



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIMINAL APPEAL NO: 50 OF 2017

(From Original Conviction and Sentence in Criminal Case No: 1009 of 2012 of the Chief's Magistrate's Court at Gatundu.)

J M W.....APPELLANT

-V E R S U S-

REPUBLIC.....RESPONDENT

J U D G M E N T

1. This is the judgment of Criminal Case **No: 50 of 2017**. The appellant, **J M W**, was charged for the offence of incest contrary to **Section 20 (1)** of the Sexual Offences act of 2006.

The particulars thereof were that on the **20th** day of **October, 2012** in **Gatundu** South District **Kiambu** County did an act which caused penetration with genital organ namely a vagina of **E W** aged **9** years whom he knew to be his cousin.

2. The appellant was duly convicted by the trial court at **Gatundu** and was sentenced to life imprisonment.

3. Being aggrieved and dissatisfied the appellant has now appealed against both the conviction and the sentence. He is prosecuting his appeal in person.

The appellant set out the following grounds:

1. **THAT**, the prosecution had failed to prove the case beyond reasonable doubt.
2. **THAT**, the appellant was not accorded a right to a fair trial under **Article 50 (1) (2)** of the constitution 2010.
3. The trial court shifted the onus of proof to the appellant contrary to **Section 107 (2)** of the evidence act.

In his Supplementary grounds of appeal, the appellant says:-

4. **THAT**, the penile penetration of the complainant genitalia was not conclusively proved.
5. **THAT**, the trial court failed to take into account the evidence of the grudge are raised by the appellant in his defence.

4. The appellant in his Written submissions avers as follows:

1. That trial court failed to comply with **Section 200**, as the appellant was not accorded the opportunity to elect to have the case heard *de novo* or recall the witness who had already testified. He cites two (2) legal authorities:

i. Bob Ayub Alias Edward Gabriel Mbwana Alias Robert Mandinga Vs Republic, Criminal Appeal No: 106 of 2006.

ii. Johnesh Nyasimi Nyangau Vs Republic 2016 Ekir G. W. Ngenye - Macharia.

2. On grounds of non-penetration into the complainant's genitalia issues he states that since the offence of incest was substituted with the one of defilement, the trial court did not prove penetration by the appellant into the vagina of the complainant. This in his view, is mandatory and crucial.

3. On issue of age, age is critical and must be proved conclusively, as the penalty varies in accordance age. **PW1** testified that she was **10 years** at the time of testifying. The charge was read **9 years**. It was amended subsequently by the prosecution to read **6 years**.

Finally the age assessment report put the age of the complainant to **12** years. No documentary evidence was tendered in evidence.

Therefore, the life sentence meted out on the appellant lacks statutory back up. This court is called upon to intervene and reduce the life sentence as this has no exact age backing.

4. Contradictions related to **PW3** and **PW1** on the issue of discharge on **PW1's** pants, **PW3** said pants had discharge but **PW1** said no discharge on her pants.

5. The appellant's defence raised the issue of grudge in family ranks, the trial court ignored the same in favour of the appellant.

5. However, the respondent **Madam Maundu**, opposes this appeal. **She submits as follows:**

1. On non-compliance with **Section 200** of Criminal Penal Code, she states there was compliance, when the new magistrate took over the case decided to proceed with the same starting from where it had stopped.

2. On the issue of not proving the case beyond reasonable doubt. The case against the appellant was proved. The complainant testified that she was his cousin and had known him since he was a child. The defilement took place in broad day light. The appellant threatened to cut her with a panga if she screamed for help.

There was no issue of mistaken identity. The evidence was corroborated by that of **PW2** was testified that she found the appellant defiling (in the act) the complainant and when the appellant noticed **PW2**, he stood up, he was half naked and the complainant's dress was pulled up.

PW4 – produced **P3** form and stated that the injuries were consistent with defilement.

3. The court considered the appellant's defence on issue of a grudge and proceeded to dismiss as an afterthought because he never raised it during cross-examination of **PW3**.

4. The age of the complainant was proved by production of **Exhibit I** which was the immunization card. This showed that the complainant was born in **2003**.

5. All the grounds of defilement were proved. At no one time, did the burden of proof shift to the appellant.

6. At conviction stage, the trial court, substituted the offence of incest with that of defilement contrary to **Section (1)** as read with **Section 8 (2)** of the Sexual Offence Act as cousins are not amongst those who constitute incest.

7. Therefore, I submit that there was no prejudice suffered by the appellant because the ingredient of defilement and incest are the same, same in **Section 20 (1)** of Sexual Offence Act, the victim is a cousin to the appellant.

8. Therefore the conviction and sentence is safe. I urge the court to uphold the same.

6. FIRST APPEAL

The legal principles governing the first appeal is enunciated in the **Case of Okeno Vs Republic [1972] E.A. page 32**. It behoves the appellate court to read and evaluate the trial court's proceedings for himself so as to come to his own conclusions bearing in mind that he never saw or heard the witnesses for himself, having given this fact as an allowance, he reached his own independent conclusion in respect of the appeal before him.

7. ISSUES FOR DETERMINATION

1. Was **PW1** defiled as alleged?
2. Was the appellant positively identified by **PW1**?
3. Did the appellant commit the offence of incest as charged?

8. THE TESTIMONIES IN THE PROCEEDINGS: ANALYSIS.

On **20/10/2012** at [**Particulars withheld**] village in **Gatundu** the appellant's being known to **PW1** as a cousin, asked her to accompany her to look for grass to feed cattle. The appellant carried a panga. **PW1** obliged.

Along the way, however, the appellant forcefully laid **PW1** on the road and had sex with physical threats if she screamed. **PW2**, then passing by, witnessed the act. When ambushed them, the appellant stood up, **PW2** was able to see the penis of the appellant.

PW2 reported the matter to the mother of **PW1 – PW3**. Both reported to **Gatundu** police station and went to the hospital.

PW4 – Dr. Oponga confirmed that a foreign object i.e. penis, had been inserted in **PW1’s** vagina, although the hymen was not broken.

9. Penetration, in my view, was achieved. **PW2** positively identified the appellant in the act – which further confirms him as the person who committed the said offence.

10. The trial court, however, substituted the offence of incest with that of defilement, from **Section 20 (1)** of Sexual Offence Act to **Section 8 (1)** as read with **Section 8 (2)** of Sexual Offence Act, since **Section 20 (1)** of Sexual Offence Act, is reticent on cousins in respect of the offence of incest.

11. FINDINGS

For these reasons, this appeal is hereby dismissed. The conviction and sentence of the trial court is hereby upheld.

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 OCTOBER 2017

JOEL NGUGI

JUDGE

In the Presence of:

.....the Appellant

.....for Respondent

.....for Court Assistant