



REPUBLIC OF KENYA

High Court at Nakuru

Criminal Appeal 261,265 of 2011

(from original conviction and sentence in Nyahururu Criminal Case No. 1483 of 2011 of the Senior Resident Magistrate's Court- A.B. MONG'ARE)

P. M.K..... APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

The appellant, P.M.K, was charged with the offence of attempted incest contrary to **Section 20(1)** as read with **Section 20(2)** of the **Sexual Offences Act 2006**. In the alternative, he faced a charge of indecent act with a child contrary to **Section 11(1)** of the **Sexual Offences Act, 2006**. He was subsequently convicted on the main charge and sentenced to 15 years imprisonment. Aggrieved by both the conviction and sentence, the appellant filed an appeal to this court on the following summarized grounds:

- 1. That the offence was not proved to the required standard;**
- 2. That the trial magistrate erred in law and fact in shifting the burden of proof to the appellant;**
- 3. That the trial magistrate did not consider the appellant's defence and submissions;**
- 4. That the sentence is draconian, unjustifiable and excessively harsh.**

The State opposed the appeal. The Learned State Counsel, Mr. Chirchir submitted that the conviction was safe; that the charge against the appellant should be read in its entirety, it is a charge for attempted incest. He argued that the evidence before the trial court proved that there was a struggle, however, the attempt by the appellant to defile PW1 was unsuccessful. Finally, the State Counsel conceded that the sentence was harsh and excessive. The appellant was remorseful and though the minimum sentence is ten years the appellant was sentenced to 15 years.

The brief facts of the case are that on 23/7/2011, AWM (PW1), a standard six pupil was at home with her mother and two sisters. The appellant, who is her father returned home in the evening while drunk. He instructed PW1 to tie the donkey at the usual place. The appellant then followed PW1 outside and told her

to do **“bad manners”**. She declined. The appellant pinned her to the wall and tried to remove her trousers. PW1 screamed for help and her mother, N.W (PW2), came out of the house. The appellant released her and she ran towards the house. She later reported the incident to the nearby Administration Police Post. Samson Enywok (PW3), an Administrative Police Officer was on duty on that evening. He testified that PW1 reported that her father had attempted to defile her. Accompanied by his colleague PW3, arrested the appellant was arrested and escorted to Nyahururu Police Station. The investigation officer, Japheth Asasha (PW4) testified that he visited the scene. At the scene, he observed the ground had been disturbed an indication of struggle. He further observed the trouser PW1 wore on the day material day was torn. When called upon to enter his defence, the appellant denied attempting to commit the offence. He was arrested at about 8 p.m. and was taken to Nyahururu Police Station. As to whether the offence was proved to the required standard. The Learned Counsel for the appellant, Mrs. Njoroge, submitted that the prosecution had not proved its case beyond reasonable doubt. She argued that the evidence that was adduced before the Court, showing that the button on PW1's trousers cut during the struggle does not prove that the offence occurred. Counsel, also submitted that the evidence of PW1 and PW4 was at variance. The trial magistrate relied on PW4's testimony that the ground at the scene of the incident was disturbed. However the evidence of PW1 did not show any form of struggle at the scene.

This being a first appeal, it is the duty of this court to re-evaluate the evidence afresh in order to arrive at its own independent conclusion, bearing in mind that it neither heard nor saw the witnesses. I have considered the findings of the lower Court and am of the view that the trial magistrate arrived at the correct conclusion. I do wish to point out that the mother of the complainant (PW3), who first arrived at the scene of the incident was declared a hostile witness and her testimony worthless. Under **Section 24 of the Evidence Act**, the trial magistrate can rely on the evidence of the complainant child in sexual offences, if the court is satisfied that the child is telling the truth and must give the reasons for believing the witness. In line with this, the trial magistrate observed in his judgment that **“I believe the subject is not lying”**.

I also find that the trial magistrate did consider the appellant's defence. In his judgment, the court raised questions emanating from the appellant's defence such as- **“why was the accused disciplining the complainant? She had not refused to obey the father, she acted on his instructions”**. This does not amount to shifting the burden of proof but was an attempt by the trial court to evaluate the strength of the appellant's defence. In conclusion, the court could not understand why the child complainant could have framed the father, the accused. I am satisfied that the appellant was properly convicted.

It is trite law that that sentencing is a matter of discretion of the court and the appellate court will rarely interfere with such exercise of discretion unless it is demonstrated that the court overlooked some material factor, took into account some immaterial factor, acted on a wrong principle or the sentence was manifestly excessive in the circumstances. See **Ogola s/o Owuora (1954) 21 EACA 270**.

In the present case, the record shows that the appellant in his mitigation said; **“I am sorry, I ask court to decide as per the law”**. In passing his sentence, the trial court stated- **“I have considered the mitigating factors. Accused person is not remorseful even though he is a 1st offender, he is sentenced to imprisonment for 15 years”**.

Taking into account the circumstances of the case, in that the act had not taken place, I hereby reduce the sentence of 15 years to 10 years imprisonment being the minimum sentence prescribed in law. To that extent the appeal is successful. Orders accordingly.

DATED and DELIVERED this 17th day of May, 2013.

R.P.V. WENDOH

JUDGE

PRESENT:

Ms Njoroge for the appellant

Mr. Chirchir for the State

Kennedy – Court Clerk

