REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 50 OF 2015

(From original conviction and sentence in criminal case No. 670 of 2014 of the Principal Magistrate's court at Mwingi- G. W. Kirugumi - RM).

K M..... APPELLANT

V E R S U S

REPUBLIC ..... RESPONDENT

JUDGMENT

The appellant was tried and convicted in the magistrate's court at Mwingi with incest contrary to section 20 (1) of the Sexual Offences Act No. 3 of 2006, convicted and sentenced to life imprisonment.

He has now come to this court on appeal through counsel C K Nzili and Company Advocates on the following grounds:-

1.That the learned trial magistrate erred in law and in fact in finding the him guilty against the weight of the evidence tendered.

2. That the learned trial magistrate erred in law and fact in failing to consider the appellants' defence testimony.

3.The learned trial magistrate erred in law and in fact in being biased and failing to consider the grudge, hostility and undue interest on the part of PW2 and PW3 to frame up the appellant.

4. The learned trial magistrate erred in law and in fact in shifting the burden of proof to the appellant.

5.The learned trial magistrate erred in law and in fact in admitting documentary evidence which was suspicious and contrary.

The appellant's counsel also filed written submissions in the appeal. Counsel relied on the case of ***Joseph Ikauni Emase -vs- Republic Bungoma High Court Criminal Appeal No. 68 of 2009,*** the case of ***Wilson Muchiri Nguchi -vs- Republic Embu High Court Criminal Appeal No. 125 of 2009*** and case of ***Peter Mutiria Mutambo -vs- Republic Chuka High Court Criminal Appeal No. 28 of 2015.***

At the hearing of the appeal, counsel relied on the written submissions filed and emphasized that the prosecution did not establish penetration, and in addition there existed a grudge between some prosecution witnesses and the appellant.

Learned Prosecuting Counsel Mr. Okemwa, opposed the appeal. Counsel submitted that the evidence of the complainant PWI which was corroborated by PW2 through to PW8 was consistent and believable. Counsel added that the appellant and the victim PWI were father and daughter, and the age, of the complainant a minor of 12 years and sexual penetration proved. Counsel emphasized that in cases of incest, the age of the complainant was not an important ingredient to be proved by the prosecution.

In response, learned counsel for the appellant Mr. Nzili submitted that the P3 form relied upon by the trial court, was irregularly produced as the appellant was not asked whether he had any objection to it. In addition there were alterations in the entries in the form which were not explained. According to counsel, the P3 form was unreliable. Counsel added that age was a major factor in sexual offences in order to distinguish the appropriate sentences applicable in each specific case.

In brief the prosecution evidence is that the complainant PWI BKwas a daughter of the appellant. The appellant lived in Ukambani while his wife lived in Nairobi doing domestic work.

On the 27TH October 2014 at around 1.00 Pm the complainant a girl aged 12 years, came home from school and proceeded to her grandmother's house. She was there with her brother PW5 K M till 10.00 Pm when her father told K to take her to his small one bedroomed house. On arrival at her house, the appellant instructed K to leave and he did so. The appellant then ordered the complainant to get into the house and lie on the bed, then proceeded to remove her clothes and did something bad things to her by inserting his penis into her private parts two times and she slept there till morning. In the morning, the complainant went to school but was chased away as she didn't have money. Then her grandfather sent an aunt PW2 E M to ask her where she had slept the previous night. The Aunt took her to school and asked her what had happened. The complainant disclosed the incident and both went to the Teacher and the Deputy Teacher and then to the Chief's office and the Chief called the police. The appellant was then arrested and charged with the offence.

In his defence, the appellant denied committing the offence on oath and stated that one of the women who had reported him had a grudge against him. He called two witnesses including his wife in his defence.

The trial court convicted and sentenced him. Therefrom arose this appeal

This is a first appeal and as a first appellate court, I am required to re-examine the evidence on record and come to my own conclusions and inferences. I have to bear in mind that I did not have the advantage of seeing witnesses testify to determine their demeanor - see the case of ***Okeno -vs- Republic (1972)EA 32***.

The appellant has come to this court on appeal on several grounds. I will deal with the technical grounds first.

The first issue is the admission of the documentary evidence which was suspicious. Counsel for the appellant has strongly argued that the entries in the P3 form were cancelled and changed and that the appellant was not asked during the trial whether he objected to the production of the P3 form.

I have perused the P3 form relied upon. The cancellation I can see is where the form is printed hospital/dispensary. The word dispensary was cancelled in ink. That cancellation in my view is understandable because the victim was taken to Mwingi District Hospital and not Mwingi Dispensary. It is a straight forward cancellation and in my view didn't need to be endorsed by anybody.

The other thing that can be noted from the said P3 form entries is the date when the child victim was taken to the hospital where the number 9 of date 29th October is overwritten. However in my view that is not a serious problem because it is clear from the entries in the whole document that the report to the police was made on 28th October 2014 and the girl taken to Mwingi hospital on 29th october 2014 which was the date that the doctor made her entries in the P3 form on examining the girl. In my view therefore it cannot be said that the P3 form had defects which would render it incredible or inaccurate.

With regard to production of the P3 form without asking the appellant whether he had any objections to it, the law does not require that an accused person be specifically informed that he can object to the production of a document. It is of note that the P3 form was produced by the maker Dr. Katherine Kago PW7. Counsel has also not cited any law that required the court to ask the appellant to raise objections before a document or P3 for was produced. It might have been preferable to do so but in the circumstances of this case, I find no prejudice caused to the appellant by the magistrate in not asking the appellant whether he had any objection with production of the P3 form, as the document is clean and authentic.

The second technical point is with regard to shifting the burden of proof by the trial court to the appellant. Counsel for the appellant has argued that the magistrate in the judgment shifted the burden of proof to the appellant. Counsel did not however specifically state where or how the magistrate shifted the burden to the appellant. In the Judgment, the learned magistrate stated as follows:-

" the accused blame (sic) he was framed by PW3 and PW2 since they had a grudge and did not get along well. He also claimed the complainants teachers were influenced (sic) PW2 and PW3 to frame him. He did not demonstrate what PW4, a teacher had to frame him."

If this is what counsel for the appellant considers to be shifting of the burden of proof by the trial court to the appellant, my view is different. The learned trial magistrate in the above observations was merely considering the prosecution evidence as against the defence of the appellant in order to come to a decision. That was what the law under section 169 of the Criminal Procedure Code (cap.75) required the trial court to do that is to weigh the prosecution evidence against the defence and give its reasons for its decision.

The Magistrate did not say that the appellant was required to prove the grudge. The magistrate merely said that the appellant claimed that PW2 and PW3 framed him because of a grudge but went on to find that he did not connect or show the connection of that grudge with the allegation that the teacher PW4 framed him. I thus find that the trial court did not shift the burden of proof to the appellant.

The third technical point is the complaint that the magistrate failed to consider the appellant defence testimony. In view of my finding on the issue of grudge above I find that it is not true that the magistrate did not consider the defence of the appellant in her judgment. In addition to what the learned magistrate said above, she went on to state as follows in the Judgment:-

"in addition the accused person's mother admitted she was not at home on the material day. The complainant's mother was at Nairobi. They claimed they were not involved in the case hence the accused was being framed. However, by their own admission, they were absent on the material day. Their evidence would have been of little value to the prosecution case."

The above observations in my view shows that the learned magistrate was alive to the defence of the appellant and the evidence of the appellants witnesses. The appellant's mother was a defence witness. The complainant's mother was also a defence witness. It cannot thus be said that the trial court did not consider the defence testimony of the appellant and his witnesses.

The next issue is with regard to bias. This was ground 3 of appeal. The record does not at any point show, either in the proceedings or in the judgment, that the learned magistrate was biased in favour of the prosecution witnesses. At no point was such an issue raised at the trial. The fact that the magistrate believed the evidence of PWI, PW2 and PW3 on its own, did not amount to bias.

The learned magistrate was entitled to believe either the prosecution witnesses or defence witnesses or some of them. Whichever way, such finding did not amount to bias unless there was evidence on record to show that the magistrate was out to favour a certain witness or version of the case. There is no such evidence on the record of the proceedings or from the judgment.

The last issue is to do with the proof of guilt, which is covered ground 1 of appeal. It is contended that the

magistrate erred in finding the appellant guilty against the weight of the evidence tendered.

In my view, the evidence on record is clear that the complainant PWI was a child of the appellant which is not disputed. The appellant was also the father of M K PW5. Both these witnesses testified that on 17th of October 2014 the appellant called the complainant to his house at night. That the complainant did not go back to the house of her grandfather to sleep as was the usual practice.

The complainant stated that the appellant asked her to sleep in his house and that they had sexual intercourse in his bed two times. The medical evidence from the P3 form which was signed on 29th October 2014 about twelve days later by PW7 Dr. Kathleen who produced it as an exhibit, showed that the hymen of the complainant was broken. This evidence is quite consistent.

The fact that PW2 and PW3 who were aunties of the children PWI and PW5 later took an active part in pursuing the matter was not a reason to say that there was no evidence to support the fact that the appellant committed incest with his daughter. These two witnesses were only instrumental in making sure that the law took its course. There is no evidence that they pursued PW1 the complainant and PW 5 both children of the appellant, to implicate the appellant with this serious offence. I find no reason that would convince me that PWI and PW5 would deliberately implicate their father with this serious crime. I find that the evidence tendered by the prosecution in the trial was adequate to prove the offence. I appreciate the cases cited by counsel for the appellant. I am however of the view that they are not helpful in the present case. In my view the prosecution proved their case against the appellant beyond reasonable doubt.

On the above reasons, I find no merits in the appeal. I dismiss the appeal and uphold both the conviction and the sentence of the trial court.

Dated and delivered at Garissa this 22nd day of July 2016.

GEORGE DULU

JUDGE