



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUSIA**

**CRIMINAL APPEAL NO. 58 OF 2016**

**F M B.....APPELLANT**

**VERSUS**

**REPUBLIC.....REPUBLIC**

*(From the original conviction and sentence in S.O.A case No. 28 of 2015 of the Chief Magistrate's Court at Busia by Hon. Hannah Ndung'u- Chief Magistrate)*

**JUDGMENT**

1. The appellant, **F M B**, was convicted of the offence of incest contrary to section 20 (1) of the Sexual Offences Act No. 3 of 2006.
2. The particulars of the offence were that on the 24<sup>th</sup> January 2015 at **[Particulars withheld]** sub Location of **BUSIA** County, being a male person, caused his penis to penetrate the vagina of **S N**, a female juvenile who was to his knowledge his step daughter.
3. He was sentenced to life imprisonment.
4. The appellant was in person. He raised the following grounds of appeal:
  - a) That the learned trial magistrate erred in law and in fact by failing to appreciate that his rights to fair trial were violated.
  - b) That the charge was incurably defective.
  - c) That the learned trial magistrate erred in law and in fact by relying on hearsay.
  - d) That the learned trial magistrate erred in law and in fact by disregarding the defense.
  - e) That the learned trial magistrate erred in law and in fact by convicting him without sufficient evidence.

**5. The state opposed the appeal through Mr. Owiti, the learned counsel.**

6. The facts of the prosecution case were briefly as follows:

When the mother of the complainant was attending a funeral, the appellant took **S N** to his bed and defiled her.

7. The appellant in his defence denied the offence. He testified on how he was arrested.

8. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **OKENO vs. REPUBLIC [1972] EA 32**.

9. The appellant contended that his right to fair trial was violated. Other than making this general statement, he never demonstrated how this was violated. My perusal of the record did not reveal any such instance. In any case, the law is now settled where an accused person alleges that his rights were breached. The recourse is to file a civil suit for compensation but cannot be a basis for acquittal. This was held by the Court of Appeal in the case of **JULIUS KAMAU MBUGUA vs. REPUBLIC [2010] eKLR** when it stated in a very well researched judgment:

*In our view, it is not the duty of a trial court or an appellate court dealing with an appeal from a trial court to go beyond the scope of the criminal trial and adjudicate on the violations of the right to personal liberty which happened before the criminal court assumed jurisdiction over the accused.*

*However, the trial court can take cognizance of such pre-charge violation of person liberty, if the violation is linked, to or affects the criminal process. As an illustration, where the prolonged detention of a suspect in police custody before being charged affects the fairness of the ensuing trial e.g. where an accused has suffered trial – related prejudice as a result of death of an important defence witness in the meantime, or the witness has lost memory, in such cases, the trial court could give the appropriate protection – like an acquittal. Otherwise the breach of a right to personal liberty of a suspect by police per se is merely a breach of a civil right, though constitutional in nature, which is beyond the statutory duty of a criminal court and which is by Section 72 (6) expressly compensatable by damages.*

Though this decision was made before the advent of the new Constitution, the principle applies to the new Constitution. If the appellant is aggrieved, he is at liberty to file a civil suit to seek redress.

10. It is the contention of the appellant that his wife who is also the mother of the complainant was not called to testify and that this was fatal to the prosecution case. The legal position is clear on the failure to call material witnesses. The Court of Appeal for East Africa in **BUKENYA vs UGANDA [1972] EA 549**, (Lutta Ag. Vice President) held:

*The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.*

*Where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.*

11. The prosecution and the court were thrown into a dilemma. Apparently the family decided to sabotage the hearing in order to save the appellant. Guided by the decision in **BUKENYA vs UGANDA** (supra), I will endeavour to find if there was sufficient evidence for a conviction.

12. Though the appellant contended that the charge was incurably defective, the same is not supported by any facts. He was charged with incest contrary to section 20(1) of the Sexual Offences Act. The particulars of the offence disclosed all the ingredients of the offence. Even if there were defects, unless the appellant was prejudiced, the defects are normally cured under section 382 of the Criminal Procedure Code. In the case of **JMA v. Republic (2009) KLR 671**, it was held inter alia that:

*It was not in all cases in which a defect detected in the charge on appeal would render a conviction invalid. Section 382 of the CPC was meant to cure such an irregularity where prejudice to the appellant is not discernible.*

This ground on defective charge lacks merit.

13. What is hearsay? **Black's Law Dictionary Ninth Edition** defines hearsay as follows:

*Traditionally, testimony that is given by a witness who relates not what he or she knows personally, but what others have said, and that is therefore dependent on the credibility of someone other than the witness.*

There are, however, several exceptions to the hearsay rule and in our case is where the witness is unavailable. One of the condition to be satisfied is that the relevant person cannot be found although such steps as it is reasonably practicable to take for him have been taken (see **Phipson on Evidence, Eighteenth Edition** para 30-24 on page 970).

14. Some aspects of the evidence of **Sgt Gladys Legsom (PW2)** were hearsay. These were the details she gave and attributed them to the mother of **S N**. This is a witness where all attempts to secure her attendance in court were made including issuance of a warrant of arrest. All reasonable steps were taken to avail this witness but it would appear that the family colluded to defeat justice. I therefore find that the hearsay evidence attributed to her, was admissible. The admissible hearsay evidence was tested like any other evidence on record.

15. It was contended that the learned trial magistrate disregarded the appellant's defence. The appellant's defence amounted to mere denial and this denial was subjected to evaluation together with other evidence on record before it was dismissed.

16. The evidence of **S N** is that the appellant inserted his fingers into her vagina. This was at night after he had picked her from where she was sleeping with her sister, and placed her on his bed. When **Cornelius Ambase (PW3)** examined her on 26<sup>th</sup> January 2015, he made the following findings:

- a) Swollen on both labia;
- b) Broken hymen;
- c) Hyperaemic vaginal walls; and
- d) Thick whitish discharge from the vaginal introitus extending to the labia majora.

17. When he examined the appellant, he found that he had a yellowish discharge from his urethra.

18. The medical evidence corroborated the contention by S N. At her age, she may be excused when she says that the appellant inserted his fingers into her genitalia.

19. The proviso to section 124 of the Evidence Act provides as follows:

**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 accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.** [Emphasis added]

In the instant case the learned trial magistrate recorded her reasons as to why she believed that S N was telling the truth.

20. In a case of defilement, the prosecution has the onus of proving the following:

- a) The penetration of the complainant's genitalia;
- b) Whether the victim is a child and the age of such a victim; and
- c) Whether the penetration was by the Appellant.

These ingredients were succinctly expressed by Judge Joel Ngugi in the case of **FAPPYTON MUTUKU NGUI vs. REPUBLIC [2012] eKLR** at paragraph 24 he said:

***Going by this definition of defilement, I agree with Mr. Mwenda on the issues which the court needs to determine. 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.***

In a case of incest, a prohibited degree of consanguinity must also be proved. The age of a victim is relevant for sentencing purposes.

21. The test of relationship is provided for under section 22 (1) & (2) of the Sexual Offences Act which states:

***(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.***

***(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.***

The appellant, it was proved, is a step father of S N. All the necessary ingredients therefore, were proved against the appellant.

22. Section 20(1) of the Sexual Offences Act provides as follows:

***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.***

S N, the complainant herein was 7 years at the time of the commission of the offence. The sentence cannot be said to be harsh especially factoring the prescribed sentence in section 8 (2) of the Sexual Offences Act.

23. The appeal is dismissed for want of merits.

**DELIVERED and SIGNED at BUSIA this 15<sup>th</sup> day of March, 2018**

**KIARIE WAWERU KIARIE**

**JUDGE**