



No. 169/2014

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 237 OF 2010

M W APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence in Kitui Principal Magistrate's Court Criminal Case No. 631 of 2009 by

Hon. E. Juma Osoro - S.R.M. On 12/8/2010)

J U D G M E N T

1. **M W**, the appellant was charged with the offence of incest by male contrary to section 20(1) of the Sexual Offences Act No. 3 of 2006. Particulars thereof being that on the 2nd day of May, 2009 at about 2.00 p.m. at **[particulars withheld]** village, [particulars withheld], Kitui District of the Eastern province had sexual intercourse with **M P** a girl aged 12 years who to his knowledge knew was his niece.
2. In the alternative, he was charged with the offence of doing an Indecent Act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006. Particulars of the offence being that on the 2nd day of May, 2009 at about 2.00 p.m. at **[particulars withheld]** village, [particulars withheld] location, Kitui District of the Eastern province did commit an indecent act with **M P** a girl aged 12 by touching her private part namely vagina.
3. He was tried, convicted and sentenced to serve 20 years imprisonment. Being aggrieved with the conviction and sentence he appeals on grounds that: the magistrate erred in both law and fact by relying on fabricated evidence without considering that there was a grudge between him and the complainant; by convicting him on defective charges and by rejecting his alibi defence.
4. To prove the case the prosecution called four (4) witnesses. PW1 **M P** a girl aged 12 years was at home with her sibling aged 8 years old when the appellant her paternal uncle asked her to assist him to cut some meat. Later he took her to his son's house having asked her if she was capable of revealing something done to her. He asked the complainant to remove her underwear but she declined. He then forcefully removed her underwear and told her to lie on the bed. The appellant then removed his pair of long trousers and his underpants. He lay on her, applied saliva on her private parts and pushed his private parts into hers. He defiled her. She felt pain. He told her not to disclose the information to anyone as he would be ashamed. She opened the door as told by the appellant. She saw M the Appellant's son. He advised her to hide. Later the appellant called his son K and told him to cut meat with the complainant. Thereafter he gave her Ksh.10/= to buy some fruits. Thereafter her mother got information about the money. She confronted her. She

- told her what the appellant had done.
5. PW2, **N P** the mother to the complainant on learning of the incident examined her daughter's private parts and being satisfied that it had been interfered with reported the matter to the assistant chief, then to the police. The complainant was taken to hospital for treatment. She was examined by PW3, **Martin Njue** a clinical officer who found evidence of penetration as the hymen was absent. PW4, **No.88218 P.C. Joseph Musomba** investigated the case and caused the appellant to be charged.
 6. When put on his defence the appellant acknowledged the fact that the complainant is his niece. He however denied having defiled her. It was his evidence that he used to support the complainant's mother but when he withdrew the support she framed him up. He stated that on the material date he was cutting grass with his son M. When they returned home they found the complainant, his daughter K and K. He offered to pay them Ksh.10/= each if they cut for him grass. He gave them meat to cook. On his return meat was ready.
 7. DW2, his 10 year old daughter said she worked throughout with the complainant on the material date and she even spent the night at their home. On cross examination she said the appellant told her what to say in court. DW3, **P K B** aged eleven(11) years gave a similar story as DW2. On cross examination she said the appellant made all of them sit down and told them what to come and state in court. DW4, **W M** a grandfather to the complainant and father to the appellant was told about the incident and when he confronted the appellant he denied the allegation.
 8. DW6, **W M**, the appellant's son aged 15 years said he worked with his father on that day. The father also assigned the complainant, DW2 and DW3 work and he was to pay them Ksh.10/= each. He remembered having left the girls cooking meat. He said he was not able to tell if something happened between the appellant and the complainant. DW7, **M W** the mother to the appellant said the complainant and other girls spent the night at her house. She just heard that the appellant had defiled the complainant. Although she could not remember the date, she said the appellant and his son were cutting grass the whole day.
 9. The State in this case issued a notice of enhancement of sentence in case the appeal succeeded. The appellant having been notified of the enhancement of sentence notice opted to proceed with the appeal. At the hearing he relied on his written submissions. Mrs. Gakobo, the learned state counsel urged the court to evaluate the evidence afresh and uphold the conviction then impose the sentence provided by the law.
 10. This is a first appeal. Being a first appellate court I am mandated to re-look at the evidence adduced before the trial court, re-evaluate and re-assess it to reach my own independent conclusion bearing in mind the fact that I neither saw nor heard witnesses who testified (*see Okeno -vs- Republic (1972 E.A. 32, Njoroje versus Republic (1987)KLR 19*).
 11. It is not in dispute that the complainant herein is the appellants niece. Medical evidence adduced in her regard by PW3 proved that she was sexually assaulted. The hymen was absent, she had bacteria infection. There was evidence of penetration of her genital organ.

The issue to be determined is whether it was the appellant herein who caused the act of penetration with the complainant herein.

12. According to the evidence of the complainant it happened at 2.00 p.m. He assigned her duties of cutting meat. Thereafter he took her to K's room where he committed an act that penetrated her namely pushing his private part into hers an act that was painful. There was no eye-witness to what transpired. On cross examination the complainant stated thus:

“There was no eye witness when you defiled me. I did not offer myself to you, you forcefully defiled me.”

Suggesting to the complainant that she offered herself to him is tantamount to saying that she consented to the act of having sexual intercourse with him. The complaint said after the act he told her to join K whereby she continued cutting meat that they cooked. K DW2 was one of the witnesses who said they told the court what the appellant asked them to say.

13. In convicting the appellant the trial magistrate stated thus:

“The young girl (PW1) consistently gave evidence in detail on what happened even after the sexual assault. I do find she was a trustful witness. She could not have fabricated the events.”

Considering the fact that the appellant believed the complainant offered herself to him which suggested it was a generous offer, the court was justified in finding that the evidence was credible enough to sustain a conviction. The issue of fabrication of the charge as alleged in the grounds of appeal does not arise.

14. With regard to the allegation that the charge was defective, the statute provides that a male person who commits an act that causes penetration with a female ... is guilty of ... incest (***see Section 20(1) of the Sexual Offences Act, 2006***).

According to the charge as drawn the ***“act that caused penetration was sexual intercourse”***. To conclude that a charge is defective it must be established that the particulars of the offence were ambiguous that the appellant was not able to tell what charge he faced. This would mean that he was prejudiced.

In the case of ***Ridge versus Baldwin (1964) AC 40*** Lord Morris had this to say:

“It is well established that the essential requirements of natural justice at least include that before someone is condemned he is to have an opportunity of defending himself and in order that he may do so that he is made aware of the charges or allegations or suggestions which he has to meet”.

The charge as framed enabled the appellant to understand that he was being accused of having sexual intercourse with the complainant. This enabled him prepare for his defence appropriately. He called several witnesses to support him. He was not prejudiced. In the circumstances the charge cannot be said to have been defective.

15. It was the contention of the appellant that his alibi defence was rejected irrespective of the fact that his witnesses' evidence was not challenged. As aforesaid the defence witnesses said they were coached as to what to tell the court. This fortified by the fact that the appellant accused the complainant of having willingly given herself to him, the alibi defence was non consequential. The learned trial magistrate was justified in disregarding it.

16. From the foregoing I am satisfied that the trial magistrate did not misdirect herself in reaching the decision to convict the appellant. The only error he made was failure to state which offence he convicted the appellant of.

This is a case where the appellant faced an alternative charge. His judgment is silent on the alternative charge. Procedurally he ought to have convicted on the main count and noted his act of having not made a finding on the alternative charge. The appellant therefore stands convicted on the main charge of incest by male contrary to section 20(1) of the Sexual Offences Act, 2006.

17. On sentence, notice of enhancement was given. This was prudent as stated in ***Stanley Nkunja versus Republic Criminal Appeal No. 280 /2012***.

The proviso to Section 20(1) of the Sexual Offences Act, 2006 provides thus:

“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 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.”

The complainant was 12 years old. I therefore set aside the sentence imposed by the lower court and hereby sentence the appellant to life imprisonment.

18.It is so ordered.

DATED, SIGNED and DELIVERED at MACHAKOS this 22ND day of JANUARY, 2014.

L.N. MUTENDE

JUDGE