



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL CASE NO. 234 OF 2013

G M M.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Mutomo Senior Resident Magistrate's Court Sexual Offences Case No. 18 of 2013 Sandra Ogot, R.M on 20th September, 2013)

JUDGMENT

1. **G M M**, the Appellant, was charged with the offence of **incest** contrary to **Section 20(1)** of the **Sexual Offences Act No. 3 of 2006**. Particulars are that on diverse dates between the month of June, 2012 and June 2013 at unknown time in [**Particulars Withheld**] within **Kitui** County caused his penis to penetrate the vagina of **H M** a child aged 14 years who was to his knowledge his daughter.
2. In the alternative he was charged with an offence of committing an act of **indecency** with a child contrary to **Section 11(1)** of the **Sexual Offences Act No. 3 of 2006**. Particulars are that on diverse dates between the month of June, 2012 and June 2013 at unknown time in [**Particulars Withheld**] within Kitui County touched the private parts; namely vagina of **H M** a child aged 14 years with his penis.
3. He was subjected to full trial, convicted and sentenced to life imprisonment.
4. Being dissatisfied with the conviction and sentence he appealed on grounds that:-
 - i. The prosecution's case was not proved to the required standard of proof namely, beyond reasonable doubt as that trial magistrate shifted the burden of proof unto the appellant whereas in law the burden never shifts;
 - ii. Medical evidence was presented by a clinical officer who legally was not a medical officer and there was a misdirection on the part of the magistrate.
5. Facts of the case were that the appellant herein was the complainant's father. In June 2013 the complainant was in her room asleep when she was woken up by the appellant. He lifted her night-dress, forced himself onto her and penetrated her. That was not the first time he was having sex with her. She did not inform anyone about the incident because he used to give her money and would tell her not to talk about it. On 18th July, 2013 she declined to take the money he gave her which made him furious. He wanted to hit her with a pair of pliers.
6. In the course of the year, the appellant assaulted her mother, PW2, **L M M**, when she discovered

- the sexual relationship that existed between him and the complainant. They reported the matter to the police. The complainant was examined by **PW5, Daniel Mulwa** who found her hymen missing which was evidence of having engaged in sex previously. The case was investigated by **PW6, No. 75433, P.C. Japheth Kidiavai** who caused the appellant to be charged.
7. When put on his defence the appellant denied having committed the offence. He stated that the charge was trumped up because of the disagreement he had with his estranged wife. In respect of the complainant he stated that he got a report from her teachers that she was disrespectful to them. She also refused to repeat a class and he decided to discipline her by beating her up.
 8. The trial magistrate evaluated evidence adduced and found the case having been proved to the required standard.
 9. At the hearing the appellant canvassed the appeal by way of written submissions. The State opposed the appeal through learned State Counsel, **Ms Amojong**. She submitted orally that the complainant positively identified the appellant as the person who had sex with her. She stated that medical evidence adduced confirmed the fact of having engaged in sex previously. The defence put up according to her was a mere denial. She called upon the court to confirm the conviction and sentence as the complainant was 14 years old.
 10. This being the first appellate court, it is my duty to subject the evidence tendered in the lower court to fresh and exhaustive evaluation to reach my own conclusion bearing in mind the fact that I did not see or hear witnesses. (*See Okeno –versus- Republic [1972] E.A. 32*).
 11. Medical evidence was adduced by a clinical officer who was competent to fill the P3 form. (*See Raphael Kavoi Kiilu versus Republic Criminal Appeal No. 198 of 2008; Fappyton Mutuku Ngui Criminal Appeal No.32 of 2013; Section 2 of the Clinical Officers (Training, Registration and Licencing Act)*). That ground of appeal fails.
 12. It is not in dispute that the complainant was the appellant's biological daughter. He acknowledged that fact. It was therefore within his knowledge that the complainant herein was his daughter.

The issue to be determined is therefore whether he committed an act that caused penetration with her.

13. In her testimony the complainant re-counted how the appellant started having sexual intercourse with her from the month of June, 2012. She alluded to an unknown date in the month of June, 2013 when the appellant walked into her bedroom bare-chested with only a towel tied around his waist. He wore a condom. He removed her panties having lifted up her nightdress and penetrated her. They had sex as they had done previously. She did not feel any pain as she used to when they started engaging in sex. On cross-examination she emphasized the fact that she was only having sex with the appellant and nobody else.
14. None of the witnesses who testified saw the appellant and the complainant in the act of coitus. It was therefore the complainant's sole evidence that the court had to rely on. There was medical evidence adduced that proved beyond doubt that the complainant, a child had been sexually violated. The trial magistrate had the opportunity of hearing and seeing the complainant as she testified. In her considered judgment she states thus:-

“I am convinced the victim is telling the truth. Her story is too elaborate and consistent to be a fabrication. She never changed the narrative when she told all the adults involved in this issue... in fact during cross-examination she unflinchingly faced him and remained adamant that he defiled her and he had been at it for a year.”

15. In the case of *Geoffrey Kioji -versus- Republic -Criminal Appeal No. 270 of 2010 (Nyeri)* the Court of Appeal stated thus:-

“...The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed under the proviso to Section 124 of the Evidence Act, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief”.

16. In his defence the appellant stated in details what made him disagree with the complainant's mother and how he married another wife who later conspired with the complainant's mother after she returned to her marital home. Thereafter they disagreed and the complainant's mother deserted her matrimonial home. He explained that the charges were trumped up by the complainant because he disciplined her following her refusal to repeat a class in school. The learned magistrate considered his defence and opined that the defence offered was wanting and did not challenge the prosecution's case. It was erroneous on the part of the learned magistrate to reach such a conclusion. As a general rule, the burden of proof never shifts to the accused unless it is specifically stated by the law. The appellant was therefore required to render an explanation but not to disapprove the prosecution's case.
17. That notwithstanding, evidence adduced by the complainant was believed by the trial magistrate as aforesaid. She had no iota of doubt in her mind that the complainant told the truth. Pursuant to the law that was sufficient to have the appellant convicted. The evidence adduced proved the fact that the appellant did an act that caused penetration with the complainant, his daughter. It was an act of indecency as it was unlawful and intentional, the complainant having been incapable in law of consenting to the act.
18. Per the evidence adduced, the complainant was a minor aged fourteen (14) years. According to the proviso to Section 20(1) of the **Sexual Offences Act, 2006** Law of Kenya, it is mandatory for such an offender to be sentenced to life imprisonment.
19. Consequently, having re-evaluated evidence adduced I am satisfied that the trial court reached a proper conclusion. The appeal therefore fails, it is dismissed in its entirety.

DATED, SIGNED and DELIVERED at MACHAKOS this 19TH day of MARCH, 2015.

L.N. MUTENDE

JUDGE