



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: D. K. Kemei - J

CRIMINAL APPEAL NO. 117 OF 2019

JMM.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an Appeal from the conviction and sentence by Hon. I. M. Kahuya (S.R.M.) at Machakos Chief Magistrate's Court in Criminal Case. No. 6 of 2014 delivered on the 07/09/2017)

BETWEEN

REPUBLICPROSECUTOR

VERSUS

JMM.....ACCUSED

JUDGEMENT

1. The Appellant herein **JMM** had been charged with a main count of incest by a male person contrary to section 20 (1) as read with section 20(2) of the Sexual Offences Act No. 3 of 2006. The particulars were that on the 4th day of June, 2015 at [Particulars withheld] village, Ngoleni Sub location in Kathiani Sub County within Machakos County intentionally and unlawfully caused his penis to penetrate the vagina of **KM** a child aged 16 years old knowingly that the girl was his daughter. He also faced an alternative count of indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006 with the particulars being that on the 4th day of June, 2015 at Nzoweni [Particulars withheld] Ngoleni location in Kathiani Sub-County within Machakos County, intentionally and unlawfully touched the vagina of **KM** a child aged 16 years using his penis. He was subsequently found guilty on the main count and sentenced to fifteen (15) years imprisonment by Hon. I. Kahuya (SRM) on the 7/09/2017.

2. Being aggrieved by the said conviction and sentence he lodged the present appeal and vide his Memorandum of Appeal filed on 25/10/2019 he raised two grounds of appeal namely:-

(i) That the trial magistrate erred in law and fact by not considering the whole evidence as required by the law.

(ii) That the trial magistrate erred in law and fact in dismissing the Appellant's defence without enough reasons yet the same was comprehensive and cast doubt and which could have overturned the prosecution's evidence.

3. This being a first appeal, it is my duty to re-evaluate and analyze the evidence tendered before the trial court and subject it to a fresh scrutiny and then arrive at my own independent conclusion as to whether or not to uphold the decision of the trial court. I also have to take into account the fact that I did not have the benefit of seeing and hearing the witnesses testify but to give an allowance for the same. (see **Okeno -vs- Republic [1972] EA 32**).

4. **KM (PW.1)** testified that she was at home on the material date around 9 p.m. when the Appellant knocked on the door. She opened it only for him to get hold of her hand and directed her to her mother's bedroom where he defiled her. She stated that she was then aged 16 years old and in class six at [Particulars Withheld] Primary School. She went on to state that after the ordeal he threatened to kill her with a panga which had been placed near the door and also warned her not to reveal it to her mother. She later informed one of her grandmothers who in turn alerted the school head teacher who in turn reported to the Assistant Chief. The Appellant was thus arrested. She was later escorted to hospital for medical check-up and she identified the P.3 form. She finally stated that the Appellant had been defiling her since 2010 when she was in class three whenever her mother was away from home and all this time she was consumed by fear and thus could not

report.

5. **RS (PW.2)** testified that the complainant was like her grandchild and that on 8/06/2015 the complainant informed her that the Appellant who was her father had been raping her since she was in class three and had not reported to her mother. She then alerted the complainant's head teacher who in turn reported to the Assistant Chief and that the Appellant was arrested. On cross – examination, she confirmed that the complainant could not report the incident at home as she had been threatened by the Appellant. She also confirmed that the complainant spent at her place on 8/06/2015 as she feared the Appellant now that she had spilled the beans.

6. **Martha Wavinya (PW.3)** was the Assistant Chief Ngoleni, sub-location and who testified that upon getting the report from the complainant's head teacher she mobilized the community policing members and had the Appellant arrested and escorted to Mitaboni police post from where both Appellant and complainant were escorted to Kathiani Police Station.

7. **Dr. Musyoka (PW.4)** who testified on behalf of his colleague Dr. Mutinda and who produced the P.3 form under section 77 of the Evidence Act stated that the complainant's private parts were normal save only that the hymen was missing thus implying that she was sexually active prior to the examination.

8. **No. 101285 Pc. Wairuri (PW.5)** was the investigating officer who took up the task from his colleague who had been transferred. He confirmed that a report of defilement was lodged on 9/06/2015 and that the complainant was referred to hospital for medical check-up and that the Appellant who had been apprehended and handed to police was subsequently charged.

9. The trial court established that a prima facie case had been established and duly placed the Appellant on his defence. He opted to tender a sworn testimony. His case was that on the day of his arrest, he had been working at his farm when he received a report that he was needed at school since the complainant who was his daughter had made some allegations against him. He proceeded to her school where he found her in company of her aunt R and four women of [Particulars withheld] church and it was from there that he was escorted to Kathiani Police Station where he was charged with the present offence. He maintained that the whole case was a frame up instigated by the four church women and the complainant's aunt. He added that he had earlier forbade his family from worshipping in the said church as he did not trust their teachings and doctrines and thus the grudge against him.

10. Parties filed submissions. The Appellant's submission dwelt mainly on the issue that no voire dire examination was conducted upon the complainant as well as the fact that the charge sheet was defective and finally that penetration was not proven by the prosecution.

Mr. Mwangera learned counsel for the Respondent submitted that all the ingredients of the offence had been proved by the prosecution beyond reasonable doubt and urged this court to dismiss the appeal and uphold the conviction and sentence.

11. I have considered the evidence tendered before the trial court and the submissions filed. The only issue for determination is whether the prosecution proved its case against the Appellant beyond any reasonable doubt.

The charge preferred against the Appellant in the main count is section 20(1) of the Sexual Offences Act No. 3 of 2006 which provides as follows: -

“Any person who commits an indecent act or an act which causes penetration with a female person who 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 (10) years;

Provided that 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”

From the above, the key ingredients of the offence are relationship and penetration. Starting with the aspect of relationship, section 22 of the said Act provides the ambit or category of the persons affected for the purposes of the offence of incest as follows: -

22(1) ***In cases of the offence of incest brother and sister includes half-brother, half-sister and adoptive brother and adoptive sister and a father includes a half father and an uncle of the first degree and a mother includes a half mother and an aunt of the first degree whether through lawful wedlock or not;***

(2) ***In this Act-***

(a) ***“uncle” means the brother of a person's parent and “aunt” has a corresponding meaning;***

(b) ***“nephew” means the child of a person's brother or sister and “niece” has a corresponding meaning;***

(c) ***“half – brother” means a brother who shares only one parent with another;***

(d) ***“half – sister” means a sister who shares only one parent with another; and***

(e) ***“adoptive brother” means a brother who is related to another through adoption and “adoptive sister” has corresponding meaning.”***

From the above description and relating it to the charge preferred against the Appellant herein as well as the evidence tendered, there is no doubt that the Appellant was the father to the complainant. The complainant herself stated that she was the third born child in the family and the eldest daughter. The Appellant in his sworn evidence confirmed that indeed the complainant was his daughter and that is why he visited her school upon learning that a complaint had been raised by her against him. The relationship of father and daughter was thus established by the prosecution and that the same falls under the degree of consanguinity forbidden under section 22 of the Sexual Offences Act. Hence the charge had been properly drafted pursuant to the provisions of section 134 of the Criminal Procedure Code and that the Appellant had reasonable information as to the nature of the offence he faced and that is why he was able to present his defence evidence. The Appellant's submissions that the charge sheet was defective must therefore fail.

12. As regards the other ingredient of penetration, the same is provided for under section 2 of the Sexual Offences Act as the partial or complete insertion of the genital organ of a person into the genital organ of another person. The prosecution was under a duty to prove the same beyond any reasonable doubt. The P.3 form produced as *exhibit 1* by Dr. Musyoka (PW.4) and which had been filled by Dr. Mutinda established that the complainant's hymen was broken and it was the opinion of the said doctor that the same was possible evidence of penetration. Dr. Musyoka while testifying stated that the missing hymen implied that the complainant was sexually active prior to the examination. The complainant in her evidence maintained that her father started defiling her way back in 2013 and that fear made her not report the incidents to her mother or her teachers. The complainant's fragile predicament is summed up during her further cross-examination by the Appellant when she stated that she never told the class teacher because every time she wanted to tears just rolled on her cheeks. The complainant after the incident on 4/06/2015 appeared that she could not persevere any longer and resolved to confide in her grandmother (PW.2) who brought the issue into the open leading to the arrest of the Appellant.

The evidence of the complainant left no doubt that the Appellant was the person who had defiled her. The evidence both in chief and cross – examination was clear that the complainant was clear in her mind about what had been done to her by her father. The Appellant in his defence attempted to suggest that he had been framed up by the four women from Mt Zion Church who were punishing him for forbidding his family from joining the said church due to wrong doctrines. I am not convinced that the charge was a frame up because the Appellant on cross-examination admitted that he had no problem with his aunt RS (PW.2) who had rescued the complainant. Again, the Appellant's said aunt could not have used the Appellant's daughter as a victim of sexual abuse with a view to settling scores or alleged differences emanating from the Appellant's opposition to Mt Zion church and its doctrines upon his family. That is farfetched and highly unlikely. In any event it is quite remote for the complainant to just wake up one day out of the blues and lodge serious allegations against her own father. I am satisfied by the evidence of the complainant that indeed the Appellant penetrated her on the material date. The Appellant has claimed in his submissions that one of the children with whom the complainant slept together at their grandmother's hut should have been called to testify. I find the failure to do so was not fatal since the prosecution is under no obligation to call a superfluity of witnesses as any number of witnesses are sufficient by dint of section 143 of the Evidence Act. Further, it transpired that the Appellant had in the past warned her of dire consequences should she reveal what used to go on between them behind the scenes. Hence the Appellants arrival on 4/06/2015 and beckoning the complainant was a matter of routine. Even though the complainant was the sole witness to the incident, the provisions of section 124 of the Evidence Act comes to the aid of the prosecution. Indeed, the learned trial magistrate indicated her reasons for believing the testimony of the complainant. The complainant's testimony left no doubt that the Appellant was the one who had molested her by penetrating her. Her evidence and that of the doctor established that penetration had indeed taken place. The learned trial magistrate was right in rejecting the defence of the Appellant.

13. The ingredients of incest being relationship and penetration having been established, I proceed to analyse the issue of age. The age of the complainant was established by the clinical officer who examined the victim as 16 years. The complainant herself who was in class six clearly confirmed her age as 16 years. The need for establishing the age of the victim is for the purposes of sentencing since vide section 20(1) of the Sexual Offences Act a minimum sentence of ten years is provided and which can be enhanced to life imprisonment if it is established that the victim was below the age of 18 years. Conclusive proof of age in cases of involving sexual offences under the Sexual Offences Act does not necessarily mean that there has to be a formal production of a birth certificate or production of age assessment report since such documents might be used in borderline cases and that a court is entitled to receive any available evidence on the same from the victim or parent/guardian. In Uganda Court of Appeal Cr. A. No. 2 of 2000 the court held that in defilement cases medical evidence is crucial in determining age of the victim and that a doctor is the only person who could professionally determine it. It also held that parents, guardians and by observation or common sense can also help in determining the age. I am persuaded to hold that the available evidence shows that the victim was a minor and under the age of 18 years' old which is the threshold for triggering a charge under section 20(1) of the Sexual Offences Act. This being the position, I find the conviction of the Appellant by the trial court was safe and I see no need to interfere with the same.

14. On sentence, I note that the Appellant was sentenced to serve fifteen (15) years imprisonment. A reading of section 20 (1) of the Sexual Offences Act indicates that a minimum sentence of 10 years ought to be imposed but which can be enhanced to life imprisonment if it is shown that the victim is aged below 18 years old. This does not connote that the enhancement of the sentence must be mandatory even though the relevant provision of the law is couched in mandatory terms by the use of the word "shall". Looking at the said provisions, the same seems to give the trial court some leeway to determine the appropriate sentence. In the case of Daniel Kyalu Muema –vs- Republic [2009] eKLR the Court of Appeal observed as follows:-

"The last observation we want to make is that the phrase as used in the penal statutes was judicially construed by the predecessor of this court in Opoya –vs- Uganda [1967] EA 752 where the court said at page 754 paragraph B:

"It seems to us beyond argument the words "shall be liable" do not in their ordinary meaning require the imposition of the stated penalty but merely express the stated penalty which may be imposed at the discretion of the court. In order words they are not mandatory but provide a maximum sentence only and while liability existed, the court might not see fit to impose."

The trial court received the Appellant's mitigation and noted the fact that he was a first offender but noted that the offence was serious as it affected the family unit. The evidence of the complainant revealed that the sexual attack had been going on since the year 2013 and hence she had suffered so much torment in her life and which left psychological and mental scars in her life as a woman. The Appellant's conduct was reprehensible in that he preyed on his own young and defenseless daughter yet he was to protect and not molest her. I find the sentence

imposed upon him to be appropriate. The same is neither excessive, harsh or unlawful. I do not see any reason to interfere with the sentence.

15. In the result, it is my finding that the Appellant's appeal is devoid of merit. The same is dismissed. The conviction and sentence by the trial court is hereby upheld.

It is so ordered.

Dated and delivered at **Machakos** this **15th** day of **October, 2020**.

D. K. Kemei

Judge