



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT VOI
CRIMINAL APPEAL NO 34 OF 2014

J M.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case Number 699 of 2010 in the Senior Resident Magistrate's Court at Wundanyi delivered by Hon K. I. Orenge (SRM) on 24th January 2012)

JUDGMENT

INTRODUCTION

1. The Appellant herein, J M, was tried and convicted by Hon K. I. Orenge Senior Resident Magistrate for the offence of incest by male contrary to Section 20 (1) of the Sexual Offences Act No 3 of 2006. He was sentenced to serve twenty (20) years' imprisonment.

2. The particulars of the charge were as follows :-

“On the 10th day of August 2007 in Taita Taveta County intentionally and unlawfully caused his penis to penetrate the vagina of R M a girl aged 14 years who was to his knowledge his niece.”

3. The Alternative Charge was for the offence of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No 3 of 2006. The particulars were as follows:-

“On the 10th day of August 2007 in Taita Taveta County, intentionally and unlawfully touched the vagina of R M a child aged 9 years with his penis (sic).”

4. Being dissatisfied with the said judgment, on 11th September 2012, the Appellant lodge a Petition of Appeal. The Grounds of Appeal were as follows:-

1. THAT the present case was returned to trial after a successful appeal was lodged at the High Court of Kenya at Mombasa.

2. THAT his constitutional rights were breached as he was unlawfully detained in police custody thus contravening section 72(3)(b) of the Penal Code.

3. THAT the Learned Trial Magistrate erred in both facts and law by failing to consider that

the prosecution evidence was riddled with discrepancies, contradictions and inconsistencies, (sic) the prosecution evidence was a fiction imagined to settle a grudge due to a land dispute.

4. THAT the Learned Trial Magistrate erred in both law and facts by failing to evaluate and analyze the evidence that was adduced before him and convincing (sic) him upon hearsay evidence.

5. THAT his evidence was true and decisive in all circumstances and the course of its rejection thus contravening section 169 of the c.p.c (sic).

6. THAT p.w. 1(sic), the mother of the said victim was his younger sister, pw (sic) 2 and being married with four (4) sons, sexual contact with his niece was obscene and also a taboo in his society so he could not undertake (sic). The conviction therefore not only wrong notwithstanding the prosecution and defence (sic).

5. On 15th March 2016, this court directed him to file his Written Submissions. He filed Mitigation Grounds of Appeal and Written Submissions on 31st March 2016. The said Mitigation Grounds of Appeal could be summarised as follows:-

1. THAT the case commenced in 2007 whereupon he was re-tried in 2010.

2. THAT the charges were re-read to him after 3 years after a Re-Trial without his knowledge as he was illiterate.

3. THAT the Senior Resident Magistrate sentenced him to 20 years which commenced from 2012.

4. THAT since he had been in custody since 2007, the sentence ought to run from 2009 to avoid a violation of the law.

5. THAT he had engaged himself in a rehabilitation programme to assist him live a better life with his family.

6. THAT the court ought to consider his rehabilitation programme as a new man who was ready to serve under any hand of the law (sic).

7. THAT the court should consider his mitigation and remember the humanitarian and the international criminals (sic).

6. The State's undated Written Submissions were filed on 4th June 2016.

7. When the matter came up in court on 27th June 2016, both the Appellant and the State requested the court to render its decision based on the said Written Submissions. The Judgment herein is therefore based on the said Written Submissions.

LEGAL ANALYSIS

8. As can be seen from the Appellant's Grounds of Appeal, he did not challenge the fact that the Prosecution had proved its case to the required standard. No value then would be added in analysing the evidence that was adduced during trial. At the outset, this court found the Appellant's submissions that he had been rehabilitated not to have been irrelevant in the circumstances of this case.

9. The State correctly submitted that Section 20 (1) of the Sexual Offences Act Cap 62A provides that a person who is convicted of the offence of incest of a child below the age of eighteen (18) years is liable to life imprisonment.

10. Section 20(1) of the said Act provides as follows:-

“Any male who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years

Provided that, if it is alleged in the information or charge or proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person.”

11. The Learned Trial Magistrate was cognisant of the fact that the Appellant was liable to life imprisonment but that he opted to sentence him to twenty (20) years' imprisonment. He rendered himself as follows:-

“The offence is serious and the law provides for a possible life imprisonment. The court however (sic) will send the offender to 20 years...”

12. On his part, the Appellant did not seem to have any problem with the number of years he was sentenced to. Rather, his argument was that he had been in custody for a long time having gone through a Re-trial and consequently, his sentence ought to run from 2009. The question that he had therefore put before this court for consideration and determination was from which year his sentence of imprisonment was to commence and/ or run from.

13. It was not clear from the proceedings when the Re-trial of the Appellant's case was ordered. It was alluded to by the Learned Trial Magistrate in his Ruling of 22nd March 2011 when the Appellant had sought to be given a new Prosecutor as the said Prosecutor had made certain utterances that he said did not come from witnesses.

14. It was, however, evident from the Charge Sheet that he was arrested on 11th August 2007 and from the proceedings in the file that was placed before this court, that the Appellant was arraigned afresh before the Learned Trial Magistrate on 10th November 2010. He submitted that he had been in custody since 2007.

15. Having considered the facts of this appeal, this court was unable to say for a fact that sentence ought to commence from 2009 as it was not clear to it if that was the year a Re-Trial was ordered. Suffice it to state that the computation of the Appellant's sentence should include the period he served his sentence for his first conviction before his Re-Trial commenced, if at all he served any time, but will exclude any period he may have been out on bond for his Re-Trial. The computation of the sentence will also include the time the Appellant remained in custody while the Re-Trial was being conducted.

16. The court took the position that the computation of these days is best left to the prison authorities as they have the records of the periods the Appellant was in custody before his second conviction after the Re-Trial on 24th January 2012.

DISPOSITION

17. As the Grounds of Appeal in the Appellant's Petition of Appeal lodged on 11th September 2012 were not an appeal against facts and law that the Learned Trial Magistrate's had considered during the trial, there was no reason to disturb the conviction and sentence that he handed down to the Appellant. In this respect, the said Petition was not merited and is hereby dismissed.

18. However, the Manyani Maximum Prison is hereby directed to compute the Appellant's sentence in line with this court's holding in Paragraph 15 hereinabove.

19. It is hereby ordered.

DATED and DELIVERED at VOI this 28TH day of JULY 2016

J. KAMAU

JUDGE

In the presence of:-

James Mwangemi.....Appellant

Sirima.....for State

Ruth Kituva– Court Clerk