



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 16 OF 2018

CORAM: D.S. MAJANJA J.

BETWEEN

JMC.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. N. M. Idagwa, PM dated 23rd August 2016 at the Principal Magistrate's Court at Nkubu in Sexual Offence Case No. 1464 of 2014)

JUDGMENT

1. The appellant, **JMC**, was charged and convicted of the offence of incest contrary to **section 20(1)** of the **Sexual Offences Act** ("the **Act**"). The particulars of the charges were that on 5th October 2015 within Meru County being a male person caused his penis to penetrate the vagina of FN, a female person who was to his knowledge his daughter.

2. The appellant was sentenced to life imprisonment and now appeals against conviction and sentence on grounds set out in his amended supplementary grounds of appeal and the written submissions. He complained that the prosecution failed to prove its case beyond reasonable doubt. He submitted that medical evidence was inconclusive and that the prosecution failed to order a DNA test to be conducted on the appellant to see whether the epithelial cells seen in the complainant's vagina matched his DNA. He further contended that the child's mother, who was an essential witness, was not called and that his defence was not considered. The respondent supported the conviction on the grounds that the prosecution proved all the elements of the offence.

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 facts of the case before the trial court were as follows. The child (PW 4) gave sworn testimony after a *voire dire*. She testified that she was class one and the appellant was her father. She explained that he used to help her do her homework and on one night her father did "*bad manners*" to her. Through an intermediary, she explained that he entered the bed and he removed her clothes. She further explained that:

[I] had been hurt by my father using his thing that he uses to urinate. I was lying on my back. He laid on my stomach. He put his urinating thing inside where I showed you. I felt pain and that is why I was taken to hospital. I did not sleep on his bed till morning. He removed me on his head and put me on our bed in the morning. He washed me with salty water. That salty water when I touched where I showed you I felt pain.

5. The child's teacher (PW 2) recalled that on the morning of 6th October 2015, PW 1 came to inform her that the step mother had left her father and he had sexually assaulted her and warned her not to tell anyone. She told the child that if he repeats what he did she should report him to her. On the next day, PW 1 came back to school and reported to her that the appellant had done the same thing to her. PW 1 the reported the incident to another teacher, PW 3. PW 3 stated that he was informed of the child's molestation and directed her to take the child to Kanyakine Hospital.

6. PW 1, the clinical officer, told the court that PW 4 was brought to the hospital for treatment on 9th October 2014. She filled the P3 medical form on 15th October 2014 after examining PW 4. She noted that her hymen was broken and a whitish discharge. A high vaginal swab revealed pus cells, moderate epithelial cell and spermatozoa. She was of the view there was penetration. PW 5, the investigating officer, gave an account of the investigation.

7. When put on his defence, the appellant denied the charge in his sworn testimony. He admitted that he was PW 4's father. He told the court that he used to be a boda boda rider for PW 3 until he refused to collect tea and carry maize to the posho mill when he threatened him with certain consequences. He further stated that he had a balance of Kshs. 1000/- balance on account of school fees which PW 3 asked him to go and pay and when he to the school he was arrested. He also claimed that there was a grudge between him and PW 2's family and also the child's mother who was not called as a witness.

8. Based on the evidence I have outlined, the trial magistrate convicted the appellant. I have appraised the evidence and I find that PW 4 gave clear testimony on how the appellant would molest her. Given that she was still a child of tender years and the emotional trauma which was noted by the trial magistrate when she directed that the child testifies through an intermediary, I find her testimony clear on the fact that the appellant did indeed cause an act of penetration.

9. The proviso of **section 124** of the *Evidence Act (Chapter 80 of the Laws of Kenya)* dispenses with corroboration if the trial Magistrate, for reasons to be recorded believes the child to be telling the truth. In this case the trial magistrate expressed her view as follows:

I am satisfied that the complainant told the truth. I observed her demeanour. She was steady through her evidence despite being disadvantaged due to her age. She had no reason to lie against her father. Her evidence was not shaken in cross examination.

10. In addition to the testimony of PW 4 was the testimony of PW 2 and PW 3. PW 1 was the teacher she informed what happened and who reported to PW 3. They organized for her to be taken to hospital. The medical evidence showing that the child's hymen was broken and evidence of epithelial cells and spermatozoa all point to the fact of penetration by none other than the appellant who was the adult male living with PW 4.

11. The final ingredient of the offence of defilement is the relationship between the appellant and the child. The child recognised the appellant as her father while the appellant also admitted that the child was his daughter.

12. The appellant's defence was that the charges against him were a grudge by PW 2 and PW 3. When this issue was put to the two witnesses they denied it. This denial taken alongside the fact that they would use a random child to frame him for refusal to do some manual work is preposterous. In any case, the child's evidence standing alone was sufficient to snuff out the appellant's defence.

13. I also note that the prosecution did not call the child's mother to testify. In *Sahali Omar v Republic MSA CA Crim. App No. 44 of 2016 [2017] eKLR*, the Court of Appeal discussed whether the failure to call a witness was fatal. It observed as follows:

The prosecution reserves the right to decide which witness to call. Should it fail to call witnesses otherwise crucial to the case, then the court has the mandate to summon those witnesses. But should the said witnesses fail to testify and the hitherto adduced evidence turn out to be insufficient, only then shall the court draw an adverse inference against the prosecution. This is because the prosecution is not obliged to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt (see. Keter v Republic [2007] 1 EA 135).

14. In this case, PW 4 testified that her step mother had left them and it is when the appellant started to molest her. Her mother was not present when the appellant committed his felonious acts and her testimony would not have added or subtracted anything from the prosecution case.

15. The appellant also complained that DNA test was not done to ascertain whether the epithelial cells and spermatozoa seen the vaginal swab from PW 4 would match his DNA. **Section 36** of the *Act* empowers the court order DNA tests. Regarding this provision, the Court of Appeal in *Robert Mutungi Muumbi v Republic, MLD CA CRA No. 52 of 2014* explained that:

Section 36(1) of the Act empowers the Court to direct a person charged with an offence under the Act to provide samples for tests, including for DNA testing to establish linkage between the accused person and the offence. Clearly that provision is not couched in mandatory terms. Decisions of this Court abound which affirm the principle that medical or DNA evidence is not the only evidence by which commission of a sexual offence may be proved.

16. As I have found, the evidence pointing to the appellant is watertight and at the end of the day, a DNA examination of the appellant's body fluid samples would only be corroborative and would neither add nor subtract from the case. The totality of the evidence is that the prosecution proved the case beyond reasonable doubt. I affirm the conviction.

17. Although age is not an element of the offence of incest, it is nevertheless a consideration in imposing the sentence. The child was aged 7 years hence the sentence of life imprisonment was within law as PW 4 was below eleven years consistent with **section 8(2)** of the *Act*.

18. I affirm the conviction and sentence and dismiss the appeal.

DATED and DELIVERED at MERU this 23rd day of October 2018.

D.S. MAJANJA

JUDGE

Appellant in person.

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