



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL CASE NO. 88 OF 2016

(Being an appeal arising from Kitale Chief Magistrate's Court Sexual Offence No. 115/2013

delivered by M.I.G. Moranga Principal Magistrate on 15/9/2016)

F M N.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

1. F M N “ the appellant “ was charged with the offence of **Incest contrary Section 20 (1) of the Sexual Offences Act NO. 3 of 2006**. The particulars being that the appellant on diverse dates between **6th April 2015 and 9th April 2015 in Trans -Nzoia County, being a male person , intentionally caused his genital organ namely penis to penetrate the genital organ namely vagina of N C N a female who was to his knowledge a daughter.**

He faced an alternative count of **indecent act with a child contrary to section 11(1) of the same Act**. The particulars being that the appellant on the diverse dates between **6th April 2015 9th April 2015 in Trans - Nzoia County intentionally caused the contact between your organ namely penis and the genital organ namely vagina of N C N a child aged 15 years.**

2. He denied the charges and the matter proceeded to full hearing where he was found guilty, convicted and sentenced on the main count to 20 years imprisonment.

Being aggrieved by the judgement he has filed this appeal raising the following grounds;

- i) That the the conviction was manifestly unsafe as the trial proceeded on a defective charge sheet.**
- ii) That the fundamental rights to fair and impartial trial was violated.**
- iii) That trial magistrate made an error in both law and fact by failing to apply the principles applicable in a case of circumstantial nature.**
- iv) The the trial magistrate made an error by convicting the appellant on evidence of penetration that was not proved.**
- v) That the learned trial magistrate erred in law and fact by finding the appellant guilty**

contrary to section 124 of the Evidence Act Cap 80 laws of Kenya.

vi) That the appellant was substantially prejudiced and unable to defend himself due to being charged with a provision of punishment of sexual offences Act No. 3 of 2006 (Section 8(2)) and yet the charges are on Section 20(1) of the same Act.

3. When the appeal came for hearing the appellant proceeded by way of written submissions. He submitted that the charge was defective because there was no nexus between the dates in the O.B and the charge he was facing . That going by the O.B. number it means he was not taken court until after one year. He argued that according to the particulars of the charge the age of the complainant was unknown. That the word “unlawful” was also omitted from the charge sheet hence making the charge defective. He therefore prayed that the charge be dismissed for being defective. He further states that he was sentenced under Section 8(2) of the Sexual Offences Act which was an error.

4. He also submitted that PW3 (his wife) was not a truthful witness and that she was the one behind the fabrication of this case against him. He argued that the differences with his wife (pw3) were responsible for his woes. He wondered why other witnesses like his brother J and others were not summoned as witnesses. He denied the charges saying penetration of PW1 was not proved.

5. The appeal was opposed by the State through Mr Kakoi who submitted that all elements of the offence were proved. That age was proved to be 15 years through PW1, PW3 and Exhibit 1a. He referred to PW1's evidence and said she was clear that her father defiled her severally. When PW3 returned home she informed her of what the appellant had been doing. Due to the time lapse the clinical officer would not make a finding but PW1, and PW2 confirmed penetration. The trial court appreciated section of the Evidence Act, he submitted.

6. He finally submitted that identification and relationship did not present any serious issue. The trial court gave an interpretation to the sentencing provision of life and gave a specific sentence of 20 years imprisonment. The State was not opposed that.

7. The prosecution called a total of four (4) witnesses in this case. PW1, (N.C.N) a minor was taken through the voire dire examination before giving her evidence. She testified an oath and said she was almost 16 years of age, having been born on 3rd June, 1999. Her clinic card was produced as Exhibit 1a. She explained that she was staying in her uncle Nicholas's house because the father was yet to build them a house. Her mother was not living with them, as she had differences with the appellant and she lived in Njoro. Her elder brother used to stay with their aunt. Their uncle J had a house but was not married, so her father stayed with J stayed in his house.

8. She testified that on 6th April 2015 which was a Monday she woke up and went to school. That day the appellant returned from work before midnight, and told her to stop staying at N's house and join them in J's house. J's house had two beds (one for J and another for the appellant. The room is just one and not partitioned. As she studied she was joined by the appellant who asked for food and she served him. He then took a bath. She told him she was going to her uncle's to sleep but he could not hear any of that. It was late and she could not therefore leave.

9. Its then that he ordered her to get into bed. She wondered how that could work given that the bed had only one blanket. She obeyed and slept. When she woke up she found the appellant on top of her and she had no pants on. He turned her to face upwards and he had sex with her. He warned her not to make a sound as his brother could hear. The next day she went to school and he went to work.

10. When she returned from school she met uncle J who asked her about something he had heard the previous night and he was not happy. She explained to him what the appellant had done to her. He promised to inform uncle G. The appellant still refused to allow her to go and sleep at her Uncle's place. He had sex with her on 7th, 8th and 9th April 2015, nights. She did not go back to school on 9th April 2015 2pm, as she had information that word was going round over what her father was doing to her.

11. On 10th April 2015 the appellant allowed her to go spend at her uncle's. Later he went to Njoro to look for PW1's mother, and in May they went to Rongai Njoro to see her mother who later came home. After about a week she reported to her mother (PW3) what the appellant had been doing to her between 6th – 9th April 2015. She reported to the village elder the next morning. She recorded her statement and the appellant was later arrested and charged. In cross-examination she said she only reported to uncle J and not N as the appellant used to threaten them. She said she used to study in J's house and sleep at N's house. It was her evidence that the appellant denied her the opportunity to stay with her mother.

12. **PW2 Dr. Charles Macharia** produced the P3 (Exhibit 2). He did not find anything unusual on PW1's genitalia or in the tests done.

PW3 RNM is the mother of PW1 and wife to the appellant. She testified that PW1 was born in 1999. In April 2015 she was not living with PW1 or the appellant as the latter had chased her away. She received a report from PW1 that the appellant had turned her into a wife by sleeping with her. She reported to the police the matter and he was arrested.

She denied being behind the woes facing him in this case. She made it clear that she received the report from PW1 as parent she is and she had to report it.

13. **PW4 P.C. Patrick Mutei** was at Twiga police station on 15th June 2015 when he received the report from PW1 in company of her mother. The report was on defilement of PW1 by the appellant. He sent PW1 to Endebess district hospital for examination. He produced PW1's clinic card (Exhibit 1), saying he believed the complainant.

15. The appellant in his unsworn statement of defence testified that on the dates mentioned he was doing his work as a tractor driver. He was living with his two children without their mother upto 20th June 2015. He was arrested by Kenya Police Reservist on instructions of an officer from Twiga police post. He explained how he was arrested and how he has stayed with his children in the absence of the mother without any problems. He believed his wife is the one behind this case against him.

16. This a first appeal and the duty of this court has been set out in many authorities. The court of Appeal in the case of *Mwangi V Republic [2004] 2 KLR 28* said the following in respect of this duty:

“1. An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to have the appellate court's own decision on the evidence.

2. The first appellate court must itself weigh the conflicting evidence and draw its own conclusions.

3. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court had the advantage of hearing and seeing the witness.”

17. I have therefore considered the evidence on record, the grounds of appeal and the submissions by both parties, I find that the issues that need determination are as follows:

- i) The relationship between PW1 and appellant.
- ii) Age of PW1
- iii) whether there was sexual penetration

iv) If (ii) is in the affirmative whether the appellant who did it.

Issue No. (I) The relationship between PW1 and appellant.

The evidence of PW1, PW3 and the appellant confirm that PW1 is a daughter to the appellant and I so find.

Issue no. (ii) Age of PW1

18. PW1 and PW3 testified that the former was born in 1999. The clinic card (Exhibit 1) showed the date of birth as 3rd June 1999. When this offence was allegedly committed she was aged 15 years and 11 months. She was therefore a minor for purposes of Section 20(1) of the Sexual Offences Act. It is true that the particulars of the charge do not show the age of the complainant, but the complainant appeared in court and was seen by the appellant and the court. She was taken through the voire dire examination because of her age. Further in the alternative count the age of the complainant is clearly stated as 15 years. My finding is that PW1 was a minor and the failure to state the age in the principal count did not prejudice the appellant. Further being the father he is expected to know the daughter's age.

Issue no. (iii) and (iv)

19. PW1 testified that she was sexually penetrated by the appellant from 6th April – 9th April 2015. A report was made to the police on 15th June 2015, and PW1 was sent to hospital. An examination was done by PW2 who produced a P3 form in court as Exhibit 2. The report shows that nothing unusual was detected in her and nothing is mentioned about the complaint of defilement in the P3 form Exhibit 2. This report was therefore of no value in as far as the issue of penetration is concerned.

Besides receiving the complaint from PW1 and reporting the matter to the police, PW3 did not play any other role in the matter, as she was not an eye witness.

20. The only key evidence that is left is that of PW1 which this court wishes to analyse, in view of the proviso to Section 124 of the Evidence Act which states:

“ 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, no reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

When a trial court relies on the victim's evidence alone to convict, it must give reasons for believing the victim (in this case PW1) to be speaking the truth.

21. The learned trial magistrate has in her judgment at page 51 – 52 stated that PW1 was confident and honest in the manner she responded to questions. That her evidence was unshaken even cross-examination and so she believed her.

Going by her evidence PW1 was in standard 8 when this first incident took place i.e 6th April 2015. She went to school on 7th and 8th April 2015. On 9th April 2015 she went but did not go back in the afternoon. All this time she did not report what was happening to her to the teachers or anyone at school.

22. When she returned from school on 7th April 2015 6pm she met her uncle J who brought up the issue of what he had heard the previous night. She explained to him everything and he promised to call Uncle G. She later learnt from her cousin D that indeed uncle G had been called through a neighbour's phone and they were aware. As at this point uncles, (J and G), neighbours, P and cousin D knew what PW1 was going through according to her evidence.

23. **PW4 P.C. Patrick Mutei** who is the investigating officer did not tell the court why he did not get these witnesses to tell the court what they knew. In her judgment the trial court tried to explain that getting these witnesses was a problem because of their relationship with the appellant, and that the appellant threatens them. These findings are not supported by the evidence of the investigating officer. This court would have expected PW4 to express to the court his frustration in getting the witnesses and even seek the court's assistance in summoning them. I have seen no such evidence on record. Therefore the court could not speak for the investigating officer without supporting evidence.

24. PW1 explained that she did not tell the teachers about these happenings because she wanted to inform her mother first, but the mother was not present. In May 2015 the appellant went with PW1 to Rongai in Njoro of Trans Nzoia County where PW3 was staying. They both stayed there with PW3, Knight and her children. The evidence shows that they returned home with PW3 on 9th June 2015. Upto this point PW1 had not told her mother (PW3) who was now staying with her what she was complaining about. She only did so around 14th June 2015. She had indicated that it is only her mother she wanted to tell and she had the opportunities to do so in good time but she did not. There is no reason that was advanced for the unnecessary delay in reporting the matter, however embarrassing it was. It is for this reason that the evidence of those uncalled witnesses was necessary to show when they received the complaint and if so why they failed to take any action. Their evidence could have made PW1's to be complete.

25. In as much as the proviso to Section 124 of the Evidence Act allows the court to convict on the single evidence of a victim, the court will not just convict on any evidence. The evidence must be watertight, to sustain such a conviction. In this particular case there have been allegations by the appellant to the effect that PW3 was using PW1 to hit at him due to their own marital issues.

26. To rule out all this the investigating officer ought to have availed witnesses mentioned or made efforts to avail them. Secondly there ought to have been an explanation why there was such a delay in reporting the case when two good opportunities presented themselves for PW1 to report to her mother i.e in May 2015 while they were in Rongai- Njoro and in June 2015 as soon as the mother landed home on 9th June 2015. The failure to do so would mean there was something being prepared, or something which the court is not being told.

27. All evidence and circumstances taken together I find it unsafe to base a conviction on the sole evidence of PW1. The appellant will get the benefit of doubt. I have noted that the learned trial magistrate sentenced the appellant under section 8(2) of the Sexual Offences Act, when he had been charged under section 20(1) of the same Act. There was no reason for her to do that, since the punishment for incest with a minor is found in the proviso to Section 20(1) of Sexual Offences Act.

28. The upshot of this is that the appeal is allowed. The conviction is quashed and sentence set aside.

The appellant to be set free unless otherwise lawfully held under a separate warrant.

Orders accordingly.

Delivered, signed and dated on this 31st day of August 2017 at Kitale.

H. ONG'UDI

JUDGE

In the presence of;

M/s Kakoi for Respondent

Appellant present

Kirong – Court Assistant

Court: Judgment delivered in open court.

Right of Appeal explained.

H. ONG'UDI

JUDGE

31/8/17