



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CRIMINAL APPEAL 146 OF 2013

D M KAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal arising out of the judgment and sentence of L.A. Mumassaba RM in Criminal [Case No. 394 of 2012](#) delivered on 26th April 2013 at the Principal Magistrate's Court at Mavoko)

JUDGMENT

D M K, (hereinafter “the Appellant”), was convicted of the offence of incest contrary to Section 20(1) of the Sexual Offences Act, and sentenced to life imprisonment. The Appellant was initially charged with two counts in the trial Court. In count I he was charged with the offence of incest contrary to Section 20(1) of the Sexual Offences Act. The particulars of the offence were that on the 29th June 2009 at lower Athi-river in Athi District, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of B P a girl aged 13 years and who to his knowledge his granddaughter.

In count II the Appellant was charged with indecent act with a child contrary to section 11(1) of the Sexual Offences Act. The particulars of the offence being that on the 29th June 2009 at lower Athi-river in Athi District, the Appellant intentionally touched the buttocks/breasts/anus/ vagina of B P a girl aged 13 years with his penis.

The Appellant was arraigned in the trial court on 11th October 2010 where he pleaded not guilty to the charges. He was tried, convicted of the offence of incest and sentenced to life imprisonment.

The Appellant is aggrieved by the judgment of the trial magistrate and preferred this appeal in a Petition and Grounds of Appeal filed in Court on 13th May 2013. The grounds for the appeal are that the trial magistrate erred in both law and fact by: relying on evidence that was not cross examined by the his counsel; relying on contradictory evidence which was not proved to the required standards; relying on the DNA test notwithstanding that the complainant and himself were of the same blood; rejecting his evidence that before the crime in 2004 his private parts were not working; by proceedings with his case without finding whether his counsel had withdrawn and if he could proceed on his own and thereby contravening 200 of the Criminal Procedure Code; and in rejecting his defence without reason as per section 169(1) of the C.P.C.

Mr. Konya, the Appellant's learned counsel made oral submissions in court on 23rd March 2016. It was submitted that that the evidence by the prosecution lacked credibility. That the incident took place at night time and in a populated area and the complainant did not scream for help during the attack for someone to hear. It was stated that the complainant had washed herself and her clothes that she wore during the

incidence, and had destroyed the evidence. It was further submitted that the complainant was living near Athi River police station and had every opportunity to report to the station or to her grandparents. The DNA evidence was also questioned and it was stated that there cannot be similar DNA evidence from two persons. Further, that the trial magistrate ought to have relied on independent evidence.

Reference was made to the decisions in **Roria vs R, (1967) E.A. 583** and **Abdullah Bin Wendo & Another vs R (1953) 20 EACA 166** on the danger of relying on circumstantial evidence. Lastly, it was argued that the case should not have been heard by a resident magistrate, and that the trial was a mistrial and should have been before a Chief Magistrate, a Principal Magistrate or a Senior Resident Magistrate. The Appellant's counsel urged the court to consider a retrial stating that the sentencing was beyond the powers of the magistrate.

The prosecution opposed the appeal in oral submissions made in Court by Ms Rono, the learned prosecution counsel, on 23rd March 2016. It was stated that the complainant testified that on the material day she found the door to their home had been broken into and reported the matter to the Appellant. That the Appellant then advised her to put a table against the door to prevent intruders. It was submitted that on 29th January 2009 the Appellant went to the complainant's room and defiled her, and that the complainant saw her grandfather leave the room. Further, that the complainant became pregnant but did not tell anyone since the Appellant had threatened to send her away.

It was further submitted that the evidence of PW1 was corroborated by PW4. It was stated that a birth certificate had been produced to show the age of the complainant. That it was the testimony of PW 5 who was the son of the Appellant, that the Appellant had stayed with the complainant when she became pregnant. In addition, that PW 7 had produced DNA evidence to show that there was a 99% chance that the Appellant was the father of the complainant's child. The prosecution relied on section 124 of the Evidence Act and prayed that the court upholds the conviction and sentence.

A brief summary of the evidence adduced before the trial court is as follows. The prosecution called seven witnesses. PW1 was B R P the complainant who testified that she was 17 years, and that in the month of November 2008 she was living with the Appellant who was her grandfather at lower Athi River, and that one night the Appellant came to the room she used to sleep in and defiled her. She also testified that she got pregnant as a result of the defilement and gave birth to a baby girl, who died six months after birth.

PW2 was E M P, the complainant's mother and also a daughter of the Appellant; PW 3 was M D K, a son of the Appellant; PW 4 was M M a sister to the complainant; and PW 5 was P M D another of the Appellant's son, who stated that he was living with the Appellant in the same plot at Athi River. All these witnesses gave evidence on how they came to learn of PW1's pregnancy, and that PW1 told them that the Appellant is the one who had defiled her.

PW 6 was Sgt. Rachael Wamboi Mwangi who was the investigating officer of the case, and testified as to the arrest of the Appellant and that she took the Appellant to Athi River hospital where his blood samples were taken together with the one for the complainant and her child. Further, that she took the samples to the Government Analyst in Nairobi for analysis. She produced the clinic card for PW1's child and complainant's birth certificate as exhibits.

The last witness (PW7) was John Kimani Mungai, a government analyst. He testified that on 7th October 2010 at the laboratory of government chemist, he received blood samples from PW6 for the complainant, the Appellant and the complainant's child. He did a DNA analysis and produced the report in court. He stated that from the analysis there were 99.9 % chances that the Appellant was the father of PW1's child. He produced his report as an exhibit in court.

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 called one witness. The Appellant testified that he did not commit the offence he was accused of, and that it was a fabrication by his separated wife who was the complainant's grandmother, as a result of a land dispute. He questioned why there were no independent

witnesses, and yet the plot they lived in had many people. He also testified that he did not have the energy to have sexual intercourse.

DW2 was Nyambale Moli, who testified that he was a tenant at the Appellant's plot and had not heard of him committing an offence. He said that he lived next to the Appellant's house, and had not heard any noise emanating from there on the material day. He said he had not seen the complainant live in the plot in the year 2010.

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**).

I have considered the grounds of appeal, submissions and evidence given in the trial court, and find that the grounds of appeal raise three issues. These are firstly, whether the Appellant's right to a fair trial was violated; secondly, whether the Appellant's conviction for the offence of incest was based on consistent and sufficient evidence; and thirdly whether the sentence imposed was within the jurisdictional powers of the trial magistrate.

On the first issue, the Appellant claimed that the trial magistrate proceeded with the trial without his advocate. Article 50(2) of the Constitution provides as follows;

“Every accused person has the right to a fair trial, which includes the right to:-

(c) “to have adequate time and facilities to prepare the defence.

I have perused the record of the trial court, and note that on 21st November 2011, a Ms Muriungi was holding brief for Mr. Ngolya for the Accused applied for an adjournment on account of Mr. Ngolya being unwell. The prosecution objected to the application and stated that they had 7 witnesses in Court. The trial magistrate then directed that she would deliver a ruling after 20 minutes. Later on the same day the trial magistrate gave a ruling in which she concluded as follows:

“ ...A counsel who is holding brief should have full instruction counsel holding brief has not indicated to the Court how indisposed the counsel for the accused is. He has not given sufficient reasons as to why counsel is not present in Court today. In the circumstances the hearing will proceed today. Counsel's presence can be dispensed with and the hearing proceeds without counsel for the defence if his instructions are limited. If he has full instructions then he can proceed with the hearing today.”

The trial court record showed that the counsel for the accused was not present in Court at the time of the delivery of the ruling, and that it was only the accused and prosecutor who were present. The hearing then proceeded with the complainant (PW1), PW2 and PW3 testifying, being cross-examined by the accused person and re-examined. The further hearing then resumed on 22nd November 2012 when Mr. Ngolya was present appearing for the accused.

I am of the opinion that although it is important to conduct proceedings at good speed, this should not be done at the expense of the procedural rights of an accused persons as guaranteed by the Constitution. In particular an accused person must be given additional time after certain occurrences in the proceedings in order to adjust his or her position and prepare his or her case adequately. The relevant occurrence in the present appeal was the non-appearance of the Appellant's advocate at the hearing on 21st November 2011, and asking him to proceed with the hearing in the circumstances was an ambush on the Appellant, and in violation of his right to have adequate time to prepare his case.

I therefore find for these reasons that the refusal by the trial Court to grant the Appellant an opportunity to be represented by his counsel violated his right to have adequate time to prepare his defence, and to procure legal representation. I also note that three prosecution witnesses then proceeded to give evidence on that date including the key witness who was the complainant, without the Appellant having the benefit

of legal advice. I am therefore constrained to quash the conviction and sentence on the ground that he was not accorded a fair trial by the trial Court.

I am of the view that this ground is sufficient to dispose of the appeal. I will however also comment on certain inconsistencies and contradictions I noted in the evidence by the prosecution witnesses which also make the Appellant's conviction unsafe. PW1 testified on re-examination that the Appellant came to her room and raped her in July 2008, and that she gave birth to a child as a result of the defilement on 3rd March 2009. However, PW2's mother testified that she sent the complainant to live with the Appellant in September 2008, and it is therefore not possible for the complainant to have had a full term pregnancy and given birth to a child by 3rd March 2009.

In addition, PW1 testified that she used to sleep in a house next to the Appellant's house which is where the Appellant came and defiled her. PW5 who was living in the same plot as the Appellant and is his son, on the other hand testified that PW1 used to sleep on a seat in the sitting room of the Appellant's house, and the Appellant used to sleep in the bedroom of the same house.

It is my view that these inconsistencies and contradictions are material enough to create doubt in the prosecution's case. In addition, these inconsistencies and contradictions are also material in my decision that a retrial may not be prudent in the circumstances, as it may serve the purpose of giving the prosecution an opportunity to fill the gaps in its case.

I would also like to comment on the issue raised of the jurisdiction of the trial magistrate. Section 7 (1) of the Criminal Procedure Code provides in this regard as follows:-

“7 (1) A subordinate court of the first class held by

(a) A Chief Magistrate, Principal magistrate or Senior Resident Magistrate may pass any sentence authorized by law for any offence triable by that court.

(b) A Resident Magistrate may pass any sentence authorized by law for an offence under section 278, 308 (1) or 322 of the Penal Code or under the Sexual Offences Act 2006”.

A resident magistrate clearly has jurisdiction to hear and pass sentence for offences under the Sexual Offences Act, and this ground of appeal was therefore without merit.

I accordingly allow the appeal, and quash the conviction and sentence of the Appellant by the trial Court for the offence of incest contrary to Section 20(1) of the Sexual Offences Act, for the reasons given in the foregoing. I also order that the Appellant be and is hereby set at liberty forthwith unless otherwise lawfully held.

Orders accordingly.

DATED AND SIGNED AT MACHAKOS THIS 21ST DAY OF JUNE 2016.

P. NYAMWEYA

JUDGE