



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL 183 OF 2013

N K K.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal arising out of the judgment and sentence of M.K. Mwangi Ag.

SRM in Sexual Offences Case No. 25 of 2010 delivered on 14th August 2013 at

the Chief Magistrate's Court at Machakos)

JUDGMENT

N K 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 particulars of the offence were that on the 15th May 2010 at [particulars withheld] in Machakos District within Eastern Province, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of E N a child aged eight (8) years and who was to his knowledge his niece.

The Appellant was also charged with an alternative offence of indecent act with a child contrary to section 11(1) of the Sexual Offences Act. The particulars of the offence being that on the 15th May 2010 [particulars withheld] in Machakos District within Eastern Province, the Appellant intentionally and unlawfully touched the vagina of E N a child aged eight (8) years with his penis.

The Appellant was arraigned in court on 20th May 2010 and he pleaded not guilty to the charges. He was tried, convicted of the offence and sentenced on 14th August 2013. The Appellant was aggrieved by the judgment of the trial magistrate, and preferred this appeal on the grounds that he was convicted on purported identification evidence by two minors; Pw2 could not have identified her defiler since she was covered by her dress and there was no evidence of light; the magistrate shifted the burden of proof to him and did not comply with section 169 of the Criminal Procedure Code; and that the medical evidence was doubtful since the child was examined on 27.5.10 whereas the incident took place on 15.5.10.

The Appellant availed written submissions and also made oral submissions on his appeal during the hearing of his appeal. He submitted that the trial magistrate misdirected himself by holding that the scene was sufficiently illuminated by torchlight whereas such finding was not supported by evidence. He relied on the case in **R vs Sebwato (1996) EA 174**. Reference was made to the decisions in **Kiarie vs R (1984) KLR 739** and **R vs Turnbull (1976) All ER at pg 522** for the position that the identification by PW1 and PW2 was not watertight. He claimed that the evidence of the two minors was uncorroborated and without support. He further submitted that there were witnesses who are alleged to have caught him in the act of

defiling the complainant who were not called to testify, and that he was not medically examined by the doctor.

Mrs Tabitha Saoli, the learned Prosecution counsel, filed submission dated 3rd February 2016 in opposition to the appeal. It was submitted therein that the prosecution was able to procure the evidence of five witnesses which went to convict the Appellant. The complainant had testified that the Appellant had defiled her on her bed and there was a lit torch. PW1 was not around during the incident but she was informed two days later and she travelled from Nairobi and took her daughter to Machakos Level 5 hospital, where she was examined and treated. It was stated that PW4 the doctor who examined the complainant confirmed that there was vaginal tear. Further, on the issue of corroboration it was submitted that section 124 of the Evidence Act stated that corroboration was not necessary and there was indeed an eye witness in PW3.

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**).

A brief summary of the evidence adduced before the trial court is as follows. The prosecution called five witnesses during the trial of which PW1 was J K K, the mother of the complainant. She testified that she was in Nairobi when she called by her sister on 17th May 2010, and informed to go home in [particulars withheld] in Machakos, which she did the following day whereupon she was informed of the defilement of the complainant by the Appellant. Further, she narrated the events that followed including taking the child to hospital, the report to the police, and arrest of the Appellant. She testified that the complainant was born on 26th January 2002 and produced her immunization card as an exhibit.

The complainant, E N N (PW2) testified after a *voire dire* examination, as to the events of the night of 15th May 2010 when she stated the Appellant came to the house where they were sleeping and defiled her. PW3 was D M, also a minor, who testified after a *voire dire* examination as to the events of the said night as he was sleeping in the same room with PW2. Dr. Emmanuel Loiposha of Machakos Level 5 Hospital (PW4), produced the P3 form filled by the doctor who examined PW2, and testified as to the injuries noted on the complainant upon her medical examination. The last witness was the PC John Chebii (PW5) of Machakos Police Station, who testified as to the report they received from the complainant and her mother of the defilement, and on the arrest of the Appellant. He also produced an age assessment report of the complainant as an exhibit.

The trial court found that the prosecution had established a *prima facie* case and put the Appellant on his defence. The Appellant gave unsworn testimony and did not call any witnesses. He narrated the activities he undertook on 15th May 2010, and denied defiling the complainant, claiming that his arrest was as a result of a family dispute.

I have considered the grounds of appeal, submissions and evidence given in the trial court, and find that they raise two issues. These are firstly, whether there was positive identification of the Appellant as the person who committed the offence; and secondly, whether the Appellant's conviction for the offence of incest was based on consistent and sufficient evidence.

On the first issue, the Appellant claimed that the lights were not on and that the PW2 testified that the dress covered her face as she was defiled. Both PW2 and PW3 identified and recognized the Appellant as their uncle and the person who defiled PW2. PW2 and PW3 both testified that when the Appellant came into the house they were in, PW2 lit a lantern which the Appellant put off when he came to the bedroom. Further, both PW2 and PW3 testified that the Appellant had a torch when he came to the bedroom, which was bright and illuminated the whole room. Lastly they both testified that the Appellant is the one who then got on top of PW2 and started defiling her.

I am in this regard persuaded by the holding in the case of **Wamunga vs. Republic, (1989) KLR 424** in which it held *inter alia* as follows:-

“1. Where the only evidence against a defendant is evidence of identification, or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction.

2. Recognition may be more reliable than identification of a stranger but mistakes in recognition of close relatives and friends are sometimes made.”

In addition it has been stated by the Court of Appeal in Anjononi and Others vs Republic, (1976-1980) KLR 1566 that when it comes to identification, the recognition of an assailant is more satisfactory, more assuring and more reliable than the identification of a stranger because it depends upon some personal knowledge of the assailant in some form or other.

It is thus my finding that considering the prevailing conditions of identification and the recognition of the Appellant by PW2 and PW3, it was safe to convict the Appellant on the basis of PW2's and PW3's evidence of identification.

On the second issue, the Appellant was charged with, and convicted of the offence of incest contrary to section 20(1) of the Sexual Offences Act, which provides as follows:

“Any male person 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 and 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.”

PW 1 who was the complainant's mother in this regard testified that the Appellant was her brother and PW 2 also stated that the Appellant was his uncle. These facts are not disputed by the Appellant. The age of PW2 was also proved. PW 1 produced an age assessment report by the Medical Superintendent of Machakos General Hospital as the Prosecution's exhibit 7 which showed that PW2 was 8 years of age, and PW1 in this regard also testified that PW2 was born on 26th January 2002.

PW 2 and PW 3 gave testimony as to the defilement of PW2 by the Appellant. PW2 in this regard testified as follows:

On 15/5/10 about 8pm I was at home. I was living with B K my grandmother. I was with D my cousin who is today outside the Courtroom. We were sleeping in bed when my uncle came, he knocked at the door then D rose and opened the door and I also woke up and served the accused who is my uncle with ugali to eat. I then went back to bed. Accused then came to our bedroom. Accused had a torch and a stick, then accused held me, and removed my clothes and came on top of me and started putting his penis into my vagina I felt pain and screamed and mother of D came to the scene and I told her and she took me and D to her house where we slept.

The said D was PW3, and he corroborated the account of events as narrated by PW2. He testified that on the material day he was in the house sleeping with PW2, when that Appellant knocked at the door and was served food by the complainant. The Appellant then went to their bed and removed the complainant's clothes and started having sex with her. PW3 states that the complainant screamed and the Appellant ran away. That PW3's mother then came and took them away.

I find that the two children gave clear and consistent testimony that was not shaken by cross-examination. In addition, there was corroborative medical evidence provided by PW 4, who stated that the medical

records being the P3 form and treatment notes indicated that the child's vagina had been ruptured, she was stitched and there was foul discharge..

The Appellant raised the issue that there were witnesses, namely one M who was cooking for PW2 and PW3 on the material day, and one V K who came after PW2 screamed and took the children away, who were not called to testify. Section 143 of the Evidence Act in this regard provides that no particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for proof of any fact. Hence, it is not necessary to call all or any particular witness so long as the prosecution is able to prove its case with the witnesses called. In this appeal, this Court has found that the evidence by PW2 and PW3 pointing to the Appellant and the defilement of PW2 was clear, and that the two witnesses were truthful and consistent. The testimony of the two witnesses who were not called to testify would therefore not have added or subtracted anything from the prosecution case.

Lastly, on the appeal against the sentence, the minimum sentence for the offence of incest is 10 years imprisonment while the maximum sentence is life imprisonment. The complainant herein was aged 8 years, and the maximum sentence of life imprisonment therefore applies in the circumstances. The sentence of life imprisonment was therefore lawful. I have perused the trial record and note that the Appellant was a first offender, however given the tender years of the complainant and the fact that the Appellant occupied a position of trust in relation to the child which he abused, he deserves a deterrent sentence.

I accordingly uphold the conviction of, and sentence of life imprisonment imposed upon the Appellant by the trial Court for the offence of incest contrary to Section 20(1) of the Sexual Offences Act.

Orders accordingly.

DATED AND SIGNED AT MACHAKOS THIS 25TH DAY OF JULY 2016.

P. NYAMWEYA

JUDGE