



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL APPEAL NO. 49 OF 2015

JMM.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[An appeal from the judgment in Criminal Case No. 1331 of 2014 at Kigumo by D. Orimba, Senior Principal Magistrate, dated 11th May 2015]

JUDGMENT

1. The appellant was adjudged guilty of two counts of *incest* of his daughters contrary to section 20 (1) of the **Sexual Offences Act**. He also faced two alternative counts of *committing an indecent act with a minor* contrary to section 11 (1) of the Act. He was sentenced to *life imprisonment*.

2. The particulars were as follows-

“On diverse days before the 6th January 2013 and on 28th May 2014 at 3:00 p.m., at [particulars withheld] in Murang'a County, being a male person caused his penis to penetrate into the organ of J.W.M [particulars withheld] a female person aged 9 years who was to his knowledge, his daughter.”

3. The 2nd count related to his other daughter (PW2) aged 12 years. The dates were before the 6th January 2013 and on 27th May 2014.

4. The appellant has preferred an appeal. The original petition raised six grounds. On 5th March 2019, I granted leave under section 350 of the **Criminal Procedure Code** to amend the grounds.

5. There are now *three* grounds. First, that the evidence of PW1 and PW2 was unreliable because it contradicted that of PW4. Secondly, that there was insufficient medical evidence to support the charge. Thirdly, that the learned trial magistrate disregarded the *alibi* set up by the appellant and which was not rebutted.

6. In a synopsis, the appellant contends that the prosecution did *not* prove the charge beyond reasonable doubt.

7. The appeal is contested by the State. Learned State Counsel, *Ms. Gichuru*, conceded that there was *insufficient* evidence to support the two *main* counts. However, she submitted that all the ingredients of the charge of *indecent* were proved beyond reasonable doubt.

8. This is a *first appeal* to the High Court. I have re-evaluated the evidence and drawn independent conclusions. *Njoroge v Republic* [1987] KLR 19, *Okeno v Republic* [1972] EA 32.

9. The complainants were *both* class 3 pupils. After a detailed *voire dire* examination, the learned trial magistrate formed the opinion that they were intelligent and could be *affirmed*.

10. I am satisfied that the trial court complied fully with the procedure of taking the evidence of the minors. *Johnson Muiruri v Republic* [1983] KLR 445.

11. The 1st complainant (PW1) said her age was 9. The appellant was her father. Her mother is deceased. She testified that in January 2013, he ordered her to remove her innerwear, placed her on bed and inserted his penis into her anus. She said it happened on two consecutive days. On the second day, he did the same thing to her sister PW2.

12. She said the appellant threatened to kill her if she disclosed the matter. PW1 however disclosed the matter to her cousin J. She said she

felt pain. The matter was reported to the police. She was taken to the hospital and discharged.

13. PW2 on the other hand said that she was aged 12. She said that her father defiled her on several occasions in 2013. He in particular defiled her on 28th May 2014 by inserting his penis into her vagina. She said he called them, took them to the bedroom and defiled them. He threatened to kill her if she disclosed the matter. PW2 nevertheless opened up to her grandmother.

14. The matter was first reported to the area chief and eventually to the police. the report was recorded by APC Omariba (PW3). He said one of the children PW3 said one of the complainants was having difficulties walking. He issued the complainants with the P3 forms. The accused was arrested and handed over to Muthithi Police Station.

15. PW4 was Charles Kamotho. He was a clinical officer at Maragua Hospital. The complainants were examined on 29th May 2014. He prepared the P3 forms (exhibit 3 and 4). He also produced the *Post Rape Care Forms*.

16. He testified that there was *no* penetration or laceration; and the hymen was intact. The urine had pus cells. HIV was negative. He however said there was *contact* between the penis and genitalia in both cases.

17. PW5 was the investigating officer. He produced the birth notification for PW1 showing she was born on 28th April 2002. He did not have the birth notification for the other minor.

18. When the appellant was placed on his defence, he gave an *unsworn* statement. He denied the charge. He said that on the material dates, he was either at the market or attending a funeral meeting. He blamed his woes on his brother's wife. She developed a grudge after her husband was jailed for theft. She blamed the appellant for it and warned him. He said that in 2006, she made a false allegation to the chief that the appellant had defiled her daughter. The case was dismissed by the chief.

19. A number of issues arise from that evidence. I will deal first with the age of the complainant. From the birth notification, PW1 was aged 12 at the time of the hearing. PW2 was her younger sister. I am satisfied that they both fell within the *bracket* of a child of *below* eighteen years. ***Martin Wanyonyi Nyongesa v Republic***, Eldoret, Criminal Appeal 661 of 2010 [2015] eKLR.

20. I am also satisfied that the two complainants were *daughters* of the appellant. The appellant never contested the matter.

21. From the evidence of the clinical officer there was *no* proof of penetration or partial penetration. But there was *contact* between the appellant's penis and the genitalia of both complainants.

22. Granted the medical evidence, the conviction on the two main counts of incest was *unsafe*. Learned Prosecution Counsel was thus right to *concede* that aspect.

23. I find that the *two* alternative counts were *proved* beyond reasonable doubt. The upshot is that the appeal is *partially* allowed. Both the conviction and sentence under counts 1 and 2 for *incest* are *set aside*.

24. I convict the appellant on the alternative counts 3 and 4 of *committing an indecent act with a minor* contrary to section 11 (1) of the Act. I sentence the appellant to serve *ten (10) years imprisonment*. For the avoidance of doubt, the term of imprisonment *shall* take effect from *11th May 2015*, the date of his original conviction

It is so ordered.

DATED, SIGNED and DELIVERED at MURANG'A this 26th day of March 2019.

KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of-

The appellant (in person).

Ms. Gichuru for the Republic.

Ms. Dorcas and Ms. Elizabeth, Court Clerks.