



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NO. 263 OF 2011

JOSEPH MAINA THAGICO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in criminal case Number 481 of 2010 in the

Chief Magistrate's Court at Kiambu – D. A. Okundi (PM) on 7th October 2011)

JUDGMENT

1. The appellant, **Joseph Maina Thagico** was charged with two counts of defilement and a third count of indecent act with a child contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act No. 3 of 2006**. In the alternative to count 1 and count II, he faced charges of indecent act with a child contrary to **Section 11(1)** of the **Sexual Offences Act No. 3 of 2006**.
2. The particulars were that on diverse dates between the month of February, 17th and 19th March 2010 respectively at Kawaida in Kiambu District, he unlawfully and intentionally committed an act which caused penetration with his genital organ (penis) into the genital organs (vagina) and (anus) of J. W. M and P.T in counts 1 and II respectively (initials used to protect the minors' identity), children who were aged below 10 years.
3. In the alternative charge, it was alleged that on diverse dates between the month of February, 17th and 19th March 2010 respectively at Kawaida in Kiambu District, he unlawfully touched the genital organs of the said J.W.M. and P.T.
4. In count III it had been alleged that on diverse dates between the month of February and 17th March 2010 at Kawaida in Kiambu District he unlawfully committed an indecent act with M.N. a child aged 11 months by inserting his private parts (penis) into her mouth to suck.
5. The trial culminated in the appellant being found guilty and convicted in count 1 and count II respectively. He was sentenced to life imprisonment in count I, and 15 years imprisonment in the alternative charge to count II. The sentences were ordered to run concurrently. He was acquitted in count II.

6. The synopsis of the case as presented in the lower court was that **PW1**, who was the wife to the appellant and mother to the two complainants, returned home at 1 p.m. on 17th March 2010 to find **PW2**, who was one of the complainants crying. The minor who was then aged 7 years complained of pain in the neck and chest and upon taking her to Karuri Health Centre, she divulged that the appellant had sexually assaulted her. The medical officer at the hospital examined her and confirmed her allegations. Both mother and child were transferred to Nairobi women's Hospital, where the minor was examined and treated and a P3 filled in her behalf. **PW1** reported the matter to Karuri Police.

7. Two days later on 19th March 2010, **PW3** P T a minor aged 5 year at the time, reported that he too had been sexually molested by the appellant. She took him to hospital where he was examined and also had a P3 filled in his regard. **PW1** also reported the second incident to Karuri Police. The appellant was subsequently arrested and charged as set out above.

8. When placed on his defence the appellant denied that he did any of the things attributed to him and stated that all that had been said in evidence was a lie. His father testified in his support and said **PW1** was a troublesome woman, who had fabricated the evidence to get rid of the appellant so that she could live with another man.

9. Upon being convicted and sentenced the appellant filed an appeal. In the amended grounds of the appeal he stated that he was not afforded a fair hearing and that there were material contradictions between the evidence of **PW4** the doctor, and the medical report of Dr. Muhombe which should have been resolved in his favour. He also complained that the court failed to call vital witnesses such as the arresting officer and also failed to take note of the existing grudge between him and **PW1**. Lastly he was of the view that the court had not given due regard to his alibi defence.

10. Learned state counsel Mr. Mutua appeared for the Respondent and confounded the court with his submissions. He contended that since the complainants were the children of the appellant, there was a principle that had been offended by the charging of the appellant with the offence of defilement. He did not disclose the principle alluded to. He submitted, and rightly so, that no injuries had been found on **PW3** when he was examined but also pointed that no neighbour had heard the minors cry as they were being defiled and that in his view there was no evidence to link the appellant to the offences.

11. In Mr. Mutua's opinion the charge sheet in the first count was defective since the sentence for the offence of incest is stated by the law to be no less than 10 years. He contended that the threshold for proving sexual offences was higher than that of other offences and the prosecution had failed to meet it! He also asserted that there was an element of fabrication due to the acrimony between the appellant and **PW1** and urged the court to find that there was reasonable doubt and allow the appeal. In other words he conceded the appeal in both counts.

12. This being the first appellate court, I have scrutinized and reassessed the evidence to make my own findings and draw my own conclusions. In doing so I gave allowance for the fact that I neither saw nor heard the witnesses as they testified.

13. When the minors took the stand to testify **PW2** was aged 8 years while **PW3** was aged 6 years. Both minors were subjected to voire dire examination before they testified and the court found that **PW2** had very good understanding of the proceedings and appreciated both the importance of telling the truth and also the significance of an oath. She testified on oath. **PW3** was found to be intelligent enough to testify but was too young to understand the meaning of an oath. He gave unsworn testimony. The appellant was accorded the opportunity to cross-examine all the witnesses including the two minors.

14. In one of the grounds the appellant asserted that the language barrier rendered him unable to follow the proceedings and also to conduct his defence. I recalled on the decision of the Court of Appeal in the case of **JOHN KAMAU GITHUKU AND ANOR VS. REPUBLIC CRIMINAL APPEAL NO. 229 OF 2008** (unreported), in which their lordships held that since the appellant participated in the proceedings after the plea was taken, there was no prejudice suffered on his part.

15. I do note that in the instant case the record shows that at the time of taking plea, English/Kiswahili interpretation was employed. The appellant did plead to the charges and did not raise any issue on the language used being a hindrance to his following the proceedings. As the proceedings progressed, he cross-examined all five prosecution witnesses, gave his sworn testimony and also answered the questions put to him by the prosecution in cross-examination quite well all in Kiswahili language. I am therefore satisfied that he was not prejudiced in any way on this ground.

16. The appellant then complained that critical witnesses were not summoned thereby violating his rights under **Section 150 of Criminal Procedure Code**. The said section empowers the court to summon a witness or examine any witness at any stage. In **High Court Criminal Appeal Number 54 of 2011 Martin Ochieng Opiyo vs The Republic**, the court had this to say:

“As the practice is, the prosecution is always at liberty to call the witnesses they deem relevant to their case. Those witnesses called were able to establish the prosecution case.”

I therefore re-evaluated the evidence to make a finding as to whether the witnesses called in the case before me had established the prosecution’s case.

17. I examined the evidence in view of the appellant’s ground that the case was fabricated due to a grudge that existed between the appellant and his wife **PW1**. The two minor complainants gave graphic details in their testimony, of what their father the appellant did to them. **PW2** told the court as follows:

“My father put me on his bed and he removed my bikers. My father removed his trousers and shorts. Then my father put oil on me (points to her private parts). He also put oil on his thing for urinating. He then put his thing where (again points to the area of her private parts). My father told me he would kill me if I told my mother.”

She said that she cried because of the pain she felt and was still crying when her mother returned home and took her to hospital. In cross-examination she maintained that her mother had not put her up to what she had told the court.

18. PW3 gave a similar narrative except that in his case he was molested through the anal opening. He testified as follows:

“My father would put me on his bed. Then he put Vaseline on my buttocks after removing my shorts. My father would also remove his trousers. He used to put Vaseline on his thing for urinating. Then he would put his thing for urinating on my buttocks. It was painful.”

This minor also confirmed to the court that his mother had told him to tell the court only what the appellant did to him.

19. Of **PW2**, the learned trial magistrate observed that she was coherent and consistent in her testimony and that her demeanour was that of a child telling the truth. That the minor appeared to be fearful of her father. Of **PW3**, the learned trial magistrate observed that he was so scared he could hardly look at his father as he testified. She also observed that he came across as truthful and consistent and testified with the innocence of a child. That his testimony did not suggest that he had been coached on what to say in court. These are the findings of the court that had the opportunity to observe the witnesses as they testified and I had no reason to depart from its findings.

20. PW4 Dr. Gachenia Woiye of Nairobi Women’s Hospital produced two medical reports on behalf of Dr. Muhombe, who had since demised and whose signature he was familiar with. Dr. Muhombe reviewed the two minors on 22nd March 2010 at the Nairobi Women’s Hospital. Each minor presented with complaints that they had been sexually assaulted by their father on several occasions. Upon examination the medical findings with regard to **PW2** were as follows:

- Tear posterior aspect vagina fourchette

- Bruising labia minora
- Vaginal opening bruised and inflamed
- Hymen intact but inflamed and tender
- Increased white blood cells in the area.

The medical opinion was that the minor had been sexually assaulted. No tears or lacerations were found on **PW3** but the doctor's conclusion was that he too had been sexually assaulted.

21. In Mr. Mutua's view the charge sheet was defective and the appellant was wrongly charged with the offence of defilement contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act**, instead of the offence of incest by a male person, contrary to **Section 20 (1)** of the same **Act**, being a relative to **PW2** and **PW3**. The Sections referred to above provide as follows:

Section 8(1)

“A person who commits an act which causes penetration with a child is guilty of an offence termed defilement”.

Section 8(2)

“A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life”.

Section 20(1)

“Any 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.

22. From the evidence on record, it is not in doubt that the appellant is the father of **PW2** and **PW3**. From the reading of the two sections above it is evident that whereas the appellant could have been charged under **Section 20 (1)** of the **Sexual Offences Act**, which specifically deals with sexual assault by male persons, in incestuous relationships, there was nothing to preclude him from being charged under **Section 8(1)** of the **Sexual Offences Act** as he was.

23. The ingredients in both offences are similar save that in the offence of incest, the victim is a relative of the suspect. Therefore, the fact that the appellant was charged with defilement and not incest did not render the trial defective, neither did it prejudice him or occasion any failure of justice, as both offences provide a punishment of life imprisonment upon conviction, in view of the age of **PW2**.

24. Having subjected the entire record to a fresh scrutiny I find no contradictions which if resolved in the appellant's favour would create a doubt in the prosecution's case. I also find no basis to believe that the case was a fabrication of **PW1**, whether or not there existed a grudge between her and the appellant. The appellant's defence amounted to a mere denial and was not an alibi defence at all. The witnesses called by the prosecution had proved their case beyond reasonable doubt.

25. It would appear that Mr. Mutua is unaware of the decision in **FUAD DUMILA MOHAMED VS REPUBLIC CR. APP 210/2003 MOMBASA** (unreported) in which the Court of Appeal corrected the invariable practice followed by the courts in requiring corroboration in all cases of sexual assault despite the absence of express legal provision for it. Their lordships said:

“The requirement for corroboration in sexual offences affecting adult women and girls is unconstitutional to the extent that the requirement is against them qua women or girls and is an infringement of section 82 of the Constitution of Kenya. Decisions which hold that corroboration is essential in sexual offences before a conviction are no longer good law as they conflict with Section 82 of the Constitution.”

26. In any case **Section 124** of the **Evidence Act** did away with the requirement for corroboration in sexual offences. The law requires that where in a criminal case involving sexual offence, the only evidence available is that of the alleged victim of the offence, the court shall receive the evidence of the victim and may proceed to convict the accused if it is satisfied that the complainant is telling the truth. Only the reason for believing that the complainant is telling the truth need be recorded in the proceedings.

27. In sum, I have considered the appeal at length and find that the evidence on record was sufficient to sustain the conviction against the appellant on the charge against him. I find that the appeal is lacking in merit and is therefore dismissed.

SIGNED DATED and DELIVERED in open court this **28th** day of **October 2014**.

L. A. ACHODE

JUDGE