



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CRIMINAL APPEAL NO. 21 OF 2016

RN.....APPELLANT

=VRS=

REPUBLIC.....RESPONDENT

{Being an appeal against the conviction and the sentence of Hon. E. K. Nyutu – PM dated and delivered on the 20th day of May 2016 in the Original Nyamira Principal Magistrate’s Court Criminal Case No. 412 of 2015}

JUDGEMENT

The appellant was charged with incest contrary to Section 20 (1) of the Sexual Offences Act the particulars being that on 30th April 2015 within Nyamira County being a male person caused his penis to penetrate the vagina of DN a female person who was to his knowledge his cousin.

He faced an alternative charge of committing an indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act whose particulars were that on 30th April 2015 within Nyamira County he intentionally touched the vagina of DN a child aged 8 years with his penis.

The appellant pleaded not guilty on both charges but after hearing and evaluating the evidence from both sides the trial magistrate acquitted him on the charge of incest but found him guilty on the charge of committing an indecent act and sentenced him to ten years’ imprisonment.

Being aggrieved by the conviction and sentence, the appellant preferred this appeal. The grounds of appeal are: -

“1. That your honour the learned that magistrate sitting at Nyamira erred in both law and facts to have intuitionally and deliberately assumed and ignored to use the law where as he created and fabricated an alternative which was none existing in the charges of indecent at which he applied to convict and sentence me to 10yrs.

2. That your honour the learned magistrate equally earned not only in law but also in facts to have passed judgement after all witness invited for that case never turned up to help to support the alleged evidence.

3. That your honour the magistrate the fail in both law and points to have relied on a single witness evidence who is mother to the complainant that could convict and sentence one.

4. That the learned trial magistrate e.....by both law and facts to have relied on fabricate evidence of the mother of the complainant, despite failure of any evidence from the doctors and medical report as were clearly stating and they testified before court.

5. That the learned magistrate as well lacked and earned in both law and facts to draw his preference hence conclude conviction and sentence without taking into account that the investigation offence denied before court that there was nothing he found to connect me with the offence in court.

6. That the magistrate here did not worn himself that even the book of God 1 Timothy 5:19 denied conviction and sentence of a single witness evidence given in any court of law.

7. That the learned trial magistrate not only failed in law and facts, by assuming judicially systems but he equally violated and infringed my fundamental rights and freedom as a kenya.

8. That the learned trial magistrate than was based, and of selective and predetermined mind to convict and sentence me

since the evidence in record did not meet the cogent standard of proof to warrant conviction of that kind.

9. That your honour pray to his honourable higher court to have orders for this my appeal be entered and granted. This conviction be set aside this sentence quashed for me to be set free to liberty in order justice to prevail.

10. That request to be supplied with the court proceedings promptly to prepare my defence.”

The appeal was canvassed by way of written submissions.

As the first appellate court, my duty is to reconsider and evaluate the evidence adduced so as to arrive at my own conclusion. I have done so bearing in mind that I neither saw nor heard the witnesses give evidence. I am satisfied that the charge for which the appellant was convicted was proved beyond reasonable doubt. That the victim in the case was eight years old at the material time was proved through an immunization card. The clinical officers who examined the victim and the trial court also opined the victim's apparent age was eight years. The complainant vividly described how the appellant took her to his friend's house and sent his friend out to buy something before putting her on the bed and using his penis to touch her genitalia. The victim told the court that her mother found them inside the house a fact which was corroborated by her mother (Pw2). The evidence of the clinical officer (Pw4) who examined her on the same day the incident occurred confirmed that she had lacerations in her genitalia. The accused made an unsworn statement in which he denied he committed the offence. He alleged that he was arrested on his way from work and that he did not know the reason for his arrest until he was arraigned in court. When he cross examined the complainant's mother he seemed to suggest that she had framed him because of a love affair gone sour and also a case that was pending. He did not raise any of those allegations in his defence meaning they were false. The testimonies of the victim and her mother remained steadfast even upon vigorous cross examination by the appellant and I am satisfied that they were truthful, credible and reliable witnesses.

The appellant need not to have been found naked for the offence to be proved. There was evidence that corroborated that of the victim even though under **Section 124 of the Evidence Act** her evidence alone was sufficient to found a conviction. In any event the appellant did not cross examine the victim's mother on the state she found them in so as to come to the conclusion that she contradicted the complainant's evidence that they were found naked. The unsworn statement of the appellant was not convincing and my finding is that he was properly convicted. As the sentence imposed upon him is lawful, the appeal is dismissed in its entirety.

Dated, signed and delivered at Nyamira this 24th day of January 2019.

E. N. MAINA

JUDGE