



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

CRIMINAL APPEAL NO. 58 OF 2018

CMK.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

Introduction:

1. The Appellant was charged for *incest act contrary to section 20 as read with section 20(1) of the Sexual Offences Act No. 3 of 2006*.
2. Particulars being that on the 25th day of September 2016, in Mukaa district of Makueni County being a male person caused his male organ namely penis to penetrate the female organ namely the vagina of MLK a child aged 8 years who was to his knowledge his granddaughter.
3. The Appellant pleaded not guilty and after trial he was convicted and sentenced to serve life imprisonment.
4. Being aggrieved by the decision of the trial court he lodged appeal and set out four grounds of appeal namely: -
 - 1) **That**, the learned pundit magistrate erred in both law and facts by convicting him on inconsistency, insufficient as well as contradictory evidence.
 - 2) **That**, the pundit trial magistrate faulted in both law and facts by relying PW1's evidence which was totally fabricated or framed.
 - 3) **That**, the learned magistrate erred in both law and facts to convict him on single witness evidence.
 - 4) **That**, the learned magistrate erred in both law and facts by relying on PW1's message which was unquestionable and doubtful.
5. Parties agreed to canvass appeal via submissions but only Appellant who filed.
6. The State Counsel relied on evidence on record.

Appellant's Submissions:

7. The Appellant submits that the doctor PW5 acknowledged that there was no ascertainment of defilement, but proceeded to make assumption that lack of hymen in the complainant's vagina was because she was defiled by appellant a statement which was believed, there is in addition no evidence that was adduced linking the Appellant to commission of the offence.
8. The Applicant submits to this Honourable Court that that there were a number of inconsistencies, discrepancies and contradictions that trial magistrate failed to evaluate the veracity of such statements from prosecution witnesses.
9. It is the submission of the Appellant that the charges drawn against him did not disclose any offence from the way it was drafted, in that it was prepared without such words as intentionally and unlawfully thus it did not disclose any offence.
10. He cited Section 134 of the Criminal Procedure Code which provides as follows:-

“Every charge of information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the appellant person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.”

11. The Appellant also submits that the error violates provisions of Section 43 of the Sexual Offences Act No. 3.

12. The grudge that has existed warranted his son's wife to fabricate case against him with such a heinous action which has never been in his mind.

13. The Appellant states that his defence explained how the following charges were fabricated against him.

Duty of the first Appellate Court:

14. The duty of the first Appellate Court is to subject the whole of the evidence to a fresh exhaustive scrutiny and make any of its own conclusions about it bearing in mind that it did not have the opportunity of seeing or hearing the witnesses first hand. See the case of **Selle & Anor –vs- Associate Motor Boat Co. Ltd 1968 EA 123.**

Evidence Adduced:

15. PW1 stated that she worked as a cook and the complainant was her daughter, it was her testimony that on the 25/9/2016 at around 3pm, she came from church and gave her children and their grandfather food. She left home to attend a meeting.

16. She left her children under the care of Mumo King'oo.

17. She left her daughters SM and MLK in the care of M's care. She came back and was informed to try seek from MLK what could have happened to her since appellant had bought her sweets.

18. It was her testimony that she called the complainant who requested that she does not beat her. The complainant informed her that while she was playing with other children, her grandfather called her and gave her Kshs.10/= to buy sweets.

19. She bought sweets and gave to her grandfather to give out. She went to the neighbour's home. It was her testimony that the complainant informed her that her grandfather left with his wife but came back alone.

20. She was called by her grandfather and she went but SM followed her. It was her testimony that her grandfather gave SM another kshs.10/= to go and buy sweets. When SM left, her grandfather held her hands and led her into his house whereby he locked the door.

21. He took her to the bedroom and removed her clothes. She informed this court that the complainant narrated to her how her grandfather removed her under pant which he put under the bed.

22. It was her testimony that the grandfather put saliva on the vagina of the complainant and also his penis which she referred to that thing used for urinating.

23. It was her testimony that the complainant informed her that the grandfather put his thing used for urinating onto her thing used for urinating. It was her testimony that the appellant was on top of the complainant as per the latter's recollection.

24. It was her testimony that it was not the first time her grandfather was doing the same to her and she used to feel pain, it was her testimony that her grandfather asked her not to fear anything. She used to see mucus like substance and then her grandfather gives her water to shower.

25. It was her testimony that the complainant one time was defiled while on her way to church. It was her testimony that appellant had asked her to let the children sleep in his house as her house was a single room which was still under construction, it was her testimony that appellant herein was the grandfather to the complainant.

26. She examined the complainant who had injuries on her private parts and she took her to the hospital at Mbiiri. She was referred to Sultan Hamud Hospital as it was confirmed that indeed the complainant had been defiled. She also reported the case at Sultan Hamud Police Station.

27. It was her testimony that the complainant was born on the 6/7/2008.

28. PW 2 stated that appellant was her grandfather. It was her testimony that she was left at the care of Mumo and were watching television when she was called by the appellant.

29. He gave her Kshs.10/= to go and buy sweets. She went and bought sweets which she gave to T, M, SM and N. She was again called by the appellant but SM followed her and appellant gave her Kshs.10/= to go and buy sweets.

30. It was her testimony that appellant got hold of her hands and led her into his house. She stated that appellant put her on the bed and removed her under pant before smearing saliva on the area she uses for urinating. It was her testimony that the appellant slept on top of her and did bad things to her.

31. She saw mucus like things coming from her genitals when appellant removed his. It was her testimony that she felt a lot of pain. She stated that appellant gave her water to take a shower.
32. She took a shower and went back to Mumo's house. Her mother came back and she informed her of what had happened. She was taken to the hospital.
33. It was her testimony that it was not the first time appellant was putting his thing on her thing for urinating. She stated that appellant had defiled her in the farm and at Mama Musyoki's house and another time in his house.
34. PW3 stated that she was left for the children being the complainant and other. It was her testimony that their mother informed her that she did not trust their grandfather with them.
35. It was her testimony that appellant came and asked her to call for him MLK and T of which she did and the children left. Appellant sent T to go and fetch water and also sent MLK to go and buy sweets at Mangala market.
36. It was her testimony that the complainant bought sweets and came back to her home. It was her testimony that the complainant informed her that she had been given more sweets than SM which prompted her to ask their mother to try and get from her what she meant.
37. It was her testimony that the complainant's mother came back with the complainant looking shocked, it was her testimony that the complainant repeated to her how appellant had done bad things to her.
38. PW 4 carried out investigations and preferred the current charges as against appellant person. It was her testimony that the complainant's mother reported the case and narrated to her how the appellant had defiled her daughter. She booked the report. She was given the case to investigate and later recorded witness statement.
39. PW 5 examined the complainant as the medical officer and filled the P3 form. It was his testimony that labia majora was normal but the hymen was broken though not fresh. He noted yeast cells and epithelial cells after the high vaginal swab. He tendered the P3 form as PEX3, child health form as PEX2, treatment notes as PEX1.

Defence Case:

40. DW1 stated that the complainant was his son's wife. It was his testimony that he was at work at Thadeus Zambia's farm. He left work at around 4pm and arrived home at around 7pm. He stayed at home until, he went to sleep.
41. He went back to work the following day. It was his testimony that he was arrested at around 5:00 am on a day he could not remember. He denied having sex with his granddaughter and had never entertained such thoughts.
42. It was his testimony that his problem with his daughter in law started long ago as she had assaulted his later wife.
43. He reported the case to the clan and she was banished from the homestead. They left to stay in the market and later his son convinced him to allow them back. It was his testimony that the complainant's mother was annoyed for he had opposed her taking of a jembe belonging to her grandmother which prompted her hurl abuses.
44. It was his testimony that the complainant's mother had insisted that she was going to stay therein in his absence. He denied having examined in any medical facility.
45. After going through the evidence on record and the submissions, I find the issues are; ***whether prosecution proved its case beyond reasonable doubt. Was appellant defence considered?***

Analysis and Determination:

46. In cases of incest with a minor the prove is based on ingredients of defilement on and above the prove the degree of prohibited consanguinity. See the case of the ***High Court at Machakos Criminal Appeal No. 296 of 2010, Fappyton Mutuku Ngui –vs- Republic*** where the court held that, ***“the ingredients to look out for in a defilement case are; The first is whether there was penetration of the Complainant's genitalia; the second is whether the complainant is a child; and finally, whether the penetration was by the Appellant.”***
47. It was the prosecution's case that the complainant had canal knowledge of by her grandfather who is the appellant herein; suffice to note that the defence denied the contention.
48. Thus the duty of this court was to establish whether the two were actually related as defined within the prohibited degrees. Prohibited degree of kinship refers to a degree of consanguinity (blood relatedness) between the victim and the appellant.
49. PW 1 stated that the appellant was her grandfather, a fact that the defence admitted expressly and added that they lived with the same homestead. Thus they were related to and within the prohibited degree of relationship (consanguinity). It was established by the prosecution that the complainant was a child aged 8 years, a fact that the defence did not at any time dispute.
50. The child health card was produced but there was no dispute as the age as stated by PW 1 and indicated in the P3 form and the defence did not dispute the same.

51. In the case of *JWA –vs- Republic Court of Appeal at Nairobi Criminal Appeal No. 100 of 2013* it was held that “.....***the age of an individual is a fact and the two courts below established the fact that the complainant was 10 years of age. The complainant testified that she was 10 years old; the medical report produced by Dr. Kalumbe who examined the complainant indicates that she was born in 1999 and was thus 10 years in the year 2009, when the offence was committed, the P3 form tendered in evidence as exhibit 2 shows that the complainant was 10 years old at the time of the offence. we are satisfied that the evidence on record shows that the age of the complainant was proved to be 10 years***”

52. The Court therefore is satisfied that the child was aged 8 years old and was a granddaughter to the appellant herein.

Whether the child was penetrated?

53. The prosecution in form of oral and documentary evidence was adduced in support of element of penetration, however the appellant concentrated on the fact that they had a protracted dispute with the mother of the complainant.

54. The court has analysed the evidence in regard to that fact and notes the following; PW2 stated that she was defiled by DW 1 who had led her to his house before removing her clothes and ***“doing bad things with her” by inserting his “thing for urinating and inserting in her thing for urinating.”*** The trial court noted that, the complainant was referring to her genitals.

55. The defence in rebuttal only concentrated on the alleged dispute with the mother of the complainant. The child had stated that she was had carnal knowledge of and her medical findings confirmed the same.

56. PW1 stated that the complainant confided on her about the incident which was not once before she took her to the hospital. It was PW 1’s evidence that this child repeated the same story she had given to PW 3 who had been suspicious.

57. In cross examination, the defence concentrated on the alleged land dispute between him and the mother without challenging the testimony of the complainant as to what she had been informed by the complainant.

58. The witness was stating in clear terms that the minor mentioned appellant as the perpetrator but the latter did not find it wise to rebut the same, making her testimony to stand out un-contested.

59. PW3 was left to the care of the complainant. She also confirmed that the appellant herein summoned the children and sent them to the market. In cross examination, the defence concentrated on whether appellant summoned the children on his own or whether he called them through the witness, which was not also challenging the evidence by the complainant.

60. PW5 examined the complainant as a medical officer and noted the following findings: -

That the child was in fair general condition

Labia was normal

The hymen was broken but not fresh

Yeast cells were noted

Epithelial cells were also noted.

61. The Court has analysed the evidence on penetration and wish to make the following observations as per the medical opinion taking into consideration that there was no dispute from the defence on the same findings; the condition of the minor having her hymen broken at the age of 8 clearly demonstrated that she had penetration.

62. This court is seized of the fact that the complainant who was 8 years old having her hymen broken was a credible proof that she had been penetrated.

63. It was clearly proved that she had been penetrated beyond reasonable doubt, as per the definition as envisaged under Section 2 of the Sexual Offences Act No. 3 of 2006 which provides insertion of the genitals whether partial or full amounts to penetration.

64. Further this court is convinced with the evidence as presented by the prosecution that the girl was had carnal knowledge of.

65. It is worth noting that she had carnal knowledge of yet she did not have the legal consenting age as discussed in issue number 1 and further under the provision of Section 20(1) of the Sexual Offences Act, consent is not a prerequisite issue in dispute.

66. Under the provisions of Section 124 of the Evidence Act Chapter 80 Laws of Kenya, it is provided that, ***“.....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 appellant person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth”***

67. The complainant stated that she was defiled and the medical examination confirmed that indeed her hymen had been broken. The trial

court found that, she was truthful. In this case as well there was sufficient corroborative facts on the act of penetration which further corroborated the testimony of the complainant and which were not disputed by the defence, which supports this court's finding on the complainant being had carnal knowledge of.

Who had carnal knowledge of the complainant?

68. It was the prosecution's case that it was the appellant who had carnal knowledge of the complainant, suffice to note that the latter denied the offence.

69. The court has analysed the evidence and wish to make the following deductions;

70. PW2 stated that she was defiled by her grandfather who happens to be appellant herein; a fact that the defence did not challenge at all. Appellant admitted that the complainant was her granddaughter but did not dispute the clear and concise evidence of the complainant who insisted that he had done bad things when they were both naked.

71. In her testimony, which had not been disputed, the complainant stated that when appellant was doing bad things to her while both were naked she felt pain, the latter did not challenge that piece of evidence.

72. The complainant also informed this court that appellant gave her water to take a shower after the ordeal, a fact that was not challenged by the defence.

73. PW1 stated that, the victim identified the person who had sexually assaulted her to be the appellant. Appellant on his part while denying concentrated on the fact that they had personal dispute with her, though the evidence by the complainant pointed at her having been defiled and no one was making up any story herein.

74. DW1 in his defence stated that the complainant's mother was the source of this case and blamed the whole issue on land and personal differences.

75. The court has carefully analysed that defence, but what was clear is that appellant was not denying that the complainant was sexually assaulted.

76. It was not the mother making up the story since the medical evidence confirmed the same. She victim identified the person who had sexually assaulted her even in the open court.

77. This court cannot just equate the clear and cogent testimony of the complainant to the alleged dispute between her mother and the appellant. It must be noted that the evidence of PW1 was actually immaterial since the whole issue revolved around whether the complainant had been had carnal knowledge of or not.

78. The defence to the extent that he had not done so was just mere denials without challenging the evidence as presented herein, since the minor stated in her evidence in a more cogent and consistent manner.

79. The complainant was truthful. The defence has not alluded to the complainant having any grudge against him to warrant her to fabricate this case on him.

80. It is clear from the evidence on record that the identification of the appellant was without any doubt owing to recognition and the impeccable recollection of the complainant who was able to identify appellant as the perpetrator.

81. Appellant was the grandfather to the complainant and so there was no error apparent to warrant this court to doubt her testimony.

82. This court did not find any evidence of fabrication by the prosecution but on the converse, it found the appellant as one fabricating issues to mislead the court. The defence was an afterthought tailor made to confuse the court.

83. The court observed of the evidence where the complainant in her testimony also narrated several other times when the appellant had defiled her. The appellant who focused all his energy on the alleged dispute with the complainant's mother never disputed the claim.

84. Appellant in his defence raised an alibi in which he contended that he was at the farm of Nzambia where he was working as a farm hand.

85. The court has carefully analysed the alibi and going by the defence at cross examination, appellant was not disputing having been present at home at the time indicated which was after 5:00 pm as he confirmed having left for his home at around 4:00 pm.

86. The alibi raised was a mere afterthought tailor made to mislead the court. The complainant knew appellant very well as they are related and lived in close proximity and so there was no chance of the former making an error over her identification.

87. The trial court therefore was justified in rejecting the defence, as a mere denial. The court therefore finds no merit in the appeal.

88. Thus the court makes the following orders;

i. The appeal is hereby dismissed, conviction affirmed and sentence confirmed.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKUENI THIS 31ST DAY OF MAY, 2019.

.....

C. KARIUKI

JUDGE