



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL APPEAL NO. 69 OF 2009

(From original sentence and conviction in Criminal Case No.156 of 2009 the Senior Resident Magistrate's Court at Kilifi Before Hon. J. M. Nduna - SRM)

M.Y.....APPELLANT
=VERSUS=
REPUBLIC.....RESPONDENT

JUDGEMENT

M.Y (the appellant) was convicted on a charge of incest by a male contrary to section 20(1) of the Sexual Offences Act No. 3 of 2006. The prosecution case was that on 16th February 2009 within Kilifi District, the appellant penetrated M.K.M who was his grand daughter.

He had faced an alternative charge of committing an indecent act with a child contrary to section 11 (1) of the Sexual Offences Act.

Appellant denied the charge. Prosecution called a total of five witnesses and upon conclusion of the trial where appellant was the only defence witness, he was convicted and sentenced to serve life imprisonment.

M was then aged 6½ years and told the trial court that appellant was her grandfather. On 16th February 2009, appellant took her to his house and did bad things to her. She described how appellant closed the door to his house, placed her on the bed and inserted his penis into her vagina after removing her clothes. She described the experience as painful, but appellant warned her that if she cried he would beat her. She later informed her grandmother and she was eventually taken to hospital.

F.K, a sibling of PW1 is aged 14 years and told the trial court on 16th February 2009, she did not go to school but stayed at home with M.

PW2 went to their neighbour's home, leaving M at home. When she returned, she found M bleeding from her private parts and noticed that their grandfather's bed had blood. Their grandfather (i.e the appellant) was naked and PW1 was crying. The appellant then folded his clothes. She informed their mother about the incident and when their mother S (PW3) returned, she learnt from PW1 that her grandfather had penetrated her vagina. She examined her genitals and noticed they were injured, so she took the child to hospital.

PW4 (Dr. Mutinda who examined the girl noted that she had blood stains on her clothes, her hymen was broken, and the tissues around the genitalia were inflamed.

Pc Mwaka Mwanuye (PW5) who received the report, confirmed being given a blood stained dress belonging to PW4. He also confirmed that PW1 was the child of appellant's son – the report to police was made one day after the incident. The appellant was taken for medical examination and the doctor assured

the police officer that a man can have an erection at any age.

In his defence appellant denied doing anything to the girl saying she was sick with fever and she had blood on her clothes. Since PW1 was too young to have her periods, the appellant called the child's grandmother so that she could find out what had happened. According to appellant, the child was told by her colleague to tell the grandmother that appellant had defiled her. It was his testimony that he is very many years old and cannot even have an erection, having lost his erectile powers and so he could not defile anyone.

The court then directed that the appellant be examined to confirm his sexual power due to his age – the examination was to be conducted by an independent doctor. Dr. Njiiri (DW2) who examined the appellant told the trial court that appellant is aged between 75 and 80 years and had nine (9) children. Appellant was born healthy but developed polio later in life. His examination revealed that appellant had a normal sexual life despite the paralysis on his lower limbs and his sensation was found to be intact.

The doctor confirmed that appellant was able to get a slight erection in the penis and his conclusion was: ***“Mzee M is physically disabled and sexually active...it (sic) is sexual power is still intact”***

The trial magistrate in his judgment held that the evidence demonstrated that appellant was a close relative of the complainant within the prohibited degrees of consanguinity. Further that there was evidence confirming that appellant's erectile function was intact and what PW1 went through was confirmed by all witnesses, including appellant who saw her discharging blood.

The trial magistrate found that there was evidence of penetration and that appellant knew so well that PW1 was his granddaughter.

In the amended grounds of appeal, the appellant contested the conviction and sentence on grounds that the charge sheet was at variance with provisions of section 18(1) (2) of the Police Act (Cap 84).

- (2) That the trial magistrate erred in relying on the evidence of a minor.
- (3) The blood stained bedsheets were not recovered nor presented to court as exhibits.
- (4) The doctor who examined the child did not testify nor was any explanation given for his non attendance.

The trial magistrate shifted the burden of proof on to the appellant.

Appellant filed written submissions where he argued that the charge sheet is defective because it was only signed by the OCS

Quite honestly, I fail to appreciate the defect appellant refers to, or even how that causes him prejudice. I think the standard test as to whether a charge sheet is defective is to weigh such a charge sheet against what is anticipated by section 137 of the Criminal Procedure Code – and my assessment of that charge sheet – both on the statement of the offence and the particulars is that it is clear and easily understood, and meets the standards required in framing a charge and its contents.

He argues that the entire episode is a scheming by his first wife and his sons to fix him due to domestic misunderstandings he had with them and the fact that he married other wives.

Appellant further submits that he was prejudiced because he was not taken for medical examination as provided by section 36(1) of the Sexual Offences Act No. 3 of 2006, saying medical evidence could have revealed whether he had indulged in sex with his granddaughter.

Appellant pokes holes at the investigations done, saying, despite claims that his beddings were blood stained, the police officer who visited the scene did not bother to make any recovery and the prosecution had nothing to rely on to prove the charge against him.

He also complains that the trial magistrate did not allow him to cross-examine PW1 who gave

unsworn testimony and that this offended the provisions of section 194 of the Criminal Procedure Code.

In opposing the appeal, Mr. Kemo for the State submits that medical evidence tendered proved that PW1 had been defiled as was evidenced by the broken hymen and inflamed area around the genitalia. He also pointed out that PW1's blood stained dress was produced in court.

Mr. Kemo argued that appellant's defence was considered and that is why the court ordered for his examination because appellant claimed he was sexually impotent and could not even penetrate. The examination by an independent doctor proved the contrary and it was Mr. Kemo's contention that it proved that appellant was capable of penetrating a female and this then confirmed PW1's claims and corroborated by the medical evidence she had been penetrated and also corroborated her evidence as much. The relationship between appellant and the complainant was established by PW1, PW2 and pW3 that he was her grandfather – so all the elements of incest by a male were proved.

As regards sentence, Mr. Kemo submitted that it was legal and he urged this court not to interfere with it.

As a court of first appeal I am obliged to consider the entire evidence and make an independent finding. It seems the appellant did not cross-examine PW1 because she gave unsworn testimony. Was this prejudicial to the appellant? I don't think so, because apart from her evidence, there was the evidence of PW2 F.K, who found the girl crying and bleeding from her private parts and observed that appellant's beddings were blood stained and he was naked.

Then there is also the evidence of her mother S.K who examined the child and confirmed the injuries. As regards corroboration, there are two elements here.

(a) from the record, the evidence of PW1 is corroborate by the evidence of PW2 and PW3

(b) even the defence witnesses (the doctor) corroborates her evidence to the extent of confirming that appellant is capable of penetrating a female and that he is indeed sexually active and even has young children.

The degree of consanguinity was properly examined by the trial magistrate who noted that the witnesses confirmed appellant was PW1's grandfather – being the daughter to appellant's son. Further the appellant himself confirmed this relationship. The Sexual Offences Act section 20(1) provides as follows:

“Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge hisgranddaughter, is guilty of an offence termed incest and is liable to imprisonment....Provided that ifthe female....is under the age of eighteen years, accused shall be liable to imprisonment for life....”

As to whether PW1 was aged 8 years or 6 years is really immaterial as it is the degree of consanguinity which was significant in this matter. Although the police did not take the appellant for a medical examination, whatever prejudice may have been caused to appellant was cured by the trial magistrate in ordering for the appellant to undergo medical examination.

The trial magistrate duly considered the appellant's defence and rejected it as it did not dent the prosecution's case. I detect no error on the part of the trial magistrate whatsoever and my conclusion is that the conviction was safe and I uphold it. The offence carries a penalty of ten years as minimum sentence.

The trial magistrate considered the circumstances especially the age of the victim and the provision of section 20(1) which provides for enhancement to life sentence where the age of the victim is less than 18 years and thus enhanced the sentence to life.

Whether PW1 was 6 years or 8 years – the bottom line is that she was below 18 years, infact according to appellant she was too young to even have her periods – so the incident was a traumatic experience and rather nasty way to introduce her into the world of sex. Taking into account that this was her grandfather and really bearing in mind what a grandfather symbolizes (security and kindness) then I cannot fault the

magistrate on the sentence meted out. The upshot is that the appeal has no merit. The conviction was safe and I uphold it. The sentence was appropriate under the circumstances and I confirm it. The appeal is dismissed.

Delivered and dated this 25th day of **October** **2010** at Malindi.

H. A. Omondi
JUDGE