



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

HCCRA NO. E019 OF 2020

GOA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[An appeal against the Conviction and Sentencing by the Principal Magistrate's Court

at Tamu in Criminal Case No. 6 of 2017 delivered on the 29th day of May, 2020]

JUDGMENT

The Appellant, **GOA**, was convicted for the offence of **Incest** contrary to **Section 20 (1) (2)** of the **Sexual Offences Act**. He was then sentenced to Life Imprisonment.

1. In the appeal, he has challenged both the conviction and the sentence.

2. He has raised five grounds of appeal, which can be summarized as follows;

1. The circumstantial evidence of penetration was inconclusive and full of gaps, and was in sharp contrast to the medical evidence.

2. The court erred by convicting the Appellant on the basis of the unsworn and uncorroborated evidence of a minor.

3. The evidence about the 1st report of the complainant was inconsistent *with her testimony in court*.

4. The court erred by handing down a sentence that was not in accordance with the law, as it was not in accord with Section 7 of the Sexual Offences Act.

5. In any event, the Supreme Court had *held that the mandatory nature of sentences was unconstitutional*.

3. I will re-evaluate all the evidence on record, as is required of a first appellate court.

4. I will also give due consideration to all the Appellant's submissions.

5. The prosecution called 5 witnesses.

6. PW1, MA, was the Complainant. She was first examined by the learned trial magistrate, to try and establish whether or not she could give sworn evidence.

7. PW1 was 13 years old. She did not understand the meaning of swearing by the Bible. However, she appreciated the importance of telling the truth.

8. It was in those circumstances, that the trial court directed **PW1** would give unsworn evidence.

9. **PW1** testified that the Appellant, who was her father, “*harmed*” her between 1st March 2017 and 7th March 2017.

10. Her testimony was that the Appellant would chase away her mother, from their house, and he would then intoxify her with chang’aa, in the pretext that the said chang’aa would treat measles.

11. **PW1** slept on the floor of their one-roomed house. She went to sleep whilst wearing a skirt, blouse, underpant and socks.

12. However, when she woke up, at about 2.00a.m, **PW1** was completely naked, and was on the bed.

13. At that time, the Appellant was also on the bed, naked.

14. **PW1** felt pain in her vagina, and her buttocks were wet.

15. When she asked her father what she was doing on the bed, he told her not to ask silly questions.

16. **PW1** testified that the wetness on her buttocks was not urine.

17. She made it clear that the Appellant had sex with her, severally.

18. On the night when the Appellant was arrested by the police, he had had sex with the Complainant, and the 2 of them were on the same bed, naked, when the police arrived.

19. PW2. Victor Omondi Ajumbo, was a Clinical Officer at the Muhoroni Hospital.

20. He examined the Complainant on 3rd March 2017. He found no tears on her genitalia: her external and internal genitalia were normal.

21. The hymen was not freshly perforated.

22. However, the Complainant had a foul smelling vaginal discharge.

23. The high vaginal test revealed no spermatozoa.

24. Nonetheless, the Clinical Officer concluded that the Complainant had been defiled.

25. **PW3, M.A** is the mother of the Complainant. She testified that the Appellant used to chase her away from home. On one incident, **PW3** returned home and found the Appellant with the Complainant, asleep on her matrimonial bed.

26. When **PW3** was chased away from home on 6th March 2017, she sensed that something was wrong. When **PW3** returned home at about 10p.m, she saw the Appellant and the Complainant asleep on the same bed.

27. **PW3** testified that their house was made of mabati, and that there was a gap or space at the window. Therefore, when she peeped through the said gap, **PW3** saw the Appellant hugging his daughter.

28. **PW3** reported the incident to the police, and the police went to the scene.

29. It was her testimony that when the police arrived and arrested the Appellant, the Complainant was drunk.

30. During cross-examination **PW3** reiterated that the Appellant used to have sex with his daughter.

31. PW4. CPL FREDRICK ONSEMBE, was attached to the Muhoroni Police Post. He received a report from **PW3**, that the Appellant was defiling the daughter of **PW3**.

32. PW5. PC FRANCIS OKETCH OKONGO, was a police officer attached to the Koru Police Station.

33. After **PW3** reported that the Appellant was defiling **PW1**, the 2 police officers went to the scene.

34. **PW4** and **PW5** peeped through the gap at the window, and they saw the Appellant on the same bed with the Complainant.

35. Both officers said that the Appellant was naked.

36. When the Appellant was put to his defence, he gave an unsworn testimony.

37. He said that his wife ran away from home, on the night of 7th March 2017. He said that **PW3** thought that he would beat her up, as he was annoyed because she had given him little food.

38. According to the Appellant, the Complainant had just sat on the bed, so that she could do her homework.

39. The Appellant testified that he was also seated on the same bed, as he was drinking some chang'aa. He then fell asleep.

40. When the police arrived at the house, the Appellant first testified that the Complainant was not where she normally sleeps. He said that the daughter was under the bed.

41. He then testified thus;

“The police asked me why I was sleeping with my daughter on the same bed and I told them I don't know how she got to be on the bed.”

40. The Appellant denied ever having had sex with his daughter.

43. Having evaluated the evidence, I find that it was incorrect to state, (as the Appellant did) that all the evidence adduced was circumstantial.

44. The evidence by the Complainant was direct evidence by a person who had undergone defilement, first-hand.

45. The evidence by the mother was also that of an eye-witness.

46. The Clinical Officer testified about what he established when he examined the Complainant. Therefore, his evidence was not circumstantial.

47. Similarly, when the 2 police officers arrived, they were eye-witnesses to the situation in which a naked Appellant was in the same bed with his daughter.

48. Although the officers did not see the Appellant when he was defiling the Complainant, the medical evidence proved that the Complainant's hymen had been perforated.

49. Whereas there might be other ways through which a hymen could be broken or perforated, the Complainant made it clear that in this instance, it was the sexual act, carried out by her father, which caused her hymen to get perforated.

50. I also find that the evidence of the Complainant was duly corroborated by all the other witnesses who testified for the prosecution.

51. The fact that the Complainant's hymen had not been newly perforated corroborates the evidence of the Complainant, that her father had had sex with her severally, prior to the date when he was arrested.

52. Although the Appellant submitted that initially the Complainant had blamed her mother, I have found no such evidence on record.

53. The evidence which comes closest to what the Appellant has said, was that of **PW5**. He said;

“When we entered the house, we woke up the complainant, and she was drunk. The complainant was even defending the accused.”

54. I find that the said evidence does not in any way suggest that the Complainant was exonerating the Appellant from blame, for what he had done to her.

55. The evidence is that the Complainant was drunk and was asleep. It is the police officers who woke her up.

56. In the circumstances, when 2 strangers entered the house, and they confronted the Appellant, I deem it to have been a normal reaction of the Appellant's daughter to try and protect the father. I say so because the officers arrived after 10p.m and the girl, who was woken up from sleep, was drunk.

57. Meanwhile, as regards the alleged inconsistency between the medical evidence and the rest of the evidence, I note that the clinical officer's conclusion was that the girl had been defiled.

58. The girl had engaged in sex when she was under the age of 18.

59. The identity of the person who had sex with the girl is clear; it was the Appellant.

60. On the question about the sentence, the Appellant submitted that pursuant to **Section 7** of the **Sexual Offences Act**, he ought to have been sentenced to 10 Years Imprisonment.

61. The said statutory provision stipulates as follows;

“A person who intentionally commits rape or an indecent act with another within the view of a family member, a child or a person with mental disabilities is guilty of an offence and is liable upon conviction to imprisonment for a term which shall not be less than ten years.”

62. However, the Appellant was neither tried nor convicted for an offence under that provision of the law. Therefore, the court could not hand down a sentence which had not been prescribed for the offence that the Appellant was convicted for.

63. The Appellant was convicted under **Section 20** of the **Sexual Offences Act**. Pursuant to **Section 20 (2)**, a person convicted for the offence of Incest shall be liable to imprisonment for life, if the Complainant was under the age of 18 years.

64. The Complainant in this case was under the age of 18.

65. Therefore, I find that the sentence handed down by the trial court was lawful.

66. Finally, the Appellant urged this Court to review the sentence in the light of the advisory opinion of the Supreme Court on the issue of the mandatory nature of minimum prescribed sentences.

67. On 6th July 2021 the Supreme Court issued guidelines on the applicability of the judgment in **FRANCIS KARIOKO MURUATETU & ANOTHER Vs REPUBLIC PETITION NO. 15 OF 2015**. The Supreme Court made it clear that the judgment in that case was only applicable to sentences handed down to persons who had been convicted for the offence of Murder.

68. Based on the guidelines issued by the Supreme Court, it follows that the judgment in “*the Muruatetu case*” is not applicable to the Appellant’s case, as he was not convicted for the offence of Murder.

69. In the result, there is no merit in the appeal; and it is therefore dismissed. I uphold both the conviction and the sentence.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 22ND DAY OF SEPTEMBER 2021

FRED A. OCHIENG

JUDGE