



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL APPEAL NO. 115 OF 2015

MM.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from Original Conviction and Sentence in Mutomo Senior Resident Magistrate's Court Criminal Case (S.O.) No. 38 of 2014 by Hon. Z. J. Nyakundi (PM) on 22/12/15)

J U D G M E N T

1. **MM**, the Appellant, was charged with the offence of **Defilement** contrary to **Section 8(1)** as read with **Section 8(4)** of the **Sexual Offences Act No. 3 of 2006**. Particulars of the offence were that on diverse dates between the year **2012** and the month of **July, 2014** in **Ikutha District** within **Kitui County** intentionally caused his penis to penetrate the vagina of **JM**, a girl aged **16 years** and impregnated her.
2. In the alternative he was charged with the offence of **Committing an Indecent Act with a Child** contrary to **Section 11(1)** of the **Sexual Offences Act No. 3 of 2006**. Particulars of the offence were that on diverse dates between the year **2012** and the month of **July, 2014** in **Ikutha District** within **Kitui County** intentionally touched the breast and vagina of **JM**, a child of **16 years** with his penis.
3. Having been taken through full trial he was convicted of the main Count and sentenced to **twenty (20) years imprisonment**.
4. Aggrieved, he appeals on grounds that: The charge was defective and the relationship between the Complainant and the Appellant was overlooked; The burden of proof was not discharged; **Section 150** of the **Criminal Procedure Act** was overlooked and the Constitution was violated.
5. Facts of the case were that PW2, **KM** married the Appellant in **2005**. By then she was a mother of three. The couple was blessed with four children. In the course of their cohabitation the Appellant engaged in penetrative sex with the Complainant, his step-daughter, an act that resulted into the Complainant conceiving. When PW2 confronted her about the pregnancy she identified the Appellant as the person responsible. The Complainant was delivered of the child. The matter was reported to an Administrator, PW3, **Onesmus Mutoka** who caused the Appellant to be arrested. Investigations were carried out that culminated into the Appellant being charged.
6. Upon being put on his defence the Appellant denied having knowledge of the matter. He stated that he had a land dispute with an individual known as **Musyoka Kingote** who bribed PW3 (Assistant Chief) to frame him.
7. The Appeal was canvassed by way of written submissions. It was urged by the Appellant that the charge was defective as no amendment was made after the testimony of witnesses who stated that the Appellant was the Complainant's step-father. That the learned Magistrate misdirected herself in not reaching a specific finding that the burden of proof was discharged. That the trial Court fell into error in not reaching a specific finding to the burden of proof. That the finding of the Court of the first instance was unreasonable and could not be supported by evidence.
8. It was further urged that vital witnesses were not called to testify and no reason was given why they were not called to testify. And, that no indication was given if the Appellant was informed of the right to be assigned an Advocate pursuant to **Article 50(2)(g)** of the **Constitution**.
9. The Respondent opposed the Appeal. It was urged that the case was proved to the required standard.
10. This being a first Appellate Court, I am duty bound to re-evaluate the evidence that was adduced before the trial Court and come to my own conclusion bearing in mind that I never saw or heard the witnesses who testified. **(See Okeno vs. Republic (1972) EA 32)**.
11. The contention of the Appellant is that the conviction was manifestly unsafe as the trial proceeded on a defective charge. A charge sheet

can only be fatally defective if it did not allege an essential ingredient of the offence. (See **Sigilani vs. Republic (2004) 2 KLR**). The Appellant was charged with the offence of **Defilement** which is known in law. Ingredients of the offence were captured in the particulars of the offence which enabled the Appellant to participate in the trial up to the point of defending himself therefore the charge was not defective. It is also urged that the defect emanates from the fact that the Appellant was the Complainant's step-father therefore the charge should have been amended to be incest.

12. **Section 20** of the **Sexual Offences Act** provides thus:

“(1) 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 incest and is liable to imprisonment for a term of not less than ten years:

Provided that, if it is alleged in the information or charge and proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person.

(2) If any male person attempts to commit the offence specified in subsection (1), he is guilty of an offence of attempted incest and is liable upon conviction to a term of imprisonment of not less than ten years.

(3) Upon conviction in any court of any male person for an offence under this section, or of an attempt to commit such an offence, it shall be within the power of the court to issue orders referred to as “section 114 orders” under the Children’s Act1 (Cap. 141) and in addition divest the offender of all authority over such female, remove the offender from such guardianship and in such case to appoint any person or persons to be the guardian or guardians of any such female during her minority or less period.”

13. **Section 22(1)** which is in regard to the test of the relationship provides thus:

“(1) In cases of the offence of incest, brother and sister includes half brother, half sister and adoptive brother and adoptive sister and a father includes a half father and an uncle of the first degree and a mother includes a half mother and an aunt of the first degree whether through lawful wedlock or not.”

The Appellant could have been charged with incest since he was the Complainant's half father per the evidence adduced. However, looking at both offences of defilement and incest, to prove the offence of incest the Prosecution would be duty bound to prove either penetration or an indecent act that causes penetration with the female and the additional element of relationship between the parties while in the case of defilement penetration with the child is key. This must be proved. Therefore, if a step-father is charged with defilement like in the instant case, it does not render the charge defective.

14. To prove the charge, the Prosecution was required to prove beyond any reasonable doubt:

(i) The age of the Complainant.

(ii) The act of penetration.

(iii) Positive identification of the act of penetration. (See **Fappyton Mutuku Ngui vs. Republic (2012) eKLR**).

15. The Complainant adduced in evidence a Birth Certificate that established her age to be sixteen years at the time of the offence as she was born on **1st October, 1996**. In the case of **Mwalengo Chichoro Mwajembe vs. Republic, Criminal Appeal No. 24 of 2015 (UR)** the Court of Appeal stated that:

*“... the question of proof of age has finally been settled by a recent decisions of this court to the effect that it can be proved by documentary evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof” It has even been held in a long line of decisions from the High Court that age can also be proved by observation and common sense. (See **Denis Kinywa -Vs- Republic Criminal Appeal No. 19 of 2014**) and (**Omar Ucher -Vs- Republic Criminal Appeal No. 11 of 2015**). We doubt if the courts are possessed of requisite expertise to assess age by merely observing the victim since in a criminal trial the threshold is beyond any reasonable doubt. This form of proof is a direct influence by the decisions of the Court of Appeal of Uganda in **Francis Omuroni -Vs- Uganda Criminal Appeal No. 2 of 2000**. We think that what ought to be stressed is that whatever the nature of evidence presented in proof of the victim's age, it has to be credible and reliable ...”*

This was therefore sufficient proof of the Complainant's age.

16. It was the Complainant's testimony that she engaged in penetrative sexual intercourse and as a result she got pregnant. She was delivered of a child, **MM** on the **17th day of April, 2014**. A Birth Notification was issued acknowledging the stated birth that was adduced in evidence. To conceive she must have engaged in penetrative sex with a male. Therefore, the person responsible did insert his male genitalia into her female genital organs. This was undisputed.

17. It was the Prosecution's case that the individual who perpetrated the act that caused penetration into the female genital organs of the Complainant was the Appellant, an allegation vehemently denied by the Appellant.

18. In the course of investigations, DNA Profiles generated from the blood samples of the Appellant, Complainant and the child sired by the Complainant were subjected to examination. Per the report adduced in evidence it was concluded that there were 99.99+% more chances that the Appellant was the biological father of the child. To impregnate the Complainant, he did penetrate her genital organs with his male genital organs that spewed sperms. Therefore, he was the perpetrator of the act of the penetration.

19. The Prosecution is faulted for not calling vital witnesses. **Section 143** of the **Evidence Act** provides thus:

“No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.”

In the case of **Mwangi vs. Republic (1984) KLR 595** the Court stated that:

“Whether a witness would be called by the prosecution is a matter within the discretion of the prosecution and a court will not interfere with that discretion unless it may be shown that the prosecutor was influenced by some oblique motive.”

20. In **Keter vs. Republic (2007) 1 EA 135** the Court stated that:

“The prosecution is not obliged to call a superfluity of witnesses but only such witnesses who are sufficient to establish the charge beyond any reasonable doubt.”

21. The most important witness in this case was the Complainant. The act was being done in secrecy. There were no eye witnesses to the act. Her evidence was corroborated by that of the DNA test performed. It was therefore not necessary to call other witnesses who were of no consequence.

22. The learned Magistrate has been faulted for not complying with **Article 50(2)(g)** of the **Constitution** that provides thus:

“(2) Every accused person has the right to a fair trial, which includes the right—

(g) to choose, and be represented by, an advocate, and to be informed of this right promptly;”

23. Looking at the law, it is the constitutional right of any individual charged to retain an advocate for purposes of representation. Ordinarily, the Accused would be reminded of that fact when the trial Court is giving pre-trial directions.

24. In the case of **David Macharia vs. Republic (2011) eKLR** the Court of Appeal addressed the issue of representation by an advocate as follows:

*“The counsel’s role at the trial stage is most vital. This is because of his knowledge of the applicable laws and rules of procedure in the matter before the court, and his ability to relate them to the fact, sieve relevant, admissible, and sometimes complex evidences from what is irrelevant and inadmissible. A lay person may not have the ability to effectively do so and hence the need to hire the service of a legal representative. The importance of a counsel’s participation was succinctly articulated by Lord Denning in his decision in *Pett –vs- Greyhound Racing Association (1968) 2 All E.R 545, at 549. He had this to say:**

“It is not every man who has the ability to defend himself on his own. He cannot bring out the points in his own favour or the weakness in the other side. He may be tongue-tied, nervous, confused or wanting in intelligence. He cannot examine or cross-examine witnesses. We see it every day. A magistrate says to a man: ‘you can ask any questions you like;’ whereupon the man immediately starts to make a speech. If justice is to be done, he ought to have the help of someone to speak for him; and who better than a lawyer who has been trained for the task?”

25. In the case of **Republic vs. Karisa Chengo and 2 Others (2017) eKLR** the Court of Appeal stated as follows:

*“[87] Article 50(2)(h) of the Constitution provides that “[e]very accused person has the right to a fair trial, which includes the right...to have an advocate assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly.” It does not define what “substantial injustice” means. However, in *David Macharia Njoroge v. Republic, (supra)*, the Court of Appeal held that “substantial injustice” results to “persons accused of capital offences” with “loss of life” as the penalty if they have no counsel during their trials. We do not entirely concur with that holding, as it has the effect of limiting the right to legal representation in criminal trials only to cases where the accused person is charged with a capital offence. The operative words in Article 50 (2) (h) are “if substantial injustice would otherwise result...” While it is therefore undeniable that a person facing a death penalty and who cannot afford legal representation is likely to suffer substantial injustice during his trial; the protection embedded in Article 50 (2) (h) goes beyond capital offence trials. The Court of Appeal indeed appears to have embraced this reasoning in a recent decision in *Thomas Alugha Ndegwa v. Republic; C.A No. 2 of 2004*, when it allowed an application for legal representation by the appellant who had been convicted of defilement and sentenced to life imprisonment.”*

26. It has been held that the right to legal representation especially in matters where the Accused is not sentenced to death or life imprisonment where a substantial injustice results will be achieved progressively and not instantaneously therefore the Appellant herein did not suffer prejudice.

27. On the **21st October, 2014**, the Appellant applied to be supplied with copies of the Prosecution witness statements and a charge sheet. An order to that effect was made by the Court and when the matter came up on **16th December, 2014** the Appellant intimated that he was ready to proceed. The case proceeded and he examined witnesses extensively which was proof that he was aware of the nature of evidence that the Prosecution was relying upon.

28. From the foregoing I find no reason to interfere with both the conviction and sentence meted out by the trial Court. Therefore, the Appeal lacks merit and is hereby dismissed.

29. It is so ordered.

Dated, Signed and Delivered at Kitui this 19th day of June, 2019.

L. N. MUTENDE

JUDGE