



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL APPEAL NO. 60 OF 2012

M. J. K..... APPELLANT

VERSUS

REPUBLICRESPONDENT

(From original Conviction and Sentence in Criminal Case No. 2421 of 2010 of the Senior Resident Magistrate's Court at Kwale – Hon. Usui Macharia - SRM)

JUDGMENT

The Appellant above mentioned was Convicted and Sentenced to twenty years imprisonment for the offence of Incest contrary to section 201(1) of the Sexual offences Act No. 3 of 2006.

The particulars being that on diverse dates between the month of August, 2009 and 9th February, 2010 at Mabatani County he had an indecent act with M. J. K. with his penis which caused penetration to the vagina of the Complainant who to his knowledge was his granddaughter.

The complainant is a girl aged fifteen years. At the time of the alleged offence she was staying with her grandparents. The appellant announced his desire to have a grandchild and between the complainant and M he chose the complainant. Henceforth she was tasked with cooking for him and several days later he told her that she was his wife and with that announcement he commenced sexual intercourse with her culminating with her pregnancy. When she reported this to her grandmother she brushed it aside. Later she reported to her Aunt who in turn reported to the school authorities and the police. The Accused was later arrested and charged with this offence.

This case was heard by two magistrates as the first one was transferred. When section 200 of the Criminal Procedure Code was read to the Accused it is indicated that he wanted the case to start De Novo but then it is also indicated that he changed his mind and said that it could proceed from where it had reached. The second magistrate proceeded with the Defence case as the prosecution had closed their case.

This is a peculiar case. Peculiar in that it appears to have been investigated by the District child

protection committee officer (PW 2) and Assistant chief of [Particulars withheld] (PW 3).

PW 5 corporal Nelson Wanyonyi although he called himself the investigating officer his role was merely to arrest and charge the Accused.

That is why during cross-examination by the Accused at page 15 line 3 he states,

“the offence was committed between June and December 2009. The report was made on 10th February, 2010. The P3 form was filled on 2nd March, 2010”.

The charge sheet itself reads that the offence was committed between the month of August 2009 to February 2010.

During cross-examination by the Accused at page 6 line 11 of the proceedings this is what she told the Court. **“You committed the offence in May 2009 and this year”.**

It is also noted that the Accused was arraigned in Court on 11th February, 2010. The investigating officer testified that the P3 form was filled on 2nd March, 2010 when the Accused had already been charged. Its apparent that there was pressure on the part of police to have the Accused charged.

It is also instructive to note that no relative of the complainant was called to testify for the prosecution and the two who later testified were on the side of the Accused.

In the present case there was no age assessment of the complainant. The convicting magistrate did not physically see the complainant as she had testified before another magistrate. No **Voire dire** examination was done on the complainant and no attempt was done to find out whether there was corroboration or not and whether the Court was satisfied that the complainant was telling the truth.

During interrogation by the Assistant chief and the children rights officer, the complainant had mentioned that she had a boyfriend. DW 2 and DW3 did testify that the complainant had a boyfriend who had been arrested and later released by police.

This is a case riddled with a lot of inconsistencies and contradictions. The charge is a very serious one and proper investigations ought to have been made by police but not to leave the matter to an Assistant chief and a children's officer.

The Conviction was not safe. It is quashed and the Sentence set aside. The Appellant is set at liberty unless otherwise lawfully held.

Judgment dated delivered and signed this 24th day of September, 2013.

.....

M. MUYA

JUDGE

24TH SEPTEMBER, 2013

In the presence of:-

The Learned State Counsel Mr. Dzumo

The Appellant present

Court clerk Musundi