



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 116 OF 2011

H M M APPELLANT

VERSUS

REPUBLIC

(Being an appeal from the conviction and sentence of Hon. S.K Mutai Resident Magistrate delivered on 12/5/2011 in Mutomo Resident Magistrate Criminal Case No. 67 of 2011)

(Before Hon. B. Thurairaja J)

J U D G M E N T

1. The Appellant, **H M M** was charged with the offence of incest by male person contrary to **section 20 (1)** of the **Sexual Offences Act No. 3 of 2006**.

The particulars of the offence were that “on the 1st day of March 2011 at unknown time in **Mutomo District** within **Kitui County**, conducted an indecent act which caused penetration with a female person namely **M E M** aged about 26 years who his knowledge the said person is his daughter.”

2. In the alternative, the Appellant was charged with the offence of committing an indecent act with an adult contrary to **section 11(6)** of the **Sexual Offences act No.3 of 2006**.

The particulars of the offence were that “on the 1st day of March 2011 at unknown time in **Mutomo District** within **Kitui County**, committed an act of indecency with **M E M**, an adult aged 26 years by touching her private parts namely thighs”.

3. The Appellant pleaded not guilty. The case proceeded to a full trial.
4. The prosecution case was that PW1 **E M M** was asleep in her room when the Appellant who is her father broke the door and entered the room. That the Appellant was naked and tore her petticoat and had sex with her. A report was made to the police. The Appellant was escorted to hospital. A pregnancy test carried out on the complainant was positive. The Appellant was arrested and charged.
5. In his defence the Appellant gave sworn evidence. The Appellant denied the offence and stated that the charge was framed up on him by the assistant chief.
6. The Appellant was convicted for the offence of incest and sentenced to ten (10) years imprisonment.
7. The Appellant was aggrieved by both the conviction and sentence. He appealed to this court on

grounds that can be summarized as follows:-

- a. **That the prosecution case was not proved beyond reasonable doubt.**
 - b. **That the prosecution evidence was inconsistent and contradictory.**
 - c. **That critical witnesses were not called.**
 - d. **That the offence was not proved by medical evidence or by a DNA test.**
 - e. **That the defence case was not considered.**
8. During the hearing of the appeal, the Appellant relied on written submissions. The said submissions essentially reiterate the grounds of appeal.
 9. The appeal was opposed. The learned counsel for the State submitted on the sufficiency of the prosecution evidence.
 10. This being a first appeal, this court is duty bound to re-evaluate the evidence and the record afresh and come to its own conclusions and inferences – See **Okeno –vs- Republic (1972) EA 32**.
 11. Before I delve into the grounds of appeal, I must point out that the charge is defective. In Count I, the offence created by **section 20 (1) Sexual Offences Act** is either that of an indecent act or an act which causes penetration. The act constituting the offence ought to have come out clearly in the particulars of the offence.

In the alternative Count, the Appellant was charged under a non-existing law as **section 11 (6)** of the **Sexual Offences Act** was repealed by **Legal Notice No. 7 of 2007**.

12. The complainant (PW1) was a 26 year old female who testified through a sign language interpreter. It was the complainant's evidence that the Appellant who is her father had sexual intercourse with her. The petticoat which she wore at the material time and was allegedly torn during the struggle was produced as an exhibit. The complainant's evidence was that she had a torch and saw the Appellant.
13. The complainant's evidence was however not subjected to cross-examination contrary to the provisions of **section 146 (1)** of the **Evidence Act Cap 80 Laws of Kenya** which provides as follows:-

“Witnesses shall first be examined-in-chief, then, if the adverse party so desires, cross-examined, then, if the party calling them so desires, re-examined.”

14. On whether expert evidence was called to scientifically prove the offence by way of DNA test, the law does not place any such burden on the prosecution.
15. The Clinical Officer, PW5 **Daniel Mulwa** gave evidence that the complainant was pregnant and had a urinal tract infection. The age of the pregnancy was not stated. It is not clear whether the pregnancy and the urinal tract infection were linked to the offence before court.
16. The other prosecution witnesses are formal witnesses who received the report and had the Appellant arrested. These witnesses are **PW2 M M**, the Assistant Chief **PW3 Kandura Matuku** and **PW4 PC Haron Yator**.
17. The defence by the Appellant that he was framed up was not convincing. There are no reasons that emerge from the record why the Assistant Chief would frame up the Appellant. However, the prosecution evidence as analyzed about has some gaps. It is not the duty of the Appellant to fill in the gaps.
18. I have considered whether a retrial is appropriate in this case. As held by the Court of Appeal in **Yusuf Sabwani Opicho –vs- Republic [2009] eKLR:-**

“In general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its own facts and circumstances and an order for retrial should only be made where the interests of justice require it;” That was stated in **Fatehali Manji v. The Republic [1966] EA 343**. **In many other decisions of this Court it**

has been held that although some factors may be considered, such as illegalities or defects in the original trial; the length of time elapsed since the arrest and arraignment of the Appellant; whether mistakes leading to the quashing of the conviction were entirely the prosecution's making or not; whether on a proper consideration of the admissible or potentially admissible evidence, a conviction might result from a retrial; at the end of the day, each case must depend on its own particular facts and circumstances and an order for retrial should only be made where the interests of justice require it."

19. As observed above, the charge sheet was defective. The prosecution evidence was also insufficient. The complainant's evidence left some gaps on the intensity of the torch light. On this aspect the prosecution cannot be allowed to have a second bite of the cherry. The Appellant has been in custody since the date of arrest. That is a period of about four years. The Appellant has substantially served the sentence. The appeal is allowed. The Appellant is at liberty unless otherwise lawfully held.

B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 19th day of March 2015.

B. THURANIRA JADEN

JUDGE