



REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
APPELLATE SIDE
CRIMINAL APPEAL NO. 64 OF 2011

(From the original conviction and sentence in criminal case no. 33 of 2011 at the Resident Magistrate's Court at Hola before Hon. M.O. Obiero – RM)

A. S. S.APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The Appellant in this case had been charged in the first court with the offence of Defilement contrary to section 8 (1),(3) of the Sexual Offences Act. The Particulars of the charge were that on the 28th day of January, 2011 at [particulars withheld] Village at Tana River District within Tana River County he intentionally caused his penis to penetrate the vagina of R.A a child aged 13 years.
2. In the alternative count he was charged with the offence of Committing an Indecent act with a child contrary to section 11 (1)of the Sexual Offences Act. The Particulars of the charge were that on the 28th day of January, 2011 at [particulars withheld] Market at Tana River District within Tana River County he intentionally touched the vagina of R.A a child aged 13 years.
3. The second Count was Incest contrary to section 20 (1) of the Sexual Offences Act, the Particulars being that on the 28th day of January, 2011 at [particulars withheld] Market at Tana River District within Tana River County he intentionally touched the vagina of R.A a child aged 13 years with his penis who was to his knowledge his daughter.
4. He was convicted on the alternative count of Committing an indecent act with a child and the second count of Incest. He was subsequently sentenced to serve 10 (Ten) years imprisonment for the alternative count and life imprisonment in respect of the second count. The sentences were to run concurrently.

5. He has appealed against both the conviction and sentence. He has raised the following grounds of appeal:
 1. **The Appellant appeals and states that the Honourable trial magistrate erred in law and in fact by not providing the Appellant with adequate time to prepare for his defence and infringed on his constitutional Rights as stipulated in Article 50 (j) of the Constitution.**
 2. **The trial magistrate erred in both law and fact by disregarding the evidence of the Appellant when it was clear that the evidence tendered in court was contrary to the statements given to the Police by witnesses more so the evidence of the complainant.**
 3. **The trial magistrate erred in both law and fact by disregarding the evidence of the Doctor and proceeding to convict on the evidence of the complainant who is a minor without any corroboration.**
 4. **The trial magistrate erred in both law and fact by not considering the facts that the Appellant might have been disciplining (*sic*) his child and the child decided to tell lies.**
 5. **The trial magistrate erred by holding that the complainant was truthful when there is clear contradiction in her evidence in court and statements recorded almost immediately after the alleged offence.**
 6. **The trial magistrate erred in both law and fact by not finding out why the name appearing in the statement given to the Police is different to the name the complainant gave in court. (*sic*)**
 7. **The trial magistrate erred in both law and fact by shifting the burden of proof to the Appellant.**
 8. **The trial magistrate erred in both law and fact by acquitting on the main charge and convicting of the alternative when there was no evidence to support the said offence.**
 9. **The trial magistrate erred in convicting on the evidence of a minor of 12 or 13 years without corroboration and without due regard to scientific evidence.**
 10. **The trial magistrate erred in imposing a severe sentence upon the Appellant without regard to the mitigating circumstances.**

6. This being a first appeal, the court is duty bound to evaluate the evidence on record and to draw its own conclusions and inferences, taking into account the fact that the appeal court has not had the opportunity of seeing the witnesses testify (*see Okeno vs Republic (1972) EA 32*)

7. The prosecution case was that on the material date the Appellant was alone with the victim in the house. Other relatives with whom she resided in that house were her grandmother, aunt and uncle who had traveled. Her mother was not married to the Appellant and resided separately from them. The victim testified that her father had on the material day accused her of having sexual relations with a certain boy, which she denied. He threatened to pour hot oil on her face and also threatened her with a knife. She ran out of the house to wait for her grandmother who did not come back and the Appellant sent her to bed. He later came to her room at 1.00 a.m while carrying a knife and informed her she would know who he was. He threatened to stab her, he left when she cried. That, later on he came back, undressed her while she was crying and inserted his penis into her vagina. The doctor who testified as Pw6, stated that the P3 form filled indicated that there was trauma to the genitalia but there was no penetration.

8. Pw4 stated that the victim on 29th January, 2011 came to her shop requesting for her phone that she may talk with her aunt. She also spoke with the said aunt over the phone who informed her that she and her mother had traveled.

9. The Appellant and the State filed written submissions which they relied upon. The state through Mr. Solomon Naulikha conceded to the appeal on both the conviction and sentence citing , *inter alia*, the fact that the charges were not properly framed, leading to a mistrial. The state however urges the court to consider a retrial based on the evidence tendered at the trial court.

10. The Appellant was charged with the offence of defilement and of Incest in two different counts arising from the same facts. The offence of Defilement is defined under section 8 of the Sexual Offences Act subsection (1) as:

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

Subsection (3) proscribes the offence of defilement and defines it further as:

“A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years. ”

The offence of Incest is defined under Section 20 (1) of the Sexual Offences Act as follows:

“Any male person who commits an indecent act ...with a female person who is to his knowledge his daughter ... is guilty of an offence termed incest.”

The offence of Committing an Indecent Act is defined under Section 11(1) of the Sexual Offences Act as follows:

“Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child.”

The Act defines an indecent act as follows:

“indecent act” means an unlawful intentional act which causes— (a) any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration ”

10. I have perused and considered the charge sheet. The charges are duplex. The particulars of the alleged defilement, its alternative count of commission of an indecent act and the offence of incest were based on the same set of facts. Section 134 of the Criminal Procedure Provides that:

“Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with particulars as may be necessary for giving reasonable information to the nature of the offence charged.”

11. One of the tenets of the rule of law is fair trial which encompasses the right to be informed of the charge nature of the charge. Article 50(2)(b) of the Constitution provides for the right of an accused person to be informed of the charge, with sufficient detail to answer it. Section 134 of the Criminal Procedure Code is intended to secure that right.

12. The charges and particulars of the counts in this case are muddled. It was proved that the minor complainant was the daughter of the Appellant and was 12 years old at the material time. Incest and defilement cannot be charged on the same set of facts. It is impossible to commit Incest and Defilement upon one and the same victim. The charges are bad for duplicity.

13. Based on this anomaly, I find that the charge-sheet is bad for duplicity. In ***Cherere s/o Gukuli vs. Republic [1955] EACA 478*** the East African Court of Appeal concluded that a charge was bad for duplicity. The court found that this had breached an elementary principle of criminal procedure, thereby occasioning a failure of justice and quashed the conviction. The court adopted findings in other cases such as instances where the court found that due to the duplex charge, the Appellant would be hard pressed to rely on the principle of *autrefois convict*. In the present case, though the charges were separated into distinct counts, the appellant was convicted for Committing an Indecent Act and Incest, which presents prejudice to him. It is accurate to argue that the breach of the principle of criminal procedure in framing the charges embarrassed the Appellant in preparing his defence and occasioned a failure of justice, even though his counsel appears not to have raised the issue.

14. Hence, invoking the powers bestowed upon this court on an appeal, as provided under Section 354 (3)(a)(i) of the Criminal Procedure Act, I allow the appeal on the conviction and sentence. The next question is whether to order a retrial. In ***Fatehali Manji v Republic [1966] E.A 343*** the East African Court of Appeal outlined the circumstances in which a retrial may be ordered. It stated:

“In general, a retrial will be ordered only when the original trial was illegal or defective. It will not be ordered where the conviction is set aside because of insufficiency of evidence or in the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where the conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not necessarily follow that retrial should be ordered. Each case must depend on its peculiar facts and circumstances and order for retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause only injustice to the accused person.”

Upon a careful re-evaluation of the evidence, and giving due consideration to the nature of the offences; and the Constitutional provisions that endeavour to protect children from violation, it is meted and just to order a retrial. (See ***Mwangi v R [1983] KLR 522***). There were fundamental irregularities in the trial even though the admissible evidence at trial was capable of resulting in a conviction.

15. The Appellant had not served any significant portion of the sentence and had been released on bail pending appeal less than 2 months after sentencing. Retrial is hereby ordered before a different magistrate. For this purpose, the Appellant is to appear for plea on 26th June, 2013 before the Senior Resident Magistrate's court at Garsen on appropriate charges, namely Attempted Incest contrary to section 20 (2) of the Sexual Offences Act.

Delivered and signed at Malindi this 29th day of May, 2013 in the presence of Mr. Kiamba for the Appellant, Mr. Nyongesa for the State, Court Clerk-Evans.

C.W. MEOLI

JUDGE