



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 36 OF 2014

R M N APPELLANT

VERSUS

REPUBLIC RESPONDENT

(From the Original Conviction and Sentence in the Criminal Case No. 8 of the Chief Magistrate's Court at Malindi – L.W. Gicheha, SPM)

JUDGEMENT

The appellant was charged with the offence of incest contrary to section 20 (1) of the Sexual Offences act No. 3 of 2006. The particulars of the offence are that the appellant on diverse dates between January, 2011 and January 2014, [particulars withheld] village in Magarini District within Kilifi County, intentionally and unlawfully caused his penis to penetrate the vagina of P.R.R. a girl aged 17 years who is to his knowledge his half daughter.

The trial court convicted the appellant and sentenced him to serve life imprisonment. The grounds of appeal are that: -

- 1. The prosecution did not prove its case beyond reasonable doubt.***
- 2. The case of the complainant was not established beyond reasonable doubt.***
- 3. The conviction is based on the evidence of the complainant only.***
- 4. The trial court erred in law and fact by rejecting the appellant's defence.***

The appellant argued his appeal by way of written submissions. The appellant reiterate that the prosecution did not prove its case beyond reasonable doubt. There was no proof of penetration. The medical evidence only show that PW1's hymen was missing. The absence of the hymen cannot be proof of defilement. It is submitted further that hymen could be missing due to other factors such as vigorous sporting activities and falling on sharp objects.

The appellant submit that the complainant informed the court that she was threatened and beaten. The trial court observed in its judgement that had PW1 not been threatened or beaten, then the matter could not have been reported. The appellant also contend that the trial court relied upon circumstantial evidence to convict him. According to the appellant, the alledged duration of the crime is quite long – three years. PW1 failed to report the matter to her mother all that time. The allegation that she was threatened with

death if she talked about it could not have lasted that long.

The appellant further submit that the age of the complainant was not proved beyond reasonable doubt. PW1 testified that she was 17 years old. The P3 form gives the age as 16 years. PW1 does not know when she was born. A document produced as P. Exhibit 3 indicated that the complainant was 18 years as on 3rd September, 2013. On 20th January, 2014 PW1's age was assessed to be 17 years. The appellant relies on the court of Appeal case of **ALFAYO GOMBE OKELLO V REPUBLIC [2010] eKLR**.

It is further submitted that the complainant testified that she was pregnant and the appellant took her to the police to say who impregnated her. She was interrogated and beaten at the police station but did not give the name of the father of her child. She also told the police that she had not slept with the appellant. The appellant contends that that evidence coupled with the defence evidence should have led to his acquittal. PW1 was made pregnant by her boyfriend. The prosecution did not discharge the burden of proof.

Mr. Fedha, prosecuting counsel, opposed the appeal. Counsel submit that the appellant was related to the victim. The complainant was below 18 years old and therefore within the definition of a child under section 2 of the Children's Act. PW1 identified the appellant who forced her into sexual intercourse. PW2 corroborated PW1's evidence. The medical evidence confirmed that the victim was defiled.

The record of the trial court shows that PW1 was the complainant. She testified that she was 17 years old but does not know when she was born. She went to school upto class III and dropped out. The appellant is her step father. Her mother is the appellant's second wife. She was staying in their farm with the appellant while her brothers were staying with her mother. There was only one bed in the house. The appellant used to have sex with her. He told her not to tell anyone or else she would die.

It is PW1's evidence that on 5th January, 2014 she was at home. She was told to go and get vegetables from the farm. The appellant went there. He started beating her and took her to their neighbours while continuing to beat her. The appellant threatened to cut her with a panga and kill her. She ran away to her mother who told her to go and sleep at their neighbour's place. The following day she went to her grandmother's place. She informed her uncles. The matter was reported to the police. She was referred to Malindi District Hospital where her age was assessed and a P3 form filled. They also informed PW3 about the incident. She had no dispute with the appellant.

It is her further evidence that at one time she was pregnant and the appellant took her to the police. She did not reveal the father of the child. She told the police that she was not sleeping with the appellant as he had told her not to tell anyone. PW1 was recalled and testified that at one time she became sick and the appellant took her to hospital. She had a boyfriend. The appellant took care of her like his wife. The appellant took her to Mombasa for prayers and asked her mother to counsel her.

PW2, A R is the appellant's child and sister to PW1. She testified that she used to live together with PW1 and the appellant. Their brothers were living with their mother. There were two houses. They used to sleep in the kitchen while their father would sleep in his house. Sometimes PW1 would sleep with the appellant. The appellant did not sleep with her. PW1 would come to her in the morning. She did not tell anyone. From where she used to sleep she could see the appellant in his house. At one time she saw PW1 and the appellant doing their own thing.

PW3 JOSEPHINE MUSENYA KAKURI is a farmer at Wakala. On 16th January, 2014 she received a report that PW1 had ran away from her home. PW1 informed her that the appellant had beaten her and threatened to kill her and that he used to sleep with her. The matter was reported to the chief and then to the police. PW3 usually helped children with domestic problems.

PW4, P.C. BONIFACE MUTISO was attached to Adu police station. On 17th January, 2014 PW1 was taken to his office. It was reported that PW1 used to be defiled by her father for a period of two (2) years. He investigated the case, took witness statements and charged the appellant with the offence of incest. PW1 was referred to Malindi District hospital where her P3 form was filled. Medical evidence

revealed that PW1 had been defiled. It is his evidence that none of the other witnesses saw the appellant having sex with PW1. PW1 informed him that the appellant had threatened her.

PW5 IBRAHIM ABDULLAHI is a clinical officer who was based at the Malindi District hospital. He examined PW1 on 29th January, 2014 and filled the P3 form. PW1's hymen was broken. Her genitalia had no tears, cuts or bruises. He assessed her age to be 17 years old. She was not pregnant. PW5 concluded that PW1 had been defiled.

In his unsworn defence, the appellant testified that he is a sculptor. He was married to K KN who testified as his witness. He married K K while PW1 was a minor. PW1 was involved with another man called T. Village elders informed him to stop the relationship between PW1 and Tella. He called the complainant and told her to stop sleeping with T. T family informed him that they were ready for a marriage between the two. He talked to PW1 and she said she was ready for the marriage. T family members did not go back to him. They went quiet. However, Tella claimed that PW1 was his wife. He called T and warned him from calling PW1 his wife.

It is his further evidence that in December, 2013, he found PW1 had been constructed a house by a young man. He asked his wife to allow him to go with PW1 so that he could take care of her. After one week he found PW1 with Kshs.1,000/=. She told him that she had been given by one M. He took the money and told her not to take such money. On 10th December, 2013 he asked PW1 to go and call her boyfriend. The boyfriend went to him with sugar and soda. The children then went to the forest to get firewood. He went there and found them having sex. The children ran away for one week. He started looking for them. He managed to take them back home. On 10th January, 2014 he left his home. He found PW1 was sleeping with a young man by the name S who had given him work of selling water. He reported the matter to PW1's uncle. It is his evidence that he is being implicated for taking care of his girls and protecting them.

DW1, K K N is the wife to the appellant. She testified that the appellant was staying with PW1. He beat her and she went to stay with her. PW1 told her that the appellant used to sleep with her and she had been told that she would die if she revealed that.

The trial court framed the issues for the case as whether PW1 was a minor, whether PW1 is the appellant's daughter and whether the appellant committed the offense of incest. The trial court found all the above issues in the affirmative.

The appellant contends that the age of the complainant was not established. The issue of age under section 20 of the Sexual Offences Act is quite crucial. If the complainant is below 18 years old, under section 20 (1), then the accused is sentenced to life imprisonment. If the complainant is over 18 years old, the minimum sentence is ten (10) years imprisonment. I have gone through the record of the trial court and noted that the age of the complainant is given differently several times. The P3 form that was issued by the police on 17th January, 2014 indicate that PW1 was 16 years. PW5, Ibrahim Abdullahi, filled the P3 form a few days later on 29th January, 2014 and indicated PW1's age was assessed to be 17 years as on 20th January, 2014. The charge sheet gives the age of the complainant to be 17 years. It is not clear why the police indicated in the charge sheet that PW1 was 17 years yet the same police indicated the age to be 16 years on the P3 form. The alleged offence as per the charge sheet occurred between January, 2011 and January, 2014.

The record shows that there were treatment notes for the complainant from Malindi District hospital that were produced as exhibit three. This was before the incident was reported to PW4 on 17th January, 2014. The medical notes indicate that the complainant was 18 years old on 3rd September, 2013. The complainant was taken to hospital on allegations that she was pregnant. It appears that the pregnancy test were negative. There is another document from Malindi District hospital dated 30th August, 2013. It indicates that the complainant's urine was taken for pregnancy test and there was allegation of defilement. The document indicate that the complainant's age was 17 years old. The urine was taken on 30th August, 2013.

While testifying, PW1 informed the court that she was 17 years old. She does not know when she was born. There is an age assessment form by Dr. Ariba dated 20th January, 2014 indicating that PW1 was about 17 years old. Since the issue of age is so crucial in Sexual Offences cases. It is required that the complainant's age must be proved beyond reasonable doubt. There is conflicting evidence as to the complainant's exact age. There are medical notes from Malindi hospital that were not prepared by PW5 indicating that the complainant was 18 years old. These notes are dated 3rd September, 2013. The case was reported on 17th January, 2014. There is no indication in the record that PW1 had complained earlier and the matter was being discussed at home. According to the appellant, the complainant had a boyfriend by the name Tella. There was also M and S. I believe the three names do not refer to the same person. The complainant testified that she had a boyfriend although she had not had sex with another man before.

From the evidence on record, I do find and hold that the complainant's age was not proved beyond reasonable doubt. The trial court noted that PW1 was mature. The age assessment reported indicates that PW1 was about 17 years old. It could be more than 17 years. On 3rd September, 2013, PW1's age was given as 18 years. I have carefully checked the documents and it is clear to me that there was no misdescription of the date on the documents dated 3rd September, 2013 and 30th August, 2013. This was about four (4) months before the case was reported on 17th January, 2014. I do find that the appellant is entitled to the benefit of doubt and the age of PW1 should be taken to be above 18 years old. PW1 did not give specific dates when the alleged incest took place. She was living with the appellant for three years. It's not clear whether the offence occurred in 2011, 2012 or 2013. The charge sheet includes January 2014. According to the investigating officer, the complainant told him that she was defiled for two years. This can be taken to be 2013 and 2014. PW1 was 18 years in 2013. I do find that PW1 was above 18 years when the alleged offence took place.

The second issue framed by the trial court is the relationship between PW1 and the appellant. The appellant concedes that he married PW1's mother while PW1 was a minor. Although section 20 of the Sexual Offences Act does not include the term step daughter in relation to the offence of incest, it is logical that the appellant could not have had sex with the mother of PW1 and also have sex with PW1. A step daughter comes within the definition of a daughter under section 20 (i) of the Sexual Offences Act. Any sexual relationship between the appellant and PW1 would fall within the ambit of incest. PW1 knew the appellant as his father.

The last issue is whether the appellant committed the offence of incest. It is the evidence of PW1 that the appellant had sex with her. There was only one bed in the house. PW2, a sister to PW1 and the appellant's biological daughter testified that she used to see PW1 and the appellant doing their own things. She could see them from where she slept. The appellant's wife testified as his witness. She told the court that PW1 informed her that the appellant used to have sex with her.

On his part, the appellant contends that he is being implicated for taking care of his children. There is no evidence that PW1's mother was instigating the case. PW1 testified that no one was telling her to implicate her father. At her age, she was mature enough to know what had happened to her. There is also no evidence that PW1's uncles were behind the case. I am satisfied that indeed the appellant had sex with PW1. The appellant's defence does not raise doubt on the prosecution case. Even if PW1 had a boyfriend that does not rule out the sexual relationship the appellant had with his step daughter. The alleged duration does not matter as PW1 was threatened that she would die if she revealed the sexual acts with her step father.

From the evidence on record, I do find that the prosecution did prove beyond reasonable doubt that the appellant used to have sex with PW1. Since no definite time and dates are given in the evidence of the sexual acts, I do hold that the sexual acts did occur when PW1 was over 18 years old. The appeal on conviction is disallowed. The life sentence imposed by the trial court is hereby set aside and replaced with the minimum sentence of Ten (10) years imprisonment under section 20 (1) of the sexual Offences Act. The appellant shall serve ten (10) years imprisonment from the date of conviction.

Dated and delivered in Malindi this 30th day of August, 2016.

S.J. CHITEMBWE

JUDGE