



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

Criminal Appeal 352 of 2010

J M K.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the convicting and sentence in Kitui Senior Principal Magistrate's Court

Criminal Case No. 265/2008 by Hon. E. Juma Osoro, SRM on 23/10/2010

JUDGMENT

The appellant faced the offence of attempted incest contrary to section 20(2) of the Sexual Offences Act in the Senior Principal Magistrate's Court at Kitui. It was said that on the 19th May, 2000 at around 1.30pm at *[particulars withheld]* Village, Mutula sublocation, Miambani Location in Kitui District within Eastern province, the appellant attempted to commit an indecent act namely incest which act would have caused penetration with a female person namely **W K** who to his knowledge was his mother. The appellant denied the charge and was soon thereafter tried.

The evidence by the prosecution in brief was that on 18th May, 2000 at about 1.30pm while the complainant was in the house the appellant who was her son went and insulted her using vulgar words and threatened to have sex with her that day. The appellant then undressed completely, grabbed the complainant and tore her dress. The complainant screamed and PW2 who witnessed the whole event went to her assistance. She was a daughter in law. She confirmed just as the complainant had stated that the appellant attacked the complainant saying that he was going to have sex with her that day. Both the complainant and this witness saw the appellant's hardened penis. It was fully erect. PW3 who was passing by also went to the rescue the complainant after he heard her screaming. He found the appellant holding the complainant. At first the appellant asked him to leave, however, he talked to him who softened his stand and set the complainant free. The complainant reported the matter to police and the appellant was arrested the same day and charged with the offence the following day.

The appellant gave unsworn statement of defence called one witness, his wife. He denied committing the offence. On that day he woke up early and went to church with his wife. He remained in church until 2pm. Thereafter he went elsewhere and remained thereat until 8pm when he came home and slept. The following morning he was arrested at 6am by 2 people who took him to the police and was subsequently charged. His wife testified that he was with the appellant the whole day and as such he did not commit the offence at 1.30pm.

Having keenly evaluated the evidence adduced by the prosecution and the defence sides, the court was satisfied that the prosecution had managed to prove the case against the appellant to the required standard. Accordingly, she convicted the appellant and sentenced him to 10 years imprisonment.

Aggrieved by the conviction and sentence, the appellant lodged the instant appeal initially on 6 grounds to wit:-

Øthat prosecution's evidence was weak,

Øthe court failed to consider the grudge which existed between the appellant and his mother, the complainant,

Øthe court did not test with the greatest care the circumstances of the offence,

Øthe case was not proved beyond reasonable doubt, and

Øthat the sentence imposed was too harsh

However, at the hearing of the appeal on 12th July, 2012, the appellant applied and was allowed to file amended petition of appeal. He now claimed that the trial court had failed to comply with the provisions of section 207 (1) 85(1) 7(1) respectively of the Criminal Procedure Code, thereby rendering the entire trial a nullity.

At the hearing of the appeal, the appellant tendered written submissions which I have carefully read and considered.

In opposing the appeal, **Mr. Mukofu**, learned State Counsel submitted that the appellant was positively identified in the act as the incident occurred in broad daylight, the ingredients of the offence were met, the trial court considered the appellant's defence and found it wanting. Though he called his wife as a witness, she failed to confirm to court the appellant's whereabouts at the time he is alleged to have committed the offence.

Being a first appellate court, it is my duty to subject the evidence tendered before the trial court to afresh and exhaustive re-evaluation so as to reach my own independent conclusion as to whether the conviction and sentence of the appellant can be sustained.

I have carefully read and considered the evidence tendered by both sides, the judgment of the learned magistrate, the amended petition of appeal as well as rival written and oral submissions on record and I am satisfied that the conviction and sentence of the appellant cannot be disturbed. However, before I can justify the above determination, let me first deal with issues of law raised by the appellant in his amended petition of appeal. Since the appellant now hinges his appeal purely on points of law, it appears therefore that he is not questioning the evidence which was led before the trial court against him.

The first issue raised by the appellant is that the learned magistrate did not comply with the provisions of section 207(10) of the Criminal Procedure Code which requires that the substance of the charge be stated to the accused by the court who should then be called upon to plead. Essentially, what the appellant is complaining about is that he was never asked to plead to the charge when arraigned in court. Despite that omission, the trial magistrate proceeded to hear the case. Accordingly failure by the trial magistrate to ask him to plead to the charge was an illegality which is incurable.

The typed record of the proceedings tends to support the appellant's contention that when arraigned in court on 20th May, 2008, he was not called upon to plead. However, a careful perusal of the original and handwritten record of the trial court points to the contrary. Indeed it shows thus:-

"... Date: 20/5/2008

Coram

Magistrate : J.O. Ombura, SRM

Prosecutor : I.C. Kalabai

Court Clerk: Mutisya

Interpretation: English/

Accused/Present/Absent /represented by

The substance of the charge(s) and every element thereof has been stated by the court to the accused person, in the language that he/she understands, who being asked whether he /she admits or denies the truth of the charge(s) replies: It is not true.

Court: Plea of not guilty entered. Hearing 2/7/2008 Court 1. Mention 3/6/2008. Accused may be released on a bond of Ksh. 50,000/= plus surety”

From the foregoing, it is quite clear that the appellant duly took his plea when presented to court on the very first day. Failure to so indicate in the typed record of the proceedings can easily be attributed to a typographical error on the part of the person who typed the proceedings.

The other point of law raised is that the trial court failed to consider the provisions of section 85(1) of the Criminal Procedure Code. These provisions deal with public prosecutors and their powers. The appellant is basically saying that during his trial, the trial magistrate failed to indicate the rank of the prosecutor present thereby creating a serious doubt as to whether the prosecutor present was of the rank recognized under section 85 of the Criminal Procedure Code. From the record, the case was prosecuted by **I.P. Nyambache**. The record however, shows that on occasions, the prosecutor will simply be shown as **Nyambache**. However, on 2nd April 2009, his full rank is given. There is no evidence that there were 2 **Nyambaches** who prosecuted the case. I do not therefore think that failure to indicate the rank of **Nyambache** on some occasions when the case came up for hearing occasioned the appellant a miscarriage of justice. In any event by the time the case was being heard the legal requirement that a police prosecutor must be of the rank of an inspector of police and above had been repealed by Act No. 7 of 2007. All that was required was- “ **the Attorney General , by Notice in the Kenya Gazette, may appoint Public Prosecutors for Kenya or for any specified area thereof, and either generally or for any specified case or class of cases...**” The appellant has not suggested that **Nyambache** had not been gazetted as a public prosecutor by the Attorney General.

Section 169 (a) of the Criminal Procedure Code deals with contents of a judgment. To the extent that the trial court did not consider his defence or rejected the same, the appellant seeks that there was non-compliance with the said provision of the law. Nothing can be further from the truth. The trial court considered the appellant’s defence of *alibi* and found it wanting. The appellant called his wife as a witness. However, the wife failed to confirm the appellant’s whereabouts at the time of the alleged offence. She conceded that she was not with him at the time. The defence was accordingly rejected by the trial court and rightly so in my view as being a mere fabrication. I therefore cannot see how the rejection of the appellant’s defence can amount to non-compliance with section 169 of the Criminal Procedure. In the judgment, the learned magistrate clearly set out points for determination, the determination thereof and reasons for such determination.

Finally, the appellant complains about non-compliance with section 211(1) of the Criminal Procedure Code. This deals with what the magistrate should do at the close of the prosecution case. That the court should sum up the case and inform the accused that he has a right to give evidence on oath, and if he does so, he will be liable to cross-examination or to make a statement not on oath but from the dock, and shall ask him whether he has any witness to examine or other evidence to adduce in his defence, and the court shall then hear the accused and his witness and other evidence. I do not appreciate the complaints by the appellant in this regard. The record shows that there was compliance with section 211 aforesaid. Indeed the magistrate is recorded thus:-

“ Ruling

The accused has a case to answer. I reserve my reasons for now the accused is hereby asked to elect the mode of his defence under 211 CPC.”

The accused then elected to give unsworn defence and call his wife as a witness. This was subsequently done. If the appellant is complaining that the case was not summed up to him and that he was not given an opportunity to submit, that would be evident on record. The appellant did not indicate that he wished to be given an opportunity to submit. In any event having been given an opportunity to defend himself which he took up with a lot of *gusto*, which prejudice did he suffer? I cannot think of any.

Coming to the evidence tendered in support of the charge, there is no doubt at all that the appellant and complainant were close relatives. Indeed the appellant was a biological son of the complainant. They both concede to that fact. On that score, the offence of attempted incest if proved would be well founded.

There is also no doubt at all that the offence if at all was committed in broad daylight. It was about 1.30pm. According to the complainant, the appellant came to her house and stripped his clothes and told her to the face that he would sexually assault her. That ***“he was going to soften my hardened vagina...”*** He then grabbed the complainant and pulled her dress until it was completely torn. However she managed to extricate herself and ran into the bush. During the episode, the appellant’s penis which was exposed was fully erect. This testimony was corroborated by both PW2 & 3. From the circumstance, and evidence on record, it is clear that the appellant was positively identified by the complainant and these other 2 witnesses. The complainant being a mother of the appellant could not have mistaken the appellant, his son. The appellant in stripping himself and grabbing the complainant, tearing her clothes within his penis fully erect, all point to one irresistible conclusion; he was bent on having sex albeit forcefully with his mother. However, his mission was thwarted when PW2 & 3 came to the scene. The ingredients of the offence of attempted incest were met.

The appellant claims that the case was a frame up. However, he never raised the issue with his mother when he cross-examined her. I also doubt very much that the complainant would go to the extent of tearing her clothes and in the presence of PW2 and 3, and or create such spectacle merely to frame his son.

The appeal lacks merit. It is accordingly dismissed in its entirety.

DATED, SIGNED and DELIVERED at MACHAKOS this 28TH day of SEPTEMBER 2012.

**ASIKE MAKHANDIA
JUDGE**