



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 38 OF 2015

M M B.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Garissa Chief Magistrate's Criminal Case No. 1460 of 2014 – B. J. Ndeda SPM)

JUDGMENT

The appellant was charged In the subordinate court at Garissa with incest contrary to section 20 (1) of the Sexual Offences Act. The particulars of the offence were that between 1st August 2013 and 10th July 2014 at [particulars withheld] Dadaab district within Garissa County being a male person intentionally caused his penis to penetrate the vagina of RM who was to his knowledge his daughter. In the alternative he was charged with committing an indecent act with a child contrary to section 11 (1) of the Sexual Offences Act. The particulars of the offence were that between the same dates and place intentionally touched the vagina of RM a child aged 15 years.

He pleaded not guilty to the offences. After a full trial he was convicted of the main count of incest. He was sentenced to serve 10 years imprisonment.

Aggrieved by the decision of the trial court, the appellant has come to this court on appeal. His grounds of appeal are as follows:-

1. That the prosecution case was not proved beyond reasonable doubt.
2. That the magistrate erred in convicting him while the investigating officer did not testify.
3. That the evidence of the prosecution case was surrounded by contradictions.
4. That the age of the complainant was not assessed.
5. He was not given enough time to defend himself.

The appellant also filed written submissions to the appeal.

During the hearing of the appeal, the appellant adopted his written submissions and said that he was framed because of a family feud. He said that the uncle of the complainant created the animosity.

Mr. Okemwa learned Prosecuting Counsel, opposed the appeal. Counsel stated that Pw1 was a daughter of the appellant and her evidence was clear. Penetration was proved. A P3 form was produced. Counsel submitted that the appellant did not rebut the prosecution evidence in his defence, and further that the appellant was lucky to have escaped with a lenient sentence.

In response, the appellant said that the prosecution did not prove the case beyond reasonable doubt.

The prosecution evidence in summary is that the complainant Pw1 was a daughter of the appellant. The mother had died. There were other children. It was the prosecution contention that the appellant over a long period of months used to lock the complainant in the house, chase away everyone, before engaging in sexual intercourse with her, after giving her tablets to take. The complainant later informed her uncle J O and another uncle M A about the incident, who reported it to the police. According to the prosecution evidence, the complainant and the appellant lived together with a young brother in the same house.

After the complainant reported what was going on, the appellant was arrested. The complainant was taken to Dadaab District Hospital and medically examined. The appellant was also medically examined and charged.

When the appellant was put on his defence, he gave sworn testimony. He stated that the complainant was his daughter and had been married to somebody else but ran away. He advised her to go back to the husband but she refused and then he was arrested. He stated that his daughter was 20 years old. In cross examination he said that his daughter was coached to implicate him for an offence he did not know.

This is a first appeal. As a first appellate court I am required to re-evaluate the evidence on record and come to my own conclusions and inferences. See the case of ***Okeno Vs. Republic [1972] EA 32***.

I have re-evaluated the evidence on record. I have considered the petition of appeal and submission of the appellant and the prosecuting counsel.

This is a case where the prosecution case is based on the evidence of a single witness the complainant Pw1. She is the daughter of the appellant. That fact is admitted by the defence. She was living with appellant at the time of the complaint. This fact is also admitted by the defence.

The complainant is said to have reported the rape incident to two uncles whose names she stated at the trial court. None of them was called by the prosecution to testify. The appellant has stated on appeal that the evidence against him was a frame up by one of the uncles of the complainant.

The burden is always on the prosecution to prove a criminal case against an accused person beyond any reasonable doubt. ***Woolmington Vs. DPP [1935] AC 462***. An accused does not have a burden to prove his innocence.

In the present case the complainant Pw1 was said to have been married previously and was an adult at the time of the incident. She stated however that her father sexually assaulted her severally for several months. Though the appellant claims on appeal that an uncle of the appellant implicated him with this offence, he did not say so at the hearing of the case. He merely stated that he told the complainant to go back to her husband and she refused. The appellant is thus attempting to bring up new evidence on appeal as an afterthought. The magistrate could not consider such allegations which were not before the trial court.

The evidence of a single witness can be sufficient to sustain a conviction in a criminal case. In the circumstances of the present case, I do not see any reason why the complainant would have implicated her father with such a serious offence. With the cultural values in this area, I do not find it surprising that the two uncles did not come to court to testify. They might have thought of having an appropriate settlement outside the court. The case of ***Bukenya Vs. Uganda [1972] EA 549*** therefore is not applicable.

I find that the evidence on record was sufficient to prove the offence alleged against the appellant. I will thus dismiss the appeal on conviction.

The sentence is lawful, and I find no reason to interfere with the same.

Consequently and for the above reasons I dismiss the appeal and uphold both the conviction and the

sentence of the trial court. Right of appeal explained to the appellant.

Dated and delivered at Garissa this 18th day of August 2016

GEORGE DULU

JUDGE