



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL APPEAL NO. 111 OF 2015

P M K APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Being an Appeal from the Original conviction and sentence in Mwingi Senior Resident Magistrate's Court Criminal Case No. 41 of 2015 by G. W. Kirugumi R M on 03/12/15)

J U D G M E N T

1. **P M K**, the Appellant was charged with the offence of **Incest** contrary to **Section 20(1)** of the **Sexual Offences Act No. 3 of 2006**. Particulars of the offence were that on diverse dates between the month of **November, 2013** and the month of **February, 2014** in **Migwani District of Kitui County** being a male person, caused his penis to penetrate the vagina of **D K** a female person who was to his knowledge his daughter.

2. Facts of the case were that the Appellant's wife died leaving him with children among them the Complainant herein. They lived in one house. On diverse dates between **November, 2013** and **February, 2014** he molested her sexually. The Complainant used to attend a school for orphans at [particulars withheld] where PW3 **C M K** worked. On the **15th February, 2014** PW4 noticed that the Complainant was not going to school. When she went to school she confronted her and she explained that she had a problem at home as her father prevented her from going to school since he was molesting her sexually. The school reported the matter to the police. The Complainant was examined by PW2 **Doctor Christopher Waihenya** who found her hymen broken. She had vaginal lacerations that showed the presence of pus cells and epithelial cells. She was treated for the infection. The Appellant was arrested and charged.

3. When put on his defence, the Appellant who made an unsworn statement stated that he was framed up. He denied having committed the offence and stated that the Complainant was taken to an unknown place, a fact that worries him.

4. The learned Magistrate considered evidence adduced, convicted him and sentenced him to **life imprisonment**.

5. Aggrieved by the conviction and sentence he appealed on grounds that:

- Evidence adduced was not corroborated.
- The case was not proved to the required standard.
- The sentence imposed was erroneous.

6. The Appellant canvassed the Appeal by way of written submissions. He averred that the charge was defective as it was general hence not specific as to when the offence was committed. That evidence adduced was contradictory and uncorroborated. Evidence adduced by the Complainant's sibling who was called as a defence witness was not considered. **Section 150** and **169** of the **Civil Procedure Code** were not complied with.

7. In response **Mr. Mamba**, learned Counsel for the State opposed the Appeal. He reiterated facts of the case as presented. He argued that the charge sheet was properly framed. That PW1 had no reason to frame up her father. Other witnesses who could have been called were siblings of the Complainant who could not have testified against the father and that corroboration was not a requirement.

8. This is a first Appeal where I am required to re-assess the evidence adduced at trial and reach an independent finding bearing in mind the

fact that I had no opportunity of hearing or seeing witnesses who testified so as to assess their credibility (**See Pandya vs. Republic (1957) EA 336; Okeno vs. Republic (1972) EA 32.**)

9. The manner of framing charges is provided for in **Section 137** of the **Criminal Procedure Code**. The statement of offence has been given. The section of the statute that creates the offence has been disclosed. The time/period within which the offence is alleged to have been committed is stated. In the case cited by the Appellant of **Sigilani vs. Republic (2004) 2 KLR 480** it was held thus:

“The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence.”

The particulars of the offence have been stated in a clear and concise language capturing ingredients of the offence of incest. The charge was read to the Appellant, he understood it and participated in the trial as required by law. In the premises no defect is disclosed.

10. The Appellant is charged with **Incest** contrary to **Section 20(1)** of the **Sexual Offences Act No. 3 of 2006** that provides thus:

“(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.”

11. The relation between the Appellant and the Complainant of father and daughter respectively is not denied. To buttress the case the Prosecution adduced in evidence a child health card issued to the Complainant at birth which bear the name of the Appellant as her father.

12. The Prosecution therefore had the duty of proving the act of penetration. On medical examination it was proved that the hymen of the Complainant was broken and she had an infection. This was evidence of penetration into her genitalia.

13. The Appellant argued that the Complainant’s evidence required corroboration. That her two (2) siblings (boys) should have been called as witnesses by the Prosecution.

14. **Section 143** of the **Evidence Act** provides thus:

“No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.”

15. In the case of **Keter vs. Republic (2007) 1 EA 135** the Court held that:

“The prosecution is not obliged to call a superfluity of witnesses but only such witnesses as are sufficient to establish the charge beyond reasonable doubt.”

16. The Complainant testified that her father would creep into her bed, remove her inner wear, lie on her and ‘do bad things’. She said that she would never cry because he had threatened to beat her. Solar light enabled her to see him. On cross examination she stated that her siblings were not hearing as he defiled her. The Appellant called his 16 years old son **M P** as a witness. He stated that when their mother died the Complainant was taken by their aunt, **D M** who lived with her. That the Appellant, his father was arrested following allegations that he had defiled the Complainant. He further stated that **C M K** asked him if the Complainant had been defiled and promised to pay for him school fees if he implicated his father. DW3 **D M**, a sister of the Appellant stated that he lived with the Complainant after her mother’s demise. That when **C M K** (PW3) took up the matter she did not involve her.

17. In her testimony PW2 **C M K** stated that the Complainant moved to stay with her aunt after the matter was reported to the police.

18. The Complainant herein was a child of an apparent age of 11 years. At the point of testifying in Court she was in standard six. This is a sexual offence. **Section 124** of the **Evidence Act** provides thus:

“Notwithstanding the provisions of section 19 of the Oaths and Statutory

Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:

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.”

In the case of **Mohamed vs. Republic (2006) 2 KLR 138** the Court of Appeal stated that:

“It is now settled that the court shall no longer be hamstrung by requirements of corroboration where the victim of a sexual offence is a child of tender years if it is satisfied that the child is truthful.”

The trial Magistrate in the matter on considering evidence adduced believed the Complainant. She stated that the Complainant was not capable of lying about her father as she had nothing to gain. She dismissed the defence witnesses as having intended to protect the Appellant.

19. The trial Magistrate had the opportunity of observing the demeanor of the Complainant whom she found truthful. Considering her age, the fact that the Appellant was her sole parent her mother having passed on; further, considering the fact that the Appellant did not give any reason why he would be framed; I have absolutely no reason to doubt her. Therefore I am satisfied that the conviction in the circumstances was proper.

20. The Appellant has faulted the Court for imposing a sentence he termed erroneous. The child herein was under eighteen (18) years. Considering the circumstances in which the offence was committed, the trial Magistrate correctly exercised her discretion.

21. In the circumstances I find the Appeal lacking merit. Accordingly it is dismissed in its entirety.

22. It is so ordered.

Dated, Signed and Delivered at Kitui this 22nd day of May, 2018.

L. N. MUTENDE

JUDGE