



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CRIMINAL APPEAL NO.156 OF 2017

(Appeal Originating from Nyahururu CM's Court SOA 6 of 2016 by: Hon. V. Ochanda – R.M.)

N N M.....APPELLANT

- V E R S U S -

REPUBLIC.....RESPONDENT

J U D G M E N T

N N M, the appellant, was convicted for the offence of incest contrary to Section 20(1) of the Sexual Offences Act.

The particulars of the charge are that on 5/1/2016 at [particulars withheld] of Laikipia County, intentionally and unlawfully caused his genital organ, namely penis, to penetrate the genital organs, namely the anus of **D.G.M.** a child aged 4½ years.

In the alternative, he faced a charge of incest contrary to section 20(1) of the Sexual Offences Act in that on 5/1/2016 at [particulars withheld], intentionally and willingly caused his genital organ to penetrate the genital organ i.e. the anus **D.G.M.** a child aged 4½ years.

Upon conviction, the appellant was sentenced to life imprisonment.

The appellant is dissatisfied with both the conviction and sentence which provoked this appeal. The grounds of appeal are contained both in the petition of appeal filed in court on 8/5/2017 and submissions filed in court on 30/1/2018.

The grounds are that:

- (1) The trial court erred in believing the evidence of PW1 & 2 who are his family members;***
- (2) That there were contradictions in the prosecution evidence;***
- (3) That there was no evidence to connect the appellant with the offence;***
- (4) That the charge was not proved to the required standard.***

The appellant added to his submissions that he was framed by the wife with whom they had disagreed.

The appeal was opposed by the learned counsel for the State **Ms. Rugut**, who submitted that the complainant's mother PW3 testified that the appellant is the biological father of the complainant which fact was corroborated by PW4; that the complainant was declared a vulnerable witness due to his age but PW2 told the court what the boy kept telling her that his father had done '*tabia mbaya huku nyuma*' and the doctor, PW3 found the anus to have lacerations and a tear. She urged the court to dismiss the appeal.

This is the first appellate court and it is the duty of this court to re-examine all the evidence tendered before the trial court, analyze it and make its own determination but remembering that it is the trial court which had the advantage of seeing the witnesses testify and can gauge their demeanor.

The minor was brought to court on 20/4/2016, and apart from stating his name, he did not answer any questions and was referred to counseling. Even after counseling, the child was unable to speak and upon application by the prosecution, he was declared a vulnerable witness and the mother was allowed to testify as the intermediary.

PW2, M M N testified that, D (PW1) is her second born son and was born on 29/9/2010 and that the father is the appellant, **N M**; that on

5/1/2016, she took the bigger child to school and carried the smaller one on the back while the complainant was left with the father. She returned home next day; that the complainant complained of pain in the anus and she enquired from him what was wrong and he said that his father used a stick behind him. Next day, she went to do casual jobs and thereafter took the child to a nearby private hospital and the doctor referred her to a Government Hospital. She reported to the chief who sent her to the police station for P3 form. Doctors were on strike and the chief came to arrest the appellant; after the chief interrogated the complainant, PW2 said that the complainant kept saying that ‘*baba tabia mbaya*’.

PW3, Harrison Karuri examined the complainant on 7/1/2016. Upon examination, he found a laceration on the anal region and that HIV was positive. PW3 said the child told him what he had told the mother.

PW4 Geoffrey Maina Kangangi told the court that the appellant hails from his village where he is an elder and it is the wife who reported the defilement to him. He informed the Assistant Chief and also talked to the child who confirmed that the appellant defiled him.

PW5 PC John Mburu took over this case as investigating officer from P.C. Ezekiel. He was familiar with this case and was at the police station when PW2 made a report of the complainant having been abused by the father and the appellant was arrested by the public on 8/1/2016. PW5 said he recorded the complainant’s statement where he stated that he was defiled by the appellant.

In his unsworn defence, the appellant recalled 8/1/2016 when he was arrested in [particulars withheld]; that on 5/1/2016 a 12 year old girl told him that his son was doing bad manners.

In a charge of incest, it is the duty of the prosecution to prove beyond any reasonable doubt.

(1) That there was penetration of the victim or an indecent act to the victim;

(2) The relationship of the perpetrator and victim must fall within the category of relationships listed under Section 20 of the Sexual Offences Act i.e. mother, son, daughter, niece e.t.c.

(3) The age of the complainant for purposes of sentencing.

PW2, the mother of the complainant told the court that the complainant was born on 29/9/2010 and hence was about 4½ years as of 5/1/2016 when the offence was allegedly committed. The complainant’s immunization card was produced in evidence as P.Ex.No.1 and shows the date of birth to be 29/9/2010. It is PW5 who said that date of birth was 1/10/2010 but the court has no idea where he got that from and it is what he indicated in the PCR form. However, the P3 form indicates that PW1’s age was 4½ years. PW2 being the mother of the complainant is the best placed to know his age and her evidence is supported by the immunization card. The court will agree with the trial court’s findings that PW1 was 4½ years old as of 2016.

When PW1 attended the court on 20/4/2016 and told the court his name, he was totally unable to say anything else despite an adjournment to have him undergo counseling. It is PW2, his mother who testified as an intermediary. PW1 was indeed a child of very tender age.

PW2 testified that the appellant was her husband and the biological father of the complainant and two other children. PW4 the village elder corroborated PW2’s testimony. The appellant did not deny the fact that he is the biological father of the complainant.

Whether there was penetration: Penetration is defined as “***the partial or complete insertion of the genital organs of a person into the genital organs of another person.***”

The question then is whether the appellant committed the heinous act on the complainant. PW1 explained to the court that she left the home with the other 2 children leaving the complainant with the appellant and did not return but upon returning next day, PW1 told her that the father had done ‘*tabia mbaya*’ to him (bad manners) in the anus and that he kept repeating that the father put a stick in his anus. PW4, a village elder told the court that when PW2 reported the matter to him, he interrogated the complainant who told him what the appellant did to him.

PW5 who recorded PW1’s statement also told the court that complainant told him in Kikuyu that he was defiled. PW4 & 5 however did not tell the court the exact words that PW1 told them. PW2’s evidence was corroborated by the findings of the doctor that there was a laceration in the anal opening at 12.00 noon while lying on the abdomen. This was evidence of penetration.

The defence was a mere denial. In fact, he only addressed his arrest on 8/1/2016. The appellant stated that a girl alleged the son did bad manners but that defence was so vague that it does not make any sense. During the hearing of his appeal, the appellant alleged that the wife framed him because they had disagreed. PW2 seemed to agree that indeed she was not getting along with the appellant because the said appellant had not been talking to her for 2 weeks and she had taken the first child back to her mother to live there. Despite the fact that PW2 admitted to there having been a strain in their relationship, the appellant did not raise it in his defence. He cannot raise it during the appeal. Furthermore, PW1 was left with the appellant, he was found to be in pain and alleged the father had done bad manners to him which story he repeated to PW4 & 5. PW3’s findings did corroborate those testimonies. PW2 could not have inflicted injuries on PW1 in order to frame the appellant. Besides PW1 is too young a child to know what it is to frame somebody.

In his submissions, the appellant alleged couching of witnesses. That allegation is not clear and one wonders who would have couched PW2 or the doctor. PW1 did not testify and so could not be couched. That ground is baseless.

I have read the provisions of section 20(1) of the Sexual Offences Act. I find that the Section does not provide for a n incest of a male upon another male and so the appellant was wrongly charged under Section 20(1) of the Sexual Offences Act and the court erred in convicting the

appellant under that section.

It is however clear that PW1 was sexually assaulted. He told the mother that the father put a stick in his anus. There was evidence of penetration. It is not clear whether the appellant used his genital organ to penetrate PW1 or used something else. For that reason, I will find that the facts disclose an offence of commission of an indecent act. I hereby quash the conviction under Section 20(1) of the Sexual Offences Act and instead find the appellant guilty of the offence of committing an indecent act with a child contrary Section 11(1) of the Sexual Offences Act.

I quash the sentence of life imprisonment and substitute it with 15 years imprisonment.

Dated, Signed and Delivered at NYAHURURU this 19th day of April, 2018.

.....

R.P.V. WENDOH

JUDGE

PRESENT:

Ms. Rugut - Prosecution Counsel

Soi - Court Assistant

Appellant - present