



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NANYUKI

CRIMINAL APPEAL NO 65 OF 2018

FMK.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original Conviction and Sentence in Nanyuki CM Sexual Offence Case No 57 of 2016 – N Thuku, PM)

J U D G M E N T

1. The Appellant in this appeal, **FMK**, was convicted after trial of **incest** contrary to **section 20(1)** of the **Sexual Offences Act, 2006**. It was alleged in the charge that on 06/12/2016 at Nturukuma in Laikipia County, he intentionally caused his penis to penetrate the vagina of one **JW**, a child aged 15 years who was to his knowledge his daughter. On 12/10/2018 he was sentenced to life imprisonment. He has appealed against both conviction and sentence.

2. The conviction is challenged upon the main grounds that the charge was not proved beyond reasonable doubt, and that the trial court failed to appreciate that the charge was trumped up against the Appellant due to domestic problems between him and his wife (mother of the complainant).

3. Learned prosecution counsel has supported the conviction. He submitted that the charge, in all its main ingredients, was proved beyond reasonable doubt.

4. I have read through the record of the trial court in order to evaluate the evidence and arrive at my own conclusions regarding the same. This is my duty as the first appellate court. I have borne in mind however, that I neither saw nor heard the witnesses testify, and I have given due regard to that fact.

5. Indeed there was overwhelming evidence as given by the complainant herself (PW1) that the Appellant had been having sexual intercourse with her since she was about 8 years old, a period over six years. This would have continued were it not for what happened after the last encounter. The Appellant's shirt was stained with the complainant's menstrual blood during the sexual intercourse. The shirt came to the notice of the complainant's mother (PW2) when she was doing some washing. She followed up the matter, leading to the complainant owning up that indeed it was her menstrual blood that was on her father's shirt, and ultimately disclosing the whole sordid affair of her father forcing himself upon her for all those years.

6. There was no dispute that indeed the complainant was the Appellant's daughter. There was proof beyond reasonable doubt of penetration as well as the age of the complainant. I would not have hesitated to uphold this conviction except for one aspect of the trial that in my respectful view led to a mistrial.

7. At some stage of the trial, the presiding magistrate proceeded on transfer and was succeeded by another magistrate. **Section 200(3)** of the **Criminal Procedure Code** provides as follows –

“(3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right.”

8. Indeed the Appellant herein was informed of that right, and he promptly demanded that all witnesses be resummoned and reheard. The prosecution raised objection to that demand. In a considered ruling the succeeding magistrate declined the Appellant's demand.

9. The issue here of course is whether the succeeding magistrate had the discretion to decline such demand by an accused person, the demand being a right accorded by law. It is worthy of note that the statute uses the term **demand**, not **ask** or **request**. The statute also does not state that the succeeding magistrate may refuse or allow such demand. My considered view, with all due respect, is that the succeeding magistrate

has absolutely no discretion to decline a demand of recall of a witness or witnesses by an accused person under section 200(3) of the Criminal Procedure Code. Of course the practicalities of such demand would be something for the trial court to consider where it has not been possible to bring back a witness or witnesses to testify afresh.

10. In any event the previous testimony of any such witness or witnesses will still be on record and may be assessed in the usual way, having in mind the circumstances of the case, including the fact that the accused person chose to exercise his statutory right to demand recall of a witness or witnesses and that it was not possible, for whatever legitimate reason, to recall such witness or witnesses.

11. To say that the succeeding magistrate has a discretion to allow or decline such demand by an accused person, is in my respectful view, a misunderstanding of that provision of the law. **Subsection (4)** of section 200 of the Code shows how important that right of an accused person is. It provides –

“(4) Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the High Court may, if it is of the opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial.”

12. The right of an accused person under section 200(3) aforesaid is of course different from the court’s power under **section 150** of the Code, at any stage of a trial, to –

“summon or call any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine a person already examined, and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case...”

Clearly here it is entirely the discretion of the trial court to summon and examine or recall and re-examine witnesses, unlike where an accused person demands recall of a witness or witnesses under section 200(3).

13. Upon the reasons already given above, this court is of the opinion that the Appellant was materially prejudiced by the trial court’s refusal to recall witnesses as demanded by him under section 200(3) of the Criminal Procedure Code. I will in the result set aside the conviction entered against him. Given the gravity of the offence that the Appellant faced and the circumstances of the case, I hereby order that there shall be a new trial of the Appellant. It is so ordered.

DATED AND SIGNED AT NANYUKI THIS 12TH DAY OF MAY 2021

H P G WAWERU

JUDGE

DELIVERED AT NANYUKI THIS 13TH DAY OF MAY 2021