REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL NO. 209 OF 2012

[Arising from the judgment by SRM P.N. ARERI in Bungoma CMCR case no. 918 of 2013]

REPUBLIC ……..……..…….. APPELLANT

VERSUS

J W B ……..…….……. RESPONDENT

JUDGMENT

1. This is an appeal preferred by the state following the judgment delivered by the trial court, in Republic versus J W B CMCRC NO.918 of 2013. The respondent had been charged with the offence of incest contrary to Section 20 (1) of the Sexual Offences Act no. 3 of 2006. In the said case the trial court in its judgment delivered on the 14th of November, 2012 acquitted the accused of the charge. The State being dissatisfied with the judgment preferred this appeal.

The petitioner appealed on the following grounds;

1. **The judgment is void in law**

2. **The learned trial magistrate erred in law by failing to appreciate and evaluate all evidence placed before him and especially prosecution evidence thereby arriving at a wrong conclusion.**

3. **The trial magistrate erred in law in over relying on defence evidence to arrive at his decision.**

4. **The learned trial magistrate erred in law in finding that the medical examination report (P3) produced as exhibit no. 1 is not sufficient evidence when the same showed that the complainant's genitalia had bruises and oedema hence corroborating the evidence of the complainant.**

5. **The learned trial magistrate erred further by trashing away medical report from Nairobi Hospital when the report indicated that the complainant suffered from rape trauma syndrome.**

6. **The trial magistrate erred in law and fact in failing to analyze the evidence on record and contrary over relying on his own opinion.**

SUBMISSIONS

At the hearing of the appeal Miss. Odumba represented the State while Mr. Situma appeared for the respondent.

APPELLANT'S SUBMISSIONS

In her submission Miss. Odumba stated that the state appealed on judgment and acquittal. She submitted that the trial court failed to appreciate and evaluate the prosecution evidence when arriving at its conclusion. She further submitted that the ingredients necessary to prove the offence of incest were presented before the court. In that the prosecution proved that the respondent and the victim were related and this was known to the respondent. Secondly the victim was a child of 15 years. Further that the testimony of the victim was corroborated by the evidence of her mother. She further stated that the testimony of the victim was categorical of who had carnal knowledge and that this did not happened at one time. It was her assertion that there was doubt that the respondent was responsible and that the trial court erred in refusing to consider the medical report.

RESPONDENT'S SUBMISSIONS

In opposing the appeal Mr. Situma for the respondent urged that the prosecution evidence did not tie the loose ends, there was an allegation of long molestation yet DW2 the father of the victim was not aware of the said allegations; further medical cards and initial treatment cards were not produced in evidence.

DETERMINATION

This is a court of first appeal and it has to consider the entire record and arrive at an independent opinion ***Okeno v. Republic [1973] E.A 322***.

Section 345 A of the Criminal Procedure Code provides as follows;

"When an accused person has been acquitted on a trial held by a subordinate court, or where an order refusing to admit a complaint or formal charge, or an order dismissing a charge has been made by a subordinate court, the attorney general may appeal to the high court from the acquittal or order on a matter of law"

In the case of ***Joshua Ntonja Mallanji V. R Criminal Appeal No. 481 of 2010*** the Court of Appeal expounded on what constitutes a matter of law as follows;

"We recognize that what constitutes a question of law for purposes of an appeal to the superior court would ultimately depend on the nature of the determination by the Subordinate Court and will vary infinitely from case to case. In some cases, the point of law can be gleaned from the decision without much ado. For instance, the subordinate court could make findings which are *exfacie,* ***erroneous in law or embark on our erroneous statutory interpretation. Those cases where the error of law is patent or is apparent on the face of the record present no difficulty. There are other less obvious cases where the error of law may arise from the manner the subordinate court treated the evidence adduced at the trial. The cases of Republic V. Kidaga [1973] (975) EA 262 from the High Court and Patel V. R [1968] EA 97 from the predecessor of this court are good illustrations of this category of cases. In all the three cases, the respective subordinate courts acquitted the accused without putting him on his defence on the ground that there was no case to answer. In all the three cases, the attorney appealed to the High Court under Section 318 A of the Criminal Procedure Court against the acquittal. The appeals were invariable allowed on the ground that the respective magistrate reached a conclusion on the evidence which no court property directing itself could have reached. That ground was recognized to be an error of law. So a question of law warranting an***

appeal to the High Court by the Attorney General arises. If the subordinate court reaches a decision which on evidence, no reasonable court properly directing itself on the evidence and the law could arrive at."

I considered the above authority in order to appreciate the current appeal.

The case for the State is as summarized in the above case.

The prosecution's evidence is that on the 24th day of April 2011, the respondent committed incest with the complainant C N a minor aged 15 years who is a daughter of his brother.

The Respondent had for period of 10 years prior to the said date sexually assaulted the complainant threatening he would kill her if she told the mother. On the 25th of April, 20111, the complainant's mother took the complainant for a medical examination at Bungoma District Hospital where she was examined and thereafter the matter was reported to the police.

PW1 C N – informed the court that the respondent had asked her at 4.00 p.m., on the 24.4.11 to cut for him sugarcane and her grandfather's farm which she declined. She later took a jerrican to fetch water, when the respondent followed her, asked to put the jerrican down, held her hand taking her to the sugar plantation, removed her panty and had carnal knowledge of her, threatening to kill her if she told anyone. She did not report to her mother. The following day her mother took her to Bungoma District Hospital where she was examined and the matter was reported to Bungoma police station. It was her further testimony that the respondent had a habit of having sex with her since 2002 even before she started the primary school. She further testified that she was taken to Nairobi Women's hospital for medical checkup.

PW2 C N W1 mother of PW1 recalled that on 26.4.2011 between 9.00 and 4.00 p.m she took PW1 to hospital as PW1 was looking traumatized. The doctor examined and counseled PW1 upon which and PW1 opened up to the doctor and told him that she had been defiled by an uncle since 2002. She gave the name of the respondent. PW2 thereafter reported the matter to Bungoma police station. A P3 form was issued. PW1 was treated and tests done.

The witness thereafter reported the matter to the children's office Bungoma and was referred to the Nairobi Women's Hospital where PW1 underwent treatment for a month. The respondent was later arrested.

PW3 C N W2 is s sister to PW2. On 26.4.2011 PW2 and PW1 went to her house. PW1 looked sick and confused. She comforted PW1 and asked her to confide in her for assistance. PW1 told her that the respondent had been having carnal knowledge of her overtime, since she was 6 years. The following day the witness accompanied PW1 & PW2 to Bungoma police station to make a report. They were issued with a P3 form. PW1 was examined and later taken to Nairobi Women's hospital and the accused was charged.

PW4 – Elias Adoka a clinical officer produced the P3 form on behalf of Dr. Kirika who examined PW1 and filed the same. The contents of the P3 form indicated that the victim had been defiled. Her genitalia had traumatic bruises with Oedema on the labia. Age assessment was given as 16 years.

PW5: P.C. Martin Kiprono – of Bungoma Police Gender and Children's desk was the investigating officer. He recalled receiving a complaint from PW1 accompanied by her mother on the 28.4.11. The complainant gave an account of how her uncle had defiled her and the witness booked the report. He issued a P3 form that was filled at Bungoma District Hospital where the doctor confirmed sexual assault. He later visited the scene and arrested the respondent.

The respondent gave evidence on oath had called witnesses testified as follows;

DW1 – J W B the respondent denied the charges. He denied having accompanied PW1 to the river on

24.4.2011. He cited differences between him and PW2. He admitted that PW1 was his niece.

DW2 – J W brother to DW1 and PW1's father. He stated that DW1 and his family do not stay in the same compound. He was never informed about the allegations against the respondent. When he enquired from his wife, she got angry and left. He was not informed when PW1 was taken to hospital. PW1 never told him of the assault either. He confirmed that respondent said about the differences between DW1 and DW2.

In its judgment the trial court stated in part,

"…….. there is no evidence to prove that the accused did any indecent act to the complainant on the day alleged because the only medical evidence produced in the form of P3 form (exhibit 1) is not sufficient in any case it does not contain anything to support the charge."

"On the other hand the medical report from the Nairobi Women's Hospital cannot be relied upon as the complainant had gone to that hospital for stool incontinence."

The above statements informed the opinion of the trial magistrate that culminated in the acquittal for lack of evidence.

The respondent was charged under section 20 (1) of the Sexual Offences Act NO. 3 of 2006.

"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 18 years, the accused person shall be liable to imprisonment for life and it shall me immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person."

Section 124 of the Evidence Act on the other hand provides;

"***Notwithstanding the provisions of section 18 of the Oaths and Statutory Declaration Act, there the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.***

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

I will now analyze the evidence guided by the above Sections of the law.

The victim C N, PW1 and the respondent both concur with the relationship between the two. This fact is fortified by the evidence of PW2, PW3 and DW2.

The P3 form prepared by a doctor and produced as exhibit 1 in Section "c" 2 (a) reads,

"Abnormal external genetalia, traumatic bruises and oedema on the lobia"

Remarks by the doctor are given as follows;

"Examination reveals long standing…. Sexual molestation.

The report from the Nairobi Women's Hospital were C N was referred to by the Bungoma Children's Office gave details of her referral as follows:

"The above named patient was referred from the Ministry of Gender, Children and Social development, District Children's Office with complaints of stool incontinence following a prolonged 10 year period of defilement by an uncle. She was admitted on 11.5.11 received by gynecologist and psychiatrist.

Diagnosis: Rape trauma syndrome.'

The report was prepared by Dr. Thuo, a medical officer.

PW1 C N gave an account of how the respondent had sexual encounters with her spanning several years. She named her uncle to Dr. Kisika the first doctor to attended to her. When she reported the matter to the police she gave the same name , similarly to her mother, her aunt and to court, all so consistent including the information on the prolonged sexual assault. There may have been a difference between PW2 and the respondent however the molestation is alleged to have been ongoing for a long time and no evidence to show that the two were related in anyway.

I have considered the consistency of PW1's statement to all concerned, the police, the doctors, her mother, her aunt and the evidence adduced before court and I am convinced beyond doubt that she told the truth. I have gone beyond the requirements of Section 124 to ensure that doubt if any is erased from my mind and I find that the two medical reports quoted extensively above corroborate the evidence of PW1. The P3 clearly shows injuries. The report from Nairobi Women Hospital gives the trauma arising from the prolonged harassment.

I now turn to the trial court's judgment and totally disagree with the findings of the trial court. In my view the trial court was very casual in its analysis of the evidence before it. This is a case, where quoting the court of appeal in ***Joshua Nteya Makonyi vs. R*** (*supra)*

"……. So a question of law warranting an appeal to the High Court by the Attorney General arises if the subordinate court reaches a decision which on evidence, no reasonable court properly directing itself on the evidence and the law could arrive at."

All in all I am of the considered view that the necessary ingredients of the offence of incest were proved by the prosecution witnesses. In this regard I set aside the acquittal and proceed to find the respondent guilty of the offence as charged and I convict him accordingly.

Dated at Bungoma this 22nd day of May 2015.

ALI-ARONI

JUDGE.