



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 105 OF 2016

CORAM: D.S. MAJANJA J.

BETWEEN

P M.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. O. Wanyaga, RM dated 18th November 2016 at the Senior Principal Magistrate's Court at Maua in Criminal Case No. 2603 of 2016)

JUDGMENT

1. The appellant, **P M**, was charged and convicted of the offence of incest contrary to **section 20 (1)** of the **Sexual Offences Act**. It was alleged that on 20th August, 2016 in Igembe South Sub-County of Meru County, he intentionally caused his penis to penetrate the vagina of JM a child aged 9 years who was to his knowledge his niece. He was convicted and sentenced to life imprisonment and now appeals against conviction and sentence.
2. The thrust of the appellant's appeal as set out in his grounds of appeal and written submissions is that the prosecution did not prove the offence beyond reasonable doubt.
3. It is the duty of this court, being a first appellate court, to subject the evidence on record to a fresh review and scrutiny and come to its own conclusions all the time bearing in mind that it did not see the witnesses testify as to form its own opinion on their demeanour (see **Okeno v Republic [1972] EA 32**).
4. The evidence before the trial court was as follows. The child (PW 2) who gave sworn testimony after a *voire dire* recalled that the appellant was her uncle as he was a brother to her father and that they were living in the same compound. On the afternoon of 20th August 2016, while she was playing, the appellant called her into his house. She described in graphic terms what took place as follows;

He asked me to play the snake game. His house is one roomed. I was seated on his bed. He closed the door and removed my clothes. I was wearing a skirt. He removed my skirt. He also removed my pant. He lay on me. He removed his trousers before coming on top of me. I was on the bed. He did sex to me. He inserted his penis into my vagina. He had closed my mouth. I jumped out of bed and pulled up my dress and ran out. I opened the door and ran out. I felt a lot of pain.

5. When PW 2 ran out of the appellant's house, she told her sister what had transpired. Her sister then called her sister in law, PW 3, who then called her mother, PW 1. PW 3 recalled that on the material afternoon PW 2 came to her house with her sister and narrated to her what took place. She quickly called PW 1 who came and they went to report the incident. In the meantime, PW 1, upon receiving information of the incident called her elder son who called the administration police officers who came and arrested the appellant.

6. After reporting to Maua Police Station, PW 2 was taken to Nyambene District Hospital on the night of 20th August 2016. The medical history was given by a Clinical officer, PW 4, who testified on behalf of her colleague who had examined PW 2. According to the P3 form, there were visible bruises on the genitalia and the hymen was absent although there was no obvious discharge. The high vaginal swab revealed pus cells. The Clinical Officer concluded from the bruises and hymen being absent that there was penetration.

7. The investigating officer, PW 5, confirmed that the incident was reported at Maua Police Station on 20th August 2016 at 5.00pm. She issued the P3 form and referred PW 2 for examination and treatment. She told the court that the appellant was arrested by administration police officers and brought to the police station where he was re-arrested and later charged.

8. In his defence, the appellant admitted that PW 2 was his niece and that on the material day she came to his house and found him sleeping. She took the phone and started playing with it. She stayed in his house for about 30 minutes. As the phone had no charge, she left. He also left the house to go and spray his miraa whereupon he was arrested.

9. **Section 20(1) of the Sexual Offences Act** ("the Act") defines the offence of incest 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 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. [Emphasis mine]

10. An "indecent act" under **section 2** of the **Act** is defined as an unlawful intentional act which causes, "(a) any contact between any part of the body of a person with genital organs, breasts or buttocks of another, but does not include an act that causes penetration" while "Penetration" under **section 2** of the **Act** means, "the partial or complete insertion of the genital organs of a person into the genital organs of another person."

11. The relationship between the appellant and PW 2 was established as PW 2 testified that the appellant was a brother to her father and he confirmed in his defence that she was his niece. There is no doubt that they knew each other, the incident took place at daytime in the same compound they lived hence there was no chance of mistaken identity. Moreover, the appellant, in his defence admitted that on the material after noon, PW 2 was in his house.

12. The testimony of PW 2 established the element of penetration from her testimony. The trial magistrate noted that PW 2's sworn evidence was, "very consistent even in cross-examination." By reason of the proviso to **section 124** of the **Evidence (Chapter 80 of the Laws of Kenya)**, it did not require corroboration if the magistrate, for reasons to be recorded believed her.

13. In this case though, there was sufficient evidence to corroborate PW 1's testimony. There was the evidence of PW 3 to whom PW 2 narrated her ordeal immediately after the incident. The medical evidence produced by PW 4 was that PW 2 was examined on the very same day and the evidence of

bruises on her vagina was consistent with and pointed to the fact of penetration. I am also satisfied that the series of event on that day from the time PW 2 was sexually assaulted, to the time the incident was reported upto the time she was examined later that night support the credibility of the prosecution case. I reject the appellant's submission that the prosecution evidence was undermined by failure of PW 1 and PW 3 to check PW 2's private parts. As I stated earlier, the appellant's defence put him at the *locus in quo* and I did not see any evidence of a grudge.

14. The age of a child is a question of fact and in as much the birth certificate was not produced, the P3 form and PRC form prepared by the medical officers confirmed that PW 2 was 9 years old. PW 2 stated in her *voire dire* examination that she was 9 years old and the trial magistrate, who observed her testify, concluded that she was 9 years old. Since PW 1 was below the age of 11 years which would attract a life sentence under the provisions of **section 8(2)** of the **Act** had the appellant been charged with defilement, I find the life sentence imposed legal and proper.

15. The prosecution proved all the elements of the offence of incest. The conviction and sentence are affirmed.

16. The appeal is dismissed.

DATED and DELIVERED at MERU this 29th day of May 2018.

D.S. MAJANJA

JUDGE

Appellant in person.

Mr Namiti, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.