



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CRIMINAL APPEAL NO. 166 OF 2011**

**SMM .....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

*(Being an appeal from the original conviction and sentence in Makindu Principal Magistrate's Court Criminal Case No. 478 of 2011 by Hon N.N. Njagi PM on 14/9/2011)*

**JUDGMENT**

1. The Appellant, **Simon Musyoki Musembi** was charged with the offence of incest by male person contrary to **Section 20(1)** of the **Sexual offences Act No. 3 of 2006**. Particulars thereof being that on the 20<sup>th</sup> day of April, 2011 in Kibwezi District within the Eastern Province, intentionally and unlawfully committed an act with his male organ namely penis to cause penetration to the vagina of **NM** who was to his knowledge his niece.
2. In the alternative the appellant was charged with Committing an **Indecent Act** with a child contrary to **Section 11(1)** of the **Sexual Offences Act No. 3 of 2006**. Particulars thereof being that on the 20<sup>th</sup> day of April, 2011 in Kibwezi District within the Eastern Province, intentionally and unlawfully touched the vagina of **NM** a child aged 6 years with his penis.
3. The second count was committing an unnatural offence contrary to **Section 162(a)** of the **Penal Code**. Particulars thereof being that the 20<sup>th</sup> day of April, 2011 in Kibwezi District within the Eastern Province had carnal knowledge of **NM** against the order of nature.
4. Having denied the charges the appellant was subjected to the trial process, convicted on both counts and sentenced as hereunder:-

**Count 1** - life imprisonment.

**Count 2** - 14 years imprisonment.

5. Being dissatisfied with the conviction and sentence thereof the appellant appealed on grounds that the Lower Court erred in law and fact in that:-
  - i. Age was not proved;
  - ii. The complainant stated that the 'accused penetrated' her anus and the trial magistrate made a finding of incest and unnatural offence under **Section 142(a)** of the **Penal Code**.
  - iii. Treatment notes were produced by a different person from the author and the same did not bear the name of the author;
  - iv. The trial court did not caution and satisfy itself if the complainant, a minor understood the purpose of speaking the truth.

- v. There was no compliance with **Section 211** of the **Criminal Procedure Code** and no certificate of compliance was recorded.
  - vi. Evidence adduced was contradictory in material particulars;
  - vii. The magistrate failed to appreciate there was bad blood between the parents of the complainant and the appellant; and
  - viii. Facts presented did not disclose offences as charged.
6. The facts of the case are that the appellant herein is the complainant's paternal uncle. On the 20/4/2011, **PW1, NM** was called by the appellant. She went to his house. He told her to remove her knickers. The appellant removed his pair of trousers and used his penis to penetrate her anus. She felt pain and cried. The appellant then released her. **PW2, MM** was away from home. She returned at 3.00pm. The complainant told her what happened. She reported the matter to the police. **PW1** was taken to hospital for examination.
  7. **PW6, Mary Mutindi Mbanda** examined her on the same day and found she had sustained a small bruise around the anal orifice. The genitalia however had no bruises on both the minora and majora. The hymen was broken previously not on the 20/4/2011. The appellant was re-arrested by **PW5 No. 83667, P.C. (w) Emily Omoke** and charged. Thereafter **PW4, Patrick Musyoki Kibwana** a medical officer at Makindu Hospital filled the P3 form in that regard.
  8. When put on his defence the appellant denied having defiled the child. He stated that he was on duty. He was called and told that the child had been defiled and he told them to take the child to hospital. They did and he was arrested later on. He called his mother **AKM** as a witness who stated that following the allegation she examined the child but she had no injuries..
  9. The appeal was canvassed by way of written submissions which I have duly considered.
  10. This being the 1<sup>st</sup> appellate court my duty is to re-evaluate the evidence, draw my own inferences and come to a logical conclusion knowing that I did not have an opportunity of seeing or hearing witnesses who testified at the trial court. *(See Okeno versus Republic (1972) E.A. 32).*
  11. In the first count of incest, it is stated that the appellant had knowledge that the complainant was his niece and he caused his male organ to penetrate her vagina. It is not in dispute that the complainant herein is the appellant's niece. **PW1** stated that the appellant penetrated her anus. Medical evidence adduced confirmed penetration of the anus but not her vagina. According to **Section 20(1)** of the **Sexual Offences Act** :-

*“Any person who commits an indecent or an act which cause penetration.”* is guilty.

Penetration is the insertion of a genital organ into that of another. The genital organ per the law includes the anus. However the particulars of the offence having been specific that the penetration was of the vagina, the facts presented did not prove the first count. It was therefore erroneous on the part of the learned magistrate to convict on count 1. In the premises I quash the conviction and set aside the sentence imposed.

12. With regard to count 2, it is argued that count 2 was incurably defective as the section of the law was repealed. Submitting that the section was repealed the appellant's counsel alluded to **Section 142 (a)** of the **Penal Code**. That provision of the law was indeed repealed. However, the appellant was stated to have violated **Section 162(a)** of the **Penal Code**. This section is still in existence.
13. It is stated that **Section 211** of the **Criminal Procedure Code** was not complied with. In his ruling the trial magistrate stated:-

*“Accused has a case to answer. Accused shall be put on his defence. Section 211(1) Criminal Procedure Code.”*

14. Pursuant to the ruling, the appellant elected to give unsworn evidence and to call one witness. This is evidence that **Section 211** of the **Criminal Procedure Code** was complied with and the appellant understood the explanation given which enabled him to defend himself appropriately. The appellant having not been prejudiced, that ground of appeal must fail.
15. **PW5** indeed stated that treatment notes produced in evidence were authored by **Miss Makau**.

- PW6, Mary Mutindi Mbanda** stated that she treated the child and authored the treatment notes. The medical examination report having been filled by a medical doctor who examined the complainant, the contradiction is not fatal to the prosecution's case. Prior to filling the P3 form the medical officer examined the complainant and confirmed that indeed the child had sustained the injury.
16. The magistrate has been faulted for basing the conviction on evidence of the child without warning himself.
17. Previously, it was possible to convict on uncorroborated evidence of a victim of a sexual offence as long as the court was satisfied with evidence adduced and after duly warning itself of the dangers of convicting on uncorroborated evidence of truthfulness of the complainant's evidence. (*See Chila and Another versus Republic [1967] E.A. 722; Peter Osare versus Republic [1981] LLR 2998(CAK)*).
18. Today however, **Section 124** of the **Evidence Act** is clear. It states thus:-
- “... 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.”***
19. The complainant herein was a child of tender age, (6 years old). Evidence that she was violated sexually against the order of nature was corroborated by medical evidence. However, the fact that it was the appellant who had carnal knowledge of her against the order of nature was her sole evidence. The learned trial magistrate had an opportunity of observing her demenour as she testified. He was the only person who could tell whether she was truthful in the manner that she testified. I have perused the entire proceedings, the judgment inclusive. It is not specifically stated that the court was satisfied that the victim was telling the truth. This being the case, it cannot be asserted with certainty that the case was proved beyond any reasonable doubt.
20. Consequently, the appeal succeeds and is allowed. The conviction is quashed and the sentence set aside. The appellant shall be set at liberty unless otherwise lawfully held.
21. It is so ordered.

**DATED, SIGNED and DELIVERED at MACHAKOS this 14<sup>th</sup> day of JANUARY, 2015.**

**L.N. MUTENDE**

**JUDGE**