



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL 80 OF 2013

B K N.....APPELLANT

VERSUS

REPUBLIC...RESPONDENT

(An appeal arising out of the judgment and sentence of P.M. Mugure RM in Criminal [Case No. 1424 of 2012](#) delivered on 29th April 2013 at the Chief Magistrate's Court at Machakos)

JUDGMENT

B K N, (hereinafter “the Appellant”), was convicted of the offence of incest by male contrary to Section 20(1) of the Sexual Offences Act, and sentenced to life imprisonment. The particulars of the offence were that on diverse dates between April 2012 and 21st September 2012 [*particulars withheld*] at Machakos County, he intentionally and unlawfully caused his penis to penetrate the vagina of M K a girl under the age of 18 years whom to his knowledge was his daughter. The Appellant had also been charged with an alternative offence of indecent act with a child contrary to section 11(1) of the Sexual Offences Act.

The Appellant pleaded not guilty to the charge on 14th December 2012. He was tried, convicted of the offence and sentenced on 29th April 2013. The Appellant was aggrieved by the judgment of the trial magistrate, and preferred this appeal in Petition of Appeal filed in Court on 9th April 2013. The grounds of appeal as set out in the said Petition are as follows:

1. THAT the Appellant pleaded not guilty.
2. THAT, the trial magistrate erred in both fact and law by failing to consider the fact that, the Appellant was found to be HIV positive while the alleged victim was found to be HIV negative after the commission of the alleged offence.
3. THAT, the trial magistrate failed to consider the fact that the investigation officer withheld vital evidence (medical report) which was not disclosed to the Appellant as the law requires, and the Appellant only came to know about it when the investigating officer was testifying against him thereby catching him off guard, and subsequently rendering the entire trial not fair.
4. THAT, the trial magistrate erred in both law and fact when she failed to consider the fact that, the prosecution did not in any way connect him to the alleged offence, as no forensic evidence was tabled to prove the fact that the victim in question was indeed defiled by the Appellant, and that the Prosecution only tabled stained underpants and relied solely on the victim's word of mouth that she was defiled by the Appellant.

The Appellant's Advocate Paul Kisongo & Co Advocates, filed written submissions on the appeal dated 17th October 2016, wherein it was urged that the appeal raises two main legal issues being whether the Prosecution proved its case beyond reasonable doubt, and whether the charge sheet was fatally and incurably defective. On the issue of proof, it was submitted that the evidence of E N N (PW2) who is the mother of the accused person, contradicted that of the other Prosecution witnesses. Additionally, the complainant (PW1) was examined by Dr. Kamwele and not Dr. Emmanuel Loiposha (PW3), who testified contrary to the evidential rule that documents should be produced by their makers.

Further, that even though, the Age Assessment Report (Exhibit 5) confirmed the age of the complainant as 12 years, no birth certificate was relied on as primary evidence, and that all Prosecution witnesses save for PW5 testified to the effect that PW1 was 10 years. Besides, that all the medical documents produced as exhibits were of no probative value, because there was a time lapse between the alleged time of commission of the offence and the time and date of medical examination. It was urged that these inconsistencies and/or inadequacies ought to have been resolved in favour of the Appellant, since it was clear that the case by the prosecution was incompetent and premised on conjecture, fabrications, speculations and guesswork. Reliance was placed on the decision in **Woolmington v. Director of Public Prosecutions (1935) A.C. 462** for the position that the prosecution must prove its case beyond reasonable doubt.

On the issue of the defective charge, it was submitted that the principal charge read as follows: "Incest by Male contrary to section 20(1) of the Sexual Offences Act No. 3 of 2006" and that there is no such an offence. Further, that the said charge should therefore be "Incest by Male Persons contrary to section 20(1) of the Sexual Offences Act No.3 of 2006." It was urged that it is a cardinal principle of criminal law that no person can be convicted of an offence unless that offence has been created by the law and the penalty thereof prescribed, and that this principle is embodied in Article 50(2)(n)(i)&(ii) of the Constitution. Reliance was in this regard placed on the decision in **Hilda Atieno vs Republic, (2016) e KLR**. It was also submitted that this is a defect that cannot be cured by section 382 of the Criminal Procedure Code.

Ms. Rita Rono, the learned Prosecution counsel, filed submission dated 17th November 2016 in opposition to the appeal. It was submitted therein that the charges against the Appellant were proved beyond reasonable doubt, and that the Prosecution in discharging its burden of proof called a total of five witnesses. Further, that section 124 of the Evidence Act is clear that in matters of sexual offences the testimony of the complainant was enough to convict the Appellant. It was also contended that the complainant, PW1, testified that she was defiled by the Appellant.

On the ground raised of the defective charge sheet, it was urged that the charge sheet was properly drafted as section 20(1) of Sexual Offences Act prescribes the offence and penalty of incest by males hence there was no ambiguity. In addition, that the charge sheet contained all the ingredients hence it was not defective, and the fact that the magistrate did not include word person in the judgment does not render the charge sheet defective.

Further, that section 33 of the Evidence Act is clear that when a maker of a document cannot be traced the same can be produced as evidence, and that Dr Loiposha confirmed that he worked with Dr Kimwele whose handwriting was familiar to him as they worked together for close to one year. He confirmed that the complainant's hymen was broken and there was whitish discharge from vagina, a confirmation that indeed she was defiled. On the issue of age of the complainant, it was submitted that an age assessment report was produced indicating the accused was a minor.

As this is a first appeal, I am required to conduct a fresh evaluation of all the evidence and come to an independent conclusion as to whether or not to uphold the conviction and sentence. This task must have regard to the fact that I never saw or heard the witnesses testify (see **Okeno v Republic [1973] EA 32**).

A brief summary of the evidence adduced before the trial court is as follows. The prosecution called five witnesses during the trial, of which E N N (PW2), J Nd (PW4), and Cpl. Moses Masanyiri (PW5), who were the complainant's paternal grandmother, paternal aunt, and investigating officer respectively all

testified as to information they received about the defilement of the complainant, and their conversations with the complainant in this regard.

The complainant, M K K, who was PW1, testified after a *voire dire* examination as to the events of April 2012 when she was at home alone with the Appellant who was her father, and how he called her to his house, put her on his bed, removed her clothes and his clothes, and inserted his penis into her vagina. Further, that he repeated the act after four weeks. PW3 was Dr. Emmanuel Loiposha who gave evidence as to the results of the complainant's medical examination after the alleged defilement, and produced a P3 Form filled by a Dr. Kamwele as an exhibit.

The trial court found that the prosecution had established a *prima facie* and put the Appellant on his defence. The Appellant gave sworn testimony and did not call any witnesses. He denied defiling the complainant.

I have considered the grounds of appeal, submissions and evidence given in the trial court, and find that the grounds of appeal raises two issues. These are firstly, whether the charge pursuant to which the Appellant was convicted was defective; and secondly, whether the Appellant's conviction for the offence of incest was based on consistent and sufficient evidence.

On the first issue, the Appellant claimed that the charge sheet was defective as it did not state that the incest was by a male person as indicated in section 20(1) of the Sexual Offences Act, but stated that the offence was "incest by a male" which is a non-existent offence. I have in this regard perused the charge sheet, and the charge therein was stated as follows: "incest by male contrary to Section 20(1) of the Sexual Offences Act, No. 3 of 2006", and the charge sheet proceeded to give the particulars of the offence.

Section 20(1) of the Sexual Offences Act provides for the offence of incest as follows:

"20. Incest by male persons

(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."

The question therefore is whether the omission of the word "person" after the word "male" in the charge makes the charge sheet defective. In **Peter Ngure Mwangi v Republic, [2014] eKLR** the Court of Appeal sitting at Nairobi held that there are two limbs to the issue of a defective charge sheet. The first one deals with the issue as to whether the charge sheet is indeed defective, whereas the second one deals with the issue as to whether even if a charge sheet is defective, that defect is curable or not.

The issue of when a charge is defective is to be examined in light of the requirements of the law as regards the framing of charges as stated in section 134 of the Criminal Procedure Code which provides as follows:

"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."

In addition it was held in **Sigilani vs Republic, (2004) 2 KLR, 480** that:

"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."

I have perused the charge sheet and find that other than the missing word of "person", the particulars of the offence of incest by male person were clearly spelt out, which included the section of the law creating the offence, the date of the offence, the place of the offence, the act constituting the offence and the name of the victim.

Turning to the second limb as to whether the noted omission in the charge sheet is curable, section 382 of the Criminal Procedure Code provides as follows in this regard:

"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice. Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

In the instant appeal, I find that the missing word of "person" in addition to the word "male" in the charge sheet did not prejudice the Appellant in any way, as the word male can also be, and is ordinarily construed to mean a person of the male sex. In addition, the section cited in the charge which was section 20(1) of the Sexual Offences Act clearly indicates the offence which is one that exists in the law. This error is therefore one that is curable under section 382 of the Civil Procedure Code.

On the second issue, PW2 and PW4 who were the Appellant's mother and sister respectively testified that the Appellant was the complainant's father, and PW1 also stated that the Appellant was her father. These facts are not disputed by the Appellant. The age of PW1 was also proved. PW5 produced an age assessment report by the Medical Superintendent of Machakos General Hospital as the Prosecution's exhibit 5 which showed that PW2 was about 12 years of age as at 4th October 2012.

PW 1 gave testimony as to penetration by the Appellant. PW1 in this regard testified as follows:

"K is my father now before court. I am now 10 years old. I do not go to school. In 2012 I was schooling K primary school in class 4. 4/2012 on an unknown date I was home alone.

My father was asleep. We were home alone with him . He asked for water and when I took it to him to him he closed the door. He told me that I would not leave. He never took the water. He caught me by force. He took me to his bed. He removed my clothes. All my clothes. I was naked. He removed his clothes. He came to the bed. He slept on me. He touched me and he did bad manners. I felt pain on my lower abdomen. He slept on me. He inserted his penis into my vagina. He told me not to tell anyone. There was a discharge from his penis. He repeated the same after four weeks. He told me that he would kill me if I told anyone."

In addition, there was corroborative medical evidence provided by PW 3, who stated that the medical records being the P3 form and treatment notes indicated that the complainant's hymen was broken and she had a whitish discharge. Infection with HIV is not an ingredient of defilement and incest, and therefore the fact that the Appellant was HIV positive and the complainant was HIV negative was immaterial, and as explained by PW3 in his testimony is possible. In addition the P3 form could be produced by PW3 under section 33 of the Evidence Act, as the maker could not be found, and the P3 form was filled in the course of the maker's professional duties.

Lastly, on the appeal against the sentence, the minimum sentence for the offence of incest is 10 years

imprisonment, while the maximum sentence is life imprisonment where the victim is aged below eighteen years. The complainant herein was aged 12 years, and the maximum sentence of life imprisonment therefore applies in the circumstances. The sentence of life imprisonment was therefore lawful.

I have perused the trial record and note that the Appellant was a first offender, however given the tender years of the complainant and the fact that the Appellant occupied a position of trust in relation to the child which he abused, he deserves a deterrent sentence. I am in this regard also mindful that the minimum sentence of defilement of a child between the age of twelve and fifteen years is imprisonment for a term of not less than twenty years under section 8(3) of the Sexual Offences Act, which in my view would be deterrent enough for the Appellant.

I accordingly uphold the conviction of the Appellant by the trial Court for the offence of incest contrary to Section 20(1) of the Sexual Offences Act. I however set aside the sentence imposed upon him of life imprisonment for this conviction, and substitute it with a sentence of twenty (20) years imprisonment, which term shall start to run from the date of his conviction by the trial Court.

Orders accordingly.

DATED AND SIGNED AT MACHAKOS THIS 27TH DAY OF FEBRUARY 2017.

P. NYAMWEYA

JUDGE