



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL 281 OF 2011

BETWEEN

HYA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the original sentence in the Chief Magistrate's Court at

Makadara Cr. Case No. 3054 of 2010 delivered by Hon. T.Ngugi, PM, on 3rd August, 2011).

JUDGMENT

1. HYA, the Appellant herein as charged with the offence of incest contrary to Section 20(1) of the Sexual Offences Act No. 3 of 2006. It was alleged that on the 11th day of August, 2010 at Korogocho slums Kariobangi North Estate within Nairobi County, intentionally and unlawfully caused his penis to penetrate the vagina of H.D. who to his knowledge was his grandmother. In the alternative, he was charged with indecent act with an adult contrary to Section 11(6) of the Sexual Offences Act in that he intentionally touched the vagina of HD with his penis.

2. He was convicted and sentenced to serve 20 years imprisonment. Dissatisfied with both the conviction and sentence, he proffered an appeal to this Court. It suffices to state that this is the second time that the appeal is being heard by the High Court. The first appeal was heard by a bench of two judges who upheld both the conviction and sentence. The Appellant at that stage preferred a second appeal to the Court of Appeal which referred him for a rehearing of the appeal by this Court as the first appeal was heard by judges who did not have jurisdiction.

3. The Appellant did not file a fresh Petition of Appeal. A look at the Petition of Appeal filed on 19th September, 2011 shows that he had appealed against both the sentence and conviction. At the hearing before me however, he submitted that he was abandoning the appeal against his conviction and instead, would proceed on appeal against the sentence only.

4. He made brief oral submissions in which he admitted committing the offence, adding that he regretted because at the time he was under the influence of drugs. He informed the court that he had since reformed, having stopped taking the drugs. He stated that he had apologized to his entire family which had forgiven him. Furthermore, he had fully recovered although he required proper medication which was not available in prison. He further submitted that he had learnt some skills in prison, namely agriculture and motor vehicle mechanics which would aid him after he left the prison. He urged the court to substitute the custodial sentence with a non-custodial one.

5. Leaned State Counsel, Miss Akunja for the Respondent submitted that considering the Appellant's mitigation and the circumstances of the case, she was not opposed to the sentence being reduced.

6. I have accordingly considered the submissions and the Appellant's mitigation. To appreciate the decision that the court shall finally arrive at, it is important to highlight the background of the case.

7. The complainant, then a 90-year old grandmother was in her house alone at about 11.00 pm sleeping. The Appellant went into the house when the lights were still on and uncovered her. Incidentally, he had a separate bed in the same room where he would put up when he came to Nairobi. He had travelled from Mombasa that evening. The bed had been allocated to him by the complainant's daughter. It was separated from the bed of the complainant by a curtain. The Appellant, on getting into the house switched off the lights. The complainant tried to get up but the Appellant pulled her back to the bed, pulled her dress upwards and raped her. The complainant screamed for help and neighbours responded. They broke into the house. The Appellant was found stark naked by the members of public who arrested him. The complainant

was taken to Kenyatta National Hospital for treatment.

8. The Appellant currently states that he is remorseful. In his defence at the trial, he claimed to have been suffering from fits for which he displayed treatment cards. The court did not however note on record the nature of the illness that he was suffering from. He claimed that as a result of the fits he did not know how he arrived in Nairobi. He neither could recall how he was arrested adding that he came to while in prison. This account of defence was rightly dismissed by the learned magistrate as any treatment that he had undergone was before his arrest.

9. Hence, the Appellant consciously committed the offence. He took advantage of his old defenseless grandmother and the hospitality that her family had accorded him. He committed a shameful act that exposed an old woman to shame and distress. I am hence unable to align myself with the submission of the learned State Counsel that the Appellant deserves mercy.

10. Section 20(1) of the Sexual Offences Act states that:

“Any male person who commits an indecent 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.”

11. In enhancing the minimum sentence provided, the learned trial magistrate noted that the Appellant had turned against the only person closest to him and attacked her in the most inhumane manner. Further that the complainant was elderly and deserving of the Appellant’s respect which unfortunately was not accorded to her.

12. I cannot add more save to state that the Appellant is a person who ought to be kept off the society for some time. His actions were beastly. The victim, if still alive, will fade away in an undignified manner. It is difficult to fathom how a young person as the Appellant could get the audacity of stripping his 90 year old grandmother naked and subsequently commit a sexual act with her. What a shame. Only a stringent sentence can serve the retributive purpose of a punishment. I am unable to disturb the sentence in the circumstances.

13. The totality of my observations is that this appeal entirely lacks merit and I dismiss it accordingly .

Dated and Delivered at Nairobi This 12th May. 2020

G.W.NGENYE-MACHARIA

JUDGE.

In the presence of:

1. Appellant in person.

2. Mr. Momanyi for the Respondent.