



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MURANG'A
CRIMINAL APPEAL NO 123 OF 2013
(FORMERLY NYERI HCCR APPEAL NO.211 OF 2010)

(Appeal against Conviction and Sentence in Kangema Criminal Case No 1 of 2010 SRM – D. Orimba SRM)

P G M.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

1. The Appellant in this appeal, **P G M**, was convicted after trial of **incest** contrary to **section 20(1)** of the **Sexual Offences Act, No 3 of 2006**. It was alleged in the charge that on 30th December 2009 at 2.00 p.m. in Murang'a North District of the Central Province, he intentionally touched the vagina of E W with his penis, who was to his knowledge his daughter. He was sentenced to life imprisonment. He has appealed against both conviction and sentence.

2. The Appellant was unrepresented in this appeal. At the hearing he tendered amended grounds of appeal and written submissions, which I have carefully considered. His first ground of appeal is to the effect that the testimonies of the key prosecution witnesses were flawed “with lots of doubts and inconsistencies which rendered them incredible”. His second complaint is that the trial court erred in rejecting his defence despite it not having been challenged by the prosecution “as required in section 212 of CPC”. His last complaint is that the charge against him was not proved to the required standard, considering the entire evidence placed before the court.

3. Learned **Prosecution Counsel** supported the conviction and sentence. He submitted that the complainant (PW1) was the Appellant's biological daughter and was 14 years old, facts verified by her mother (PW2) and a doctor (PW6), and that in any event the Appellant did not controvert these facts.

4. Learned counsel further submitted that the testimony of PW1 was clear regarding the circumstances and actual act of the incest; that PW2 and PW3 corroborated the testimony of PW1; and that the doctor (PW6) verified that there was penetration. The witnesses were never shaken in cross-examination, further submitted counsel, and the Appellant gave an unsworn statement in which he only narrated how he was arrested and never alleged, during trial, that he was framed up or that there existed any prior grudge with any member of his family as he was now trying to allege in this court.

5. Learned counsel however did concede that the medical report produced by PW6 had important inconsistencies which should have been resolved in the Appellant's favour.

6. As for sentence, learned counsel submitted that the same was mandatory where the complainant is under 18 years of age, as in this case.

7. I have considered the submission of the Appellant and those of the Respondent. I have also read through the record of the trial court in order to assess the evidence placed before that court and arrive at my own conclusions regarding the same. This is my duty as the first appellate court. I have borne in mind however, that I neither saw nor heard the witnesses myself, and I have given due allowance for that fact.

8. The act alleged in the charge sheet that constituted incest was that the Appellant ***intentionally touched the vagina of the complainant with his penis***. However, the testimony-in-chief of the complainant, as recorded by the trial court, was that he ***defiled*** her. Now, ***defile*** is a legal/technical term that the complainant could not have used in her testimony. The term, as recorded by the trial court, could only have been the trial court's interpretation of the words used by the complainant. But what were those words? A trial court should always avoid putting in the mouth of a witness legal/technical terms that she could not have used.

9. It is to be noted, however, that in cross-examination by the Appellant the complainant stated –

You forced me to have sex with you.

The trial court accepted this testimony of the complainant, that is, that the Appellant had sex with her, which would connote that there was penetration. So, the act proved by the evidence placed before the court that constituted incest was that ***the Appellant committed with the complainant an act that caused penetration***. It is in this respect that learned Prosecution Counsel alluded to difficulties caused by the medical report produced by PW6 (Dr Muriithi Ng'ang'a). His testimony was that he examined the complainant on 01/03/2010 and that at that time the "injuries" of the complainant were approximately 2 months old. He found that the *labia majora* and *labia minora* were normal, the vagina was not examinable because the hymen was intact, and that during "initial examination" (it is not stated when this initial examination took place or who conducted it!) the hymen was ***seen to be broken***. There was no discharge or spermatozoa seen. The medical examination report (P3) of the complainant was produced in evidence as Exhibit 2.

10. This medical report raises important problems. Can a hymen, once broken, grow back to be intact? If so, how long would that take? There was no medical opinion before the trial court on those issues. As it was, a serious doubt was cast by the medical report as to whether or not there was penetration. A conviction for incest based on the complainant's testimony that the Appellant had forcibly had sex with her (and therefore that there had been penetration) clearly cannot be upheld.

11. But that is not the end of the story! The testimony of the complainant clearly established beyond reasonable doubt that the Appellant at the very least grabbed her, tied her mouth with a piece of cloth, tied her hands with a rope and pushed her onto his bed. He then removed her underpants and also removed his trousers and laid on her. All these constituted ***indecent acts with a child*** contrary to **section 11(1)** of the Sexual Offences Act. It was proved beyond reasonable doubt that the complainant was a child aged 14 years. The defence under **section 11(2)** of the Act was not available to the Appellant.

12. The offence of indecent act with a child under section 11(1) of the Act carried a minimum sentence of 10 years imprisonment. For the offence of incest by a male person under section 20(1) of the Act, where the complainant is under the age of eighteen years, the accused is liable to imprisonment for life. The offence of indecent act with a child under section 11(1) of the Act is thus minor but cognate to the offence of incest under section 20(1) of the Act where the complainant is under the age of 18 years.

13. In the event I will partially allow the appeal. I will quash the conviction for incest under section 20(1) of the Sexual Offences Act and set aside the sentence of life imprisonment imposed. But I will substitute under **section 179(1)** of the ***Criminal Procedure Code*** a conviction for indecent act with a child contrary to section 11(1) of the Sexual Offences Act. I will sentence the Appellant to ten (10) years imprisonment

(effective from the date of his original sentence).

14. To that limited extent only is the Appellant's appeal allowed. It is so ordered.

DATED, SIGNED AT MURANG'A THIS 14TH DAY OF APRIL 2016

H P G WAWERU

JUDGE

DELIVERED AT MURANG'A THIS 15TH DAY OF APRIL 2016