



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.198 OF 2018

J M.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal arising out of the conviction and sentence of Hon. H. M. Nyaga CM delivered on 8th August 2018 in Makadara CM Cr. Case (S/O) No.1 of 2016)

JUDGMENT

The Appellant was charged with the offence of incest contrary to Section 20(1) of the Sexual Offences Act. The particulars of the offence were that on 25th January 2016 at [particulars withheld] in Embakasi within Nairobi County, the Appellant intentionally touched the vagina of M M K with his penis, who is, to his knowledge, his niece. In the alternative charge, the Appellant was charged with the offence of committing an indecent act with a child, contrary to Section 11(1) of the Sexual Offences Act. The particulars of the offence were that on 25th January 2016 at [particulars withheld] in Embakasi within Nairobi County, the Appellant intentionally touched the vagina of M M K, a child aged fourteen (14) years with his penis. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charges. After full trial, the Appellant was convicted as charged on the main charge and sentenced to serve thirty three (33) years in prison.

In his petition of Appeal, the Appellant raised several grounds of appeal, challenging his conviction and sentence. He faulted the trial court for convicting him on the basis of a defective charge sheet since it was inconsistent with the evidence adduced by prosecution. He asserted that the ingredient of penetration was not established by the prosecution. He was aggrieved that the trial court relied on evidence by the prosecution which was inconsistent and full of contradictions. He took issue with the fact that the trial court failed to take his defence into consideration in arriving at its decision. He was of the view that the sentence meted out by the trial court was harsh and excessive in the circumstances. In the premises, the Appellant urged the court to allow his appeal, quash his conviction and set aside the sentence that was imposed on him.

During the hearing of the appeal, the Appellant presented to court written submissions in support of his appeal. He urged the court to allow his appeal. Ms. Nyauncho for the State opposed the appeal. She made oral submission to the effect that the prosecution had established all the ingredients of the offence of incest against the Appellant to the required standard of proof beyond any reasonable doubt. The complainant was fourteen (14) years of age at the time of the sexual assault. She lived in the same house with the Appellant and his wife. The Appellant's wife was her aunt. As the complainant was sleeping, the Appellant approached her, covered her mouth, threatened her and defiled her. The Appellant's wife was asleep. The complainant stated that she was in pain. She bled. The following morning, the Appellant's wife noticed that the complainant was walking with a limping gait. The complainant told her that the Appellant had sexually assaulted her.

Learned State Counsel averred that the medical evidence adduced established that there was penetration. She had bruises on her vagina. She submitted that the complainant's birth certificate was produced into evidence which established the complainant's age. She asserted that the charge sheet was not defective. She was of the view that the sentence against the Appellant was lenient since the complainant was a minor. In the premises, she urged the court to dismiss the Appellant's appeal.

The facts of the case according to the prosecution are as follows: PW1, M M K, was the complainant. The Appellant's wife was her aunt. She was fourteen (14) years of age at the time of the alleged sexual assault. She lived in Kangundo with her grandmother. On 6th January 2016, she accompanied her aunt and the Appellant to their rural home. They arrived late at night at about 10.00 p.m. They spread a mattress on the floor and the three of them plus the Appellant's child slept on the said mattress. The Appellant slept next to her but on opposite directions, with his head at her feet. In the middle of the night, she felt the Appellant tagging on her underwear and pulling them down. She moved close to her aunt and he stopped. The next morning, he warned her not to tell her aunt about the incident. They left for Nairobi that day and went to

the Appellant's house at Mukuru kwa Njenga. The complainant lived with the Appellant and his wife.

On 27th January 2016, the complainant was in the house with her aunt and the Appellant. The house was a single room. She prepared dinner. She stated that her aunt was not feeling well. Her aunt took some drugs and fell asleep with the baby on the bed. The complainant slept on a mattress on the floor. She stated that at about 10.00 p.m, the Appellant lit up a stove to warm food. He then sat on the coffee table and put his plate aside. He went to where the complainant was sleeping. He covered her mouth. He threatened to kill her if she raised an alarm. The complainant was wearing a skirt. The Appellant pulled down her underwear and inserted his fingers in her vagina. He then started fondling her breasts. He afterwards pulled down his trousers and inserted his penis in her vagina. The complainant stated that she felt pain. She also bled. She felt a liquid oozing out of the Appellant's penis. After the Appellant was done, he went back to bed. The complainant got up and sat at the doorway. The Appellant woke up and ordered to go back inside and warned her against telling anyone about the incident. She went back to the house and slept.

She was still in pain the following morning. Her aunt asked her what was wrong. She told her aunt what had happened the previous night. Her aunt confronted the Appellant and he became very hostile. Her aunt called the complainant's mother. She sent the complainant bus fare to go back home to Kangundo. She was taken to a hospital. She then came back to Nairobi with her mother and they reported the incident to the police. She was afterwards referred to Makadara Health Care for medical examination.

PW2, J N was the complainant's aunt and the Appellant's wife. She stated that the complainant's mother was her elder sister. She testified that the complainant came to live with her to help out with taking care of her child as she awaited admission to a high school. Her house at Mukuru kwa Njenga was a single room. The complainant slept on a mattress on the floor while she, the Appellant and her child slept on a bed. On the material day, she was feeling unwell. The Appellant sent the complainant to get some drugs for her. She took *malariatab*, *panadol* and *piriton* and went to bed. The next morning, she noticed that the complainant was crying. She asked her what was wrong. The complainant however did not say anything. After threatening to cane her if she failed to speak, the complainant finally told her that the Appellant sexually assaulted her the previous night. He had threatened to kill her if she told anyone about the incident. PW2 confronted the Appellant. He denied sexually assaulting the complainant and became very hostile towards her. PW2 stated that the complainant was walking with a limping gait. PW2 informed the complainant's mother who sent bus fare for the complainant to go back home. She was taken to the hospital. The complainant and her mother later came back to Nairobi and reported the incident at the Chief's office. The Chief referred them to the police station. The complainant was afterwards examined at a hospital in Makadara. PW2 stated that she separated with the Appellant after the incident occurred.

PW3, J K is the complainant's mother. She lived in Makadara. She stated that the complainant was fourteen (14) years of age. She produced her birth certificate in evidence. She told the court that PW2 was her sister. The Appellant was PW2's husband. The complainant was previously living with her grandmother in Kangundo. The complainant later moved in with the Appellant and PW2. On 28th January 2016, PW3 received a call from PW2 who informed her that the Appellant was introducing the complainant to boys. She sent PW2 bus fare for the complainant to be taken back to Kangundo. The following day, PW2 called her and told her that the Appellant had sexually assaulted the complainant. She asked her to take the complainant to a hospital. They reported the incident to a police station in Kangundo. They were however advised to travel to Nairobi and report the matter there because the alleged sexual assault occurred there. The complainant was afterwards examined at Makadara Health Centre.

PW4, Dr. Maundu of Police Surgery examined the complainant on 2nd March 2016. He observed that her hymen was intact. However, she had bruises on the lower part of her vaginal wall. He produced the P3 form in evidence. PW5, Betsy Njoroge was a clinical officer at Makadara Health Centre. She examined the complainant on 1st February 2016. She was alleged to have been defiled. Her hymen was intact. However, she had bruises on her posterior fourchette (rear part of hymen). There was also presence of discharge. She produced the Post Rape Care form into evidence.

The case was investigated by Cpl. Agnes Mwanja (PW6) based at Mukuru Police Post. She was assigned the present case on 31st January 2016. The complaint had been reported at the station the previous day on 30th January 2016. PW6 interrogated the prosecution witnesses and recorded their statements. The complainant informed her that the Appellant sexually assaulted her on 25th January 2016 at about 11.00 p.m. PW2 who was in the house at the time, was sound asleep as she had taken some medication. She visited the Appellant's house. She later charged him with the present offences.

The Appellant was put on his defence. He stated that PW2 was his wife. Sometime in June 2015, they separated due to a disagreement. After about six months, they reconciled with the help of their parents. They went to his rural home and left for Nairobi the following morning. The complainant accompanied them. On 23rd January 2016, he again disagreed with PW2. The disagreement was over money. PW2 threatened to leave their home and move in with another man. The next day, the neighbours informed him that he was being accused of sexually assaulting the complainant. He asked PW2 about the allegations. She however denied having knowledge of the same. He stated that he was not in good terms with the complainant's mother (PW3). PW3 had earlier threatened to teach him a lesson. He was arrested and taken to Embakasi Police Station. He denied sexually assaulting the complainant. He stated his wife who was in the house did not witness the incident. He asserted that the complainant's injuries could have been caused by something else other than a sexual assault. He was of the view that the present case was a ploy by his wife to frame him of the charge.

As the first appellate court, it is the duty of this court to subject the evidence adduced before the trial court to fresh scrutiny and re-evaluation, before reaching its own independent determination whether or not to uphold the conviction and sentence of the Appellant. In doing so, this court is required to bear in mind that it neither saw nor heard the witnesses as they testified and cannot therefore make any comments regarding the demeanour of the witnesses (See David Agwata Achira –vs- Republic [2003] eKLR). The issue for determination by this court is whether the prosecution adduced sufficient evidence to secure the conviction of the Appellant on the charge of incest contrary to Section 20(1) of the Sexual Offences Act.

This court has re-evaluated the facts of this case and the applicable law. For the prosecution to establish the charge of incest against the Appellant, it was required to establish the following: that the Appellant was related to the complainant, that there was penetration, and in the case where the complainant is a minor, the age of the complainant. Section 22 of the Sexual Offences Act sets out the specific relationships

that may be considered as constituting an offence of **incest**. By virtue of **Section 22** of the **Act**, a sexual relationship between an uncle and a niece is prohibited. In the present appeal, the complainant stated that the Appellant was her uncle. He was married to PW2 who was a sister to the complainant's mother (PW3). This evidence was corroborated by PW2 and PW3. The Appellant did not challenge the same. It was therefore established that the complainant is the Appellant's niece.

With regards to the age of the complainant, she testified that she was fourteen (14) years old at the time of the sexual assault. This evidence was corroborated by her mother, PW3. The complainant's **birth certificate which indicated that she was born on 8th October 2001 was produced in evidence. This evidence remained unchallenged by the Appellant. This court therefore holds that the prosecution did establish that the complainant was a child within the meaning of Section 2(1) of the Children Act.**

With regards to the ingredient of penetration, Section 2(1) of the Sexual Offences Act defines the same as:

“the partial or complete insertion of the genital organ of a person into the genital organs of another person.”

PW1 was living with the Appellant and his wife in their single-roomed house. She slept on a mattress on the floor while the Appellant, his wife (PW2) and their child slept on the bed. On the material day, PW2 was unwell. She took some drugs and fell sound asleep. PW1 narrated to the court how the Appellant sexually assaulted her. He went to where she was sleeping. He covered her mouth with his hand and warned her against making any sound. She was wearing a skirt. He pulled down her underwear and inserted his fingers in her vagina. He then fondled her breasts. Afterwards, he pulled down his trousers and proceeded to insert his penis in her vagina. The complainant stated that she felt liquid ooze out of the Appellant's penis. After he was done, he went back to his bed. He warned her against telling anyone. She told her aunt (PW2) about the sexual assault by the Appellant the following day. PW2 informed her mother (PW3) who then took the complainant to hospital and reported the matter to the police station.

PW1 was examined by PW5 at Makadara Health Centre on 1st February, 2016. On examination, she noted that PW1's hymen was intact. However, she had bruises on her posterior fourchette (lower part of the vulva). She was also examined by Dr. Maundu (PW4) on the 2nd March 2016. He made similar observations. This court notes that the complainant was examined about a week after the alleged sexual assault occurred. The presence of injuries along the entry point of her vagina, points to the fact that there was partial penetration. The fact that the hymen was intact does not in itself imply that there was no penetration. As stated earlier in this judgment, penetration encompasses partial or complete insertion of the genital organ of a person into the genital organ of another person. In the case of Erick Onyango Ondeng vs Republic [2014] eKLR the Court of Appeal addressed itself as follows:-

“We agree with the first appellate Court that to establish defilement, it is not necessary that the hymen must be broken; even partial penetration of the female genital by male genital will suffice to constitute the offence. In TWEHANGANE ALFRED VS UGANDA [2003] UGCA the Uganda Court of Appeal expressed the same view as follows:

“In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured.”

The complainant narrated to the court how the Appellant, her uncle, sexually assaulted her. She stated that he inserted his fingers in her vagina after which he inserted his penis into her vagina. She stated that she felt liquid ooze out of his penis which is indicative of an ejaculation. This court is of the view that the evidence adduced by the complainant was sufficiently corroborated by the medical evidence of presence of injuries at the entry point of the vagina. It was further guided by PW2's evidence that the complainant had a limping gait the following morning after the sexual assault. She informed PW2 and PW3 that the Appellant had sexually assaulted her. It is therefore clear that the evidence adduced established that the prosecution did indeed prove penetration to the required standard of proof. The complainant's testimony before court had a ring of truth in them. The **Proviso** to **Section 124** of the **Evidence Act** clearly applies.

The Appellant's defence that his wife framed him does not hold water. The Appellant and his wife had just reconciled. The complainant was staying with them since PW2 needed help taking care of their child. The Appellant had earlier, while at Kangundo, attempted to sexually assault the complainant. The Appellant, PW2 and the complainant were sleeping on the floor on the same mattress when she felt him pulling down her underwear. She moved close to her aunt. He was thwarted in his endeavour. The medical evidence also established that indeed the Appellant was sexually assaulted. She underwent counselling after the incident occurred. For the above reasons, this court finds that the prosecution established the Appellant's guilt on the charge of **incest** contrary to **Section 20(1)** of the **Sexual Offences Act** to the required standard of proof beyond any reasonable doubt.

As regard sentence, the Appellant was sentenced to serve thirty-three (33) years imprisonment. This was after the trial court had taken into consideration the period of two years that the Appellant was in remand custody. Upon re-evaluating this sentence, this court formed the view that the same was legal. **Section 20** of the **Sexual Offences Act** provides that anyone convicted of the charge of incest where the victim is a child shall be liable to be sentenced to serve life imprisonment. In the present appeal, this court sees no reason to interfere with the exercise of the sentencing discretion of the trial court. The Appellant's appeal therefore lacks merit and is hereby dismissed both on conviction and sentence. It is so ordered.

DATED AT NAIROBI THIS 17TH DAY OF DECEMBER 2019

L. KIMARU

JUDGE