



REPUBLIC OF KENYA

High Court at Mombasa

Criminal Appeal 23B of 2012

(From Original Conviction and Sentence in Criminal Case No. 357 of 2009 of the Senior Resident Magistrate's Court at Wundanyi – Orange K.I. (SRM))

BENSON SALIM NGIMA APPELLANT

- Versus -

REPUBLIC RESPONDENT

J U D G M E N T

The Appellant was convicted and sentenced to 20 years imprisonment for the offence of Incest contrary to Section 20(1) of the Sexual Offences Act No. 3 of 2006.

The particulars are that-

“On the 14th day of June 2009 at (name of place withheld) Village, Mwatate Location in Taita Taveta District, being a male person had carnal knowledge of P.M(name withheld) a female person who was to his knowledge his niece.”

The main grounds of this appeal are that the prosecution evidence adduced in Court was in variance with the charge and that it failed to establish any degree or existence of consanguinity between the complainant and the Appellant.

Secondly that the sentence passed was excessive and further that there was no proof of the alleged age of the complainant. Counsel for the State Mr. Gioche concedes the appeal and submits for a retrial.

I have perused the record of proceedings and observed that the case against the Appellant was heard by two trial Magistrates. The first one had ordered for D.N.A test to be conducted so as to establish paternity. The second one in a ruling delivered on 26th May 2011 was of the view that the test was not necessary, however, he subsequently allowed the report to be produced by the investigating officer and he also relied on it in his judgment.

There is no evidence as to whether the Appellant was explained the contents of the report and its conclusion. The report ought to have been produced by the maker unless the Appellant had no objection on it being produced by the Investigating Officer. There was need for the Court to comply with Section 77(1) (3) of the Evidence Act.

A further perusal of the proceedings before the trial Magistrate shows that in the absence of voire dire proceedings the Magistrate at line 1 of page 5 gives the age of the complainant as 17 years even before she testified and gave her age. She did not tell the Court when she was born. Neither her mother nor her

guardian did testify on the age of the complainant. There was no age assessment of the girl.

Section 20(1) of the Sexual Offences provides-

“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.”

From the evidence adduced before the trial Magistrate there was no proof that the complainant was aged 17 years. Such proof was essential so as to determine the sentence to be meted out on the Accused/Appellant.

The issue of the relationship between the Appellant and the complainant has not been properly spelt out. The degrees of consanguinity are found in Section 22 of the Sexual Offences Act No. 3 of 2006. I do find that if a retrial is ordered no injustice or prejudice would be occasioned to the Appellant.

I accordingly reverse the conviction and sentence of 20 years imprisonment and order that the Appellant be retried by a Court of competent jurisdiction.

Dated and delivered at Mombasa this 8th day of March, 2013.

**M. MUYA
JUDGE**

In the presence of:-

Oyodo` for State

Appellant in person

Court clerk - Benta

**M. MUYA
JUDGE**