



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

HIGH COURT CRIMINAL APPEAL NO 61 OF 2019

ZMD.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the original conviction and sentence dated 11th July 2019 in Criminal Case No. 39 of 2019 at Ogembo Senior Principal Magistrate's before Hon. G.N. Barasah, RM)

JUDGMENT

1. The appellant, **ZMD**, was arrested and arraigned before the Senior Principal Magistrate's Court at Ogembo on 1st April 2019 on a charge of incest, contrary to **section 20(1) of the Sexual Offences Act**. The alternative charge was one of indecent act with a child contrary to Section 11 (i) of the Sexual Offences Act No.3 of 2006.
2. The particulars of the charge were that during the night of 8th March 2019 in Gucha South sub-county within Kisii County, he intentionally caused his penis to penetrate the vagina of SM who was to his knowledge his daughter, a child aged 9 years.
3. The appellant was convicted of the offence of incest and sentenced to 30 years imprisonment.
4. The duty of this court, being a first appellate court, is to subject the evidence on record to a fresh review and scrutiny and come to its own conclusions all the time bearing in mind that it did not see the witnesses testify as to form its own opinion on their demeanor (see ***Okeno v Republic [1972] EA 32***).
5. The evidence before the lower court was as follows; aftervoire *dire*, Pw1 gave sworn testimony. She recalled that on the material day her mother had gone to see her grandmother at the hospital. She shared her room with Pw2 when they went to sleep. She testified that she heard chicken squawking and thereafter heard someone clicking. That the accused threatened to kill them if they spoke and they kept quiet. The accused removed her clothes and put his penis in her vagina and anus. She testified that the following day she told her grandmother what transpired and was taken to hospital. Pw2 testified that while sleeping with Pw1, the appellant came and removed their blanket. Pw1 grabbed his wrist band and he left again. The appellant came back removed his towel, threatened to kill them if they talked and he did bad manners to Pw1. Pw4 testified that on 9th March 2019 she found Pw1 walking uncomfortably. When she asked her what was wrong Pw1 told her that she had been defiled by the appellant. Pw3 the mother to Pw1 testified that she was told by Pw4 that the appellant had defiled Pw1 and she took her to hospital and was admitted for 3 days.
6. The clinical officer, Pw5, produced into evidence the P3 form and PRC form. He testified that Pw1 had blood from the vagina; the cervix was tender and experienced abdominal pain. She was first treated at Etago hospital and discharged but her condition worsened and was taken to Kisii Teaching and Referral Hospital where she was admitted from 22nd to 26th April.
7. Pw6 testified that on 9th March 2019 a report was made by Pw1 accompanied by her family member claiming that Pw1 had been defiled by the appellant. Pw6 referred them to Etago sub county hospital for examination and treatment.
8. In his defence, the appellant opted to keep quiet. The trial court considered the prosecution evidence and was convinced that the prosecution had proved its case.

ANALYSIS AND DETERMINATION

9. I have considered the appellant's written submission and the prosecution's oral submissions. The appeal challenges both the conviction and sentence. The offence of incest as provided under **section 20(1) of the Sexual Offences Act** is 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 his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years:

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.”

10. On the elements to be proved by the prosecution to secure a conviction for the charge of incest the Court of Appeal in **Mk v Republic [2018] eKLR** held that;

“[14] This means that to prove the charge, the following elements had to be established: First, that there was an indecent act or penetration committed on a female person; secondly, that the female person was under the age of 18 years; and thirdly, that the indecent act or penetration was caused by the father of the female person.”

11. The prosecution had to prove penetration. **Section 2 of the Sexual Offences Act** provides that penetration entails the partial or complete insertion of the genital organs of a person into the genital organs of another person. Pw1 testified as follows;

“He took his penis and put it to me in my vagina and anus.....I felt pain.....I was feeling pain when I was urinating. My dad did bad manners at my vagina. He was doing both sides.”

12. Pw2 testified that the appellant did bad manners to Pw1. The medical evidence presented by Pw5 corroborates the fact that there was penetration. According to the P3 form, the injuries sustained by Pw1 on her genitalia included torn hymen, bruises on the labia and bleeding from the vagina. There was also evidence of a venereal disease.

13. It was not disputed that the appellant was the father of the minor. Pw1 testified that the appellant was her father and Pw3 gave evidence that the appellant was the father to her children including Pw1. What this court has to grapple with is whether the appellant was positively identified. In this case the incident took place at night and Pw2 testified that the lights were switched off. Pw1 testified that the appellant talked to her and she recognized his voice. Pw2 also testified that the appellant had threatened them that if they spoke and they remained quiet. From the evidence by the prosecution the appellant was identified by voice recognition. In ***Yaa Baya vs. R [2017] eKLR*** the Court of Appeal held that:

“With regard to voice recognition, it has been stated time without number that voice identification is just as good as visual identification. However, just like visual identification, care has to be taken to ensure that the voice was that of the appellant, that the person testifying as to the voice recognition was familiar with the voice and recognized it, the conditions prevailing at the time of the recognition were favourable...”

14. The appellant in this case was the father to Pw1 and Pw2 and the witnesses were familiar with his voice. Recognition was also fortified by the fact that the Pw1 grabbed her assailant’s wrist and recognized the wrist band worn by the assailant was the appellant’s. I am satisfied that the evidence on record is one of voice recognition and the identity of the appellant as the person who committed the alleged offence was proved beyond reasonable doubt.

15. I now turn to whether the prosecution proved that the complainant was a female person was under the age of 18 years. The Court of Appeal in **LOA v Republic [2020] eKLR** cited with approval the case of ***Hilary Nyongesa v Republic, Criminal Appeal No. 123 (ur)***, where the Court stated:-

“... In defilement cases medical evidence is paramount in determining the age of the victim and the doctor is the only person who would professionally determine the age of the victim. In the case of any other evidence apart from medical evidence age may also be proved by a birth certificate, the victim’s parents or guardian and by observance and common sense...”

16. The prosecution produced an age assessment form showing that Pw1 was 9 years old. According to the P3 form the estimated age for the child was 9 years. Based on the evidence I am satisfied that Pw1 was under the age of 18 years.

17. The appellant complains that *section 200 of the Criminal Procedure Code* was not complied with, however I find that compliance with *section 200 of the Criminal Procedure Code* does not arise as the matter was only heard by Hon. G.N. Barasah, and the issue of a succeeding magistrate does not arise. I have also noted that the accused was to make submissions at the close of prosecution case but informed court that he was unwell and the matter was adjourned. When the matter came up on a subsequent date the accused relied on the evidence on record.

18. Having reviewed the evidence and I am satisfied that the prosecution proved their case beyond reasonable doubt. I affirm the conviction.

19. Finally on the issue of sentence the appellant has submitted that the sentence was harsh. Under the proviso of **section 20 of the Sexual Offences Act**, the maximum sentence for incest is life imprisonment. I note that before sentencing the appellant, the trial court considered his mitigation. Considering the gravity of the offence and the manner in which the offence was committed, the sentence of 30 years imprisonment meted out on the appellant lawful. In the end the appeal is hereby dismissed.

Dated, Signed and Delivered at KISII this 19th day of February 2020.

R. E. OUGO

JUDGE

In the presence of;

Appellant in Person Present

Mr. Otieno Senior State Counsel Office of the DPP

Ms. Rael Court Assistant