



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

CRIMINAL APPEAL NO 76 OF 2017

BETWEEN:

JM.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

(Being an Appeal from the Judgment of Hon. N. N. Njagi SPM at SPM's Court Wundanyi. Cr. Case No. 10 of 2017 delivered on 16th August 2017)

1. The Court has before it a Petition for Appeal. The Petition is set out in the following terms:

I the under mention do most humbly beg leave to appeal against both the conviction and sentence for an offence of incest passed upon me by the chief/principal/senior resident/ 1st class/ and 2nd class Magistrate SPM's Wundanyi in criminal case no 10/017 at the SPM's court at Wundanyi, judgement dated 24-8-2017.

I plead not guilty

I am a poor man and have no money for appeal.

2. Alongside the Petition the Appellant filed his **Grounds of Appeal** which state that he is appealing from "An appeal from the original conviction and sentence in cr. Case no 10/017, judgment delivered and dated 24th day August of 2017 by Hon. N. N. Njagi at SPM's court Wundanyi" Also that;

1. That unless I the appellant invoke section 349 of the criminal procedure code CAP (75) L.O.K. in filing the same, the appellant in this appeal would stand to suffer grave injustice.

2. That the learned trial magistrate erred in law and facts by failing to consider the case was not proved beyond reasonable doubt c/sec 109 and 110 of the evidence act.

3. That the learned trial magistrate erred in law and facts by failing to consider no cogent reasons linking I the appellant to the commission of the alleged offence.

4. That the learned trial magistrate erred in law and facts by relying on incredible prosecutions adduced evidence.

5. That the learned trial magistrate erred in law and facts by failing to consider that my defence was unrebutted or buttressed by the prosecution witness.

6. That it is utmost important that this application be heard and determined.

The required leave was granted by Hon J. Kamau J. the previous Judge.

3. The Appellant also filed a Notice of Motion Application [undated] seeking leave to amend his Grounds of Appeal. The leave was granted on 5th June 2018. The Amended Grounds were:

1. That the learned trial magistrate erred in law and fact in convicting and sentencing while not considering that, I the appellant was not assigned an advocate by the state as required by the law since I am a layman in law.
2. That the learned trial magistrate erred in law and fact in not considering that the benefit of doubt was not discharged beyond reasonable doubt.
3. That the learned trial magistrate erred in law and fact in not considering that, I the appellant was a first offender hence deserved an alternative sentence.
4. That the learned trial magistrate erred in law and fact in not considering that my defence evidence which created a reasonable doubt to the prosecution whereby the benefit ought to have been given to me.

The Appellant and Respondent filed Written Submissions which the Court has considered.

4. The Appellant was charged with:

Unnatural offence contrary to Section 162 (a) of the Penal Code as read with Section 162 (a) (i) of the same Act.

Particulars: On the 12th day of March 2017 at around 2.00pm within Taita Taveta County had carnal knowledge of JM against the order of nature.

Committing an indecent act with a child contrary to Section 11(i) of the Sexual Offences Act No 3 of 2006.

On the 12th day of March 2017 at around 2.00pm within Taita Taveta County, intentionally touched the anus of JM a child aged 6 years with his penis.

Incest contrary to Section 20 (I) of the Sexual Offences Act No. 3 of 2016.

JM: On the 12th day of March 2017 at around 2.00pm within Taita Taveta County intentionally and unlawfully caused his penis to penetrate the anus of JM child aged 6 yrs who to his knowledge is his son in contravention of the said Act.

Committing an indecent Act with a child contrary to Section 2 (I) as read with Section 11(II) of the Sexual Offences Act No 3 of 2006.

On the 12th day of March 2017 at around 2.00pm within Taita Taveta County, intentionally and unlawfully touched the anus of JM a child aged 6 years with his penis.

5. The Appellant was tried in the SPMs Court in Wundhanyi and found guilty. He has appealed to this Court. This being the first appeal this Court has the duty to re-evaluate and analyze the evidence in detail and come up with its own conclusions bearing in mind that neither saw the witness nor heard the evidence when parties were testifying to see their demeanor. See the case of **MARK OIRURI MOSE –VS- REPUBLIC [2013] e KLR Criminal Appeal. No.295 of 2012** where the Court of Appeal stated: “It has been said over and over again that the first appellate Court has the duty to revisit the evidence tendered before the trial Court afresh, analyze it, evaluate it and come to its own independent conclusion on the matter but always bearing in mind that the trial Court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and to give allowance for that.” See also the well known case of **OKENO –VS- REPUBLIC [1972] E.A. 32** which sets out the same principle. (**J O v Rep 2013 KLR**)

6. The Evidence heard by the Trial Court is set out in the proceedings. The Trial Court heard the evidence of the Complainant a minor. His parentage was confirmed by his birth certificate. His age was also set out in that certificate but confirmed separately. The evidence of the Complainant's injuries are set out in the medical report and corroborated by the evidence of PW-1 the Child's Mother. She also gave evidence that she had left the Child in the care and control of the Appellant when he suffered those injuries.

7. By way of Defence the Appellant put forward a mere denial and challenging the veracity of the complainant. He sought to suggest the Child had a grudge against the Father he chose to visit.

8. In relation to the lack of legal representation. The Constitution provides for such representation where the absence could result in substantial injustice. The Appellant has not demonstrated the substantial injustice that has been visited upon him. That ground of appeal must fail.

9. Having considered the evidence afresh as required, this Court has come to the decision, that there is no reason for it to interfere with the decision of the Court below.

10. Disposal: Appeal Dismissed.

It is so ordered,

FARAH S. M. AMIN

JUDGE

SIGNED DATED AND DELIVERED in Voi on THIS the 22nd day of January 2019.

In The Presence of :

Court Assistant: Josephat Mavu

Appellant: In Person

Respondent: Ms Anyumba