



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 29 OF 2014

E M APPELLANT

VERSUS

REPUBLIC RESPONDENT

(From the original conviction and sentence in criminal case No.572 of 2010 of the Chief Magistrate's Court at Meru by R.N Kimingi – Chief Magistrate)

JUDGMENT

The appellant, **E M**, was convicted for the offence of incest contrary to section 20 (1) of the Sexual Offences Act No.3 of 2006. He was also convicted for the offence of indecent act with a child contrary to section 11 (1) of the Sexual Offences Act No.3 of 2006.

The particulars of the offences were that on 29th day of November 2009 at **[Particulars withheld] area**, Meru Central District of Meru County intentionally a caused his penis to penetrate the vagina of **B K** a child aged 10 years who to his knowledge was his niece. He also unlawfully and intentionally touched the complainant's vagina with his penis.

The appellant was tried, convicted and sentenced on both counts. The sentences were ordered to run concurrently. He now appeals against both conviction and the sentence.

The appellant raised several grounds of appeal that can be summarized as follows:

- 1.That the learned trial magistrate erred in law and facts by failing to find that the prosecution evidence was contradictory.
- 2.That the learned trial magistrate erred in law and fact by failing to make a finding that the failure to call two material witnesses was prejudicial to him.
3. That the learned trial magistrate erred in law and fact by failing to consider his defence.

The state opposed the appeal and was represented by Mr. Odhiambo, the learned counsel.

The facts of the case are briefly as follows:

While the complainant was sleeping on a sofa at her aunt's house, the appellant entered the house and undressed her. She was roused from sleep by pain. When she raised an alarm the appellant pretended he was checking on the children before he ran away.

On his part the appellant contended that he was falsely implicated. He pleaded an alibi.

This is a first appellate court as expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **OKENO Vs. REPUBLIC 1972 EA 32**.

Although the appellant contended that the prosecution witnesses contradicted each other, my perusal of the record does not disclose any contradiction.

Before the offence of incest is established, the prosecution must prove:

- (a) Sexual liaison between the complainant and the accused whether consensual or not; and
- (b) The two must be within the prohibited degree of consanguinity.

In the instant case the evidence on record sufficiently proved that the appellant is an uncle of the complainant.

The complainant in her evidence testified that she was aroused from sleep by pain from her genitalia. She was able to see her uncle and when she raised an alarm he started calling Brian and asked him to cover himself properly. When she arrived at her aunt's home, she found him there.

J G (PW2) is the complainant's aunt. She testified that she returned to her home on the material day at about 7PM and found both the complainant and the appellant. Later in the night at about 3 AM the complainant reported to her about the incident. She found her window open. She said this was where the appellant passed.

The complainant was medically examined on that day and it was confirmed that she had been defiled. This was the evidence of Dr. Macharia.(PW2).

The appellant raised an issue of grudge with the complainant's mother which was denied. The learned trial magistrate addressed this defence and the alibi before dismissing both. My analysis of the record is that this defence was displaced by the evidence by the prosecution.

My perusal of the record indicate that the prosecution did no fail to call any material witness.

What the prosecution indicated to be count two ought to have been an alternative charge. The appellant ought not therefore to have been convicted and sentenced. The appellant's conviction in respect of count 2 is quashed and the sentence set aside.

Section 20(1) of the Sexual Offences Act 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.

In the instant case I am not persuaded to interfere with the sentence for the complainant was a child of tender years The appellant's appeal is dismissed except in respect of count two.

The appellant will therefore serve the sentence meted in count one.

Orders accordingly.

DATED at Meru 19th day of December 2016

KIARIE WAWERU KIARIE

JUDGE