



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 80 OF 2015

J M KAPPELLANT

VERSUS

REPUBLICPROSECUTOR

(Being an appeal against conviction and sentence of Hon. L. Simiyu - (Acting Senior Resident Magistrate) in Machakos Chief Magistrate's Court Cr. Case 651 of 2014 delivered on 18th February, 2015)

JUDGEMENT

1. The appeal arises from the conviction and sentence of Hon. L. Simiyu Acting Senior Resident Magistrate in **Machakos C.M. Criminal Case No. 651 of 2014** wherein the Appellant had been charged with an offence of incest and committing an indecent act with a child contrary to Section 20(1) and 11(1) respectively of the Sexual Offences Act No. 3 of 2006 and in which the Appellant was ordered to serve life imprisonment.

2. Aggrieved by the said conviction and sentence the Appellant raised the following grounds of appeal:-

- i. The learned trial magistrate erred in law and fact in basing her findings on an assumption and hypothesis yet no evidence was adduced to suggest such an inference.
- ii. The learned trial magistrate erred in law and fact in convicting the Appellant on inconsistent evidence that did not support the charge.
- iii. The learned trial magistrate erred in law and in fact in shifting the burden of proof to the Appellant who had no obligation to discharge the same.
- iv. The learned trial magistrate erred in law and fact in reaching the decision on wrong principles and conclusions.
- v. The learned trial magistrate erred in law and fact in failing to find that no critical witnesses were called to testify.

3. This being a first appeal the court's duty is to re-evaluate the evidence and subject it to a fresh analysis and reach its own independent conclusion bearing in mind that it neither saw nor heard the witnesses testify but to make an allowance for that. (see **OKENO =VS = REPUBLIC [1972] EA 32**).

4. The Appellant had been charged with a main charge of incest by male contrary to Section 20(1) of the Sexual Offences Act No. 3 of 2006 where the particulars were that on 13/4/2014 in Machakos County he intentionally and unlawfully caused his penis to penetrate the vagina of M M M a child aged 9 years who was to his knowledge his granddaughter. The Appellant also faced an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the Sexual offence Act No. 3 of 2006. It was the evidence of the **Complainant (PW.3)** that on the material date she had been sent by her sister to go borrow a hoe from a neighbour when she was waylaid by the Appellant who is her grandfather who forcefully took her to his house where he defiled her. He only released her after her sister **F M M** intervened.

5. **F M M (PW.2)** testified and stated that on the material date she had sent the Complainant to a neighbour's house to borrow some salt. However, the minor took too long and she decided to follow up and walked along a foot path that passed by the Appellant's house as he was their grandfather and saw his door ajar and she pushed the door and stumbled upon the Appellant lying on top of the Complainant. The Appellant later ordered her to go look after the goats but she hid near a window and after a while the Appellant ordered the Complainant to dress up and leave. She later reported to her mother about the incident.

6. **Z S (PW.1)** was the mother of the Complainant. She testified that she had left her children at home as she went to church. Upon receiving the report of the incident she checked the Complainant's vagina and saw semen like fluid and on interrogating the minor she learnt

that the Appellant had defiled her. She also received some corroboration from her other daughter **F M M**. She later alerted her husband and they confronted the Appellant who became hostile. She later reported the incident to the police and had the child examined at Machakos Level Five Hospital. She confirmed the complainant was born in 2005 and duly identified the clinic card and the complainant's stained underpant.

7. **J M M (PW.4)** was the father of the complainant and who stated that upon receiving the complaint from her daughter he rushed and confronted the Appellant who is his father only for the Appellant to turn hostile and attacked him. He was thus forced to lodge a report at Katangi police post. He followed up on the issuance of a P.3 Form and Post Rape Care Form which were duly filled by a doctor. He maintained that the Appellant had molested the minor on three other occasions and which had greatly strained his relationship with him.

8. **Dr. Lydia Lulua (PW.5)** testified and produced the P.3 Form and Post Rape Care Form on behalf of her colleague Dr. Muli who had examined the Complainant and filled the said forms. The witness confirmed that the Complainant's hymen was perforated indicating that there was penetration. The witness further confirmed the presence of a discharge of blood and some whitish discharge.

9. **Mathew Masibu (PW.6)** was the investigating officer attached at Katangi police post under Masii police station. He stated that he received the Complainant on 14/4/2014 who was accompanied by her parents. He issued a P.3 Form and had the Complainant examined at Machakos Level Five Hospital. He later arrested the Appellant two weeks after the incident as the Appellant had escaped from his house. The said witness produced the clinic card and bloodstained underpant as exhibits.

10. With the above testimonies of the witnesses, the Appellant was put on his defence. He tendered a sworn testimony. He stated that he learnt that police were looking for him and decided to take himself to the police station only to be met with the alleged charges. He maintained that he had been framed by the mother of the complainant with whom he had disagreed over the way she treats his grandchildren. He denied being a paedophile as he resides with some of the orphaned grandchildren who have never raised complaints of sexual molestation against him.

11. Parties herein agreed to canvass the appeal by way of written submissions. The Appellant filed his submissions on the 6/2/2018 while the Respondent filed theirs on 14/5/2018. I have carefully considered the said submissions and find the following issues necessary for determination namely:-

- i. Whether the prosecution failed to call crucial witnesses.**
- ii. Whether there were contradictions in the testimonies of the prosecution witnesses.**
- iii. Whether the Appellant's defence was considered by the trial court.**
- iv. Whether the prosecution proved its case beyond the required standard of proof.**
- v. Whether the sentence meted out by the trial court was appropriate.**

12. As regards the first issue, it is noted that it is the duty of the prosecution to prove the guilt of an accused person and that the responsibility to call witnesses and the number lies with the prosecution to decide in its bid to discharge the burden of proof imposed on it by the law. The Appellant herein has poked holes on the prosecution's case to the effect that certain witnesses such as the one who alerted the Complainant's elder sister over what had befallen the Complainant at the home of the Appellant as well as one Kioko were not called to testify. Indeed by the Provisions of Section 143 of the Evidence Act the Prosecution is not under any obligation to call a particular number of witnesses to prove any fact. The prosecution according to them had been satisfied that the six witnesses lined up were sufficient to prove the charges against the Appellant. In any event it was not the business of the Appellant to choose or decide for the prosecution which witnesses were to be called since that was not his duty under the law. The Appellant has not shown that the failure by the Prosecution to call other witnesses was deliberate and meant to achieve a certain motive other than a genuine duty to prove the guilt of the Appellant. In the case of **BUKENYA & OTHERS =VS= UGANDA [1972] EA 549** the court held as follows:-

“The law as it presently stands is that prosecution is obliged to call all witnesses who are necessary to establish the truth in a case, even though some of those witnesses evidence may be adverse to the prosecution's case. However, the prosecution is not bound to call a plurality of witnesses to establish a fact where, however the evidence adduced barely establishes the prosecution's case and the prosecution withholds a witness, the court, in an appropriate case is entitled to infer that had that witness been called his evidence would have been adverse to the prosecution's case.”

Looking at the evidence of the prosecution's witness, I am satisfied that there was no need to call other witnesses since those witnesses were peripheral in nature and their evidence not weighty as compared to the six who were called to testify for the prosecution.

13. As regards the second issue, it is noted that the Appellant has maintained that the witnesses more specifically **PW.2** and **PW.3** had contradicted themselves regarding the main purpose of the complainant leaving home before she was waylaid by the Appellant. The Complainant stated that she had been sent by her elder sister **F M M** to go to a neighbour to borrow a hoe while the elder sister stated that she had sent her to go and borrow some salt. Clearly there was a contradiction on the item sought to be borrowed. However the said contradiction was not that prejudicial to the Appellant since the issue that was crucial was whether the complainant had been defiled by the Appellant and not on the purpose or mission the complainant had as she left her home on the material date. If there was any such prejudice then the said contradiction or discrepancy was curable under Section 382 of the Criminal Procedure Code. As to whether the Complainant had ventured out of her home to go borrow salt or a hoe, the same did not in any way prejudice the Appellant since he has only been accused of defiling the minor and that the issue to do with a hoe or salt does not affect or concern him in any way whatsoever.

14. As regards the third issue, it is noted that the trial court duly considered his defence and found that the same did not shake that of the

prosecution which was overwhelming against him. The Appellant had claimed in his defence that he had been framed up by the mother of the Complainant with whom he had differences previously over what he termed the mistreatment of his orphaned grandchildren and that he had earlier ordered her to leave the compound. However, the evidence of the Complainant and her elder sister was so cogent and truthful as the Appellant was actually caught in the act. It is therefore highly unlikely for the mother of the Complainant to use her own daughter as a victim of a sexual assault so as to settle scores with the Appellant over some perceived differences with him.

15. As regards the fourth issue, it was the evidence of the Complainant that upon being sent by her elder sister to go to a neighbour's house, she was waylaid by the Appellant who was her paternal grandfather who took her to his house where he defiled her. It was the evidence of the Complainant's elder sister **F M M** that she had to go and check since the complainant had overstayed and thus passed by the Appellant's house only to find him lying on top of the Complainant. She therefore literally caught him in the act. The incident took place during the day and in broad daylight and thus there was no mistaken identity. The parents of the complainant (PW.1 and PW.4) were later alerted of the incident and took the necessary action. The mother of the minor confirmed seeing some semen on the girl's vagina. The minor was later examined at Machakos Level Five Hospital and she was found to have been defiled. PW.5 produced the P.3 Form and Post Rape Care Form which clearly indicated that the Complainant's hymen had been perforated and that penetration of her vagina was established. PW.6 also produced the clinic card which showed the age of the complainant as 9 years old. The doctor did confirm that the penetration of the vagina was forceful as there was discharge of blood in addition to some whitish discharge the remnants or stains of which were found on the Complainant's under pant which was produced by the investigating officer. The evidence of the Complainant and her elder sister left no doubt as to the fact that the Appellant was the assailant. Hence all this evidence established the essential ingredients of the aspect of defilement namely that the Complainant's age was established to be 9 years, there was penetration and lastly that the penetration was by the Appellant who is the grandfather of the Complainant. The defence evidence did not shake that of the prosecution which was overwhelming against the Appellant. I find the prosecution therefore had proved the case against the Appellant beyond any reasonable doubt. The trial court's finding on the Appellant's conviction was sound in all respects.

16. As regards the fifth issue, it is noted that the Appellant had been charged with the offence of incest by male contrary to Section 20(1) of the Sexual offences Act No.3 of 2006. The same provides as follows:-

20(1) any male person who commits an indecent 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 consent of the female person.

The evidence availed before the trial court left no doubt that the Complainant was aged 9 years and therefore under the age of eighteen years and a child at that. The evidence also revealed that the Appellant was a grandfather to the Complainant and therefore the degree of consanguinity (blood relation) was established and which fitted the offence preferred against the Appellant namely incest by male. The trial court duly sentenced the Appellant to life imprisonment. I find the said sentence was lawful.

17. In the result it is the finding of this court that the Appellant's appeal lacks merit. It is dismissed. The conviction and sentence by the trial court is upheld.

Orders accordingly.

Dated and delivered at MACHAKOS this 13th day of June, 2018.

D. K. KEMEI

JUDGE

In the presence of:

J M K - the Appellant

Machogu - for the Respondent

Josephine - Court Assistant