



REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL 307 OF 2013

M M.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal arising out of the judgment and sentence of W.K Cheruiyot Ag. SPM in Criminal Case No. 23 of 2013, delivered on 7th November 2013 at the Senior Resident Magistrate’s Court at Tawa)

JUDGMENT

The Appellant was convicted of two counts of incest contrary to section 20(1) of the Sexual Offences Act, Act No. 3 of 2006. The particulars of the first count were that on 11th January 2013 in Mbooni West District within Makueni County, being a male person, he caused his penis to penetrate the vagina of J S M, a female child aged 15 years who was to his knowledge his daughter. The particulars of the second count were that on the night of 15th and 16th January 2013 in Mbooni West District within Makueni County, being a male person, he caused his penis to penetrate the vagina of J S M, a female child aged 15 years who was to his knowledge his daughter.

The Appellant was also charged with two alternative offences of committing an indecent Act with a child contrary to section 11(1) of the Sexual Offences Act, Act No. 3 of 2006. The particulars of the alternative offences are that on 11th January 2013 and on the nights of 15th and 16th January 2013 respectively in Mbooni West District within Makueni County he intentionally and unlawfully did indecent acts to J S M, a child aged 15 years who was his daughter , by touching her private parts namely breasts with his hands.

The Appellant was found guilty of the two counts of the offence of incest and sentenced to life imprisonment for each of the counts. The Appellant being aggrieved has appealed the conviction and sentence meted by the trial magistrate. His grounds of appeal are stated in his Ground of Appeals filed in Court on 18th November 2013, and supplementary grounds of appeal availed to the Court during the hearing of the appeal.

The grounds of appeal are that the trial magistrate made an error in both law and facts and misdirected himself by holding that the prosecution had proved its case beyond reasonable doubt on the two counts whereas the evidence on record does not support such a finding. Further, that there was variance of evidence between the particulars of the charge sheet and PW 5’s evidence in relation to the date of penetration which rendered the charge defective and violated Section 214 (1) of the CPC. Lastly, it was also alleged by the Appellant that his defence was not properly considered.

The Appellant who was unrepresented provided the Court with written submissions. He argued in support

of his contention that the evidence was not sufficient to convict him, that the medical evidence clearly revealed that the victim was not penetrated on 11th January, 2013, and he referred the Court to the testimony of PW 5 that the victim was examined on 14/1/2013 and that victim's hymen was broken but the scar was an "old scar". He submitted that the prosecution failed to prove how old the said scar was. Further, that PW 5 also noted the presence of whitish discharge on the victim's vagina and there were signs of infection, but the prosecution failed to prove the origins of the same to establish a link to the Appellant.

The Appellant also submitted that the victim and her mother were initially hesitant to testify and it is on record that PW 1 was stood down two times in course of the trial. It is the Appellant's contention that the prosecution used tricks to compel them to testify.

On the ground of the defective charge, the Appellant submitted that the provisions of section 214(1) of the Criminal Procedure Code were violated for the reason that the charge sheet on the two counts alleged that on 11th January 2013 and on the night of 15th and 16th January 2013, the Appellant caused his penis to penetrate the vagina of J S M (PW 1), whereas upon several medical examinations of her genitalia the doctor confirmed that the victim was not penetrated on the said dates for the reason that she had an old scar on her genitalia. According to the Appellant, no penetration took place on the respective dates indicated in the particulars of the charge sheet. The Appellant cited the decisions in **Ramadhan Ahmed vs R, (1985) 22 EACA 395** and **Woolmington vs The DPP, AC 462** in support of his arguments.

Mr. Mamba, the learned counsel for the State on his part submitted that PW 1 who was the complainant, testified that on 11th January 2012 the accused approached and had sex with her and warned her not to make any noise. Further, that on 15th January 2013 the PW 1 reported the incident to PW 2 the area chief, and she was then issued with a PW 3 form and sent to hospital, and the police requested the administration police to arrest the Appellant on 16th January 2013. The accused was arrested on that day by PW 2 and administration police officers.

The learned counsel also submitted that PW 3 who was the wife of the Appellant and mother of PW 1 testified that she went to bed early on the material day, and that she woke up at 11 am and went to the kitchen where she saw the Appellant hurriedly leave the bed of PW 1 without his pants. She also testified that she heard the PW 1 ask the Appellant if she had become his wife.

The counsel for the state also pointed out that PW 4 who was a doctor produced the medical evidence, while PW 5 who was the arresting officer testified as to the arrest and arraignment of the Appellant. The learned counsel submitted that question before the court was whether PW 1 was defiled and her relationship with the Appellant. Further, that PW 1 testified that the Appellant was her father, and PW 4 produced medical evidence showing a broken hymen and actual penetration.

It was also averred by the State that the assessment report of PW 1's age was produced as an exhibit in the trial court, and concluded that the approximate age of PW 1 was 15 years. According to the State all the prosecution witnesses were consistent and their evidence remained unshaken. Lastly, the learned counsel for the State submitted that the sentence that was meted on the Appellant was appropriate under section 20 (1) of the Sexual Offences Act which provides for life imprisonment.

As this is a first appeal, I am required to conduct a fresh evaluation of all the evidence and come to an independent conclusion as to whether or not to uphold the conviction and sentence. This task must have regard to the fact that I never saw or heard the witnesses testify (see **Okeno v Republic [1973] EA 32**).

The key evidence given at the trial is as follows. After a *voire dire*, the complainant (PW 1) testified on oath that she was 15 years old, and a pupil at [particulars withheld] Primary school. On the first two occasions when she gave evidence she stated that on 11th January 2013, she came home, had her supper and went to bed, and that nothing happened. She was stood down on the two occasions after the prosecution expressed fears that she had been told not to testify against her father.

On the third occasion PW1 testified that on 11th January 2013 she went home and had supper, and went to bed in the room they also used as the kitchen, and left their father by the fireplace in the same room. That while sleeping her father came into the bed she was sleeping with her sister and had sex with her, and that at the time her mother had gone to sleep in the next room.

PW1 further testified that she told an uncle of hers what had happened, which uncle is the one who in turn informed the assistant chief. PW1 stated that on 14th January 2013 the assistant chief came to look for her in school, and she confirmed to him that the Appellant had slept with her, whereupon the assistant chief and a police officer took her to Mbooni District Hospital where she was examined by a medical doctor, and that she also filled a P3 form at the police station on 15th January 2013.

PW1 explained that upon arrival back home on 15th January 2013, the Appellant again had sex with her that night, and that the police arrested him at 4.00 am the following morning. She informed the police that the Appellant had slept with her again, and she was taken back to hospital on 16th January 2015 and filled another P3 form on that date.

The assistant chief of Utangwe sub-location (PW2) confirmed that he got a call from a village elder on 14th January 2013 telling him that the complainant was looking for him, and that he called the headmaster of her school, and arranged to meet with the complainant. Further, that the complainant came to his office and informed him and the chief that her father had raped and assaulted her.

PW2 confirmed taking the complainant to the police station and hospital on 14th January 2013, and that on 15th January 2013 he took her back to the police station to have the P3 filled. He stated that a warrant of arrest was issued for the Appellant, and that he led the police who arrested the Appellant in the early hours of 16th January 2013, and that on that day the complainant informed him that the Appellant had defiled her again in the night.

The complainant's mother (PW3) testified after two warrants of arrest had been issued and effected against her, and after she was penalized for not coming to court when summoned. She stated that on 11th January 2013 after preparing supper, she ate and went to sleep, and left her husband warming himself in the fireplace in the kitchen where the children also slept. Further, that she later woke up and went to the kitchen and saw her husband coming from the children's bed without his trousers, and he asked her to forgive him.

PW3 testified that she informed a village elder what had happened the next day, who informed the assistant chief, and that she accompanied the complainant to the police station on 15th January 2013. PW3 also testified that on the night of 15th January 2013 she heard the complainant asking the Appellant whether she had become his wife, after she left him in the kitchen and gone to sleep.

PW4 was an administration police officer who was attached to Utangwe administration police post in January 2013, and he testified that he got a report from the police station to look for and arrest the Appellant, and that he was led to the Appellant's house by the PW2 on 16th January 2013 where he arrested him.

PW5 was the Medical Superintendent, Mbooni District hospital, who testified that he had worked at the hospital for 3 years and was working with Dr Andrew Mulwa, the doctor who examined the complainant, and was familiar with his signature and handwriting. PW5 produced as exhibits the assessment report by Dr. Mulwa showing the complainant to be 15 years old, the two P3 forms dated 14th January 2013 and 16th January 2013 filled and signed by the said doctor, and his treatment notes.

PW5 further testified that from the said exhibits when the complainant was examined on 14th January 2013 there were signs of infection in her private parts and the hymen was broken although it was an old scar. PW5 also testified that the complainant was examined again on 16th January 2013 and her

underpants were dirty with stained with discharge, and that a whitish discharge from the genitalia was visible.

The last prosecution witness (PW6) was the investigating officer, who confirmed that on 14th January 2013 he received a report from the complainant who was in the company of PW2 and PW3, that her father had sexual intercourse with her. PW6 stated that he booked the report and sent the complainant to hospital for treatment and examination in the company of a police woman, and issued her with a P3 form. Further, that the P3 form was filled on 15th January 2013 and returned to him, and he then wrote a note to the Administration Police officer at Utangwe to arrest the Appellant.

PW6 also testified that the complainant told the police officers on the date of arrest that she had been defiled again by her father, and that she was brought to the station and recorded another report, and that he issued her with another P3 form and sent her to hospital for treatment. He also testified that he visited the scene which was a two-roomed house, and observed that the parents slept in the bedroom while the children slept in the sitting room which was also the kitchen.

After the close of the prosecution case, the Appellant was put on his defence and made a sworn statement. He stated that on 10th January 2013 he quarreled with his wife, and that on 16th January 2013 the assistant chief came with administration officers who handcuffed and assaulted him. Further, that upon inquiry they told him that he had defiled his child. The Appellant explained the processes of arrest and arraignment he was taken through, and denied having sex with or defiling the complainant, who he confirmed is his daughter. He testified that his wife is not good, and that he had frequent disagreements with her and she was always going back to her parent's home.

Upon consideration of the submissions made and evidence in the trial Court, I find that the issues raised in this appeal are firstly, whether the Appellant was convicted under a defective charge, and secondly, whether the Appellant's conviction for the offence of incest was based on sufficient and satisfactory evidence.

On the first issue, the Appellant argued that the charge was defective under section 214(1) of the Criminal Procedure Code as there was no penetration on the dates indicated in the particulars of the charge sheet. The said section 214 provides as follows:

“(1) Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:

Provided that—

(i) where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;

(ii) where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination.”

All that section 214(1) of the Criminal Procedure Code does is to give the courts power to amend or alter charges, and prescribes certain procedures to be followed when this is done. I have perused the proceedings of the trial court and note that at no time did the Court find any variance between the charge and the evidence, or make any orders as to the amendment or alteration of the charge. There was therefore no violation of section 214(1) of the Criminal Procedure Code as alleged by the Appellant.

In addition section 214(2) of the Criminal Procedure Code provides as follows:

“(2) Variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for the variance if it is proved that the proceedings were in fact instituted within the time (if any) limited by law for the institution thereof.”

It was therefore not necessary to amend the charge on account of a contestation by the Appellant as to the time when the offence was committed. Lastly, once the charge and its particulars were explained to the Appellant it was then upon the prosecution to prove the particulars, including whether the penetration occurred on 11th January 2013 and the night of 15th and 16th January 2013 as stated in the charge.

This brings me to the second issue as to whether the conviction of the Appellant was based on satisfactory evidence, The appellant was charged with incest under section 20(1) of the Sexual Offences Act, which states as follows:

- **(1) 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...”**

The key ingredients therefore of incest are an indecent act or penetration with a female who is within the stated degrees of relation. In the present case the Appellant admitted that the complainant was his daughter, and even though PW3 stated that she came with the complainant into the marriage, section 22 of the Sexual Offences Act is clear that when it comes to tests of relationship for purposes of incest, a father will include a half-father, by which is meant a step-father.

As regards the ingredient of penetration the evidence by PW1 was categorical that the Appellant had sex with her on the night of 11th January 2013 and 15th January 2013. Even though the record of the trial court shows that both PW1 and PW3 were initially not willing to testify, when they eventually did testify their evidence was consistent and they did not raise any concerns as to being forced to give evidence. In addition the evidence of PW1 was corroborated by that of PW3 who found the Appellant leaving the complainant’s bed without his trousers on the night of 11th January 2013, and who heard the complainant ask the Appellant if she had become his wife on the night of 15th January 2013.

The Appellant has disputed the medical evidence by PW5 and states that it does not show when penetration occurred. This medical evidence in my view merely corroborated the fact that PW 1 was defiled and that there was infact penetration, and even if it was to be excluded, the proviso to section 124 of the Evidence Act provides that no corroboration is required in cases involving sexual offences where the court believes that the complainant is telling the truth as in this case. Therefore even if I exclude the testimony of PW 5, I find that the prosecution proved that there was penetration. I am also in this regard guided by the holding of the Court of Appeal in **Geoffrey Kioji v Republic**, NYR Crim. App. No. 270 of 2010 (Nyeri) where it was stated that;

“Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. 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 a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief.”

Lastly, I also note that the Appellant in his defence did not give his version of what transpired on the nights the complainant stated she was defiled by him, therefore his defence did not cast any doubts on her evidence.

For purposes of sentencing the minimum sentence for the offence of incest is 10 years imprisonment

while the maximum sentence is life imprisonment. The proviso to section 20(1) of the Sexual Offences Act states;

“Provided that, if it is alleged in the information or charge and proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person.”

I do not find any fault in imposing the life sentence in respect of the two counts of incest as in this instance the offence is aggravated by the fact that the Appellant is the father of the complainant and violated her trust, and also given the fact that the Appellant does not appear to have shown any remorse for his actions.

I accordingly affirm the Appellant’s conviction on the 1st and 2nd counts of incest contrary to section 20(1) of the Sexual Offences Act, and find that the sentences of life imprisonment for this conviction are legal and are also accordingly affirmed. Both life sentences shall run concurrently.

This appeal is therefore dismissed.

It is so ordered.

DATED AT MACHAKOS THIS 23rd DAY OF JULY 2015.

P. NYAMWEYA

JUDGE