



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

CRIMINAL APPEAL NO. 72 OF 2019

DMW.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(From the original conviction and sentence by Hon. Mwaniki J. (SPM) in Makueni Senior Principal Magistrate's Court Criminal Case No. 15 of 2017 delivered on 10th April, 2019).

JUDGMENT

1. **DMW** was charged with the offence of incest contrary to section 20(1) of the Sexual Offences Act No. 3 of 2006. The particulars being that the Appellant on diverse dates between 27th December 2016 and 25th June 2017 in various places within Makueni county unlawfully and intentionally touched the vagina of **FPW** with his penis who was to his knowledge his daughter a child aged 12 years.

2. He faced an alternative count of committing an indecent act with a child contrary to section 11(1) of the Sexual offences Act No. 3 of 2006. The particulars were that the Appellant on diverse dates between 27th December 2016 and 25th June 2017 in various places within Makueni county unlawfully and intentionally touched the vagina of **FPW** a child aged 12 years with his penis.

3. He pleaded not guilty to the charges and the matter proceeded to full hearing with the prosecution calling four (4) witnesses. The Appellant gave a sworn defence without calling any witness. He was thereafter found guilty, convicted and sentenced to serve fifteen 15 years imprisonment.

4. Being dissatisfied with the judgment he filed this appeal citing three grounds of appeal which were later amended to read as follows:

(a) **That**, the learned trial Magistrate erred in both law and facts and misdirected himself by holding that the case for the prosecution was proved to the required standard whereas on the basis of record the burden of proof was not discharged and indeed left reasonable doubts that ought to have been resolved in Applicant's favour.

(b) **That**, the learned trial Magistrate erred in law and fact by convicting him without regard to his basic right of disclosure of the prosecution evidence which was intended to be brought against him as laid down under Article 50(2)(c)(j) of the Constitution of Kenya 2010.

(c) **That**, the learned trial Magistrate erred in law and fact by assuming that the case was sufficiently corroborated whereas the evidence tendered did not in material particulars corroborate but rather was untenable, unworthy, contradictory and full of lies thus not capable to pass the test of credibility.

(d) **That**, the honourable Magistrate misdirected himself after failing to cautiously explore statements of Pw1 and Pw2 whereas they had portrayed themselves as liars and unreliable before court.

(e) **That**, the learned trial Magistrate erred in law and fact in basing his evidence on facts that could not be proved like the prosecution's failure to produce any evidence linking him to the charge.

5. The prosecution case was that Pw1 (PwM) is a daughter to Pw2 and the Appellant. She was born on 17th February 2005. In the year 2017, she lived with her parents and sisters at [particulars withheld]. It was her evidence that one day in November 2016 the Appellant who had a motorcycle came home and told her that Pw2 wanted her to take her a lesso. He told her to wear a helmet and cover herself with it. He took her to a guest house in Kathonzweni. In the room he forcefully removed her skirt and pant and attempted to penetrate her vagina with his penis. He was not successful as the penis was too big. He photographed her vagina using his phone as he inserted his fingers in the said vagina.

6. He told her to dress up and they left for home. He threatened to kill her if she told Pw2 about the incident. He repeated the same thing in December 2016. This time, he took her to Chuasini to some house and even fondled her breasts after the failed penetration. He took her back home and she was crying but could not report what had happened.

7. On 27th December 2016 he brought her a phone which he told her to keep as a secret. Her sister M later saw the phone but they never used it.

8. In June 2017 when she was on half-term, the Appellant came to her bedroom, grabbed her by the neck and covered her mouth. He then removed her clothes and attempted to defile her but he was unable. He took photos of her vagina with his phone. He told her the next time he would cut her vagina to enlarge it so that he could have sex with her. During all these incidents she would feel a lot of pain.

9. Later on a Sunday of the same month she saw the Appellant behind their house and she had the phone he had told her to hide. She threw it to their house help. Pw2 suspected something and she beat her up and the house help gave out the phone. At this point the witness broke down and started crying.

10. When she went back to school she was unable to contain the pain of keeping such secrets, and she shared them with her teacher JM. Pw2 was called at her request and she came. In the presence of her teachers including the guidance and counseling teacher PWM narrated all that the Appellant had been doing to her. The incident was reported at Kavumbu police station and she was taken to hospital at Makueni.

11. She was not sure if the man penetrated her vagina but she felt a lot of pain. She had all along known the Appellant as her father. She denied colluding with Pw2 to implicate him.

12. **Pw2 CNM** identified a copy of birth certificate belonging to PWM who she said is her daughter while the Appellant is the father and her husband. She testified that in June 2017 her house help told her of a phone PWM had. She did not own up and she beat her up and the phone was given to her. She had also been told how the Appellant used to carry PWM on his motorbike. PWM explained to her how the Appellant had told her she was pregnant and needed to be examined.

13. Later she was called to school by the school teacher of PWM. She went and it's from there she learnt of what the Appellant had been doing to the child. When she returned home she noticed that the Appellant was behaving strangely. She reported to the area sub-chief. The Appellant disappeared and was arrested in August 2017 at Mbiuni of Machakos county. Besides her personal issues with the Appellant she said he had pending defilement cases.

14. In cross examination, she said the Appellant is very cruel. He has sold all their plots to defend himself in other allegations. He has been warned about his conduct with school girls.

15. **Pw3 SN** produced the P3 form (EXB1) on behalf of Dr. Loiposha with the Appellant's consent. PWM was found to have normal genitalia with a broken hymen. A PRC form (EXB2) was filled by Dr. Lugogo. P.W.M did not have any physical injuries.

16. **Pw4 No. [112380] Pc Ginaro Mbiru Karanja** was the investigating officer. He produced Pw1's birth certificate (EXB3).

17. The Appellant in his sworn statement of defence said that on 25th June 2017 he was at Luwani area in Machakos county over family issues. Pw2 and her brother had chased him away over a land problem. She had changed his title to her name plus other properties. That's what had taken him to Machakos. He was later arrested in August 2018 when his wife called him pretending to have come for reconciliation. A day later Pw2 came saying they record consent upon him releasing all the property to her but he refused.

18. She left and returned with 30 men armed with petrol. Police arrested Pw2 and the man who had petrol. Kshs.30,000/= was recovered from the men. He said so many evil things Pw2 had done to kill him. The motor cycle is his but in Pw2's names. It's Pw2 who has implicated him in all these things. He claimed that Pw2 had before the family admitted having fabricated this against him. PWM wanted to withdraw the complaint but Pw2 would not allow her. He confirmed that Pw1 is his biological daughter.

19. The Respondent through learned counsel Mr. James Kihara opposed the appeal. He has submitted that the evidence as analysed by the trial court proved the alternative count. So he was properly convicted and he deserved the sentence of 15 years imprisonment.

20. On the issue of fair trial he submits that the provisions of Article 50(2)(f) of the Constitution were observed. He was informed in advance of the evidence to be relied on by the prosecutor. That the Appellant never complained of any violation of his rights before the trial court.

Analysis and determination

21. This being a first appeal, it behoves this court to re-evaluate and re-consider the evidence on record and come to its own conclusion while bearing in mind that it did not see nor hear the witnesses. An allowance should be given for that. See **Okeno –vs- Republic (1972) E.A 32; Kiilu & Another –vs- Republic (2005) I KLR 174; Simiyu & Another –vs- Republic (2005) I KLR 192.**

22. Upon considering the evidence on record, the grounds of appeal, both submissions and the law, I find the issues falling for determination to be as follows:

- i. Whether there was violation of the Appellant's rights under Article 50(2)(c) and (j) of the Constitution of Kenya 2010.

ii. Whether the prosecution proved its case against the Appellant beyond reasonable doubt.

Issue no (i) Whether there was violation of the Appellant's rights under Article 50(2)(c) and (j) of the Constitution of Kenya 2010.

23. **Article 50 of the Constitution provides:**

(2) Every accused person has the right to a fair trial, which includes the right-

(c) to have adequate time and facilities to prepare a defence;

(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence

24. The right to be provided with copies of the documents and statements that the prosecution intends to rely on in a given case was emphasized in the Court of Appeal in **Thomas Patrick Gilbert Cholmondeley –vs- Republic Nairobi Criminal Appeal No. 116 of 2007 (2008) eKLR** where the court observed that:-

“We think it is now established and accepted that to satisfy the requirements of a fair trial guaranteed under section 77 of our Constitution, the prosecution is now under a duty to provide an accused person with, and to do so in advance of the trial, all the relevant material such as copies of statements of witnesses who will testify at the trial, copies of documentary exhibits to be produced at the trial and such like items.”

The Court of Appeal further reiterated the same in the case of **Ahamad Abolfathi Mohammed & Another –vs- Republic (2018) eKLR**.

25. The Appellant contends that he was never supplied with witness statements. According to the records on 21st November 2017 Mr. Maitima for the Appellant informed the court that he had not been supplied with witness statements. The prosecuting counsel told the court she had the file and she would supply the same day. The court then made an order for the defence to collect the statements that very day at their own costs. The matter came for mention on 22nd March 2018, 13th July 2018, 20th July 2018, 3rd August 2018 and hearing on 26th June 2018, 26th July 2018 but the Appellant never raised any issue about witness statements.

26. On 22nd August 2018 this is what transpired:

DPP: Case was for hearing yesterday but I am ready to proceed.

Accused: I don't have the statements but ready to proceed.

Court: Accused be given statements for perusal.

Later:

Coram as above

Accused: present

27. The case proceeded and two witnesses testified and the case was adjourned to 3rd September 2019 and further to 29th October 2019 when two witnesses testified and the prosecution closed its case. At no time did the Appellant raise anything about witness statements. Even in his sworn defence he never said anything about the statements. He could have complained about this if they had not been supplied. He cannot therefore be heard to raise the issue now when he would have done so during the trial court.

Issue no. (ii) Whether the prosecution proved its case against the Appellant beyond reasonable doubt.

28. **Section 20(1) of the Sexual Offences Act** defines incest as follows:

20(1) 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 an 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.”

29. PWM, Pw2 and the Appellant confirmed to the court that PWM is a biological daughter of the Appellant. The certificate of birth (EXB3) confirms that and also shows that she was born on 17th February 2005. She was therefore aged 12 years at the time of the alleged offence.

30. Section 2 of the Sexual Offences Act defines **“penetration”** as **The partial or complete insertion of the genital organs of a person into the genital organs of another person.**

The Court of Appeal in the case of **Sahali Omar –vs- Republic (2017) eKLR** held that:

“... Penetration” whether by use of fingers, penis or any other gadget is still penetration as provided for under the Sexual Offences Act”

31. PWM testified that the Appellant tried to penetrate her vagina with his penis unsuccessfully on three occasions. The reason was that his penis was too big. On the third time of failure he threatened to cut her vagina so that he could penetrate her. On the first and second occasions after failing to penetrate her, he inserted his fingers into her vagina. She further added that on all the occasions he took photos of her vagina.

32. The reason she did not tell her mother was because the Appellant had the first time threatened to kill her if she ever told her mother (Pw2) what was happening. The medical evidence by Pw3 was that PWM was examined after a month and was found to have a normal genitalia but with a broken hymen (EXB1 and 2). From her evidence the last time the Appellant did that to her was in June 2017 during midterm. She was examined on 9th July 2017 after reporting to her teachers upon her return to school. Injuries could not therefore be noted on her genitalia.

33. In his defence the Appellant put all blame on his wife (Pw2) making all manner of accusations against her. Secondly he never cross examined Pw2 on all these matters he raised in his defence. Infact he seemed to have forgotten that the complainant was PWM and not his wife (Pw2).

34. There was no reason raised by the Appellant to show why PWM would lie against him. His defence was a real afterthought just to save his face.

35. For the offence of incest to be proved there must be an indecent act OR an act which causes penetration. The learned trial Magistrate operated under the impression that incest is only proved when there is an act of penetration. There was nothing wrong with the particulars of the main charge of incest. Infact the insertion of fingers into the child’s vagina amounted to penetration hence the broken hymen. PWM was a very forthright witness whose evidence was never shaken in cross examination.

36. I find that the main charge of incest was proved beyond reasonable doubt. I hereby correct the errors made by the learned trial Magistrate by quashing both the acquittal on the main charge and conviction on the alternative count. I substitute them with a conviction on the main charge of incest.

37. The maximum sentence for incest with a minor is life imprisonment. The Appellant got away with fifteen (15) years and I will not enhance the sentence since the Respondent did not issue any notice for enhancement of sentence.

38. The result is that the appeal lacks merit and I dismiss it in its entirety.

Orders accordingly.

Delivered, signed & dated this 10th day of November 2020, in open court at Makueni.

.....

H. I. Ong’udi

Judge