



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KISUMU

Criminal Appeal 173 of 2008

J.O.D APPELLANT

VERSUS

REPUBLIC RESPONDENT

[From original conviction and sentence in Criminal Case number 206 of 2008 of the Senior Resident Magistrate's Court at Ukwala)

JUDGMENT

J.O.D (herein the appellant), was convicted and sentenced to serve ten (10) years imprisonment by the Resident Magistrate at Ukwala for the offence indecent act with a child contrary to Section 11 (1) of the Sexual offences Act. He was initially charged with incest contrary to Section 20 (1) of the Sexual Offences Act and alternatively indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act. He was convicted on the alternative count and sentenced accordingly.

The particulars of the charge were that on the night of 14th/15th July 2008 at U sub-location Ugenya Siaya District, being a male person the appellant had carnal knowledge of **S.A.D**, a girl aged eleven (11) years, who was to his knowledge his daughter.

Alternatively, on the same date and place, the appellant unlawfully and indecently touched the private parts (vagina) of **S.A. D**, a girl aged eleven (11) years who was to his knowledge his daughter.

After pleading not guilty to both counts, the appellant was tried convicted and sentenced accordingly but being dissatisfied with the conviction and sentence has preferred the present appeal on the following grounds:-

- (1) That the doctor approved that there was completely nothing to show that the complainant was defiled. No injury, no sperms found and no treatment offered.**
- (2) That the trial magistrate did not put into account that there was no witnesses apart from the complainant herself and even the exhibit (inner part) was also not produced before the honourable court.**
- (3) That the arresting officer admitted that on the material date the complainant did not spend the night at their father's home.**
- (4) That the children department officer attached at Ugunja admitted openly before the honourable court**

that he deliberately stole the complainant's right.

(5) That the arresting officer mentioned a different date from that mentioned by the complainant.

For those reasons, the appellant prays that the conviction be quashed and the sentence imposed by the trial court be set aside. At the hearing of the appeal, the appellant appeared in person and orally submitted that the most essential ingredient of the offence is penetration yet there was no penetration as the medical expert (PW3) proved that the girl was a virgin. Further, the P3 form proved that he (appellant) was innocent and that it was due to the ignorance of PW2, PW3 and PW4 that they could not differentiate between medical examination and medical treatment.

It was further submitted by the appellant that defilement is not mere theory, it rests on what happened to the complainant and that the findings of the doctor are vital and also that the P3 form produced was concrete and conclusive. The present appeal ought therefore be allowed.

Miss Oundo, the learned Senior State Counsel appeared for the respondent and opposed the appeal by submitting that the appellant was charged with incest but was found guilty of indecent assault and sentenced to ten (10) years imprisonment therefore the learned trial magistrate erred by substituting the main charge whereas the evidence was satisfactory in showing that an indecent act under Section 20 (1) of that Sexual Offences Act was committed. The learned State Counsel further submitted that the child was aged thirteen (13) years and testified that the appellant had a habit of sexually molesting her. This was confirmed by PW2 who reported the matter to the police and caused the appellant to be charged with incest. The trial magistrate believed the child after seeing and hearing her. The learned State Counsel contended that this appeal lacks merit and urged this court to apply Section 354 of the Criminal Procedure Code and enhance the sentence since the one imposed by the trial court was unlawful. The foregoing submissions by the appellant and the respondent have been put into consideration by this court whose mandate is to reconsider the evidence and draw its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses. In Okeno vs= republic [1972] EA 32, the duty of a first appellate court was given as to:-

“..... reconsider the evidence, evaluate it itself and draw its own conclusions in deciding whether the judgment of the trial court should be upheld, as well as of course as deal with any questions of law on the appeal”.

In summary, the prosecution case was that the complainant **S. A (PW1)** aged about thirteen (13) years old and at the material time a class five primary school pupil at D Academy lived with the appellant who is her father but on the night of 14th /15th July 2008 while she was asleep in the kitchen the appellant proceeded there, removed her pants and defiled her. She could not scream as she had been strangled by the appellant whom she clearly saw when he lit a match stick. He went away after the act and she reported the matter to her grandmother **M.A** who told her to scream if the appellant came again. She thereafter went back to sleep and on the following day went to school and reported the incident to her class teacher madam **M** who in turn reported to the head teacher.

The head teacher reported to **MAO (PW2)** who worked with a non –governmental organization dealing with children rights. He testified that he had previously heard complaints that the appellant was defiling his own daughter and had even called him to his office but he denied the allegations.

On receipt of the report from the head teacher, Martin (PW2) took the complainant to the hospital and thereafter reported the matter to the police.

Joshua Ree (PW3), examined the complainant at the Ambira Sub – district hospital and completed the necessary P3 form. He did not find any evidence of penetration and concluded that there was nothing to show that the act had occurred.

P. C. Prestine Gitonga Ezekiel (PW4) of the Ugunja Police Post investigated the case and arrested the appellant whom he charged accordingly. He said that the complainant reported that she had on several occasions been sexually assaulted

by her father.

In his defence, the appellant said that he was a farmer at U sub-location. He denied the charges and stated that his daughter went to school on Thursday 17th July 2008 but did not return home by 6:30 p.m. He proceeded to her school on the next day, Friday 18th July 2008 at 6:30 a.m. Her deputy head teacher was surprised that she had not returned home and advised him to go to Ugunja to enquire. He went to the police post where he met the head teacher who ordered the police to arrest him. He contended that he was suffering for defending the complainant's educational rights.

After due consideration of the evidence in its totality, the learned trial magistrate concluded that the offence of indecent act had been proved against the appellant as there was no medical evidence to establish penetration and thus the offence of incest.

Under **Section 2 (1) of the Sexual Offences Act**, indecent Act is defined as an unlawful intentional act which causes:-

- (a) **Any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration.**
- (b) **Exposure or display of any pornographic material to any person against his or her will.**

The definition of incest is contained in Section 20 (1) of the Sexual offences Act which provides that:-

“Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, grand-daughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term not less than ten (10) years; PROVIDED that if it is alleged in the information or charge and proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person”.

Under Section 20 (2) of the Sexual offences Act:-

“If any male person attempts to commit the offence specified in sub-section (1), he is guilty of an offence of attempted incest and is liable upon conviction to a term of imprisonment of not less than ten years”.

The evidence herein showed that there was no penetration. The medical officer (PW3) clearly said that **“there was no evidence of penetration”**. This may have overruled the allegation that incest was committed in the form of a sexual intercourse but did not overrule the possibility that incest may have been committed in the form of an indecent act by the appellant against his daughter aged below eighteen years at the time in terms of the definitions provided by the aforementioned Provisions of the Sexual Offences Act.

The charge sheet presented before the trial court did not contain an alternative count but rather a second separate count. There is no doubt that the second count was meant to be an alternative count but it was not stated as much thereby showing that the charge-sheet was wrongly drafted. Besides, there was no need of an alternative count or a second separate count given that the definition of incest encompasses the major act of penetration and the act of indecent assault. With due respect to the learned trial magistrate, this court thinks that he was in error in treating the second count as an alternative one and holding the appellant guilty thereof.

The evidence by the prosecution did not disclose penetration but it surely disclosed an indecent act committed against the complainant.

The drafting of the particulars of the main charge of incest was faulty in that the aspect of an indecent act was not brought into play. Instead, emphasize was placed on the act of penetration hence the phrase **“..... had carnal knowledge of S. A”**. It should have been **“.....had carnal knowledge of and/or indecently assaulted S. A. D a girl aged 11 years who was to his knowledge his daughter”**.

Even though the evidence showed that the complainant was aged 13 years or 15 years old and not 11 years old, the fact

remained that she was below 18 years old thereby bringing the offence into the ambit of Section 20 (1) of the Sexual Offences Act.

While it may be said that the charge was wrongly drafted, the defect did not go to the substance of the offence as to occasion a failure of justice.

An act of sexual intercourse or penetration requires proof by medical evidence but this would not be necessary on a charge of indecent act or assault. Indeed, in **THUMI =vs= REPUBLIC [2008] 1 KLR (G & F)**, it was stated that medical evidence is not necessary to convict on a charge of indecent assault.

The defect in the drafting of the charge sheet was a mere irregularity curable under Section 382 of the Criminal Procedure Code.

In **Jacinta Njoki Ndirangu =vs= Republic Criminal Appeal No. 262 of 2007 (NBI)**, the Court of Appeal said:-

“Section 382 of the Criminal Procedure provides that in certain instances breaches of the provisions of the law are curable provided the breach does not occasion a failure of justice and that what would amount to prejudice will vary from case to case because what amounts to prejudice is a question of fact. The court has to look at the evidence and circumstances of each case and come to a finding whether or not the breach resulted in a failure of justice and caused prejudice to the accused”.

This court finds that a charge under Section 20 (1) of the Sexual Offences Act rather than under Section 11 (1) of the Sexual Offences Act was proved. Therefore, the appellant ought to have been convicted and sentenced under the said Section 20 (1) of the Sexual Offences Act.

As to whether there was proof that the offence was committed and that the appellant was responsible, the only evidence was that of the complainant (PW1). She testified on oath that her own father, the appellant was responsible for the offence. She said that on the material date the appellant removed her clothes and his and went ahead to defile her. She implied that the appellant had formed a habit of sexually molesting her. Her mother had as that time passed away. The learned trial magistrate saw and heard the complainant. He was in a better position than this court to assess her credibility and in doing so found her to be credible enough to prove that she was sexually molested by the appellant. Suffice to hold that the conviction of the appellant was wholly dependant on the credibility of the complainant's evidence.

In **Republic =vs= Oyier [1985] KLR 353**, it was held that:-

“A first appellate court cannot interfere with those findings of a lower court which are based on the credibility of witnesses unless no reasonable tribunal could make such findings or where it is shown that there existed error of law”.

This court would therefore confirm the conviction of the appellant by the trial court only that the same be under Section 20 (1) of the Sexual Offences Act and not Section 11 (1) of the said Act. The sentence of ten (10) years imprisonment is set aside and in accordance with Section 354 of the Criminal Procedure Code it is substituted for and increased to imprisonment for life.

Ordered accordingly.

Dated, signed and delivered at Kisumu this 12th day of May 2010

J. R. KARANJA

JUDGE