



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CRIMINAL APPEAL NO.199 OF 2009

JNMAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

From original conviction and sentence in Cr. Case No. 230 OF 2007 at the Chief Magistrate's Court at Embu by Hon. L.K. MUTAI – PM on 19/10/2010

J U D G M E N T

JNM the Appellant was charged with the offence of Incest Contrary section 20(1) of the Sexual Offences Act No.3 of 2006.

The particulars as stated in the charge sheet were as follows;

JNM: On the 7th day of February 2007 in Embu District within Eastern Province intentionally and unlawfully had sexual intercourse with a minor CM aged 5½ years who is your daughter.

The case proceeded to full hearing and the Appellant was convicted and sentenced to life imprisonment. He was aggrieved with the Judgment and filed this appeal citing the following grounds;

1. ***That the learned trial Magistrate erred in both law and facts in convicting the Appellant on the evidence based on the testimony of a single witness who was minor in that;***
 - a) ***Circumstances for positive identification/recognition were in existence***
 - b) ***The evidence was uncorroborated.***
 - c) ***Failure to rely on medical examination.***

- d) *The witnesses lived very far from the complainant.*
2. *That the Prosecution case was far from proved initial report and the sentence imposed and conviction was harsh.*
 3. *That the learned trial Magistrate erred in both law and facts in convicting the Appellant by failing to consider the grudge between the Appellant and the mother of the complainant who was the Appellant's wife and had separated three years earlier.*
 4. *That the Appellant was tried in lower Court having been denied his lawful right of possessing witness's statements.*
 5. *That the clinical officer who appeared before the Court was not the one who examined the complainant.*
 6. *That the learned trial Magistrate erred in both law and fact in convicting the Appellant by failing to consider his defence and that of his defence witness who lived with the complainant.*

The Prosecution case was that PW1 whose mother had separated from the father lived with the father (Appellant), grandmother and brother. One day as she was playing with her friends on her grandmother's compound the Appellant called her to the house, took her to his bed and defiled her. He promised to buy her soda and bread. She wore her pant and went outside. She told her grandmother about it. On 20/12/2006 PW2 (mother of PW1) was at Manyatta market when she met the Appellant's mother who told her PW1 was unwell and was even defecating on herself. She had a case with the Appellant at the Children's office and so she went there to report. The matter was reported to the police post and she was escorted by the police to go and get the child. The child was taken to hospital where she was admitted for two months.

PW4 produced a P3 form (EXB1) on behalf of Dr. Kibicho confirming that the complainant had been defiled. In his sworn defence the Appellant explained how he had problems with his wife who had left him with two children. PW1 was the older of the two children. PW2 (his former wife) accused him of defiling PW1. He denied the charge and blames his woes on his former wife (PW2) who is married to another man. He complained that his mother was never called as a witness by the Prosecution. He however called her as DW2. She explained what happened when the police came for PW1. She admitted that PW1 was defecating on herself. At the time she could not confirm if the Appellant had defiled the child or not.

When the appeal came for hearing the Appellant presented the Court with written submissions in which he has basically expounded on his grounds.

Mr. Wanyonyi the learned State counsel conceded to the appeal on the following grounds;

- i) *The charge and evidence are at variance.*
- ii) *The dates in the charge sheet were deleted without being countersigned.*
- iii) *Child's age was not assessed.*
- iv) *Date of incident not clear*
- v) *There was a grudge between the Appellant and PW2*

This being a 1st appeal this Court is enjoined to reconsider and reevaluate the evidence and come to its own conclusion. I also bear in mind that I did not see the witnesses. In the case of **KIILU -V- REPUBLIC [2005]1 KLR 175** the Court of Appeal held thus;

1. *An appellate Court on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.*

- 2. It is not the function of an appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Courts' findings and conclusions. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses.***

I have considered the submissions of both the Appellant and the learned State Counsel. I have equally subjected the record before me to thorough evaluation.

I intend to condense all the grounds and deal with them simultaneously. I will start with the charge sheet. It is not clear when this offence was committed. Was it 7th January 2007, 7th February 2007 or when?. The months have been cancelled with other figures inserted below but the same have not been countersigned. PW1 did not give any date or any indication of when this incident occurred. The particulars in the charge sheet indicate that the complainant was aged 5½ years. PW2 said PW1 was born in the year 2000. This means that as at 6/8/2008 when she testified the child was about 8 years. If the offence occurred in 2007 as is indicated in the charge sheet was PW1 aged 5½ years? There was therefore need for age assessment.

In her evidence PW1 stated that she was playing with other children outside when the father called her into the house and defiled her and she went back outside. None of these children was called to testify. She further said that she reported this matter to her grandmother who I believe is the Appellant's mother and was DW2. The Prosecution elected not to call this very important witness, who was called by the Defence. She denied everything that was stated by PW1 and even PW2.

From the evidence of PW2 she allegedly met DW2 at the market on 21/12/2006 and she moved into action and the child was rescued. She keenly avoids mention of any dates. e.g when did she report the matter to the Children's Office/Police station? When was PW1 taken away? When was she hospitalized? Was she defiled in 2006 or 2007? And finally the P3 confirming that PW1 was defiled was not produced by its maker as is required under section 77 of the Evidence Act. There was also no basis laid to establish that its production fell within the categories under section 33 of the Evidence Act. It was also unprocedural for the Court to fail to find out from the Appellant if he objected to its production.

In the case of ***KAZUNGU KAHINDI -V- REPUBLIC CRIMINAL APPEAL NO.97/99 (COURT OF APPEAL MOMBASA)*** the Court of Appeal stated the following

“We, however wish to add that where, as here, the accused is unrepresented, it is the duty of the Court to inform him of his right not only to object to the production of an expert's report by a person other than the maker, but also, where the report has been admitted in evidence, to request that the maker of the report be called as a witness for purposes of being cross-examined on the report by him. There is no indication on record that the Appellant here was so informed. It is an omission which, in an appropriate case might be fatal to the conviction.

The P3 was wholly relied on to convict the Appellant. The report PW2 had received was that PW1 was defecating on herself. There is no report on what was causing this. The Appellant had in his defence denied the charge. He called a witness who denied what PW1 and PW2 had told the Court. The bad blood between the Appellant and PW2 was evident.

After analysing all the issues above I do find the conviction to be unsafe. The State does not support it. I therefore allow the appeal and quash the conviction. The sentence is also set aside.

The Appellant to be set free unless otherwise held lawfully under a separate warrant.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 20TH DAY OF JUNE 2013.

H.I. ONG'UDI

J U D G E

In the presence of;

M/s Ing'ahizu for State

Appellant

Njue – C/c