



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT LODWAR
HIGH COURT CRIMINAL APPEAL NO. 9 OF 2015
(FORMERLY KITALE HCCRA 4 OF 2015)

E EAPPELLANT

VERSUS

REPUBLICRESPONDENT

**(APPEAL FROM CONVICTION AND JUDGEMENT IN LODWAR SRMCR 930/11 – H O
BARASA SRM DATED 31/3/2015)**

JUDGMENT

The appellant E E was charged in the lower court with a substituted charge of incest contrary to section 20 (1) of the sexual offences Act No. 3 of 2006. The particulars of the offence are that on the 26th day of November, 2011 at [particulars withheld] in Loima district within Turkana county being a male person caused his penis to penetrate the vagina of A Y a female person aged 12 years who was to his knowledge his niece.

The appellant faced an alternative charge of committing an indecent act with a child contrary to section 11 (1) of the sexual offence Act No.3 of 2006. The particulars of the offence are that on the 26th day of November, 2011 at [particulars withheld] in Loima District within Turkana County intentionally and unlawfully touched the vagina of A Y a child aged 12 years with his penis.

The appellant pleaded not guilty to charge. The prosecution called seven witnesses and the appellant when put on his defence gave sworn evidence and did not call any witness.

The case in the lower court was that the appellant is the uncle of the complainant A Y aged 12 years as he is the brother to the father of the complainant who is Y E. The complainant and appellant were staying in the same house. On 26/11/2011 the complainant was asleep in the house when the appellant who is also called A came to where she was at around 3am. He woke up and removed her clothes and had sexual intercourse with her by inserting his penis into her vagina. After he was through with the act, the complainant ran out of the house and went to their house and informed her father PW2 Y E. The complainant's father went to look for appellant but did not find him. When it was day light the father took the complainant to hospital where she was examined and treated. The matter was reported to police and the appellant was later arrested and charged with present offence.

The appellant was put on his defence and gave sworn evidence. He stated that on the material day he had taken goats to graze and then went to Lodwar. He then proceeded to N M to visit one E N but did not find him but slept there. The following day he went home and was allocated maize and his mother also

gave him more maize to go and sell. That is when he was arrested. He denied ever knowing the complainant or that she is his niece. He denied that the complainant's father Y E is his brother and denies ever knowing him.

After full trial the magistrate found appellant guilty on the main charge of incest Contrary to section 20(1) of the sexual offences Act and sentenced him to life imprisonment.

Dissatisfied with the conviction and sentence, the appellant preferred this appeal. The grounds of appeal are that the learned trial magistrate erred in law and fact in convicting him despite the exonerating evidence from the minor; convicting him in absence of exhibits; convicting him despite the fact that the evidence adduced was not exhaustive and convicting the appellant despite cogent and undiminished defence.

The appellant in support of his appeal filed hand-written submissions which he urged the court to consider. In his submissions the appellant faulted the trial magistrate in the following grounds.

- a. ***That the trial magistrate did not allow him to cross-examine the complainant on the day she first testified and that her evidence was not cogent as she claims no body heard her screams and yet the other houses were near and that the complainant's evidence was coached and that there existed a grudge between the appellant and the complainant's father who is brother over distribution of the father's wealth.***
- b. ***The appellant submits that Y E (PW2) was not at the scene and therefore his evidence on the issue was not the truth. He also submits that there was contradictions in his evidence and the contention then he is same appellant defiled the complainant is not true. He submitted that the evidence by PW2 is out of malice as they have a grudge. He submits then the prosecution did not prove this offence and invited the court to be guided by the decision in Ajwang –VS – Republic (1983) EA 549.***
- c. ***The appellant faulted the evidence of F K (PW3) whose evidence he submits was only hearsay and his evidence was only on how he heard the appellant was arrested.***
- d. ***Appellant submits that he doctor who gave evidence as not the maker of the report and ought not to have been allowed to produce it. He submits that there was contradicts in the medical evidence and evidence of the complainant as to the injuries sustained.***

For the above grounds the appellant prays to this court that the conviction and sentence of the trial magistrate be set aside and appellants appeal be allowed.

Mr. Kimanathi for the Respondent opposed the appeal. He submitted from the evidence the appellant was properly identified by the complainant who is her uncle and they used to stay together and the issue of mistaken identity would not arise. He further submits that the medical report contained there was sexually assaulted. The complainant was under the age of 12 years and an offence of incest and the appellant was liable to imprisonment to life. He urged the court to dismiss the appeal.

This being the first appeal, the duty of the court is as stated in **Ekeno – VS – Republic (1972) E.A 32** where it was stated,

“The first appellate court must weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower courts finding and conclusions. It must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's finding should be supported. In doing so it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.”

The appellant was charged with and convicted on the main count of incest contrary to section 20(1) of the sexual offences Act. Section 20 (1) of the Act provides,

“Any male person who commits an indecent act or an act which caused 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 eighteen years the accused person should 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”.

Section 22 provides the test of relationship. It provides,

22 (1) in cases of the offence of incest brother and sister includes half brother, half sister and adoptive brother and adoptive sister and a father includes a half-father and an uncle of the first degree and a mother includes a half-mother and an aunt of the first degree whether through wedlock or not.

2) In this act;

- a. **‘Uncle’ means the brother of the person’s parent and aunt has a corresponding meaning.**
- b. **‘Nephew’ means the child of a person’s brother or sister and ‘niece’ has a corresponding meaning.”**

Was the complainant a ‘niece’ of the appellant? PW1 the complainant in her evidence in-chief testified that the appellant as her uncle. In her evidence in-chief she stated in reference to the appellant

“I have lived with A for some time. He is my father’s brother. He is my uncle. My father knew we were living together”.

PW2 Y E the father of the complainant in his evidence too stated

“I asked her what he matter was and she explained that the accused had sexual intercourse with her. She mentioned the accused person’s name. She told me E had defiled her. The accused E E was known to me. He is my brother. He is my younger brother. We are from the same father and mother.”

When the appellant was cross-examined of this issue of relation by the prosecutor stated.

“I do not know A Y. I saw her for the first time in court. I am speaking the truth. Y E is not known to me. I saw him for the first time in court. He is not my brother”

The trial magistrate considered this issue and he made a finding rightly in my view that the appellant was not saying the truth while denying any relationship to the complainant and the father; PW2. Considering the evidence on record, I am satisfied that the appellant is indeed a brother of the father of the complainant and therefore an uncle to the complainant and therefore if there was any sexual intercourse between them, it would be between a uncle and a niece which would under the provision of section 20(1) (6) amount to incest.

An important ingredient of the offence of defilement is that there must have been penetration. Penetration is defined in section 2 of the sexual offences act as

“‘Penetration’ means the partial or complete insertion of the genital organ of a person in the genital organ of another person.

The penetration or act of sexual intercourse has therefore to be proved to sustain a charge of defilement. In **Bassita Hussein – VS – Uganda, Supreme Court criminal appeal No. 35 of 1995**, the court stated,

“The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually the sexual intercourse is proved by the victims over evidence and corroborated by medical evidence or other evidence.”

The complainant in her evidence in court in explaining what happened stated,

“A came home and found me sleeping. He woke me up and removed my clothes. He then had sexual intercourse with me. He removed my inner pant. I made noise. I screamed but no one came to my rescue. A did tabia mbaya to me. He inserted his penis into my vagina. He stayed with me after doing the act to me”.

The complainant was examined by Mr. Mwangi clinical officer at Lodwar District hospital and filed the P3 form. PW6 Scalon Akudanya produced the P3 form which showed that on examination Mr. Mwangi found,

“The patient was 12 years old on further examination there were no bruises but the hymen was broken. The officer noted a white discharge which was however not smelly. High vaginal swab was taken which revealed pus cells. Other additional remarks were the survivor reported to have been penetrated”.

The evidence of the complainant on what happened on that night and the evidence of the clinical officer in my view established that there was penetration of the sexual organ of the complainant. PW2 Y E the father of the complainant testified how the complainant came running to where he was and reported to him that the appellant had defiled her. From the evidence and report to the father, I am satisfied that the complainant was consistent that she had been defiled.

Did the appellant defile the complainant? The identification of the person who defiled the complainant is an important ingredient of the offence of defilement. In this case the complainant stated that she was defiled by the appellant. In her evidence she stated,

“I live with A (witness refers to accused). I know him as A. We lived just the two of us. He is married. His wife was one L. She was not living with us. She is now at [particulars withheld]. I don’t know why they live separately. I have lied with A or some time. My father knew we were living together.”

PW2 Y E the father of the complainant confirmed that the appellant were staying in the same house. He stated

“We went together to my home. Incident happened in my house. It happened inside the house we went there we did not find anyone. We only found four goats. My wife was not there”.

The evidence of PW1 and PW2 all agree that the appellant who is an uncle to the complainant was staying in the same house on the material period. They were the only people in the house, complainant knew appellant well and there is no mistake in my view that the complainant identified the appellant as the person who defiled her. The appellant in his defence raises an alibi stating that he was not at the scene. However I am satisfied that the same has been displaced by the evidence of PW1 which places him at the scene of the offence.

The appellant in his submission raised the issue that the charge and evidence is a fabrication by the father of the complainant who he now admits is his brother because there exists a grudge over the distribution of their father’s property. This he submits is more so given that he had stayed with the complainant for a long time without doing anything wrong to her. This submission is not supported by any evidence either in his defence or during cross-examination of either the complainant or PW2, the brother of the appellant. That being so this in my view is an afterthought.

The appellant faulted the production of the P3 form by Simon Adukanya a clinical officer at Lodwar District hospital instead of Mr. Mwangi the maker of document and the person who examined the complainant and filled the P3 form.

Sec.77 of the Evidence Act provides,

“77 (1) in criminal proceedings any document purporting to be report under the hand of Government analyst; medical practitioner or of any ballistic expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.

(2) The court may presume that the signature to any such document is genuine and then the person signing it held the office and qualification which he possessed to hold at the time he signed it”.

(3) When any report is so used the court may if it thinks fit summon the analyst ballistic expert document examiner, medical practitioner or geologist as the case may be and examine him as to the subject matter thereon.

This provision allows public documents made by experts including medical practitioners to be admissible in evidence. In the present case there is evidence that Mr. Mwangi was not available on several occasions. Indeed then is when the prosecution proposed that another clinical officer produce the document on 26/9/2012, the appellant himself told the court

“I object (to the application for adjournment) I have no problem another clinical officer producing the P3 form”

That is when Simon Akudunya PW6 produced the P3 form. He testified that he was conversant with Mr. Mwangi’s signature and handwriting and that the P3 form was filled by him. This was in compliance with section 33(b) and section 77 of the evidence Act. I do not find therefore that the production of the P3 form by a person other than the maker unlawful.

I have re-evaluated the evidence before the trial court and my own assessment of the same I am satisfied that the trial magistrate properly considered the evidence adduced and correctly arrived at the conclusion that the appellant being a uncle of the complainant penetrated her genital organ and therefore committed an offence of incest contrary to section 20 (1) of the sexual offences Act.

On sentence section 20 (1) of the sexual offences act has created 2 sentences. One to a general sentence which applies when the complainant is an adult; and a second one where the complainant is a minor. It provides – Any

20(1) where 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 the offence termed incest and is liable to imprisonment for a term not less than 10 years.

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

The age of the complainant in sexual offences at the time of the offence is important. The court of appeal in Kaluga Elias Kasomo – VS – Republic on the issue stated,

“Age of the victim of sexual assault under the sexual offences act is a critical component. It forms part of the charge which must be proved the same way as

penetration in cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim”.

The evidence adduced by the complainant is that she was 12 years old. PW2 the father of the complainant stated that she was 12 years old. PW4 Gabriel Momanyi a community area officer attached to Lodwar District Hospital examined her and found it was not fully developed and assessed the age of the complainant as at 12 years old or thereabout. From this evidence I find that it was proved that the complainant was 12 years and therefore under 18 years provided for in the sentencing in the provision to section 20(1) of the Act.

The provision to section 20 (1) provides that accused person who has been convicted of an offence of incest where the victim is under 18 years;

“Shall be liable to imprisonment for life”

This provision in my view does not provide for mandatory sentence. It means in my view to me that life imprisonment is the maximum sentence and a person so convicted can be sentenced to a period.

This is so because the words “shall be liable do not in their ordinary meaning require the imposition of the stated penalty but merely expresses stated penalty which may be imposed at the discretion of the court. In other words they are not mandatory but provide a maximum sentence only and while the liability existed the court might not see the need to impose it. (Opoya – VS - Uganda)

The grounds upon which the High Court can interfere with the sentence of a subordinate court were stated in **Ogalo s/o Owuor – VS – Republic 1950 (EACA 270** as

“Before a court can interfere with the trial courts sentence it must be satisfied that the sentence imposed is manifestly excessive as that the trial judge in passing the sentence ignored to consider an important matter or circumstances which he ought to have considered or that the sentence was wrong in principle. The appellate court does not interfere with a lawful sentence imposed by a high court or subordinate court or grows based on mere sentiments that if it were sitting as trial court it would have imposed a different sentence.”

In the present appeal the appellant was sentenced to life imprisonment which is the maximum sentence provided for the offence. The prosecution stated that accused was a first offender. Accused in his mitigation stated that he had a wife and child was depended on him and prayed for forgiveness. The trial magistrate then stated,

“I have duly considered what the accused has told the court in mitigation. I however note that the complainant herein who as I have stated in my judgment s niece to the accused is aged below eighteen years. Accused is hereby sentenced to life imprisonment. Right of appeal 14 days”

The trial magistrate while he addressed himself to the mitigation, in my view fell into error by the finding that the complainant being aged below eighteen years, the only sentence available and which was a maximum sentence was life. As I have stated above, the provision to section 20(1) does not state a mandatory maximum sentence where the complainant is under 18 years. If the legislative wanted to set a minimum sentence it would have done so as it did in the main charge of incest where the minimum sentence is 10 years.

In my view therefore the trial magistrate applied a wrong principle in the sentencing of the appellant for life imprisonment by thinking that it was a mandatory sentence. For that reason the appellate court on the principles in **Ogalo s/o Owuor – VS – Republic** (supra) this court can interfere with the sentence.

I notice that the accused was a first offender, though the offence admittedly is serious. I reduce the sentence of life imprisonment and order accused to serve twenty (20) years imprisonment from the date of conviction and sentence by trial court on 31/3/2015.

S RIECHI

JUDGE

18/11/2015

18/11/2015

Before – S N RIECHI

Ms Kagehi for state

Appellant – present

Lotiir – court clerk

Court – the judgment is read and delivered in open court in presence of appellant, Kagehi for state and Lotiir court assistant this 18th day of November, 2015

S RIECHI

JUDGE

18/11/2015