 could not have mistaken someone else to be her father. It is this court's finding that the identification of the appellant was free from the possibility of error. As such, the issue of mistaken identity does not arise.

41. This court does not think it was odd for PW1 to have kept quiet about the incident until she had the opportunity to go to her grandmother's house on 9<sup>th</sup> October, 2016 when she opened up to her. In this court's view, in a situation where a child is defiled by her father, it is not unusual for such a child to hold back telling such information to her mother due to the special relationship that exists between parents, as viewed from the child's perspective.

42. Upon being medically examined, on 17<sup>th</sup> October, 2016, PW1's hymen was found to be absent. The Clinical Officer said that it was not a fresh act that led to the breakage of the hymen. The aforesaid goes further to prove that the offence occurred on 26<sup>th</sup> September, 2016 and about 2 weeks had gone by, at the time when PW1 was taken to hospital. The Trial Magistrate found PW1 to be a truthful witness and relied on the provisions of Section 124 of the Evidence Act in convicting the appellant. This court finds that the appellant was convicted on sound grounds and that the evidence against him was overwhelming. The case against him was proved beyond reasonable doubt. I uphold the conviction.

**If the appellant was convicted on the wrong provisions of the law.**

43. The appellant was charged with the offence of incest contrary to Section 20(1) of the Sexual Offences Act. The fact that the Trial Magistrate indicated that he was convicting the appellant under Section 215 of the Criminal Procedure Code does not in my understanding mean that he was convicted contrary to Section 215 of Criminal Procedure Code. That is a preposterous argument and is too farfetched to convince this court that his conviction was unlawful. It is a submission that has no merit whatsoever.

**If Section 211 of the Criminal Procedure Code was complied with.**

44. The appellant's contention was that the charge should have been read out to him once again before he was put on his defence as provided under Section 211 of the Criminal Procedure Code (CPC). The said Section provides as follows-

***“At the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as may be put forward, if it appears to the court that a case is made out against the accused person sufficiently to require him to make a defence, the court shall again explain the substance of the charge to the accused, and shall inform him that he has a right to give evidence on oath from the witness box, and that, if he does so, he will be liable to cross-examination, or to make a statement not on oath from the dock, and shall ask him whether he has any witnesses to examine or other evidence to adduce in his defence, and the court shall then hear the accused and his witnesses and other evidence (if any).”*** (emphasis added).

45. The prosecution closed its case on 25<sup>th</sup> May, 2017 and the appellant asked to be supplied with copies of typed proceedings of the lower court case to enable him to prepare for his defence. On 23<sup>rd</sup> June, 2017 the Trial Magistrate put the appellant on his defence and informed him of his rights under Section 211 of the CPC. On the said date, the appellant never said that he had forgotten the charge he was facing.

46. This court notes that he fully participated in the proceedings of the lower court case. He cross-examined witnesses fully. He gave a lengthy defence. Such is not the conduct of a person who did not understand the charge he was facing. The appellant did not demonstrate the prejudice he suffered by not having the charge read out to him again before the Trial Magistrate explained to him his rights under Section 211 of the CPC. Failure by the said court to read the charges once again to the appellant was an error which is curable under the provisions of Section 382 of the CPC. I invoke the said provisions to cure the said defect.

**If the sentence imposed on the appellant can be regarded as being either harsh or excessive.**

47. The appellant was sentenced to 10 years imprisonment. Section 20(1) of the Sexual Offences Act provides as follows:-

***“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 as incest and is liable to imprisonment for a term of not less than ten years.”***

48. The sentence imposed on the appellant was the minimum provided by law. The Trial Magistrate was in my view lenient in imposing a sentence of 10 years imprisonment on the appellant for such an abominable act. However, that was within the Trial Magistrate's discretionary powers and the DPP did not file a notice of enhancement of sentence. I hereby uphold the sentence of 10 years imprisonment.

49. In his defence the appellant said that he was released on bond. I however do not see any bond documents which were approved by the Trial Magistrate, as the surety whom the appellant had availed in court on 7<sup>th</sup> April, 2017 was not approved. As such the bail/bond documents which had been prepared were not signed by the Trial Magistrate. There is no indication in the lower court proceedings that the appellant availed another surety for approval. For the said reasons, as per the provisions of Section 333(2) of the Criminal Procedure Code, the appellant's sentence will run from 14<sup>th</sup> October, 2016 when he was first arraigned in court. The appellant has 14 days right of appeal.

**DELIVERED, DATED and SIGNED at MOMBASA in open court on this 20<sup>th</sup> day of November, 2020.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:-**

The appellant

Mr. Muthomi, Prosecution Counsel - for the DPP

Mr. Oliver Musundi- Court Assistant.