REPUBLIC OF KENYA

High Court at Mombasa

Criminal Appeal 217 of 2011

(From Original Conviction and Sentence in Criminal Case No. 169 of 2010 of the Senior Resident Magistrate's Court at Wundanyi – Orenge K. I. (RM))

JMM ………...……………. APPELLANT
- Versus -
REPUBLIC ………………………..……………………. RESPONDENT

JUDGMENT

Appellant was convicted and sentenced to 30 years imprisonment for the offence of Incest by male contrary to Section 20(1) of the Sexual Offences Act No. 3 of 2006.

The particulars being that on the diverse dates in the month of December 2008 and April 2009 at Chawia Village in Taita Taveta County, the Accused did have carnal knowledge of L.S a girl aged 13 years who to his knowledge was his daughter.

The grounds of this appeal are-

1. That Voire Dire examination of the complainant was not properly conducted which was a violation of Section 19 of the Oaths and Statutory Declaration Act.

2. That those who were instrumental in his arrest were not called to testify.

3. That there was no age assessment of the complainant.

4. That upon examination by a Doctor he was found to be HIV positive whereas the complainant and her child were found to be negative.

The complainant's evidence before the trial Court was that she knew the Accused as the man who had married her later mother. Sometimes in the month of December 2008, she had sexual intercourse with the Accused.

In the month of April 2009 during the school holidays she severally had sexual intercourse with the Accused in the forest and in his house. Later in the month of August of the same year she realized that she was pregnant and informed her grandmother who advised her to go for medical check-up.

The matter later reached the ears of the School Administration and the police and she was called upon to record her statement to police. The Headmistress of the school where she was studying (PW2) and the Local Chief (PW3) did testify on the relationship between the Accused and the complainant.

The Clinical Officer who examined the complainant found evidence that she had given birth. Tests done on her revealed that she was HIV-. These done on the Accused showed that he was HIV+ a fact which he knew before.

The Appellant opted to give unsworn statement in which he denied having had sexual intercourse with the complainant and blamed his predicament on the complainant's father stating that he had conjured up the whole case as he wanted custody of the children.

At the time the complainant was called upon to testify she had already given birth. The trial Magistrate did not conduct a Voire Dire examination on her. She did not give reasons for not doing so. It can only be inferred that in her assessment the complainant who was a Standard six pupil at the time was possessed of sufficient intelligence and could be sworn.

On the issue of age assessment. I do find that there is no evidence from any of her parents of the complainant's age. There is also no clinical age assessment apart from the estimation given in the P3 form of 14 years.

On the weight of evidence before the trial Court, there is no dispute that the Appellant had re-married the complainant's mother who had later passed on. This is corroborated by the evidence of the Headmistress of the school where the complainant was a student (PW2) and the area Chief (PW3). The Accused therefore is a step father of the complainant.

Section 22(1) of the Sexual Offenc es Act provides for the test of consaquinity or test of relationship thus-

"In cases of offence of incest, brother and sister includes half brother, half sister and adoptive sister and a father includes a half-father, and uncle of the first degree and a mother includes a half-mother and an aunt of the first degree whether through lawful wedlock or not."

Section 22(3) further provides that-

"An Accused person shall be presumed, unless the contrary is proved to have had knowledge, at the time of the alleged offence, of the relationship existing between him or her and the other party to the incest."

By reason of the above the Appellant cannot be heard to say that he was not the complainant's half father. As for the act itself Section 20(1) of the Act 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, grand daughter, 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 consent of the female person."

The complainant in her evidence did vividly state that the first time the Appellant had sex with her he used a condom to penetrate her genital organ. On the other occasions he did not. This is a clear indication that she was observant of what was happening and which indeed did happen as exemplified by her subsequent pregnancy and child bearing.

The fact that upon examination by a Clinical Officer the Appellant was found to be HIV+ and the complainant found to be HIV- does not in itself indicate or prove that there was no penetration by the Appellant as there are various factors including discordant couples and immunity levels.

I am satisfied that the conviction was safe. However, the issue of age was not satisfactorily proved. The Appellant had been sentenced to 30 years imprisonment. It is noted that he had been treated as a first offender. That he knew he was HIV+ before proceeding to penetrate her sexual organ with his. The 30 years imprisonment term is reduced to 20 years. Appellant will now serve twenty years imprisonment from the time of conviction.

To that extent only does this appeal succeed.

Judgement read and delivered in open Court this 28th day of May, 2013.

M. MUYA
JUDGE

In the presence of:-

No appearance for the State

The Appellant - present

Court clerk – Mr. Musundi