



No. 421/2014

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL 20 OF 2012

J W M.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an appeal from the original conviction and sentence in Kithimani Principal Magistrate's Court Sexual Offences Case No. 17 of 2011 by Hon. M.A.O. Opanga on 26/1/2012)

JUDGMENT

1. The appellant was charged with the offence of incest contrary to **Section 20(1)** of the **Sexual Offences Act**. Particulars thereof being that on the **10th** day of **April, 2011** at [**Particulars Withheld**] of **Yatta District** within **Machakos County** unlawful and intentionally committed an act which caused penetration with his penis into the vagina and **D M** a female person aged **15** years who was to his knowledge his daughter.
2. In the alternative the appellant was charged with the offence of committing an indecent act to a child contrary to **Section 11(1)** of the **Sexual Offences Act No. 3 of 2006**. Particulars of the offence being that on the **10th** day of **April, 2011** at [**Particulars Withheld**] of **Yatta District** within **Machakos County** unlawful did an indecent act to **D M** by touching her private parts namely vagina and breast.
3. He was tried convicted and sentenced to life imprisonment. Being aggrieved by the conviction and sentence, in his Amended Memorandum of Appeal he sets out the grounds of appeal thus:-
 - i. Evidence adduced against him was contradictory and inconsistent.
 - ii. The charge was defective.
 - iii. The charges were trumped up due to a grudge that existed between him and the complainant's mother.
 - iv. The alibi defence was not rebutted per the requirement of Section 212 of the **Criminal Procedure Code**.
4. At the hearing of the appeal the appellant relied upon written submissions. In a response thereto **Mrs Abuga** learned State Counsel opposed the appeal. She argued that the evidence adduced by the complainant that she was defiled was corroborated by that of PW2 and the clinical officer. She stated that the appellant had an opportunity of committing the offence. She dismissed the allegation that he was framed up as a mere afterthought.
5. The case as presented by the prosecution was that the appellant had separated with the complainant's mother and was married to another wife. PW1, **D M**, the complainant lived with her

- sister **A M (PW2)**. The appellant used to visit them. On the fateful date he visited them. They offered him a mattress to sleep on but he declined. He insisted on sleeping with the two (2) on their bed. He slept next to the complainant. In the circumstance she realized her pant was missing. He penetrated her and had sex with her amidst pain. That having not been the first encounter, when they went to visit their mother in Nairobi she divulged what had befallen her. The matter was reported to the police. The appellant was arrested and charged.
6. In his defence the appellants stated that he was framed up because he married a second wife after the complainants' mother abandoned them. His son attempted to poison his second wife, an episode that resulted into his arrest and subsequent prosecution.
 7. This being a first appeal, it is the duty of the court to re-consider evidence, evaluate it and draw its own conclusions in deciding whether or not the judgment of the trial court should be upheld. (See **Okeno versus Republic [1972] E.A. 32**).
 8. It is alleged that the charge was defective. A charge can only be fatally defective if it does not allege essential ingredients of the offence (See **Sigilai versus republic[2004] 2 KLR 48; Yosefu versus Uganda [1969] E.A. 326**). In particular the court in the **Sigilai** case stated thus;-

“The Principle of law governing charge sheets is that an accused should be charged with an offence known in law. The offence charged should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to a specific charge that he can understand. It will also enable the accused person to prepare his defence “

9. The appellant was charged with the offence of incest which is stipulated by the **Sexual offences Act, Section 20(1)**. It is therefore an offence known in law. The particulars of the offence as outlined disclose ingredients of the offence of incest. The appellant understood the charge as drawn and was able to participate in the proceedings to the end. In the premises the charge was not defective.
10. It is not in dispute that the complainant is the appellant's biological daughter. It is also not in dispute that she was born in **1996**, therefore a child aged **15 years old**.
11. The complainant was examined following the complaint. It was established that her hymen was broken prior to the episode of sex complained of. I also note that she did not report the incident to the authority soon after the occurrence.
12. This is a case where it was proved that the appellant had separated with the complainant's mother. He alleged that the charges were trumped up because of the relationship that had turned sour. The appellant called DW2, **Cosmas Mutunga Kaloki** the sub-chief of the area who testified that he received complaints of threats by the complainant's mother to the co-wife. He also purportedly received a report from the appellant's unnamed son that his siblings and their mother were threatening to frame up the appellant. However, events that transpired on the **10th April, 2011** were not within his knowledge.
13. The evidence adduced by the complainant that on the night of **10th April, 2011** the appellant having visited them insisted on sleeping on the same bed with her and her sibling is corroborated by PW2. The appellant had sex with her on the fateful night. She realized her pants had been removed; the appellant penetrated her with his penis. This was intentional and being his daughter, unlawful. It was not his first time to do so. He had done it previously on the **8/3/2011**. PW2, **A M** her younger sister who slept on the same bed with them stated;-

“... we slept on the same bed and my father did bad manners to D. They did bad manners on the bed. It was dark but I saw them. Dad and D were having sex. I saw them that night. “

14. Evidence adduced by PW2 supported and confirmed what PW1 stated as having transpired on the fateful night. The evidence was of a witness who was being taken care of by the appellant who had no reason to lie. It is important to note that after the episode, the complainant failed to report to her mother. She maintained silence as she did previously. She was however, traumatized as it was as a result that it was suspected something was wrong.
15. An evaluation of the evidence adduced by the learned trial magistrate resulted into a finding that the offence had been committed. There was proof beyond a reasonable doubt that the appellant

- had committed the offence in question. Having re-considered the evidence, I have no reason to interfere with the findings reached by the magistrate. In the premises, I confirm the conviction.
16. With regard to the sentence meted out, a male person who is found guilty of having committed incest with a female aged below eighteen (18) years shall be liable to life imprisonment. (***See the proviso to Section 20(1) of the Sexual Offence Act***). The sentence meted out was legal.
17. From the foregoing I have no reason to interfere with the decision of the Lower Court. The appeal is dismissed in its entirety.

DATED, SIGNED and DELIVERED at MACHAKOS this 28TH day of OCTOBER, 2014.

L.N. MUTENDE

JUDGE