



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

CRIMINAL APPEAL NO. 203 OF 2017

EKC.....APPELLANT

=VERSUS=

REPUBLIC.....RESPONDENT

[An appeal from the original conviction and sentence of the Principal Magistrate's Court at Eldama Ravine Cr. Case no. 40 of 2015 delivered on the 10th day of October, 2016 by Hon. R. Yator, SRM]

JUDGMENT

1. The appellant was on 10th October 2016 convicted and sentenced to imprisonment for life for the offence of incest by a male person contrary to section 9 (1) as read with 9 (2) of the Sexual Offences Act. The particulars of the offence were that he had “on the 20th day of December 2014 in Koibatek sub-County within Baringo County committed an act which caused the penetration of his penis into the vagina of SJ who is to his knowledge his daughter aged 15 years”.

2. The DPP did not oppose the appeal conceding that the complainant was the step-daughter of the accused and, therefore, the offence of incest could not be proved but urged the Court to find the offence of indecent act with a child as proved, in proceedings at the hearing as follows:

“Appellant

I have written submissions. I do not wish to add anything to the submission.

DPP

Appeal is not opposed.

Appellant convicted of incest by a male person contrary to section 20 (1) of Sexual Offences Act and sentenced to serve life imprisonment on 10/10/16.

Pw1 testified that on 20/12/14 at around 8:00 pm she was in their home with her stepfather who is the appellant and her young siblings. The eldest sibling is 11 years and the mother had gone to Elburgon. She was watching TV with the other children who later left them and went to sleep. Appellant also went to sleep. The appellant shared a bedroom with the sibling which was separate from the living room. Appellant used to sleep in the living room.

At around 9:00 pm, the complainant woke up the appellant so that he could lock the door. She went out of the house but appellant called her back. He took her to his bed and defiled her. Pw4 the doctor who examined the complainant confirmed that the complainant had been defiled although she was examined at 6 days, when she decided to tell the mother the truth.

The doctor stated that on examination of the private parts there were bruises and the hymen was not intact. He further stated that on urinalysis there were pus cells and was of the opinion the complainant had been defiled.

Age of complainant was 15 by certificate produced in and showing she was born 27/12/199.

Pw2 who was the mother of the complainant on cross-examination on page 26 line 20 stated that she got married to the appellant in 2002 and she had been married to him for 13 years. The appellant was therefore the step-father of the complainant.

Evidence of defilement is consistent and overwhelming. However, the appellant was charged with incest but Sexual Offences Act the

stepfather is not a father purpose of incest. I therefore urge the Court to use its discretion to review the charge of incest and convict on the alternative charge of indecent act contrary to section 11 (1) of the Sexual Offences Act. That is all."

3. In accordance with the duty of the first appellate Court (see **Okeno v. R** (1972) EA 32), I have re-evaluated the evidence presented before the trial Court in order that this Court makes its own conclusion before considering whether the decision of the trial Court may be upheld.

4. The Court respectfully agrees with DPP that the offence of the incest could not be proved as the complainant (PW1) was a step daughter of the accused as testified by the complainant herself and her mother PW2 who said on cross-examination *"Father to complainant is different as accused married me when I had already given birth to PW1 and I had been married to accused for 13 years and lived together as our child and he played parental responsibility over PW1 and at no time did he refuse he was not his child. When he married me PW1 was around 8 years old."*

5. Section 22 of the Sexual Offences Act defines incestuous relations and does not include the sexual intercourse between a step-father and step daughter, as follows:

"22. (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 mother and an aunt of the first degree whether through lawful wedlock or not.

(2) In this Act-

(a) "uncle" means the brother of a person's parent and "aunt" has a corresponding meaning;

(b) "nephew" means the child of a person's brother or sister and "niece" has a corresponding meaning;

(c) "half-brother" means a brother who shares only one parent with another;

(d) "half-sister" means a sister who shares only one parent with another; and

(e) "adoptive brother" means a brother who is related to another through adoption and "adoptive sister" has a corresponding meaning.

(3) An accused person shall be presumed, unless the contrary is proved, to have had knowledge, at the time of the alleged offence, of the relationship existing between him or her and the other party to the incest.

(4) In cases where the accused person is a person living with the complainant in the same house or is a parent or guardian of the complainant, the Court may give an order removing the accused person from the house until the matter is determined and the Court may also give an order classifying such a child as a child in need of care and protection and may give further orders under the Children's Act."

6. The trial Court in convicting the appellant did not consider the meaning of incest under the Sexual Offences Act and clearly assumed that sexual intercourse between a step-father and daughter amounted to an offence of incest by a male as follows:

"Judgment

I have considered the prosecution and defence evidence and exhibits herein produced as well as the accused's submissions herein filed.

First and foremost is to confirm the relationship between the victim and the accused in order for the charge of incest to stand. The accused in his submissions insists that his relationship with the child was not proved and as such the charge of incest was defective. I however note that PW1 insisted accused was his step father had which fact was confirmed by PW2 who stated she had been married to the accused for 13 years and had lived together with PW1 since she was 8 years old.

Interestingly in his defence the accused did not dispute he was the step father and he clearly stated that he married PW1's mother and had lived together with PW2 at his home in Society as his step daughter. As such it was proved that indeed she was the step daughter to the accused.

On whether the child was defiled she explained how accused called her back to switch off the T.V before pushing her to his bed and defiling her. The P3 form confirmed the child's hymen was not intact and the doctor opined she had been defiled. The accused said he was framed and submitted that the doctor's examination after six days did not prove any penetration and that further no eye witness was called to confirm the allegations.

I however note that an offence can occur without the presence of an eye witness and in this particular case complainant stated that her younger siblings had gone to sleep at their separate room when she had remained behind watching the T.V. The doctor stated that he could not have traced spermatozoa due to the period that had lapsed from occurrence of offence. The child said she was defiled on the 20th December 2014 and was examined on the 1st January 2015.

In relation to the age of the minor, the accused submitted that the assessment report tendered didn't display the internal the doctor

used to ascertain the child's age. I however note that this is not the true position as at no time was the age assessment done nor any age assessment report produced in Court. In fact the child's birth certificate was produced as P. exhibit 4 and as such there was no need for age assessment. P.exhibit confirms child's date of birth as 27th December, 1999 and as such at time of offence she was 15 years old. The accused further submitted that the child was lying to the Court. However, the Court noted how the child courageously testified on the sequence of events.

From the foregoing, I find the prosecution evidence to be quite overwhelming and that indeed the prosecution had proved its case beyond the required standard of proof and that defence case is merely denials and as such the accused is hereby convicted under Section 215 Criminal Procedure Code”.

7. Accordingly, the appellant shall be acquitted of the offence of incest by a male c/s 20 (1) of the Sexual Offences Act, and the conviction and sentence therefor imposed by the trial Court shall be quashed and set aside, respectively.

Indecent Act with a Child

8. As urged by the DPP, the Court considered whether the offence of Indecent Act contrary to section 11(1) of the Sexual Offences Act was proved. Section 11(1) of the Sexual Offences Act provides as follows:

“11. (1) Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years.”

9. Having considered the evidence of the PW1 as confirmed by the evidence of the mother PW2 to whom she reported the incident and the findings of the Clinical Officer and weighed it against the denial and irrelevant information as to rumors of the complainant's biological father seeking to take custody of the child and appellant's non-payment of dowry for the complaint's mother raised by the appellant in his defence, it is clear that the appellant had had sexual intercourse with her and the offence of indecent act with a child contrary to section 11 (1) of the Sexual Offences Act has been proved. She said:

“When the children left accused also went to sleep and I remained alone watching TV and I was watching upto to around 9:00 p.m. and I left to sleep and I told him to switch off the TV and close the door and I went up to our room at the door and he called me back to switch off the TV and I returned and immediately I entered he switched off the TV and the door was still open and there were no lights in the room as lights were switched off and only source of light was TV. He then held me and said I should not dare to talk. He held my mouth and he was behind me and he put me on the bed and he removed my clothes, he removed my inner clothes which was my pant and he threatened that I do not dare to talk or he will kill me and there was no light in the room. He only removed my pant and he had removed his clothes a shirt and trouser and it was at the time he came to push me he did not have them and he was only wearing his inner wear.

He had laid me on the bed and I was facing upwards and he then defiled me and he had left my mouth but threatened to kill if I talked. He had removed his innerwear halfway to the knees. I felt pain when he raped me around my stomach and at my private parts. I did not see any arm but usually there is a panga in that room. He inserted his private parts into mine. I became weak after he raped me and he raped me twice after which he took me up to the door then I went to our room and threatened if I tell anyone he will kill me. When I left the room I left my pant there. I found my siblings were asleep and I did not inform them what transpired and there was no one around I could tell.”

10. In accordance with section 179 (2) of the Criminal Procedure Code, the Court may properly convict an accused of an offence even though he is not charged with the offence in the circumstances:

“179. (1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.

(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.”

11. The offence with its penalty of 10 years imprisonment is a lesser and minor offence relative to the charged offence of incest which provides in cases of a child victim of incest for life sentence under section 20 (1) of the Sexual Offences Act, as follows:

“20. (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 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.

The appellant although not charged with the offence of indecent act with a child is guilty on the evidence for the offence of indecent act with a child contrary to section 11(1) of the Sexual Offences Act.

Orders

12. Accordingly, for the reasons set out above, the Court while quashing the conviction and setting aside the sentence for incest by a male person c/s 20 (1) of the Sexual Offences Act, and therefore acquitting the Appellant thereof, finds the offence of indecent act with a child contrary section 11(1) of the Sexual Offences Act proved against the appellant and convicts him for that offence.

13. The appellant is sentenced to imprisonment for ten (10) years from **15th January 2015** the date of his arraignment in Court and remand awaiting trial.

Order accordingly.

DATED AND DELIVERED THIS 23RD DAY OF OCTOBER 2019

EDWARD M. MURIITHI

JUDGE

Appearances:

Appellant in person.

Ms. Macharia, Ass. DPP for the Respondent.