



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO. 279 OF 2011

(From original conviction and sentence in Criminal Case No. 204 of 2011 of the Senior Principal Magistrate's Court at Naivasha)

S N N.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

S N N (*the Appellant*) was charged with the offence of incest contrary to Section 20(1) of the Sexual Offences Act 2006 (*No. 3 of 2006*). The Appellant was also charged with an alternative offence of indecent act with a child contrary to Section 11(1) of the said Act. The Appellant was on the evidence found guilty of the principal charge of incest and was sentenced to life imprisonment as by law provided.

Aggrieved by his conviction and sentence, the Appellant came to this court on appeal, and in his Amended Petition of Appeal tendered to court at the hearing of the appeal raised four grounds of appeal namely -

- 1. that the learned trial magistrate erred both in law and fact by not considering that he was suffering from a psychiatric disease during the proceedings of the trial;***
- 2. that the appellant received an unfair trial because the trial court failed to do order the prosecution to furnish the appellant with witness statements and the DNA results before the hearing of the prosecution's case.***
- 3. That the prosecution was conducted in a language which the appellant did not understand, and***
- 4. that the appellant's defence and mitigation were not considered.***

And for those reasons the Appellant prayed that his appeal be allowed, the conviction quashed and the sentence set aside, and he be set free. The Appellant also filed written submissions.

The Appeal was however opposed by the State. I shall consider both the Appellant's and the State/Respondent's submissions in the paragraphs following.

Section 20(1) of the Sexual Offences Act 2006, creates the offence of incest by male persons in these terms -

“20(1) 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.”

The question here is whether the prosecution proved that the alleged victim was a daughter of the Appellant, and whether he intentionally committed an act which caused penetration with the alleged victim, the female person.

On the first question, there was evidence that the alleged victim was half-daughter of the Appellant having married the victim's mother when she was 3 years of age and having adopted her as his daughter by the marriage to her mother.

The evidence on the second question whether the Appellant committed an act of penetration with a female person who is to his knowledge his daughter, was overwhelming. The evidence of PW1, (the victim) was clear. The Appellant was her step-father. She was 14 years of age. As a result of the Appellant's acts, she became pregnant. PW2, the mother received a complaint from her daughter and she was taken to hospital.

PW3, a doctor, confirmed that PW1 was pregnant, and put her on antenatal care and treatment. PW1 later gave birth to a baby boy. The Appellant was arrested and had blood samples of both the baby and the Appellant taken and analysed. The DNA analysis Report showed that the Appellant was the father of the baby. PW6 the Government Analyst produced the DNA as Pexh. 3.

When put to this defence the Appellant failed to explain the incident. He gave an unsatisfactory account in an unsworn statement ***“I used to dig water wells. I was injured in the process and my mental status has not been okay. I cannot recall if I did what I am accused.”***

Section 11 of the Penal Code (*Cap. 63, Laws of Kenya*) provides -

“11. Every person is presumed to be of sound mind, and to have been of sound mind at any time which comes in question, until the contrary is proved.”

and Section 12 thereof provides -

“12. A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is through any disease affecting his mind incapable of understanding what he is doing, or or knowing that he ought not to do the act or make the omission, but a person may be criminally responsible for an act or omission, although his mind is affected by disease, if such disease does not in fact produce upon his mind one or the other of the effects above mentioned in reference to that act or omission.”

For the Appellant to plead that at the time he committed the act of incest with his daughter he had to demonstrate he was suffering from a disease which affected his mind so as to make it incapable of understanding what he was doing, or knowing that he ought not to do the act of which he was accused.

The prosecution evidence and the court record shows that the Appellant made that claim quite early in the trial, and he was referred to a psychiatric, a doctor who examines persons affected or suspected to be affected with a disease of the mind. In her judgment the learned trial magistrate refers to a Report dated 26.01.2011 and which the Doctor found the Appellant had no history of mental illness and that his mental status was stable, and therefore fit to stand trial.

In addition the evidence of PW1, the victim, was clear, that whenever she came home before the return of her mother (PW2), the Appellant would defile her, and warned her not to tell anyone, and that for a long time she complied with these instructions, and the Appellant would after take her to hospital. However on 17.01.2011 when she fell sick while in school, her father took her to hospital the following day and asked the Doctor to procure an abortion but he Doctor refused. PW1 also testified upon returning home that her mother examined her and sought answers as to whether she was pregnant and who was responsible for the pregnancy. PW1 informed the mother, PW2, that it was the Appellant who was responsible for the pregnancy through repeated acts of defilement. Through the efforts of PW2, the victim was taken to hospital where she was examined by a Dr. Etole, and the P3 Form, produced by PW3, Dr. Mbugua with the Appellant's consent showed the findings by Dr. Etole. The victim's hymen and was pregnant. The matter was referred to the Police by PW2, and the Appellant was arrested by PW4 and taken to Mai Mahiu Police Station. PW5 testified he referred the victim and the mother to hospital, and the victim gave birth to a baby boy and thereafter the blood samples of the complainant, her baby and the Appellant were taken and submitted to the Government Chemist for analysis.

I have already observed that PW6, a Government Analyst reported in his testimony that the analysis showed that the Appellant was father of the complainant's baby was not the father of the complainant.

In light of that evidence the Appellant the prosecution had proved its case beyond reasonable doubt. The only question is whether the Appellant's defence of insanity which he had indeed raised in his unsworn statement can stand scrutiny.

PW2 evidence is clear. The attacks by the Appellant were both calculated and deliberate. The Appellant would defile her whenever the mother was not present in the home. The Appellant would warn at the pain of the severest punishment if she as much as whispered to any one, (including her mother) the Appellant's shenanigus against her. The Appellant offered to take her and took her to hospital whenever she fell ill, until the last forty days of the thief arrived and the daughter was pregnant. The doctor would not accede to an abortion. She was returned home. The mother discovered and indeed the forty days were over.

The warnings and escort to the Hospital, the requests for an abortion are not acts of a hallucinator but those of a depraved child molester who would stop at nothing to hide his imagined insanity. The Appellant knew what he was doing. He also knew that what he was doing was wrong. The cloak of insanity under Section 12 of the Penal Code is, on the overwhelming evidence of his sanity, not available to him. He was sane for the purpose of the presumption under Section 11 of the Penal Code. His appeal on the grounds of insanity have no basis and are rejected.

Article 50 2(5) guarantees an accused person the right to be “*informed and to know in advance of the evidence the prosecution intends to rely on and to have reasonable access to that evidence.*”

The Appellant contends that he was not furnished in advance the evidence the prosecution had against him. He is absolutely right. All the evidence stared him in the face. The evidence was his step daughter, PW1. He had repeatedly defiled and ultimately impregnated her. He tried unsuccessfully to procure an abortion. The Doctor quite rightly refused. Her daughter gave birth to a baby son. The baby's, the mother and the Appellant's samples were taken and submitted to the Government analyst. All that information was well within the Appellant's personal knowledge. The only piece of evidence which the Appellant did not know, and the prosecution too, did not know, was that of PW6, the Government Analyst. That was expert opinion. Analysis taken time. If it were to be waited for the Appellant's trial would have been delayed by at least 11 months (*from 20.1.2011 when the appellant was arranged in court to 3.11.2011 when PW6, the General Analyst*) and the Appellant would have cried that his right to be brought to court within 29, hours (*Article 49(1)(f)(i)*), and to be tried without unreasonable delay (*Article 50(2)(e)*). These rights have to be balanced with what is practicable and the uncommon common sense.

I find no merit at all in the Appellant's ground that he was unaware of the offence for which he was charged on that he was unaware of the evidence before him.

It is however desirable in order to give effect to the requirements of Article 50 (2)(j) -

“and to have reasonable access to that evidence” if sufficient finding is granted to the criminal justice sector, to meet the costs of producing and supply witness statements to the vast number of accused persons and perhaps commencing with those case which may be deemed “substantial injustice would otherwise result (Article 50(2)(h) of the Constitution).”

I do not find that any injustice was done to the appellant by the non provision of witness statements.

On the last point that he did not follow the proceedings because he is a typical Kikuyu” who does not understand the Kiswahili language. I find the accused economical with the truth.

The Appellant lives in Mumu village in Mai-Mahiu area within Nakuru County. This is one of the most cosmopolitan counties in Kenya. Kiswahili is a in Kenya however broken in speech, it is understood by the vast majority of Kenyans even by those in Turkana's arid north and why not the Appellant who live no works in the cross-roads of Mai-Mahiu. There is no definition of a typical Kalenjin or that a typical Kikuyu – what it means does not understand Kiswahili. In any event the accused, as the record indicates elected to have the proceedings translated to him in Kiswahili. He could as well have elected to have the proceedings translated to him in the Kikuyu language. It is clear from the record he chose not to cross-examine any of the witness not because of language incapacity, but more because of embarrassment, and hence the late hour plea of a mental disease.

I find no merit in this ground as well.

The sentence of life imprisonment is in accordance with the proviso to Section 20 of the Sexual Offences Act, 2006 and the complainant was below the age of eighteen. She was fourteen. I confirm it.

Having failed on grounds of appeal, and sentence as well, I find and hold that the appeal has no leg or limb to stand upon. I dismiss it. I confirm both the conviction and sentence. It is so ordered.

Dated, signed and delivered at Nakuru this 21st day of June, 2013

M. J. ANYARA EMUKULE

JUDGE