



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 88 OF 2019

MOO.....APPELLANT

=VRS=

THE REPUBLIC.....RESPONDENT

{Being an Appeal against the Conviction and Sentence of Hon. E. Kigen – SRM Eldoret dated and delivered on the 25th day of May 2019 in the original Eldoret Chief Magistrate’s Court Sexual Offence No. 167 of 2018}

JUDGEMENT

The appellant was charged with Incest contrary to Section 20 (1) of the Sexual Offences Act.

The particulars of the offence as stated in the charge sheet were that on diverse dates between 15th July 2018 and 19th July 2019 at Annex area in Wareng Sub-county within Uasin Gishu County he intentionally and unlawfully caused his genital organ (penis) to penetrate the genital organ (vagina) of AA a female juvenile aged 4 years who to his knowledge was his daughter.

It was contended that in the alternative he committed an indecent act with the child by indecently and unlawfully allowing his penis to come into contact with her vagina contrary to Section 11 (1) of the Sexual Offences Act.

Briefly the facts of the case against the appellant were that on 15th July 2018 the complainant’s mother left her in his care and went upcountry to attend to other matters. The complainant whose apparent age was estimated as four years was a pupil at a school called [Particulars Withheld] Academy. On 19th July 2018 JK (Pw3) an Advocate at Legal Aid Centre, Eldoret, received a call from the school, to which her daughter also attended, informing her that they had a child who had difficulty walking and they were afraid to take up the matter. She advised them to find out what had happened to the child and when she personally visited the school on 23rd July 2018 she spoke to the child - now the complainant - and the child told her that her father had inserted his fingers and his penis into her vagina. From then on Pw3 took up the matter and caused it to be reported to the police. The child was then taken to Moi Teaching & Referral Hospital where she was examined by one Dr. Rono who noted redness in the child’s genitalia as well as a hymenal tear and concluded that she had been defiled. Thereafter the child was taken to a rescue shelter and the appellant was arrested and charged with the offences detailed above.

In his defence, the appellant admitted the complainant was his daughter vehemently denied he defiled her. He testified that he learnt about their daughter being defiled in school from his wife who was admitted in a Bungoma Hospital only for him to be arrested on 30th July 2018. He contended that he did not know where the incident occurred and pointed out that there was no witness from B Academy. He also contended that no investigations were done and that the child did not identify him as her assailant.

His appeal which is against the conviction and sentence of life imprisonment is premised on grounds that the conviction was against the weight of evidence; that the charges were trumped up and poorly investigated; that the medical evidence was untrustworthy having been obtained through the instructions of a partisan organization, that the trial Magistrate erred by failing to appreciate that there was already bad blood between the appellant and the officers with Legal Aid Centre and further that the trial Magistrate erred by allowing the child to give evidence in his absence. Further, that the child’s age was not proved and that he was convicted on her uncorroborated evidence.

In this appeal, the appellant was represented by Mr. Otieno of B. I. Otieno & Co. Advocates while Ms. Kagali appeared for the State. Mr. Otieno relied on written submissions while Ms. Kagali submitted orally.

To sustain a conviction on the charge of incest, the prosecution needed to prove the following beyond reasonable doubt –

- (a) That the appellant being a male person committed an indecent act or an act which caused penetration with the complainant.**

(b) That the complainant was a female person who to his knowledge was his daughter.

The terms **penetration** and **indecent act** are clearly defined in **Section 2 of the Sexual Offences Act**, indecent act being “**an unlawful intentional act which causes 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.**” **Penetration** on the other hand means “**the partial or complete insertion of the genital organs of a person into the genital organs of another person.**”

My reading of **Section 20 (1) of the Sexual Offences Act** is that because of the use of the word “**or**” **a person commits the offence of incest if he commits either an indecent act or an act which causes penetration with a female person who to his knowledge is his daughter, granddaughter, sister, mother, niece, aunt or grandmother** the age of the victim only becoming relevant in determining the sentence.

The complainant in this case testified that the appellant inserted his fingers and something she described as “**a dudu**” in a black grass into her vagina. **Section 124 of the Evidence Act** provides that a court can convict solely on the evidence of a victim of a sexual offence provided it believes her and records the reasons for so doing. With due respect to Counsel for the appellant, corroboration is not a requirement. The complainant’s evidence was however corroborated by medical evidence. The doctor who examined her found redness in the child’s outer genitalia and hymenal tear consistent with evidence that someone inserted something into her genitalia. This confirms the child was a truthful witness. The allegation by the appellant that Pw3 and the Legal Aid Centre framed him cannot be true because it is clear from the evidence that Pw3 did not know him prior to that and only acted upon information from the school. She was an objective and independent witness who had not met him before and her only complaint against him was that he threatened her upon taking up the matter. I find it a fact that the appellant inserted his fingers into the complainant’s genitalia. From the complainant’s evidence it is clear that this was done intentionally but not accidentally. This amounts to an indecent act as defined in Section 2 of the Act. The appellant readily admitted the complainant was his daughter which completes the offence of incest as the same is committed even where only an indecent act is committed and whatever else he did is immaterial. The offence of incest was complete when he committed that indecent act with her by inserting his fingers into her genitalia. The submission that penetration was not proved and that this ought to have been a sexual assault does not therefore hold.

In regard to incest, age becomes material only for purposes of the sentence. **Section 20 (1)** prescribes a sentence to imprisonment for a term of not less than ten years for the offence and then states: -

“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.”

To say that the offence was not proved because the child’s age was not assessed is tantamount to splitting hairs because clearly she was below the age of eighteen years. Moreover, age is not a necessary element of the offence the necessary elements being the degree of consanguinity, intention and the commission of an indecent act or act which causes penetration. It is also clear from the record that the appellant was present in court on the two occasions the child gave evidence. There was also nothing irregular by her being cross examined. In the case of **Nicholas Mutula Wambua v Republic Criminal Case No. 373 of 2006 (Mombasa)** the Court of Appeal stated: -

“The second point we wish to discuss is whether or not a child witness, who gives evidence not on oath is liable to cross-examination. There appears to be a widespread misconception that a child witness who is allowed to give evidence without taking oath because of immature age, should not or cannot be cross-examined... It would appear that misconception arises from a view that because accused persons are not cross-examined whenever they make unsworn statements in the defence, child witnesses who did not take the oath should be treated in the same way. Such a view is oblivious of the peculiar protection given to an accused person in the form of a right to make an unsworn statement with no liability to be cross-examined.”

That thinking is expressed in Section 208 of the CPC which governs hearing of Criminal proceedings in the Magistrate’s courts. It provides that during the hearing, the accused persons or his advocate may put questions to each witness produced against him. Accordingly, all prosecution witnesses are liable to be cross-examined in order to test the credibility and the veracity of the witness. The trial courts should always observe that requirement of the law in criminal trials to obviate an otherwise stable case from being lost on that omission.”

The upshot is that the conviction against the appellant was safe although the trial Magistrate erroneously convicted him for the offence of defilement instead of the offence of incest which is what he was charged with. That however is an error curable under **Section 382 of the Criminal Procedure Code** as it did not occasion a failure of justice as none has been alluded to. Accordingly, I find no merit in the appeal against conviction.

Given the gravity of the offence and the appellant’s attitude I am also satisfied that the sentence imposed by the trial Magistrate was not excessive and as it is a lawful sentence, I shall uphold it and dismiss the appeal in its entirety.

Signed and dated this 16th day of January 2020.

E. N. MAINA

JUDGE

signed and delivered in Eldoret this 21st day of January 2020.

H. A. OMONDI

JUDGE