REPUBLIC OF KENYA

High Court at Machakos

Criminal Appeal 4 of 2007

M K.....…….APPELLANT

VERSUS

REPUBLIC……....RESPONDENT

(Being an appeal from the original sentence and conviction in Machakos Chief Magistrate's Court Criminal Case No. 1854/2007 by Hon. S.A. Okato on 22/12/2006)

JUDGMENT

Following an amendment apparent on the charge sheet, the appellant is charged with the offence of incest by male contrary to section 20(1) of the Sexual Offences Act, 2006.

Particulars of the offence being that on the 1st day of October 2006 at Kiimakimwe location, in Machakos District within Eastern Province being a male person intentionally and unlawful had carnal knowledge with his step-sister of the age of 11 years .

The appellant was tried, found guilty, convicted and sentenced to life imprisonment. Being aggrieved by the conviction and sentence the appellant has appealed to this court.

The appellant relies on grounds as follows:-

i. He was prejudiced by not being accorded a fair and impartial trial.

ii. The trial magistrate erred in law and fact by convicting him and sentencing him on a defective charge sheet.

iii. The prosecution failed to prove essential ingredients of the charge.

At the hearing, the appellant relied on his written submissions. The State Counsel, **Mr. Mukofu** opposed the appeal arguing that there was positive identification of the appellant as the offence was committed while the hurricane lamp was on and the complainant was in close proximity with the appellant. He called upon the court to find that the appellant was indeed related to the complainant following evidence adduced by the complainant's mother.

He also called upon the court to dismiss the appeal and uphold the conviction and sentence.

This is a first appeal. I am mandated to re-evaluate and reconsider the evidence adduced by the witnesses

in order to reach an independent decision. In doing so, I have to remind myself of the fact that I neither saw nor heard witnesses who testified in the lower court. (See **Njoroge versus Republic [1987] KLR 19.**

The facts of the case that the prosecution relied on to secure the conviction were as follows.

PW1, **M.K.** the complainant a child aged eleven (11) years was at home when the appellant, her step brother arrived and asked for food. PW2, **Jane Kilonzo,** her mother instructed her to serve the accused food. The appellant after eating grabbed her and led her to his bedroom amid threats as he held a knife. He had carnal knowledge of her until 2.00am. He released her to go to her mother's house. He again followed her, took her back to the house where he defiled her further until 5.00am. PW2, **Jane Kilonzo,** the mother to the complainant was locked outside the house as the daughter went through the ordeal. She confirmed that the complainant bled from her private part. The pant was blood stained.

PW3, **Kilonzo Musyoki,** the father to both the appellant and the complainant was away from home when the incident occurred. On learning of what transpired he took the complainant to hospital for treatment.

PW4, **Dr. Willis Omolo** on examining the complainant found her genetalia having laceration on lower vaginal wall. She had whitish discharge with blood contents. He formed an opinion that she had been sexually assaulted.

PW6, **No. 42821 P.C. Labani Wanyonyi** arrested the appellant. PW5, **No.43672 P.C Julian Ndonye** investigated the case and charged the appellant.

When put on his defence the appellant did not tender any evidence. He opted to remain silen.t

It was the contention of the appellant that he was prejudiced. He did not understand the charge he faced and its consequences. According to him the charge that was read to him was incest contrary to section 5(1) as read with section 5(2) of the Sexual Offences Act 2006, but later on it was altered to read- incest by males contrary to section 20 (1) of the Sexual Offences Act.

A perusal of the charge sheet indeed shows that initially the appellant had been charged with the offence of incest contrary to section 5 (1) as read with section(2) of the Sexual Offences Act…(*hereinafter the Act*).

Section 5(1) of the Sexual Offences Act provides as follows:-

"(1) Any person who unlawfully -

(a) Penetrates the genital organs of another person with -

(i) Any part of the body of another or that person; or

(ii) an object manipulated by another or that person except where such penetration is carried out for proper and professional hygienic or medical purposes;

(b) Manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ into or by any part of the other person's body, is guilty of an offence termed sexual assault".

Section two of the Act is the interpretation section. The charge that was read per the averments for the appellant is in regard to sexual assault. The particulars of the offence as stated do not support the charge in that respect. The Judicial officer who read the charge appended his signature using a blue pen.

There is however an alteration to the charge made in hand using a black pen. The charge was made to read as follows;-

"***Incest by males contrary to section 20 (1) of the Sexual Offence Act."***

Section 5(1) as read with section 5 (2) is deleted. The digit '***5'*** was also added in back pen. There is absolutely no indication when the alteration was made and who did it. The appellant must be believed when he says he did not understand which charge he faced.

The charge as initially drawn did quote a wrong section of the law. The conviction that followed was not based on the said charge which in actual sense should have been a nullity. In his judgment the trial magistrate concluded as hereunder:-

"I find the accused guilty of the offence of incest by male contrary to section 20 (1) of the Sexual Offences Act 2006 and I convict the accused as charged"

This brings in the question as to what charge exactly the appellant faced. There is no answer to the question.

The question begging is whether in the circumstances the appellant was prejudiced.

Looking at the proceedings, the appellant did not cross- examine any of the witnesses when he was put on his defence. It is recorded as follows:-

"***<u>Court-</u> accused explained in Kiswahili and Kikamba the 3 ways to put his defence to which he replied. I will keep quite. No witness to call."***

It was imperative for the trial magistrate to record the appellant stating what he was alleged to have stated. Otherwise the record as it is leaves this court to wonder if indeed the appellant was prejudiced.

From the foregoing, the issue I should be addressing is whether the appellant should be set free. This is a case where the prosecution drew a charge with a defect such that it was not supported by particulars of the offence in the charge sheet. The particulars of the offence supported a totally different charge under a different section of the law. The prosecution was to blame for convicting the appellant under a different section without establishing how the alteration was made. This was prejudicial to the appellant.

It is apparent that there was failure of justice. The appellant has been in jail for seven (7) years. The appeal having succeeded, I hereby allow it, the conviction is quashed, and the sentence set aside. The appellant shall be set free unless otherwise lawfully held.

DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **23rd** day of **MAY, 2013.**

L.N. MUTENDE
<u>JUDGE</u>