



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 188 OF 2010

(From original conviction and sentence in Criminal Case No. 743 of 2008 of the Chief Magistrate's Court

at Naivasha, T. W. C. Wamae, SPM dated 12th May, 2010)

P M

M.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

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JUDGMENT

The Appellant was charged with the offence of incest contrary to Section 20(1) of the Sexual Offences Act, 2006 (*No. 3 of 2006*), and was on the evidence found guilty and sentenced to 10 years imprisonment. Aggrieved with his conviction and sentence he has appealed to this court on five grounds namely -

(1) THAT the learned trial magistrate erred in law and fact in convicting him on reliance of a defective charge.

(2) **THAT she erred in law and fact in convicting him in the absence of a positive complainant's evidence.**

(3) **THAT she erred in law and fact in disregarding the omission in the prosecution side to avail some very essential prosecution witnesses.**

(4) **THAT she erred in law and fact in relying upon contradictory and inconsistent evidence.**

(5) **THAT she erred in law and fact in convicting him despite the fact that the defence wasn't rejected or shaken by the prosecution.**

And on those grounds prayed that his conviction be quashed and sentence set aside, and he be set free.

To support his Grounds of Appeal, the Appellant also made written submissions which I will consider presently after considering the submissions of Mr. Omutelema learned Senior Principal State Counsel.

Mr. Omutelema supported both the conviction and sentence. The Appellant was identified, that the case was proved beyond reasonable doubt. The maximum sentence for the offence of incest is 14 years imprisonment. The appellant was sentenced to 10 years, that the sentence was lawful and not excessive. Counsel urged the court to dismiss the appeal.

This being a first appeal, it is the statutory duty of this court to examine and re-evaluate the evidence before the trial court so as to make its own findings and draw its own conclusions. This is however subject to the caveat that this court did not have the privilege of seeing the witnesses.

The appellant's five grounds of appeal raise two issues, **firstly** whether the charge was defective, and **secondly** whether there was evidence to convict the appellant.

The procedure for drafting of charges under both the Penal Code (*Cap. 63, Laws of Kenya*), and any other law creating offences, is set out in Section 134 of the Criminal Procedure Code (*Cap. 75, Laws of Kenya*). It requires that every charge or information shall contain, and that it shall be sufficient if it contains, a statement of the specific offence or offences with which the accused is charged, together with the particulars necessary for giving reasonable information as to the nature of the offence charged.

The charge herein contains a precise statement of the offence and the law breached. It sets out particulars of the offence, the date, the time, place the essential elements in the act of incest, the insertion of the

appellant's penis into the organ (*vagina*) of the little girl, his daughter.

The appellant's claim that the charge was defective is not tenable. That ground is therefore rejected.

The appellants other ground was the contention that there was no evidence to convict him. In this regard the appellant's major ground is that there was no complainant in this matter. He based this ground on the evidence of his daughter, PW1, the victim. PW1 a child of 10 years at the time of trial gave an unsworn statement and denied that her father had defiled her. She stated that she was asked by Mama Shiko (PW2) to say that her father (*the appellant*) had defiled her so that she could be taken to see her mother in the hospital where she had gone to maternity to deliver a baby.

Indeed as the learned trial magistrate correctly observed, many a victim of sexual abuse, by relatives, and those close to them, suffer from trauma and self denial. The victim is torn between denial in the presence of the relative or friends (*the father and the mother in this case*), while complaining quietly to third parties, (*PW2 and PW3*) that the father had serially defiled her.

The appellant however raised a fundamental question - who was the complainant in this case? The appellant based his argument on the victim's evidence that she was not defiled by the appellant.

The complainant does not have to be the victim. The complainant is any concerned citizen of good will. A neighbor concerned with the fact the child or children are habitually locked in the house by a single parent, or parents without food, or denied to go to school, or that they are battered. Such neighbours, or witness to a hit and run accident, are all legitimate complainants.

In this case, the complainants were the victim's and the appellant's neighbours, ladies who were concerned that a child was being defiled by the father, the appellant. According to the evidence of PW2, a neighbor, the appellant on the material night about 8.00 p.m. came "*calling loudly*" to his daughter MN .that he wanted to "*inspect M.N,*" and that a little later she heard M.N complaining that her father, the appellant was pressing her.

Indeed when PW2 peeped through the chinks in the timber wall, she saw by the light of a tin lantern, the appellant lying on top of the little girl. PW2 denied that she had framed the appellant because he had declined to have an affair with her.

PW3 after testifying that she had been informed by PW2 of the act by the appellant, independently received information from PW1 that her father had repeatedly defiled her. It is she (PW3) together with PW2 and other concerned ladies who took PW1 (*the victim*) to the Police, and eventually to Naivasha District Hospital when she was examined by Dr. Kanyeki whose Report was given by Dr. John Silvano PW4 as Dr. Kanyeki had gone for further studies and whose testimony could not be obtained without undue delay and expense (*S. 33 of the Evidence Act, Cap. 80, Laws of Kenya*).

Dr. Kanyeki had compiled a Post Rape Care Form, and had found the girl was "*confused and hymen was absent*". This is consistent with the evidence of PW3, that the victim had informed her, that the father had been defiling her severally.

The appellant and his wife (*DW2, the mother of the victim*) all denied the allegations of incest against the appellant. This is not surprising. The offence of incest invokes such shame, and is taken to be a curse among most communities of Africa, and both parents would try and hide it in order to protect the family. However as the act had been detected by concerned neighbours, it would not be hidden any more.

The evidence of *DW2 (the mother)* was also revealing. She testified that her daughter had been taken away since 2002, and that she did not see her until May 2009. If the husband (*the appellant*) was living with the daughter on the material day, she would not have known whether or not he had assaulted her sexually, not once but severally, according to the evidence of PW3 and PW2. The Doctor's evidence of absence of hymen would confirm this.

For those reasons I would agree with the learned trial magistrate's finding and conviction of the appellant. I would therefore dismiss the appellant's appeal against conviction.

On the question of sentence, the record shows that the victim was 8 years of age at the time when the offence of incest was committed. The punishment for the offence of incest against a female person under the age of eighteen (18) years is life imprisonment. The sentence of 10 years was therefore lenient. I would therefore substitute a sentence of fifteen years in lieu of 10 years without the option of parole for the first ten years.

In addition, and in exercise of the discretion conferred upon this court by Section 114 of the Children Act, 2001 (*No. 8 of 2001*), I direct that the appellant shall have no control over the victim, M.N until she attains the age of 18 years, and I appoint her mother P. N. , and the Children Welfare Officer Nyandarua South District, to be the Wards and Guardians of M. N. until she attains the age of 18 years.

There shall be orders accordingly.

Dated, delivered and signed at Nakuru this 14th day of October, 2011

M. J. ANYARA EMUKULE
JUDGE