



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: D. K. Kemei - J

CRIMINAL APPEAL NO. 72 OF 2019

JMK.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence by Hon K. Kenei (Resident Magistrate) at the Chief Magistrate's Court at Machakos in Criminal Case(S O) Number 13 of 2018 delivered on 13.5.2019)

BETWEEN

REPUBLICPROSECUTOR

VERSUS

JMK.....ACCUSED

JUDGEMENT

1. The Appellant herein, JMK, was tried and convicted by Hon K. Kenei, Resident Magistrate at Machakos for the offence of incest by male contrary to section 20(1) of the Sexual Offences Act No. 3 of 2006.

2. He was sentenced to serve 30 years' imprisonment for the offence of incest.

3. The particulars of the charge were as follows: -

“JMK on the 5th May, 2018 in Machakos sub-county within Machakos County being a male person intentionally and unlawfully caused his penis to penetrate the vagina of EK a child aged 10 years who was to his knowledge his daughter.”

4. Being dissatisfied with the said conviction and sentence, the Appellant filed his Petition of Appeal and raised the following grounds of appeal as amended. The appellant found that the trial court went into error of law and fact in: -

a. Failing to analyse and evaluate the whole evidence and come to his own independent conclusion as required by the law.

b. Failing to find that the essential elements were not produced in court to prove the case of defilement.

c. Failing to find that the evidence was inconsistent and not corroborative.

d. Failing to give the reasons for dismissing his defence of alibi as required under section 169(1) of the CPC.

e. Reaching a decision that was below the required standard in law.

f. Failing to find that penal penetration was not proven.

g. Admitting the medical examination report that was filled 5 days from the date of the offence.

h. Failing to realize that there was bad blood between the appellant and Pw2.

i. Refuting the appellant's sworn defence statement.

5. In support of the prosecution's case in the trial court, they relied on the evidence of 6 witnesses. **Pw1** was **SK** who sells vegetables and who testified that on 5.5.2018 she was at the market at 4 pm when she received a call from her neighbour **MK** who informed her that there was an issue at home. She testified that she rushed home where she found that her husband had been tied with a rope and that she learnt that her husband had defiled her child. She examined the child and noted that she was crying; she took the child to Machakos Level 5 Hospital where she was treated and discharged. She tendered in court the P3 form, the lab report, the receipt for counselling, the PRC form, the child's birth certificate which were marked for identification.

6. **Pw2** was **MK** who was the [particulars withheld] Communication Programmer. She testified that on 5.5.2018 she heard the complainant screaming that she would report bad manners that were being done to her. She testified that she went to the complainant's home where she met the appellant who admitted having beaten the complainant for letting the cows graze on the maize. She told the court that she inquired from the complainant who informed her that the appellant had defiled her. She testified on cross examination that she did not examine the minor.

7. **Pw3** was **EKM**. After a voir dire was conducted on her, the court was not satisfied that she understood the meaning of an oath and that the court directed that she should give an unsworn statement. She testified that on 5.5.2018 she was at her home in [particulars withheld] washing clothes having been left alone with her father who caught her and took her to his bed where he removed her inner pants and his trouser and who put his penis into her vagina. She told the court that she screamed whereupon **Pw2** came and inquired on what had happened and that she informed her that the appellant had done bad manners to her and further that the appellant briefed **Pw2** that he had slapped the complainant as the cows had strayed in the garden. She testified that it was not her duty to look after the cows. She testified that she also told her mother about the incident and that she was taken to Machakos General Hospital. She was able to identify the P3 form, PRC form, her birth certificate. On cross examination, she admitted that the appellant beat her after removing the cows from grazing and there after the appellant had sex with her.

8. **Pw4** was **AMM** who testified that on 5.5.2018 he received a call from one Alex who informed him that his father had defiled his sister. He told the court that he arrived at the scene at 7 pm in the company of police officers and found that the appellant had been tied with a rope. He testified that the appellant denied the offence but however the complainant confirmed what had occurred. On cross examination, he testified that he did not witness the incident but that the complainant identified the appellant.

9. **Pw5** was **Dr John Mutunga** who testified on the medical examination that was conducted on the complainant. The witness testified that the victim was aged 10 years and with a history of incest that was committed on 5.5.2018. He testified that the examination revealed that the victim had injuries on the head; that the genitalia examination revealed an intact hymen and bruises/ lacerations on her labia minora. His conclusion was that the victim was defiled. He produced the P3 form, PRC and treatment notes as exhibits. On cross-examination, he testified that he did not know the perpetrator.

10. **Pw6** was **Pc Elda Konzolo** who is attached to Machakos Police station gender offices. She testified that on 5.5.2018 she was informed of a defilement case that had been lodged at the station and that she interrogated the minor who informed her that the appellant had defiled her at home. She testified that she escorted the child to Machakos Level 5 Hospital where the child was treated and P3 and PRC forms were issued. She testified that the appellant was brought to the station by the Assistant Chief and she arrested him and charged him with the offence. She produced the child's birth certificate to which the appellant did not object.

11. The court found that the appellant had a case to answer and he was put on his defence. He opted to give sworn evidence. He testified that on 5.5.2018 he woke up and went to the farm with his wife where they worked till 12.30 pm. He testified that he returned home and his wife went to the market and that later he went to the town centre and returned home at 5.30 pm. He testified that on arrival at home he found that the livestock had entered the farm and on inquiring from the complainant, she gave no answer prompting him to slap her. He testified that he heard a neighbour asking the complainant as to why she was crying and the response he heard was that she had been beaten for allowing the livestock to graze on the farm. He testified that **Pw2** came and inquired what the appellant had done and he responded that he had disciplined the child then an argument ensued. It was his testimony that **Pw2** left with the complainant and returned with **Kaluu**, his uncle who assaulted him and shortly his son **Ken** came and a fight ensued. He testified that at 6.30 pm the sub chief came and inquired about what had happened then later he came with officers who arrested him and took him to the cells. He recalled how **Pw1** had told the court that she saw nothing on the victim and further added that the complainant had been beaten for allowing livestock to graze on the farm. He recalled that **Pw5** told the court that **Pw3**'s genitalia was normal but she had injuries on her face where the appellant had slapped her. He testified that he should have been charged with assault and not defilement; he told court that **Pw2**, **Pw5** and **Pw6** were not truthful. On cross examination, he testified that he was alone with his two children and he denied defiling the complainant. He admitted assaulting her for allowing the livestock to graze on the farm.

12. The appeal was canvassed vide written submissions. The appellant submitted that there was no evidence of penile penetration. It was submitted that the medical evidence was unreliable and that the prosecution evidence was based on suspicion that was not sufficient to sustain a conviction. It was pointed out that there was bad blood between the appellant and **Pw2**. Further it was pointed out that the prosecution did not prove its case to the required standard. Further the appellant submitted that vital witnesses were not availed in court including one **Keli**. In placing reliance on the case of **Sawe V R (2003) KLR 364** it was submitted that the circumstances as per the prosecution evidence did not establish that the wrongful act was committed. According to the appellant, the appellant's sworn defence was not shaken. The appellant sought to invoke the case of **Evans Wanjala Wanyonyi v R (2019) eKLR** and urged the court to set aside the sentence that was meted on him and pass a 10-year sentence instead.

13. Learned Counsel Machogu for the state in submissions filed on 9.12. 2019 opposed the appeal and framed three issues for determination.

Firstly, whether the prosecution proved its case beyond reasonable doubt; Secondly, whether the evidence in court was fabricated and finally whether the trial court considered the appellant's defence. In respect of the 1st issue, while appreciating the provisions of section 20(1) of the Sexual Offences Act that defines incest as well as section 2(1) of the Sexual Offences Act that defines an indecent Act, it was submitted that the evidence on record satisfied all the ingredients of the offence of incest under section 20(1) of the Sexual Offences Act. In respect of the 2nd issue, it was submitted that Pw2 had no reason to fabricate the case against the appellant and further that the evidence adduced by Pw1, Pw3 and the doctor were well corroborated hence the same was not fabricated. On the 3rd issue, it was submitted that the accused's evidence could not exonerate him from the offence. It was the conclusion of counsel that the appellant did not raise any reason to warrant the court from interfering from the decision of the trial court; the court was urged to dismiss the appeal for lack of merit.

14. In rejoinder, the Appellant reiterated that penile penetration was not proven; that his defence was not considered and added that the judgement was incompetent.

15. This being a first appeal, this court is mandated to analyse and re-evaluate the evidence afresh in line with the holding in the case of **Odhiambo v Republic Cr App No 280 of 2004 (2005) 1 KLR** where the Court of Appeal held that:-

“On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour”.

16. Having looked at the appeal and amended grounds of appeal, the evidence tendered before the trial court as well as the submissions, I find that the issues for determination are:

a) ***Whether or not the prosecution had proved its case beyond reasonable doubt.***

b) ***Whether the trial court went into error in dismissing the appellant's defence.***

17. With regard to the offence of incest, section 22 of the Sexual Offences Act provides as follows:

“In cases of the offence of incest, brother or sister includes half-brother 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 mother and an aunt of the first degree whether through lawful wedlock or not”

18. Section 20(1) of the Sexual Offences Act provides 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.”

19. The ingredients to be satisfied are that the victim was a child and that there was an indecent act. Section 2 of the Children Act defines a child as any human being under the age of 18 years. Section 2 of the Sexual Offences Act also defines indecent act to mean an unlawful act and 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.

20. The Appellant has not disputed that he is the father of the complainant and therefore the element of consanguinity is easily proven.

21. With regard to evidence of penetration, the trial court relied on the evidence of Pw1, Pw2, Pw4 and Pw5 who were not eye witnesses and the complainant (Pw3) plus the medical evidence from Pw5. According to the complainant's evidence, the appellant defiled her while inside his house and in cross examination she testified that the appellant beat her after finding that the cows had strayed then he proceeded to defile her. There was no other witness to the incident.

22. A perusal of the list of exhibits presented before the trial court showed a birth certificate as evidence of age and that the child was aged 10 years.

23. The said medical evidence was based on a P3 form that was filled on 17.7.2018, a PRC form that was filled on 5.5.2018 on the date of the alleged incident. Whereas Pw5 testified that the complainant had lacerations on her external genitalia, he also testified that the victim's hymen was intact. If the hymen was intact, there is no evidence to convince me that there was penetration. However, I am careful to look at the evidence in totality so as to conclude that indeed there was no penetration of a male organ or that the lacerations noted on the complainant's vagina were as a result of sexual activity. With the scanty evidence on record I have doubts as to whether indeed it was a male organ that caused the swelling and bruises on the complainant's genitalia.

24. The Appellant took issue with the failure of the trial court to consider the defence of alibi. However, the appellant seemed not to have set up the defence; he simply denied commission of the offence. In the case of **Kiarie v Republic [1984] KLR** the Court of Appeal held:

“An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable...”

25. The Appellant’s defence in the trial court and the evidence on record raised a reasonable doubt as to the commission of the offence. It appears that the appellant slapped the complainant and the entire prosecution evidence seems to agree with this; however, I am not satisfied that the evidence on record established that the sexual act took place. In **Paul v Republic [1976-80] 1KLR 1622 at 1624**, the Court stated as follows:

“In a case depending exclusively upon circumstantial evidence the court must before deciding upon conviction, find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than of guilt”

26. In addressing the question as to whether or not the prosecution proved its case to the required standard, being proof beyond reasonable doubt, I find that the evidence on record is not satisfactory to convince this court that an offence of defilement did take place. Hence, I must agree with the appellant that there is nothing to prove that he was the perpetrator. It is noted that the appellant and the victim were escorted to the police immediately the alleged incident took place and that the victim’s genitalia and under pant as well as the accused’s genitalia and under garments would have shown whether or not sperms or pus cells could be detected. No such tests were conducted on the appellant so as to compare with those on the p3 form. There was no explanation why this was not done yet the opportunity to nail the appellant was available. There were no eye witnesses and so it is the story of the complainant and the appellant to be considered. One can’t tell whether the complainant had brought up the allegation against her father for having slapped her. Because doubt was created in the prosecution case, this court shall decide the doubt in favour of the appellant. The conviction arrived at by the trial court was therefore unsafe and must be interfered with by being quashed.

27. Having established that the conviction was not safe, I find a determination as to whether the sentence was appropriate becomes moot.

28. In the result, it is my finding that the Appellant’s appeal has merit. The same is allowed. The conviction is hereby quashed and the sentence set aside. The Appellant is ordered to be set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

Dated and delivered at **Machakos** this **10th** day of **November, 2020**.

D. K. Kemei

Judge