



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIMINAL APPEAL NO: 23 OF 2016

[From Original Conviction and Sentence in Criminal Case No: 1937 of 2008 of The Chief Magistrate's Court at Thika]

H N M.....APPELLANT

-V E R S U S-

REPUBLIC.....RESPONDENT

J U D G M E N T

1. This is the judgement from **Criminal Appeal No: 23 of 2016**. The appellant is **H N M**. He was charged with Sexual Offence of Incest contrary to Section **2010** of the Sexual Offences Act.

Particulars thereof were that on **25th day of May, 2008** at [particulars withheld] village in Thika district within Central Province, committed an act which caused penetration with **L W N** a child under the age of **11** years who to his knowledge was his niece.

2. The accused having denied the offence, a full trial ensued. The court found him guilty, convicted and sentenced him to **15** years imprisonment.

3. Appeal

Being aggrieved and dissatisfied he has filed this appeal against both the conviction and sentence. He is unrepresented.

Grounds of Appeal are:

1. **THAT** the trial magistrate based the conviction on contradictory statements.
2. **THAT** the medical tests were sent to Government laboratory for tests.
3. **THAT** the trial court did not consider my mitigation and meted out a harsh and excessive sentence.

4. On the day of hearing this appeal, on **8th March, 2017**, the Director of public prosecution (**DPP**) put the appellant on notice that should his appeal not succeed his sentence of **15** years will be enhanced to maximum life imprisonment as the former is an illegal sentence.

Despite the warning, the appellant elected to pursue his appeal regardless.

5. The appellant asked the court to rely on his filed grounds and, in addition, handed in his supplementary handwritten grounds for consideration.

6. The appellants addition grounds are:

1. The prosecution's evidence is inconsistent and unreliable.
2. The medical documents don't connect me to the offence.
3. The case was not proved beyond reasonable doubt.

7. SUBMISSIONS

a. The appellant expounds his grounds of appeal in his written submissions.

b. Muthei for the respondent, opposed the appeal. He prays the court to enhance the sentence to life imprisonment.

On Ground one of appeal, that he is a first offender. This does not matter, the sentence is clearly spelt out in the law, and there is not much discretion.

On Ground two, that the evidence of prosecution was contradictory. The evidence was not contradictory. The victim was able to describe the events clearly. This was also corroborated by **PW6** - the doctor. The presence of epithelial cells was an indication of sexual encounter. The presence of pus was also the indication of infection. Although no one was present, **Section 124** of Evidence Act is applicable. The court was convinced that the minor was telling the truth.

The other was the relationship of the minor to the appellant. **PW2** is the mother of the victim, **PW3** is the father of the victim, **PW5** grandmother of the victim. They were all able to confirm that the minor was a niece to the appellant. He is maternal uncle to the victim.

On Ground three, that there was no test to confirm that his spermatozoa were his. The reason for this is because the victim had showered before they went to police and hospital. Thus no sample was taken. This is not prejudicial to the appellant because the victim was able to identify him by name.

On Ground four, that the sentence was harsh and excessive. The position is that the sentence, was not harsh because the minor was six years old, and **Section 20 (1)** of Sexual Offence Act says that if a minor less than **18** years, the sentence must be life sentence.

On the appellant written submissions, that there was fabrication against him. This is an afterthought. He should have brought it out during cross-examination. He did not.

Issue of age of a minor being disputed. However, **PW1, PW2, & PW3** were able to say the age of the minor to be six years old. The **P3** form by **PW6** – noted the age of the minor as being six years. And the investigating officer **PW4** at page **24** of the bundle, also says the minor happens to be between **4-5** years old. If the accused had disputed the age during the trial, it would have been contested at the time.

I pray that the conviction be held and the sentence be enhanced because the elements of the crime were proved.

8. First Appeal

This being a first appeal, this court has a duty of reconsidering and evaluating the evidence afresh with view to reaching its own conclusions in the matter making allowance only for the fact that it neither saw nor heard the parties when they appeared before the trial court. **See generally Okeno –Vs-Republic [1972] E.A. 32**

9. Issues for Determination

1. Was there penetration of the appellant's genital organ i.e penis penetrating the genital organ of the victim i.e vagina?
2. Was the appellant known by recognition?
3. Was the appellant related to the victim?

10. Proceedings: Analysis

L W, then aged six years was assaulted sexually on **25/05/2008** by the appellant, **H N M**. The appellant took the opportunity to commit the offence of the incident. When **PW2** – the mother of **PW1**, and **PW5** – the grandmother of **PW1**, and a mother to **PW2** had gone to fetch water at the river, one hour away.

The evidence of **PW1** is not only corroborated by **PW2** and **PW5**, it is further corroborated by **PW6** – the doctor. He confirms a swab specimen showed bacteria pus and spermatozoa. There were epithelial cells. The indication are there was a sexual encounter, pus cells indicate the presence of an infection. He produced **P3** as **P Exhibit I**.

Thus this evidence informs and confirms that penetration occurred. When the appellant's penis forcefully pushed into the vagina of **PW1**.

The victim was a niece of the appellant as the mother of the victim is a sister of the appellant.

11. FINDINGS

For those reasons, there is no merit in the appeal. The court therefore upholds the conviction and enhances the sentence to life imprisonment which I hereby do. Therefore, the appeal is dismissed.

12. Orders accordingly.

Right of appeal - **14** days.

JUDGMENT WRITTEN AND SIGNED BY:

C. B. NAGILLAH

JUDGE

JUDGMENT DELIVERED, DATED AND COUNTERSIGNED IN KIAMBU BY: THIS 18TH DAY OF MAY 2017

JOEL NGUGI

JUDGE

In the Presence of:

.....the Appellant

.....for Respondent

.....for Court Assistant