



KTL.NO.494/2019

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL APPEAL NO. 45 OF 2017

PMN.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from Original Conviction and Sentence in Kitui Chief Magistrate's Court Criminal Case (S.O.) No. 46 of 2014 by Hon. M. Murage C M on 15/09/17)

J U D G M E N T

1. **PMN**, the Appellant, was charged with the offence of **Incest by Male Person** contrary to **Section 20(1)** of the **Sexual Offences Act No. 3 of 2006**. Particulars of the offence were that on the **24th** day of **May, 2014** at about **12.30 a.m.** within **Kitui County**, intentionally committed an act of which caused the penetration with **RM** a girl aged **10 years** by inserting his penis into her genital organ namely vagina who to his knowledge was his daughter.
2. In the alternative he was charged with the offence of **Committing an Indecent Act with a Child** contrary to **Section 11(1)** of the **Sexual Offences Act No. 3 of 2006**. Particulars of the offence were that on **24th** day of **May, 2014** at about **12.30 a.m.** within **Kitui County**, intentionally committed an act of indecency with **RM** a girl aged **10 years** by touching her private parts namely vagina, breast and buttocks by using his hands.
3. Facts of the case were that on the **24th** day of **May, 2014** at about **12.30 a.m.** **PW1 KM** and her family were asleep in the same room when she heard her daughter **R** crying. She woke up to find the child having been violated sexually. The child was taken to hospital for treatment after a report was made to the police. Investigations carried out culminated into the arrest of the Appellant.
4. When put on his defence the Appellant stated that after she married **PW2**, she left the matrimonial home twice in **2014, May**. But when the alleged incident took place she was at his place having returned two (2) years earlier. That on the material date the Complainant slept on the floor with her younger brother aged four (4) years. That during the night neither he or his wife left the bed. They slept until **6.00 a.m.** He denied having defiled the child or having touched her private parts but alleged that his wife had threatened her and after leaving him she married someone else.
5. The learned trial Magistrate considered evidence adduced and reached a finding that the Prosecution had adduced evidence that was overwhelming and not challenged by the Appellant. She convicted and sentenced him to **life imprisonment**.
6. Aggrieved, he now appeals on grounds that: evidence adduced was contradictory and inconsistent; evidence adduced was distorted by the learned Magistrate who convicted the Appellant of the offence of **Defilement** when the ingredients of the offence were not established as required by law; doubts established were not resolved in favour of the Appellant and the environment obtaining at the time could not permit the commission of such an offence.
7. The Appeal was canvassed by way of written submissions. It was urged for the Appellant by **J. K. Mwalimu and Co. Advocates** that **PW2** the Complainant's mother had been married to the Appellant for three (3) years, a relationship that was occasionally interrupted by multiple separations and re-unions. That the Appellant due to his poverty was unable to pay dowry to the father of **PW2, K** who had asked her to leave the Appellant for non-payment of dowry. That prior to marrying the Appellant she had three (3) children the Complainant inclusive having been married to **Mzee K** and the offence was alleged to have been committed in the one-roomed family house.
8. It was contended that the Doctor contradicted himself as to whether there was penetration of the Complainant and in the absence of penetration no offence of incest was proved.

9. That exonerating evidence was disregarded by the learned Magistrate as the report was made by the Appellant's father-in-law after his daughter had left the Appellant's home. That within three (3) weeks of the Appellant's arrest, the Complainant was married off to a rich woman known as **K** (woman to woman marriage). He argued that the story of defilement of the Complainant was stage managed to pave way for the Complainant's mother to be married off to a person who could pay dowry.

10. The learned trial Magistrate was faulted for convicting the Appellant when ingredients of the offence were not proved. That no age assessment was conducted to determine the age of the child. That no statutory documents like a Birth Certificate or Child Immunization Card were produced to ascertain the age of the Complainant; Her date of birth was not given by PW2 and there was no scientific proof of her age.

11. That the Complainant did not identify the person who did "bad manners" to her. That when lights were switched on the Appellant went out but the reason was not given which could be that he was embarrassed of being seen in the innerwear and vest.

12. The State through learned State Counsel, **Mr. Mamba** opposed the Appeal. He urged that the testimony of PW3 the minor was clear that while asleep a person lay on her and defiled her and on alerting her mother who switched on lights in the room, she was able to see her father in a vest and underpants and that he disappeared. Her evidence was corroborated by that of PW2. That the Doctor examined the minor and noted that her hymen was broken and confirmed evidence of penetration. Therefore the case was proved beyond all reasonable doubt.

13. This being a first Appellate Court, I am duty bound to re-evaluate the evidence that was adduced before the trial Court and come to my own conclusion bearing in mind that I never saw or heard the witnesses who testified. (**See Okeno vs. Republic (1972) EA 32**).

14. The offence the Appellant was charged and convicted of is created by **Section 20(1)** of the **Sexual Offences Act** which provides thus:

"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."

15. The Prosecution therefore was duty bound to prove:

- i) The relationship between the Complainant and Accused.
- ii) The act of penetration.
- iii) Age of the victim (sentencing purpose).

16. PW2 the mother of the Complainant told the Court that the Appellant was her husband. And when he married her she had three (3) children, the Complainant being one of them. In his defence the Appellant acknowledged the Complainant as his daughter as he was married to her mother. **Section 22(1)** of the **Sexual Offences Act** provides thus:

"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."

The Appellant having been the Complainant's half father was indeed her father therefore the Complainant was to his knowledge his daughter.

17. The Complainant told the Court on the material night at **9.00 p.m.** she slept on the floor with her sister **F**. And when she felt a person lying on her and doing 'bad manners' to her she called her mother who switched on lights and she saw the Appellant who was dressed in the underwear and vest and when lights were switched on he ran away.

18. PW2 her mother stated that when she heard the child calling out, she woke up and saw the Appellant who had removed his clothes and remained with the underwear. The child's pant had been removed and when she examined her she had mucous on her genitalia.

19. PW2 told the Court that she took the Complainant to hospital the following day. The offence was alleged to have been committed on the **24th** day of **May, 2014**. It is urged that the Doctor contradicted himself therefore such evidence should not have been relied upon. In the case of **Alfred Twehangane vs. Uganda Criminal Appeal No. 139 of 2001 (2003) UG CA 6** the Court stated thus:

"With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."

PW1 **Dr. Patrick Mutuku** told the Court that he filled the P3 form on **27th May, 2014** after she was treated. On cross examination he

explained that he had previously seen her on **25th May, 2014** and treated her. Treatment notes that were authored by **Dr. Mutuku** were adduced in evidence. The P3 form that he filled is clear. He filled it on **27th May, 2014** but the child was seen at the hospital and treated on the **25th May, 2014** while the offence was committed on **23rd May, 2016**. Evidence adduced was clear in that the offence was committed at night after the child went to bed at **9.00 p.m.** The alleged contradiction is insignificant.

20. At the point of examining the Complainant, the vaginal wall was red and the hymen was broken. Penetration is defined by **Section 2** of the **Sexual Offences Act** thus:

“penetration” means the partial or complete insertion of the genital organs of a person into the genital organs of another person;”

The fact that the Complainant’s hymen was broken is evidence of having engaged in penetrative sexual intercourse.

21. It is argued that the Appellant was framed so that PW2 could be married off to another individual who could be capable of paying dowry. It was established that after the Appellant and PW3 separated she married somebody else. However, the evidence does not disapprove the fact that the child was violated sexually. The Complainant had separated from a previous husband. She did not frame him prior to marrying the Appellant. The Complainant was a minor. It was demonstrated that PW2’s father wanted her to leave the Appellant because he had not paid dowry in her consideration but it was not demonstrated that the Complainant lied.

22. The Appellant did not explain his conduct of running out on being seen after the light was switched on. The conduct of the Appellant of running out of the house after the Complainant accused him of doing bad manners to her was indicative of the fact that he was conscious of what he had done, an act that was unlawful.

23. The Appellant was sentenced to **life imprisonment**. The proviso to **Section 20(1)** of the **Sexual Offences Act** stipulates thus:

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.”

24. It is urged that the age of the child was not proved. In **Mwalengo Chichoro Mwachembe vs. Republic Criminal Appeal No. 24 of 2015 (UR)** the Court stated thus:

“... the question of proof of age has finally been settled by recent decisions of this Court to the effect that it can be proved by documentary evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. It has even been held in a long line of decisions from the High Court that age can also be proved by observation and common sense. See Denis Kinywa-Vs- Republic, Criminal Appeal No.19 of 2014 and Omar Uche -Vs- Republic, Criminal Appeal No.11 of 2015. We doubt if the courts are possessed of the requisite expertise to assess age by merely observing the victim since in a criminal trial the threshold is beyond any reasonable doubt. This form of proof is a direct influence by the decision of the Court of Appeal of Uganda in Francis Omuroni -Vs- Uganda, Criminal Appeal No. 2 of 2000. We think that what ought to be stressed is that whatever the nature of evidence presented in proof of the victim’s age, it has to be credible and reliable...”

PW2 the mother of the Complainant told the Court that at the time of testifying the Complainant was **12 years old**. The Complainant also gave her age as **12 years old**. In his evidence the Appellant stated that the Complainant was **ten (10) years** then. Therefore her age was not in dispute. She was a child of an apparent age of **ten (10) years** at the time of the act.

25. Principles of interfering with a sentence were set out in the case of **Bernard Kimani vs. Republic Criminal Appeal No. 188 of 2000** where the Court of Appeal stated thus:

“It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.”

26. In handing out the sentence the learned trial Magistrate considered the fact that the offence was serious which called for **life imprisonment**. I do note that the Appellant was a 1st offender. As he focuses on rehabilitating programs in prison he can change and be of good behavior. In the circumstances I affirm the Appeal on conviction but allow the Appeal on sentence by setting aside the sentence imposed which I substitute with a sentence of **twenty (20) years imprisonment** to be effective from the date he was convicted.

27. It is so ordered.

Dated, Signed and Delivered at Kitui this 14th day of February, 2019.

L. N. MUTENDE

JUDGE