



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT VOI

CRIMINAL APPEAL NO. E003 OF 2020

GYM.....APPELLANT

~VS~

REPUBLIC.....RESPONDENT

(An appeal from the judgment of Hon. Khapoya S. Benson Principal Magistrate, delivered on 31st January 2020 in Taveta Principal Magistrate's Court Sexual Offence Case No. 9 of 2019).

J U D G M E N T

1. The Appellant GYM was accused in Taveta Principal Magistrates Court Sexual Offence Case No. 9 of 2019 with Offence of Incest contrary to Section 20(1) of the Sexual Offences Act No. 3 of 2006.

2. Particulars were that GYKM on the 26th day of April 2019 at around 0200hrs at [Particulars Withheld] village within Taveta Sub-county Taita Taveta County intentionally and unlawfully caused his penis to penetrate the vagina of EGM who was to his knowledge his daughter aged 6 years.

3. Appellant was also charged with offence of indescient act with a child contrary to Section (iii) of the Sexual Offences Act No. 3 of 2006.

4. The trial Magistrate upon taking evidence of 7 prosecution witnesses & unsworn statement appellants found him guilty and convicted him for the offence of incest and sentenced appellant to serve imprisonment for life. The appellant was aggrieved and he preferred the appeal herein on the following grounds:-

i. That the learned trial Magistrate erred both inlaw and facts when he upheld the conviction and affirmed the sentence yet failed to note that the age of the minor was not proved beyond reasonable doubt.

ii. That the learned trial Magistrate erred both inlaw and fact when she/he affirmed the sentence yet failed to note that the charges are fatally defective.

iii. That the learned trial Magistrate erred both in law and fact to uphold the conviction and affirmed the sentences and yet appellant was not examined.

iv. That the learned trial Magistrate erred in-law when he/she upheld the conviction and affirmed the sentence and yet failed to find that appellant was subjected to a fair trial process.

v. That the learned trial Magistrate erred in law when he/she dismissed the appellant's plausible defence.

5. The appellant sought that appeal be allowed, conviction quashed and sentence set aside. The appellant was said to have defiled his daughter aged 6 years old.

6. According to the son PW 2, 9 years old son to the appellant, the appellant went to the kitchen where he and the Complainant were sleeping at night and that he took the Complainant to his bedroom. PW 2 heard his sister scream and he heard the appellant tell the Complainant to go back to the kitchen. That Complainant went back to the kitchen and they slept. That the following day when Mama K asked what had happened to E his sister and that men and women started beating his father the appellant herein.

7. The Complainant also testified and said the appellant did bad manners to her after waking her up at night and taking her to his room and

taking off her paint and used his genital organ to penetrate her and she cried. She said her brother left the door open. PW 2 said in cross examination that his sister PW 1 was attacked by ghosts but he said he had forgotten the person who told him his sister was attacked by ghosts.

8. PW 3 testified that on 26th April 2019 the appellant went to her house at 08.00hrs and told her he had been attacked in the house but the person who attacked him ran away. That when he checked on Eliza and found she was okay. That when appellant left the complainant went to PW 3 and she was walking with difficulties she told PW 3 that she had pain in her private parts. That when PW 3 & PW 4 too examined PW 1's private part they saw blood stained panty. That complainant said it was jinni but when PW 2 was called he said that the appellant picked the complainant from where they were sleeping and took her to his bedroom from where he heard her crying.

9. That the village elder was called and when he came and confirmed child had been defiled he went for the appellant and also called the chief. That the minor was escorted to the police station together with the appellant she said that appellant had filed but he was traced by the village elder who arrested him.

10. PW 4 testified that the complainant was threatened and that is why she said she was attacked by jinni. PW 4 said they cleaned the complainant who was bleeding from the private parts and she was taken to hospital after reporting at the police station.

11. PW 4 said the appellant and the wife were separated. She said appellant was picked from a drinking den by the Chief. She also said that it is appellant who told the child to say she was attacked by a jinni. She said the appellant was not framed because the child was limping and groaning in pain.

12. PW 5 Clinical Officer – George Ombayo from Taveta Subcounty Hospital testified that 6 years old complainant was taken to hospital at 1300hrs. On 26/4/2019 by Alchief on allegations of having been defiled on 25/04/2019 by a well-known person to her. PW 5 said the child was tearful and scared. He observed dry blood stains on the panties and fresh cut close to labia majora with a broken hymen. There was also blood discharge. The child was treated with pain killers and antibiotics and HIV preventive drugs. Treatment notes – EX P1, Test results – EXP 2 and P3 form – EXP 3 were produced as exhibits. In cross examination PW 5 said the injuries were fresh and the child was still bleeding.

13. PW 6 Vincent Mwamade Jumamosi village elder testified that on 26/04/2019 at around 0800hrs he received alert phone call from CJ a neighbour to the appellant who reported that while at PW 3's place she found a child with injuries in her private parts and they suspected she had been defiled. PW 6 said when he went to PW 3's home he saw PW 1 was bleeding. That PW 1 said appellant had threatened her in case she disclosed what had happened. PW 1 told the village elder that appellant defiled her at night. PW 2 was called and he confirmed that the appellant took the complainant to his room at night and PW 2 heard Complainant crying.

14. PW 2 told the village elder that the appellant had gone to a neighbours home and PW 6 went for her. He was found drinking alcohol. That appellant accompanied PW 6 to his home and he said that a jinni attacked his home. That after he called Alchief they went to appellant house and found the child's T-shirt on his bed and it had blood stains. The appellant was escorted to Taveta police station and PW 1 taken to hospital.

15. PW 6 said there was no grudge between appellant and PW 3 & PW 4. He said appellant had been separated from his wife for 2 years and was living with his 2 children.

16. PW 7 P.C. Jesse Wanjohi investigated the offence of incest and preferred charge against the appellant. PW 7 visited appellants home and saw there was blood stained sheet on the appellant's bed. On interrogation of PW 1, he was told that appellant told the child to say she had been attacked by jinni. PW 7 produced certificate of birth for PW 1 showing she was born on 21/3/2013 – EXP4.

17. When placed on defence appellant gave unsworn statement and said that on 26/4/2019 he was at his farm 5Km away from home spraying tomatoes which village elder went to him in company of an unknown person and asked him what was wrong at home and he told them all was well. That the village elder told him they should go home. He said he didn't find children at home and the house was open. That he was led to K Fundis house and he found very many people & his 2 children were.

18. Surrounded and the girl was crying. That he was taken to station and police officers escorted them to hospital together with his children. That he didn't enter with the children. That when they went back to station the investigating officer took him back to his home at 1500hrs. He said no blood stained clothes were found. That he was asked for the children's certificate of birth and he was taken back to the station where he was charged. He said he didn't know about the charges. He said he was framed by these women. He said they wanted him to share his plot and that she was arrested for dealing in illicit drinks. He also said that her goats destroyed his crops and that his goat died due to their pesticide and she promised to frame the appellant.

19. This appeal was canvassed by way of written submissions. The appellants submissions together with supplementary grounds of appeal were filed on 10th March 2021 and he argued that the minimum mandatory sentence deprives judges of legitimate jurisdiction to exercise discretion and that is why the trial Magistrate had other option than to sentence him to life imprisonment.

20. The appellant relied in the holding of Chief Justice Colbert S vs Thomas (1990) Vol. 2. 80 2(A) at 806(H) where it was held that the infliction of punishment is a matter of discretion of the trial court and mandatory sentences and reduce the courts normal sentencing function to the level of a rubber stamp. The appellant also relied in the Supreme Court holding in Francis K. Muruatetu. The appellant urged the court to alter the sentence and impose a less severe sentence.

21. The appellant argued that his rights under section 211(1) of the Criminal Procedure Code were violated in that it was not explained to him how to defend himself and that this omission occasioned a miscarriage of justice. The appellant also claimed that he was not provided with fair hearing and he brought it to the attention of the court to have matter transferred to another court as his children were made to testify

while crying and that cannot be said to have been fair trial.

22. The Respondents submissions were that Muruatetu case didn't outlaw the sentences set by law but only the mandatory nature of the sentences. The respondent counsel argued that although appellant seeks to have his sentence reduced he had not provided any document to prove he had undergone any rehabilitative engagement while in custody. That a prison progress report had not been availed and it has not been determined whether appellant has made good progress on holds no bad record within the institution.

23. It was argued the appellant had not shown remorse for his actions which took away the innocence of his child and left her life scarred for life. It was submitted that appellant was meant to offer safety and protection to his child but he failed to do so. That his 7 years old son was a witness in the matter and he was also left traumatized and the appellant's action left them homeless.

24. The Respondent counsel relied on the holding in CR. A. No. 44 of 2019 where appellant had been convicted for the offence of incest contrary to Section 20 of the Sexual Offences Act and the court took into consideration that the appellant had breached his duty of care to the minor, prayed on her, thereby traumatizing her and as a result child was born out of the heinous act. That the court held that the sentence imposed is for the protection of society against predators like the appellant. The Respondent urged the court to deny the appellants prayer for review of the sentence.

25. In regard to claim that appellant was not given fair trial in respect to rights under Section 211 of Criminal Procedure Code, the Respondent argued that on 17th December 2019 the appellant choose to give unsworn testimony and his defence was recorded on 7th January 2020. The Respondent argued that the ingredients for the offence of incest as listed in the case of **HKK vs Republic [2017] eKLR** were established through the testimonies of witnesses during that and allegations by appellant were purely baseless and lacked merit. It was urged that the appeal be dismissed.

Analysis and determination

26. The mandate of the 1st appellate court is well settled in several pronouncements including in the authority of **Okeno vs. Republic [1972] EA 32**, where the Court of Appeal held that:

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post [1958] E.A 424.”

27. I have had the opportunity to peruse and re-evaluate the proceedings on the lower court together with judgments of the trial Magistrate and considering grounds of appeal and submissions. It is apparent that the appellant dropped most of the grounds of appeal and submitted only on sentencing and provision of Section 211 Criminal Procedure Code.

28. The issue for this court determination is whether the sentence of life imprisonment was properly passed and whether provisions of Section 211 Criminal Procedure Code were brought to the attention of the appellant before he elected to give unsworn statement.

29. The undisputed facts are that PW 1 & PW 2 are appellant's children. They lived with him alone after his separation with his wife. It is also not disputed that PW 1 was defiled at night and that the appellant told her to say it was jini who attacked her. According to PW 3, PW 4 & PW 6 appellant threatened PW 1 not to tell anyone about the abuse at night but PW 2 saw him carry PW 1 from the kitchen to his room.

30. Medical evidence confirmed that PW 1 had been defiled. She was still bleeding by the time she was taken to hospital and was scared & crying. Appellant claimed that PW 3 & pw 4 had framed him for reasons which he gave in his unsworn testimony but which he didn't raise in cross examination of PW 3 & PW 4.

31. All the same the allegations could not be verified in cross examination because they were raised in unsworn statement which was no probative value. Assuming that PW 3 & PW 4 had framed him the evidence of PW 1 & PW 2 that he took PW 1 to his room at night and PW 2 heard PW 1 crying was not challenged. The village elder PW 6 also saw PW 1 bleeding.

32. PW 5 the Clinical Officer who examined the Complainant on 26/4/2019 found the child had blood stains on the panty, there was a cut on labia majora and a broken hymen. Appellant went to his neighbour PW 3 early in the morning and alleged that he had been attacked at night that the attacker had escaped but he confirmed his daughter PW 1 was okay. This was to pre-empt every suspicion to put doubt in case PW 1 reported she had been defiled by the father. The appellant had custody of PW 1, a child aged 6 years and saying he didn't know about the abuse is feigning ignorance and irresponsible for a parent who has statutory duty of giving protection to his children.

33. On sentence the appellant was sentenced to serve life imprisonment as provided by the law for reasons the person who was abused sexually was his daughter and the daughter was not only below the age of 18 years but a child of tender years requiring protection by all right thinking adults particularly a parent. Taking advantage of the absence of the child's mother and praying on her to rob her of her childhood required commensurate punishment and life imprisonment is the right punishment for such brutal and heinous act.

34. Reliance on Muruatetu petition does not help because maximum sentences are not outlawed. More so it has now been confirmed that Muruatetu case and guidelines issued on 6th July 2021 are only applicable to murder cases and not robbery with violence or Sexual Offences. In the circumstances appellants case does not benefit from the interpretation in Petition Nos. 15 & 16 of 2015.

35. However since life sentence is ambiguous. I will give a definitive time frame for the appellant to serve of 30 years imprisonment. On whether Section 211 Criminal Procedure Code was explained to the appellant, it is not shown in the record of trial court that same was explained but what he doesn't explain is how he arrived at giving an unsworn statement and not sworn statement if he was not given an explanation how to defend himself.

36. I would conclude that he settled on giving unsworn statement after the provisions of Section 211 here explained to him. I do find that no prejudice was suffered. I do find that this ground of appeal cannot stand.

37. The appellants appeal has failed and the same is dismissed save for sentence which is substituted from life imprisonment to 30 years to run from 29th April 2019.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA IN OPEN COURT/ONLINE BY MS TEAMS, THIS 15TH DAY OF JULY 2021

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of:-

Ogwel - Court Assistant

Respondent - Ms. Karanja hold brief for Mr. Chirchir

Appellant - No appearance

Hon. Lady Justice A. Ong'injo J

15/07/2021