



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
HIGH COURT CRIMINAL APPEAL NO. 15 OF 2015

BETWEEN

M K..... APPELLANT

AND

REPUBLICRESPONDENT

(Being appeal from the conviction and sentence of Hon. B.O. Ochieng SPM Ag.

dated 21st February 2014 in the original Kilgoris Criminal Case No.676 of 2012)

JUDGMENT

1. The appellant M K was charged with the offence of incest contrary to Section 20(1) of the Sexual Offences Act No. 3 of 2006 the particulars of which were that on diverse dates between May 2012 and 1st September 2012 at [particulars withheld] area in Transmara West District within Narok County unlawfully and intentionally penetrated the vagina of EMK with his penis who is as to his knowledge his daughter.
2. He faced an alternative charge of an indecent act with a child contrary to Section 11(c) of the Sexual Offences Act No. 3 of 2006. The particulars of which were that on diverse dates between May 2012 and 1st September 2012 at [particulars withheld] village in Transmara West District within Narok County unlawfully and intentionally touched the vagina of EMK.
3. He pleaded not guilty to the said charges, was tried convicted and sentenced to 20 years imprisonment. Being aggrieved by the said conviction and sentence the appellant filed this appeal and raised the following grounds of appeal:-
 1. The learned trial magistrate erred in Law and in fact by failing to properly evaluate the evidence before him thus reaching erroneous decision.
 2. The learned trial magistrate erred in Law and fact when the same failed to appreciate that the ingredients of the offence of incest contrary to Section 20(1) of the Sexual Offences Act No. 3 of 2006 the basis of conviction and sentence were never proved.
 3. The learned trial magistrate erred in law and fact when the same overlooked the medical evidence as contained in P3 form and the testimony of the doctor confirming that the complainant's genitalia were normal and there were no proof of defilement and/or penetration, whether forceful or otherwise.

4. The learned trial magistrate erred in Law and fact by failing to consider the evidence of the complainant with circumspection, taking into account of the medical evidence adduced and the defence and evidence of the accused and witnesses, but taking the same as gospel truth thereby reaching erroneous decision.
5. The learned trial magistrate erred in law and in fact by failing to appreciate that the charge sheet as framed was defective and duplex as it was drawn and framed in omnibus manner so as to cover numerous incidents as a subject of common charge thereby prejudicing the accused.
6. The learned trial magistrate erred in law and in fact by proceeding with biased and prejudiced mind and restricting defence in cross examination of the complaint with a view of procuring and predetermined results in the name of protecting the complaint.
7. That the learned trial magistrate erred in law and in fact in misconstruing the principles the principles applicable in respect to admissibility of the evidence of a child witness.
8. The trial magistrate erred in law and in fact in convicting and sentencing the accused person without any basis.
9. That the learned trial magistrate erred in law by engaging into speculation as a basis of conviction and sentence against the appellant.

IT IS proposed to ask the court for Orders that:-

- (a) The Appeal herein be allowed and the Conviction and Sentence dated 21st day of February 2014, be quashed, varied and/or set aside and substituting the same by an Order dismissing the charges facing the Appellant before the subordinate Court.
 - (b) That consequent to prayer (1) above being granted, the appellant be set at liberty forthwith.
 - (c) Such further and/or other relief as the court may deem necessary.
4. When this appeal came up for hearing before me Mr. O.M. Otieno appeared for the appellant while Miss Boyon appeared for the state and opposed the same.

SUBMISSIONS

5. It was submitted by Mr. Otieno on behalf of the appellant that there was no adequate evidence and neither did the evidence on record connect the appellant with the alleged offence. It was the appellant contention that the case beyond reasonable doubt. It was submitted that the prosecution failed to prove their medical report stated that the age of the victim was below 18 and therefore the trial court proceeded without noting the correct age of the subject.
 6. It was submitted further that penetration was not proved since there was no injury in the subjects private parts who was a child of 11 years as per the testimony of pw5 it was further submitted that there was evidence that the subject had been defiled before by "*another Kisii man.*"
 7. It was submitted that the court took into account matters which were not supported by the evidence on record such as the fact that members of the family were tricked to be away to facilitate the offence and further that the court proceeded on a set mind that the child of 11 years could not tell lie.
 8. It was submitted by the appellant that vital witness such as Dw2, Dw3 and the police who recorded their testimony were never called to testify on behalf of the prosecution in support of the submission herein the appellant relied upon the following decisions.
- (a) Justus Wahome Chomba V R. Nyeri High Court Criminal Appeal No. 80 of 2009: That there was

need to confirm that sexual intercourse took place.

(b) Ngare Kamau Wahome V R. Nyeri High Criminal Appeal No. 86 of 2000 on the need to medically examine the appellant.

(c) Bernard Kebiba V R. Court of Appeal at Kisumu Cr. Appeal No. 104 of 2000 on the need for the court to look at all materials placed before it.

9. Miss Boyon for the state submitted that the prosecution proved its case beyond reasonable doubt. It was submitted that Pw5 proved the age of the subject to be below 18 years as per the medical report and that there was no dispute as to the relationship between the appellant and the subject. It was submitted that under Section 124 of the evidence act, there was no requirement of corroboration.

10. On the issue of vital witnesses having not been called, it was submitted that the Dw2 and Dw3 were married to the appellant and therefore could not be compelled to testify against the same. It was submitted that the appellants defence was taken into account.

11. This being a first appeal, the court is required to reevaluate all on the evidence tendered before the trial court and to come to its own decision through taking into account the fact that it did not have the advantage of hearing and seeing witnesses.

12. The court having noted that Pw1 was a bright child who understands differences between telling truth and lies, the same testified on oath that in May 2012 at 7.00 the appellant who is her father sent one Sankale aged five years for a charger at neighbours home and thereafter sent her step mother Elizabeth to follow him at the said place. He thereafter called the complainant into the house and defiled her. It was her evidence that the step mother came back and stood at the door asking him what he was doing to Pw1 before the appellant left her threatening to kill her if she told anyone.

13. She further testified that on 1st September 2012 at 10.00a.m. the

appellant called his wife for the keys and she sent the complainant to take the said keys to him when he once again defiled her on the sofa set and thereafter threatened to take her to where her dead mother was if she told anybody in her way back to the cattle boma she met her elder sister while crying who then reported the matter to the children officer which lead to the arrest of the appellant. It was her father evidence that there is another Kisii man who had defiled her before when she was staying with her sister.

14. Pw2 Tago James Ngoby a project director with compassion's evidence was that on 3/9/2012 at 4.00p.m he received a report from a child who said that she had been defiled by her father and that she had reported to the children officer which evidence was confirmed by Pw4 M.T.K. Who stated that the appellant had defiled her before going for the complainant.

15. Pw5 Doctor Stanley Muenda testified that he examined Pw1 and found that her private part had normal genitalia her hymen was not there but not freshly broken and age assessed to be less than 18 years and under cross examination stated that he could not tell when the hymen was broken but was unlikely to be within the four (4) days. Pw6 PC James Ngunjiri confirmed having recorded the statement from the complainant.

16. When put on his defence the appellant testified on oath and stated that he was being framed by his children. It was his evidence that the complainant's mother died immediately after birth and that he had no bad relationship with her. He further confirmed that the subject was aged 12 years. It was his evidence that on the material day when he asked the subject where she had been she started to cry and that the children had been demanding that he gives them their mother's shares of land and property. He denied having defiled her on 1/9/2012 since on that date he was coming from Nairobi.

17. Dw2 Noolkipayany Kipsang stated that the subject never told her anything like incest and that she used to stay with Dw3 who stated that she did not know whether pw1 was defiled by the appellant since

she did not tell her anything like that.

18. In convicting the appellant, the trial court had this to say.

“The subject was examined by the qualified doctor who established that she was below 18 years. It was not very clear from the examination the exact age of the subject..”

The subject gave an account of what happened to her on two occasions. Her testimony came very clearly giving two occasions that she was attacked by her father. On both these two occasions the young child recalled every detail how her step mother and step sibling were sent away to get out of the way and how she was defiled.”

19. From the proceedings herein the following issues have been identified for determination:-

(a) What is the relationship between the complainant and the appellant.

(b) What was the age of the complainant.

(c) Whether the complainant was defiled and is so whether by the appellant.

(d) Did the prosecution prove their case beyond reasonable doubt.

20. The relationship between the complainant and the appellant is not in dispute, all the witnesses testified and confirmed that she was the daughter of the appellant who was staying with the same and Dw3 her mother having died.

21. On the age of the complainant Pw5 confirmed that she was less than 18 years old since she did not have third molar. The appellant who is her father stated that she was 12 years old while Pw4 her elder sister said that she was aged 14 years and therefore the complainant must have been younger than her.

22. I am therefore not persuaded by the submissions by the appellant that the age of the complainant was not proved. In any event the appellant was charged with incest under **Section 20(1)** of Sexual Offences Act which provides that:-

“provided that if it is alleged in information charge and proved that the female person is under the age of eighteen the accused shall be liable to imprisonment for life.”

23. It is therefore clear that the prosecution only needed to prove which they did that the complainant was below 18 years

24. On the issue as to whether the complainant was defiled, in her evidence in chief and under cross examination, she testified that she had been defiled three times, one by a certain Kisii man and twice by the appellant. The Doctor confirmed that her hymen was not intact and that it was probably broken for a while and severally similar which confirms the testimony of the complainant.

25. On whether complainant had been defiled by the appellant the trial court had this to say:-

“I noted that I opened the subject to cross examination.... I wanted the subjects evidence to be interrogated to some degree.....my observations of the whole process revealed a subject who was confident and who stood her ground despite questions by the defence counsels.”

26. I find that the complainant was very consistent in her evidence and further note that the appellant did not put to the complainant in cross examination the allegations that she framed him because she wanted – share of her dead mother's property. I have further taken into of the evidence of Pw4 that the appellant had earlier defiled her before turning to Pw1. I have also noted that Dw3 did not deny that she was sent by the appellant on the material day to go for his phone at the charging place and neither did any

of the defence witnesses confirm the appellants alibi defence.

27. I am satisfied that the prosecution case against the appellant was proved beyond reasonable doubt and therefore his conviction was safe. I therefore find no merit on the appellants appeal against conviction which I hereby dismissed.

27. On sentence as noted herein above the appellant should have been sentenced to life imprisonment and therefore the terms of twenty years given by the trial court was unlawful. I would therefore in exercise of the powers under **Section 354(3) (b)** a criminal procedure code substitute the sentence of twenty years with imprisonment for life which is the lawful sentence provided for under the Section the appellant was charged.

28. I must state that the appellant being married to three wives with two living at the time of the offence for reason which I do not understand took advantage of his fiduciary relationship with the complainant to distress her life without regard that her mother was dead and she was therefore in need of special care and love which action should have been taken into account by the trial court while passing the sentence herein.

Delivered, signed and dated at Kisii this 16th day of June 2015.

J. WAKIAGA

JUDGE.

In the presence of:

Mr. Otieno and Mr. Ondari advocates for the appellant.

Mr. Mojale for the respondent.