



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
CRIMINAL APPEAL NO. 113 OF 2015
J B K APPELLANT
VERSUS
REPUBLICRESPONDENT

(From the original conviction and sentence in criminal case No.998 of 2014 of the Senior Resident Magistrate's Court at Githongo by C.A Mayamba– Senior Resident Magistrate)

JUDGMENT

The appellant, **J B K**, was charged and convicted for the offence of defilement contrary to section 8 (1) (2) (sic) of the Sexual Offences Act No.3 of 2006.

The particulars of the offence were that on diverse dates between the 23rd August 2014 and 4th October 2014 at [particulars withheld] Meru Central District of Meru County intentionally caused his penis to penetrate the vagina of **G.G**, a child aged 8 years.

The appellant was sentenced to life imprisonment. He now appeals against both conviction and sentence.

The appellant was represented by Mr. Ndubi, learned counsel. He raised seven grounds of appeal that can be summarized as follows:

1. That the learned trial magistrate erred in law and fact by trying and convicting him on a defective charge.
2. That the learned trial magistrate erred in law and fact by trying and convicting him on a wrong charge.
3. That the learned trial magistrate erred in law and fact by reading the judgment and sentence in open court.
4. That the learned trial magistrate erred both in law and fact by convicting the appellant against the weight of the evidence.

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

The facts of the prosecution case were briefly as follows:

When the complainant had gone to visit her aunt, the latter left her tending her young child. The appellant

got hold of her and took her to a bed where he defiled her.

On his part the appellant contended that he was falsely implicated for the complainant's mother is against his marriage to her sister.

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**

The charge, as contend by the appellant was wrongly drafted. It ought to read:

" ... contrary to section 8(1) as read with section 8(2) ..."

The appellant was not prejudiced in any way by the defect. He was able to understand the charge and he fully participated in the proceedings. This defect therefore is curable under section 382 of the Criminal Procedure Code.

The offence of incest by a male is created by section 20(1) of Sexual Offences Act which states:

(1) 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.

From the reading of this section, it is clear that the offence is due consanguinity (relationship by blood).

The complainant kept on referring to the appellant as her uncle. It was explained by other witnesses that the appellant is married to the complainant's mother sister. Out of respect many African communities call such a man uncle but strictly speaking he is not an uncle. He is simply one's aunt's husband. The term uncle is defined in section 22 (2) (a) of the Sexual Offences Act as follows:

“uncle” means the brother of a person’s parent and “aunt” has a corresponding meaning;

I therefore make a finding that the appellant was not wrongly charged; he could not have been charged with incest.

Article 28 of the constitution is on human dignity. It states:

Every person has inherent dignity and the right to have that dignity respected and protected.

In my opinion reading a judgment in an open court does not erode any dignity. The hearing of sexual offences in camera is aimed at protecting the privacy and dignity of the parties and mainly that of the victim. If for one reason or the other this is not observed, it cannot be the basis for nullifying the trial. Any aggrieved party may seek legal redress in a civil suit.

I was invited to make a finding that there was no sufficient evidence on record to support the appellant's conviction. The ingredients of the offence of defilement are:

(a) The age of the complainant must be proved to be under 18 years,

(b) Penetration into the complainant's genitalia must be proved; and

(c) The penetration must be proved was by the accused person.

In her evidence the complainant (PW1) testified that she was 9 years old. This is what F K (PW2) testified to. A certificate of her birth was produced. This fact was not in dispute for the appellant said that the complainant was about 9 years.

The complainant's testimony is that the appellant found her playing in his compound. She had been left to take care of baby T by her aunt, the appellant's wife. He grabbed her and covered her eyes and mouth and took her to her aunt's bed and slept on her after undressing both of them. He warned her not to tell anybody or else he was going to kill her. She initially did not tell anybody but when her mother confronted her after she had noticed some blood on her pants, she gave in. This was after her mother had asked her to swear on the Bible.

F K (PW2) testified that she noted some blood on her daughter's biker. When she asked her about it she did not come out clear. She therefore checked her genitalia and noticed some blood clot and the genitalia appeared reddish. On further interrogation she yielded after she was asked to swear on the Bible and said Baba T had done bad manners to her.

A N (PW3) the complainant's grandmother, also testified that when she checked the complainant's genitalia, she found it reddish.

Though the testimony of Sebarina Kamaithiri (PW4) at one point states that she did not examine the complainant, what follows is a description of her observations. I therefore treat the word "not" a typographical error. She observed that the complainant's hymen was missing and that there were tears on both sides of labia minora and majora. The vaginal and vulva walls were reddish. She formed an impression that there was penetration.

I make a finding that there was prove of penetration.

The complainant testified that her defiler was the appellant. In her evidence there was nobody else at home except baby Terry. The proviso to section 124 of the Evidence Act states:

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.

The learned trial magistrate had ample evidence on record to believe the complainant. He weighed the defence proffered by the appellant before dismissing it as an afterthought. This is because though he contended that the complainant's mother falsely implicated him for she was not happy with his marriage to her sister, it was not supported by the evidence on record. He never raised this issue with the complainant's mother or his mother in law.

The upshot of the foregoing analysis of the evidence on record, I find that the appeal lacks merit. The same is dismissed in entirety.

DATED at Meru 19th day of December 2016

KIARIE WAWERU KIARIE

JUDGE