



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KABARNET

CRIMINAL APPEAL NO. 20 OF 2018

SKC.....APPELLANT

=VERSUS=

REPUBLIC.....RESPONDENT

[An appeal from the original conviction and sentence of the Principal Magistrate's Court at Kabarnet Cr. Case (S.O) no. 9 of 2017 delivered on the 21st day of March, 2018 by Hon. N.M. Idagwa, SRM/

JUDGMENT

1.The appellant was on 21/3/2018 convicted for the offence of incest by a male contrary to section 20 (1) of the Sexual Offences Act and sentenced to imprisonment for life. The particulars of the offence were that the appellant “on the 15th day of September 2013 at Kipsaraman Location in Baringo North Sub-County within Baringo County being a male person did intentionally and unlawfully caused his penis to penetrate the vagina of JC a child aged 7 years who to his knowledge is his daughter.”

2. The conviction and sentence subject of appeal was upon a retrial ordered by the High Court at Eldoret in HCCRA No. 235 of 2013. On appeal from the determination of Principal Magistrate S.O. Temu in KBT PMCCR. Case no. 758 of 2013.

3. The appellant raised the issue of insufficiency of evidence to convict through Amended Grounds of Appeal filed as follows:

“AMENDED GROUNDS OF APPEAL

THAT Your Lordship, the Hon. Trial Magistrate erred in both law and facts by:

1. Failing to understand that the prosecution’s evidence falls far below the threshold of standard of proof.
2. Failing to understand that the age of the complainant was not proved to the required standard.
3. Failing to note that the Investigating Officer never tendered her evidence rendering the case as nugatory.
4. Failing to understand that the doctors finding were inconclusive.
5. Believing and interpreting that the appellant was culpable while relying on uncorroborated evidence which did not shake the defence of the appellant in no way.

Reasons wherefore; that this Appeal be allowed, conviction quashed, sentence set aside and be set free.”

The appellant filed corresponding submissions.

4. The appeal was opposed by the DPP who in oral submissions set out in the record urged that evidence against the appellant was overwhelming, as follows:

“Appellant

I have written submissions. I wish to add that

I rely on the evidence before the court. It shows that the child was not defiled. I was not at the scene as charged when I came back I was told the child had disappeared.

DPP

Appeal is opposed.

Appellant convicted of incest contrary to section 20 (1) of the S.O.A and sentence to serve life imprisonment on 21/3/2018.

Appellant's case was a retrial order of High court in Eldoret.

Pw3 is the complainant. She testified that she used to live with the father and the grandmother. At the time of the incident, the complainant was living in Pw2's house with the permission of the appellant.

On the material day the appellant went to Pw2 house at 3.00pm and picked the complainant from there. He took the complainant to his house where he defiled her. The complainant testified that the appellant put school on her private parts and used a condom in defiling.

The appellant then warned the complainant not to tell anyone or else he would slaughter her. The appellant defiled her throughout the night and repeated it in the morning.

The complainant went to school that day and during lunch time she went to Pw2's house and explained to Pw2 and Pw1 that her father had done bad manners to her.

Pw1 had visited Pw2's house and they both examined the complainant's private parts and established that she had been defiled. The appellant went to Pw2 looking for Pw3 the complainant as she had not gone home after school. That is when Pw2 called to police and the appellant was arrested at Pw2's house.

Pw2 took the complainant to hospital and Pw5 is the Clinical officer who examined the complainant.

On examination, there was reddening of the skin overlapping the Labia Majora and the clitoris. The hymen was missing. That was no discharge or blood that were was foul smell.

There were no injuries and the Clinical Officer explained that lack of bruises and lacerations were because the father had repeatedly severally assaulted the complainant before the incident.

That was the information, she got from the complainant. She concluded there was evidence of penetration. There is no doubt that the complainant was the daughter of the complainant. She testified that the appellant was father and that has not been objected by appellant.

In his defence, appellant appreciated the complainant was his daughter but denied defiling her.

The complainant was 7 years at the time of offence as stated in the charge sheet. There was no doubt to prove age but the complainant stated that she was in class 2 in [particulars withheld] Primary School. The Children's Officer who was her intermediary at the time of testifying told the Court that the complainant had been committed to [particulars withheld] children home. There is no doubt that complainant was below 18 years as per the proviso to Section 20 (1) of the S.O.A.

The evidence is overwhelming. He was the only person with the complainant on the material day and there is no doubt that he took advantage of the absence of the complainant's mother.

The complainant was living with the appellant in the same house as they had separated with the mother of the complainant. Pw3 stated that she did not know where her mother went to. All evidence point at the appellant.

Court to consider the age of the appellant. She also lived with Pw2 and other living there and there was no reason to fix the appellant.

Court to review sentence in accordance with the Supreme Court decision in Muruatetu.

Appellant in reply

I had a grudge with the Pw2."

Issue for Determination

5. The first appellate Court has a duty to reevaluate the evidence presented before the trial Court and makes its own conclusion before considering whether the judgment of the trial Court should be upheld, as held in **Okeno v. R** (1972) EA 32.

6. In this case, the Court must determine whether the offence of incest by male person has been proved by establishing whether defilement is proved and the appellant is shown to have been the perpetrator and also the father of the victim as alleged, with the meaning of section 22 of the Sexual Offences Act definition of incestuous relationships.

Determination

7. Pw1 and Pw2 testified as to how the complainant child while visiting Pw2 told them that her father had been defiling her over time. Pw1 and Pw2 examined the complainant's private parts and found "it was swollen and red in colour [and] there was a place near the clitoris that looked like it had a tear that was healing." Pw2 was a Member of County Assembly, with whom the complainant lived with the consent of her father and Pw1 was a neighbor who had gone to discuss a matter with her MCA (Pw2) when the complainant came home. The appellant was arrested at the MCA's house when he had gone to pick the girl and take her home with him. Pw2 who had by then reported the matter to the Administration Police then "called the police on the phone and they came and arrested him and took him to AP division." Pw2 testified that the complainant girl was frightened of the appellant and had when he came to pick her up "ran and hid behind the house". Pw1 had known appellant since 1982 and she knew him well because his sister is married to her uncle.

8. In her own words, the complainant Pw3 with the aid of an intermediary the Children Officer in charge, Baringo Central described the incidents of alleged defilement as follows:

"PW3

I am VC I now stay at [Particulars withheld] Children's home. I stay with Madam K. I go to [Particulars withheld] Primary School class two. My teacher is called Teacher A before going to [Particulars withheld] Children's home, I used to live with Daddy, grandmother. I used to sleep with daddy. On Sunday daddy sent me to the river to fetch water. I brought him water when night came daddy told me to lie on the bed, he told me to remove the panty, I removed he did bad manners to me. We were on the bed he did bad manners to me here (touches her crouch) I told him I was feeling pain he told me to wait he told me if I tell anybody what I had done he will slaughter me. In the morning again did bad manners to me while on the bed. He did bad manners to me here (witness touches her crouch) he put saliva here (touching her crouch) he used a condom. He removed it from his pocket. I was lying on my back. I opened my legs, my father slept with his stomach. He was lying facing me. Accused had removed his underwear half way. After removing his underwear, that is when he lay on top of me. He then used his front thing that is here (touching her crouch) that what he used to do bad manners. He did like this (witness describes the forward backward movement of the waist) when he was doing this (witness describes the forward backward movement at waist, his front thing was here (touches her crouch) in the morning I left for school. I took porridge before going to school at lunch time I went to mama [particulars withhhed]'s. I found mama [particulars withhhed] at home. I told her what father had done to me. I showed mama Linah where daddy had done. If she placed me on the bed and checked me here (touches her crouch) Daddy then came. Police came and arrested daddy. Because I was feeling pain mama [particulars withhhed] took me to hospital. I don't know the name of the hospital. At the hospital I was examined here (touching her crouch) I have forgotten what I was given in hospital after we left hospital we came here. We came here in Court.

Daddy was doing bad manners to me every day. I told [particulars withhhed] and [particulars withhhed] told Police and police arrested him. My daddy is called C. Mummy left me. I don't know where she went. We were just living the two of us in the house. Daddy and I.

CROSS-EXAMINATION BY ACCUSED IN KISWAHILI

What I have told Court is the truth (witness in tears)

We used to stay at Kipsaraman

I was not at grandmother

I was living with you

You did it in our house

It is your house

I can't remember the date

It was just me and you in that house

B was at grandmother's house

There is no day that you called grandmother and I to the road to come take flour

It is you who was always at home

I hate you because you did bad manners to me (witness crying)

It was on a Sunday when you did it

RE-EXAMINATION: Nil”

9. In allowing the complainant to give evidence, the trial Court had relied upon a *voire dire* examination:

“Although the witness does **not understand what an Oath is**, she knows the difference between truth and lies from there....analysis of the answers she has given me. I find her intelligent enough to know the different between lies and truth. **She will give a sworn statement.**”

10. In this ruling the trial Court fell into error. Having established that the minor did not understand the nature of the Oath but was intelligent enough to justify reception of her evidence, she should have been allowed to give evidence **unsworn**. See section 19 of the Oaths and Statutory Declaration Act.

11. As shown in the quoted record, the trial Court allowed cross-examination of the minor and no prejudice was suffered by the appellant by the Court’s allowance of sworn evidence of the minor who did not understand the nature of the Oath. Section 124 of the Evidence Act requires corroboration of the unsworn statement of a minor who testify under section 19 of the Oaths and Statutory Declaration Act. In this case, therefore, the Court shall look from corroboration of the complainant’s evidence before convicting on it, as the case is not one covered by the proviso to section 124 of the Evidence Act as the complainant’s is not the only evidence available

12. Pw4, the Administration Police Officer supported the testimony of the MCA (Pw2) in reporting to the AP Kipsaraman Camp where they advised her to take the child to Kipsaraman dispensary and in the arrest of the appellant at the home of the MCA when Pw2 told him that he had arrived at the home.

13. The evidence of the complainant on having been defiled is corroborated by the evidence of the examining Clinical Officer, Pw5 who testified as follows:

“PW5

I am Michael Cheburet from Baringo County Referral Hospital. Am a Clinical Officer. I have 15 years’ experience. I have a P3 form for CC which was filed on 15/9/2013 she was 7 years then it is indicated that she had been defiled severally before by the father. She was lastly defiled 2 days before 15/9/2013. She was in fair general condition. She was malnourished with distended abdomen. On examination there was reddening of the skin overlapping the labia majora and the clitoris. She had no hymen. There was no presence of blood or discharge but there was foul smell. Lab test HIV was negative urinalysis normal. She was treated with pain killers and antibiotics. There was evidence of penetration due to the absence of hymen. There was no bruises or lacerations noted since the child had reported that the father had repeatedly sexually assaulted her before if I was the first time bruises and lacerations would be seen. I referred to treatment noted from Kipsaraman dispensary. I also found a treatment form at Kabarnet hospital which I attended to her on 17/9/2013. I examined her too. I wish to produce the P3 form, treatment sheet from Kipsaraman and treatment notes from Kabarnet I signed them myself.

PROS: I pray that treatment notes from Kipsaraman dispensary PMFI – 1 be PEX 1 of those from Kabarnet District Hospital PEX 2 and P3 form 3.

Accused: No objection.

Court: Allowed is prayed.

CROSS-EXAMINATION BY ACCUSED IN KISWAHILI

- I work at Kabarnet hospital.
- I examined the patient.
- I saw the injuries.
- I don’t know who the father is.
- She said it’s the father.
- I can’t tell if you are the father.
- Examined her and made the conclusion and that she had been defiled severally.
- I don’t know who defiled her.

RE-EXAMINATION: Nil”

14. When placed on his defence the appellant gave an unsworn statement denying the charge and alleged a grudge with Pw2 who was staying with his daughter over a debt of Ksh.2000/= as follows:

“DWI

I am K C from Kipsaraman. I am a casual labourer. I know the charges I am facing. I wish to state that I never defiled her. I was the one taking care of my children’s needs. [particulars withhhed] who testified in Court refused to pay my debt that is why she

fabricated this. She wanted to take away any child by force I asked her why she was doing this to me she told me it is because I had refused to give her my daughter and that's why she was punishing me. [particulars withhhed] also snatched money Ksh.350/= from my pocket, when police asked her why she said it is because she was taking care of my daughter. My debt that she refused to pay is Ksh.2000/= she is using this Court to punish me.

There is a time I went to ask for my daughter she hid her in the kitchen and then told me she did not know where my daughter was. On the day of alleged incident I was not at home. It was on Friday I had travelled I came back on Saturday and told the child disappeared. On Saturday I started to look for her. I found on Tuesday. I am wondering how come the child was in [particulars withhhed]'s custody all through I had travelled yet she claims its me who defiled her. When I found the child in [particulars withhhed]'s custody she saw me from a distant and called the police. I asked why and I was told I will know later. I was taken to the police a crowd gathered. I was then brought to Court. That is all.

ACCUSED: I close my case. I have nothing else to add.”

15. The appellant conceded that the child was his daughter. The burden of proof with regard to lack of knowledge of relationship between the appellant and the child is by notice of section 22 (3) of the Sexual Offences Act on the appellant.

16. Weighted against the detailed graphic description of the act defilement by the child complainant, the appellant's denial and allegation of a grudge over Ksh.2000/= debt does not hold. The evidence of Pw5 Clinical Officer confirmed defilement and the child victim testified that it was the appellant whom she knew as her father, and she told Pw2 with Pw1, who on examination found the child's private parts swollen and reddish, a fact confirmed by the treatment notes at the first port of call the Kipsaraman Dispensary on 17/9/2013 as follows:

“c/o pt alleges to have been defiled by the father for long.

On examination, the hymen is broken with extensive scarring of the clitoris and both labia minora and majora.

- Foul smelling discharge
- Tenderness of the hypogastric region

This is a case of defilement of a minor.”

17. I find that the prosecution has proved beyond reasonable doubt that the complainant was defiled; that she was defiled by the appellant and that the appellant knew the complainant to be the daughter; and, consequently, the offence of incest by male contrary to section 20 (1) of the Sexual Offences Act is proved.

18. The complainant's age was given as 7 years on the medical examination form P3; she had to speak to the Court with assistance of an intermediary; she was in class 2; she was taken on rescue to [particulars withhhed] Children's Home and the trial Court observed her during the *voire dire* and although no Birth Certificate was produced there is no doubt the complainant was a child for purposes of section 20 (1) proviso of the Sexual Offences Act. In such circumstances, the offender is liable to imprisonment for life.

19. However, as the appellant is a first offender, there was no occasion for imposing the maximum sentence for no offence, and this Court considers that the imprisonment for life imposed on the appellant was excessive. See *Arissol v. R* (1957) EA 447, 449.

Orders

20. Accordingly, for the reasons set out above, the appellant's appeal from conviction is dismissed. However, the sentence is pursuant to section 354 (3) (b) of the Criminal Procedure Code reduced to a specific term of imprisonment for twenty (20) years commencing from 19/11/2013, the date of sentence in the trial Court in Kabarnet Principal Magistrate's Court Criminal Case No. 758/2013, appeal from which the retrial the subject of this appeal was ordered.

Order accordingly.

DATED AND DELIVERED THIS 30TH DAY OF OCTOBER 2019

EDWARD M. MURIITHI

JUDGE

Appearances:

Appellant in person.

Ms. Macharia, Ass. DPP for the Respondent.