



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 105 OF 2013

MGM APPELLANT

VERSUS

REPUBLICRESPONDENT

**(APPEAL ARISING FROM THE JUDGMENT OF THE PRINCIPAL MAGISTRATE'S COURT
AT BARICHO (S. JALANG'O – Ag. S.R.M) IN CRIMINAL CASE NO. 1182 OF 2012
DELIVERED**

ON 17TH MAY 2013)

JUDGMENT

The appellant MGM was tried and convicted by the Ag. Senior Resident Magistrate Baricho (S. JALANG'O) for the offence of incest contrary to **Section 20 (2) of the Sexual Offences Act No. 3 of 2006**. The prosecution case was that on the 27th October 2012 in Kirinyaga County he penetrated with his penis the vagina of JW who to his knowledge is his niece.

After hearing the evidence of six (6) prosecution witnesses and the appellant in his defence, the trial magistrate found him guilty and sentenced him to life imprisonment.

Being aggrieved by that conviction and sentence, the appellant has filed this appeal in which he has raised the following ten grounds of appeal:-

- 1. That he pleaded not guilty***
- 2. That the trial magistrate erred in law and fact by not considering that there was no eye witness***
- 3. That the trial magistrate failed to address himself that a grudge existed between appellant and PW5***
- 4. That the trial magistrate failed to consider that the complainant's father usually insults him***
- 5. That the trial magistrate erred in law and in fact by allowing exhibits which were not relevant to the case to be produced i.e. pants and skirt***
- 6. That the trial magistrate erred in law and in fact by failing to consider that the complainant was a minor who could have been influenced by the parents***
- 7. That the trial magistrate erred in law and in fact by failing to consider that PW2 went to report to her mother something that she did not see***
- 8. That the trial magistrate erred in law and in fact by acting on un-corroborated evidence***

9. *That the trial magistrate erred in law and in fact by failing to notice that PW1 was under the influence of Sexual fantasy (sic)*
10. *That the trial magistrate erred in law and in fact by denying him a fair trial which is his Constitutional right by refusing to give him a medical report*

This being the first appellate Court, I am required to consider and evaluate the evidence afresh weighing the conflicting evidence weighing and drawing my own conclusions before deciding whether the magistrate's findings can be supported. In doing so, I should make allowance for the fact that the trial magistrate has had the advantage of hearing and seeing the witnesses – OKENO VS REPUBLIC 1972 E.A 32.

The complainant JW gave sworn evidence after a voire dire examination and gave her age as 8 years at the time of the incident although DAVID WAHOME (PW4), a Clinical officer at Baricho Health Centre and who examined her on the same day of the incident and produced her P3 Form (Exhibit 1) put her age at 7 years. According to the complainant, she was at home on the material day when the appellant locked her in the kitchen, placed her on the chair, removed her pants and proceeded to defile her before going away. She identified the appellant as her uncle i.e. brother to her father. Her sister P (PW2) went and informed her mother who took her to hospital.

PW (PW2) who is a sister to complainant but whose age was not recorded and who gave un-sworn testimony told the Court that on the material day, the appellant locked himself in the kitchen with the complainant but she did not know what transpired therein. She however informed her mother. She too said appellant is her uncle.

JG (PW3) who is another uncle to complainant testified that on the material day complainant's mother informed him that appellant had defiled the complainant. He advised her to take complainant to hospital and then they started looking for the appellant whom they arrested at 11 p.m. and took to the Police Station after medical evidence had shown that indeed the complainant had been defiled.

DAVID WAHOIME (PW4) a Clinical officer at Baricho Health Centre testified that he examined the complainant the same day and although he saw no bruises on her labia majora and labia minora, they were inflamed and her hymen had missing. There was also tenderness on the vulva and vagina and he made a finding that there was sexual penetration.

LW (PW5) who is mother to the complainant testified that on the material day, her other daughter P (PW2) informed her that the complainant had been locked inside the kitchen by the appellant who had then had sexual intercourse with her and when the witness asked complainant if that was true, she confirmed that it was true. She took her to Karatina Hospital where she was examined and there was blood in her vagina. The matter was reported to the Police and she produced a birth certificate (Exhibit 4) which shows that the complainant was born on 17th April 2002. She added that the appellant is the complainant's uncle.

P.C. SALIVIN KAVITA (PW6) of Ndiriti Police Post told the Court that the appellant was taken there by members of the public on 28th October 2012 and it was alleged that he had defiled a child the previous day. After hearing the complainant's evidence together with that of other witnesses, the officer visited the scene and was shown the kitchen. He had the appellant taken to Karatina Hospital for HIV testing which was negative. Appellant was later taken to Baricho Police Station. He produced the complainant's pant and skirt as exhibits.

The record does not show whether the appellant gave sworn or un-sworn evidence during his defence on 29th April 2013. Nonetheless, he testified that on 27th October 2013 (that must be a typing error) he left his home at 7.45 a.m. but on the way, he met the complainant's father MMM who called him stupid. He went to Mathira base and started drinking beer with his friend and at 9 p.m. he was attacked by a group of people while on his way home and he was taken to the Police Station where he spent the night and the following day, he was taken to Karatina Hospital where his blood was tested. He said this case was maliciously brought against him by the father of complainant who views him as an

outsider. He questioned why the complainant was not the first to report this incident and why the P3 was produced by an officer from Baricho Clinic and not Karatina Hospital.

On behalf of the State, Ms Kambanga supported both the conviction and sentence.

I have re-considered the evidence as I should in order to draw my own conclusions. It is not in dispute that the appellant is an uncle to the complainant and although the trial magistrate found the complainant's age as 8 years as stated by herself and although the P3 form put her age at 7 years and her mother put her age at 11 years, the birth certificate put her date of birth as 17th April 2002 (see Exhibit 4). The birth certificate would therefore be the best evidence to determine one's age and going by it, the complainant was aged 10 years and 6 months at the time of the offence. That would mean therefore that she did not fall under the category of a child of Tender years as defined in the Children's Act. There was therefore no need for a *voire dire* examination of the complainant which the trial magistrate conducted before her testimony on 1st February 2013. It must be noted, however, that the birth certificate was produced much later on 22nd March 2013 and when the complainant was testifying, she had given her age as 8 years which meant that the magistrate was perfectly correct to conduct a *voire dire* examination as he did. Nothing therefore really turns on that.

In his appeal, the appellant says there was no eye witness to the crime. The State Counsel states that such offences are never committed in the open. It is true there was no eye witness to the offence. **However Section 124 of the Evidence Act** allows a trial Court to convict on the evidence of the victim alone if, for reasons to be recorded in the proceedings, it is "***satisfied that the alleged victim is telling the truth***". In this case, as stated earlier, the trial Court conducted a *voire dire* examination before accepting the complainant's evidence in the following terms:-

Court: "***The child to give sworn statement. She understands the meaning of oath and need of saying the truth***"

It must be remembered that the trial Court was best placed in determining the demeanour of this witness and whether she spoke the truth and in his judgment, the trial magistrate believed both the complainant and PW2 adding that they had no reasons to lie. On my part, I have no reason to doubt that the complainant spoke the truth about the incident of the material day. Not only did she tell her mother that appellant had removed her clothes and engaged in sex with her, but medical evidence confirmed the same. The appellant has argued that the complainant's father has brought this case maliciously. However, the complainant's father was not even a witness in this case. On the issue that wrong pants and skirt were produced as exhibits since the complainant was wearing white pants and green skirt and what was produced was black pant and blue skirt, the Court notes from the record that during cross-examination, the complainant said as follows:-

"The accused is a brother to my father. He is present in Court. I was wearing black and white underpants and green skirt. I was wearing the black pant. It's (sic) present in Court"

The list of exhibits shows that exhibit 3 was a green skirt. Nothing really turns on that.

The appellant further states in his grounds of appeal that the complainant may have been influenced in her testimony by her parents and was under what he refers to as "***Sexual fantasy***". Whatever that means. However, in cross-examination of this witness by the appellant, it was never suggested that her testimony was made up. She said she was speaking the truth and in fact added that the appellant had defiled her on a previous occasion and she told her mother.

The appellant has also complained that he was not given a fair hearing as he was not supplied with medical report. I can see from the record that on 28th January 2013, the appellant applied to be provided with the P3 Form and the trial Court made an order that the same be availed to him at his own costs. There is nothing to suggest that he was not able to procure it and it so, that he raised the issue again with the trial Court. In any event, the said P3 was produced on 20th February 2013 by DW who the

appellant cross-examined and if he needed time to study it before cross-examination, he ought to have said so. Article 50 of the Constitution provides that an accused has a right to have reasonable access to the prosecution evidence and in the circumstances of this case an order was made by the trial Court that he be supplied with the P3 and the same was eventually produced and it was his responsibility to inform the Court that the order of 28th January 2013 with regard to the P3 was flouted so that the Court could take remedial action. I see no breach of his rights under those circumstances.

Having re-examined the evidence adduced against the appellant in the trial Court and also his defence, I have reached the conclusion that his conviction was based on sound evidence. I dismiss his appeal against the conviction.

On sentence, he was imprisoned for 10 years. The offence of incest provides for that mandatory sentence which was therefore lawful. The appeal against sentence is similarly dismissed.

I accordingly dismiss the appellant's appeal on its entirety.

B.N. OLAO

JUDGE

28TH OCTOBER, 2013

28/10/2013

Coram

B.N. Olao – Judge

CC – Muriithi

Appellant – present

Mr. Sitati State Counsel – present

Language – English/Kiswahili

COURT: Judgment delivered this 28th day of October 2013 in open Court.

Mr. Sitati State Counsel present

Mr. Muriithi Court clerk present

Appellant present

Right of appeal explained.

B.N. OLAO

JUDGE

28TH OCTOBER, 2013