



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

CRIMINAL APPEAL NO. 1 OF 2018

AKK.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(Being an appeal from the original conviction and sentence in Sexual Offense Case No. 19 of 2017 at Resident Magistrate's Court at Makueni, Hon. Joan A. Otieno RM dated on 29<sup>th</sup> January, 2018)*

JUDGEMENT

**Introduction:**

1. The appellant AKK was charged with the offence of incest by male contrary to **section 20(1)** of the **Sexual Offences Act, 2006**, and the particulars being that the accused on the night of 18<sup>th</sup> and 19<sup>th</sup> November, 2017 in Makueni sub-county within Makueni County, intentionally and unlawfully caused his penis to penetrate the vagina of MNA to his knowledge is his daughter aged 10 years.

2. The appellant was also charged with an alternative charge of committing an indecent Act with a child contrary to section 11(i) **Sexual Offences Act, 2006**. The particulars being that the accused on the nights of 18<sup>th</sup> and 19<sup>th</sup> November, 2017 in Makueni sub-county within Makueni County, intentionally caused his penis to touch the vagina of MNA.

3. The trial court convicted the appellant and sentenced him to 50 years imprisonment. The appellant being dissatisfied filed the instant appeal on the grounds that: -

***1) That, the punishment as was imposed was harsh and excessive.***

***2) That the learned magistrate failed to observe, analyze and evaluate the entire evidence and find that there was no evidence to convict.***

***3) That the trial court violated the Constitution for failing to disclose all the informative contents of the charge as stipulated under Article 50 of the Constitution of Kenya, 2010.***

***4) That the trial court failed to give his defence adequate consideration.***

***5) That the prosecution case was riddled with lots of malice, contradictions and inconsistency that could have been looked upon before arriving at the decision to convict.***

**SUBMISSIONS:**

4. The appellant Counsel through their amended Written submissions amended the above grounds of appeal with the following grounds: -

***1) That the trial magistrate erred in law and facts by convicting the appellant on the inconsistent and contradictory evidence.***

***2) That the key ingredients of the charge were not proved beyond reasonable doubt.***

***3) That, the evidence of PW1 was not well established***

***4) That, the appellant defence and submissions were never considered.***

5. The appellant on the first ground of appeal contends that there was contradiction in the evidence presented by PW1 and PW2. They submitted that PW1 told the Court that the appellant cut her with a knife in the place of peeing and placed his place of peeing on her and that he did not take a shower after the incident.
6. They allege that PW2 in her testimony stated that PW1 visited her at 6am in the morning and alleges that she told her that the appellant had defiled her and that on checking her she found sperms on her thighs. The appellant contends if indeed the allegations are true then PW2 would have discovered blood stains.
7. Additionally, they submitted that the fact that PW1 alleges to have made the complaint after being denied food by the appellant is a confirmation that the complaint was not made voluntarily, implying that she made the allegations when she was not in good relationship with the appellant. In this respect the appellant relied in the Court Appeal decision of *Paul Kanja Gitari vs Republic (2016) eKLR*.
8. The Second ground advanced by the appellant is that the key ingredients for establishing the offence were not proved beyond reasonable doubt. These are the age of the complainant, positive identification of the assailant and proof of penetration.
9. On the first ingredient of the age of the complainant, the appellant submitted that there was no evidence tendered to prove the age of the complainant. They allege that there was no birth certificate produced and that the age assessment report relied on was not properly produced and that the same was objected to by the accused as the maker was not called to produce the document in breach of section 48(1) of the Evidence Act.
10. In this regard they relied on the following authorities of *R vs Lifchus(1973) 3 SCR 32*, *JKB vs Republic (2018) eKLR* and *Eliud Ouma Agwara vs Republic(2016) eKLR*.
11. In regard to the second ingredient of identification of the assailant, the appellant submitted that PW1 explanation of what transpired cannot be believable and the same is insufficient to justify that the appellant herein defiled his daughter, and that the same is as a result of coaching by PW2 who was not in good terms with the appellant and used to feed PW1 sometimes.
12. In respect to the third ingredient of prove of penetration, the appellant submitted that the learned magistrate conclusion that PW1 was defiled was erroneous as the evidence tendered was not conclusive.
13. They submitted that the evidence was contradictory and unreliable, for instance PW1 testimony that the appellant used a condom and a knife to threaten PW1 cannot be believable when taken in view of PW2 evidence that he never heard any noise on the material night, further, the statement that she noted some sperms on PW1 thighs raises lots of doubts.
14. In addition, the appellant submitted that if indeed the appellant defiled the minor, at least some blood stains would be noted.
15. Further, the appellant challenged PW6 (the Doctor) evidence that the minor was defiled severally arguing that the medical report that the hymen was broken cannot be relied upon, as Courts have previously found that the fact that the hymen has broken cannot be a conclusive prove of penetration, as it can be broken by other ways other than through carnal knowledge. In this they relied in the Court of appeal decision of *PKW vs Republic*.
16. The third ground advanced by the appellant is the argument that the evidence of the minor (PW1) was not well established. They challenged the trial magistrate finding that the minor had sufficient intelligence to tell truth. In this they relied on the PW6 testimony that he had difficulties in procuring evidence from the complainant at the material time.
17. The appellant in this regard placed reliance in the case of *JGK vs Republic (2015) eKLR* and *R vs Lal Khan* and argued that the Learned magistrate failed to take into consideration two aspects necessary when considering whether a child should be sworn.
18. They include, first a confirmation that the child has sufficient appreciation of the particular nature of the case and secondly, a realization that the taking of oath did involve more than ordinary duty of telling the truth in ordinary day to day life. In this respect they submitted that the whole process of *voire dire* was flawed.
19. The final ground of appeal advanced by the appellant is that the trial Magistrate failed to consider the appellant defence. They submitted that the Trial Court infringed on the appellant right to fair trial by failing to accord him sufficient time to prepare his defence.
20. Their concern being that the matter took 3 months after the incident to conclude. Further, they alleged that the trial magistrate failed to consider the appellant defence that there was an existing grudge between him and PW2 who was keen to do away with him.

#### **ISSUES AND ANALYSIS:**

21. This being a first appeal this court is obliged to examine the evidence afresh and draw its own conclusions on the same as was held in *Mwangi vs Republic [2004] 1 KLR 28* where the court stated that:-

**“1. An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to have the appellate courts own decision on the evidence.**

**2. The first appellate court must itself weigh the conflicting evidence and draw its own conclusions”**

22. The following is an outline of the evidence that emerged from the trial. **PW1** testified that she was 10 years old. She stated that she lived with her father, the appellant, siblings and her grandmother. She recalled giving her statement to PC Wanjohi and that she told him that his father had cut her peeing place with a knife.
23. She further recalled that that at 7.00 Pm on the material day her father came and picked her at her grandmother's house where she was sleeping and took her to his house where he defiled her as he placed the knife on the head of the bed.
24. She stated that after the incident, she informed PW2 the following morning, who called a man called John and subsequently her father was arrested as she was taken to Makuyuni Police Station and later Makueni Hospital. She confirmed that the appellant was her father and that she relocated from Mama Makau after killing a chicken. On cross-examination she stated that no one had told her to make false allegations.
25. **PW 2** in her testimony recalled that on 19/11/2017 PW1 came to her house at 6.00am and informed her that she had been defiled by the appellant. She stated that on 18/11/2017 the minor (PW1) had confessed that the appellant had turned her into a wife and had been having sex with her since the day they came back from Thika, and that she had been afraid to say because the appellant threatened her.
26. She stated that on checking her she found a patch of sperms on her thighs. She further stated that the appellant stayed a distance of 100m from her house, and that she never heard any noise from the appellant house.
27. **PW3** testified that he is the community policing officer and that on 19/11/2017 he received a call from PW2 notifying him that a minor girl had been defiled.
28. He called two officers and proceeded to PW2 place, and the minor confirmed to them that the appellant had defiled her, they traced the appellant and when they found him, the minor once again confirmed to them in the presence of the appellant that he had defiled her. He further stated that he knows the accused and that he had separated with his wife who was now living in Thika.
29. **PW4** testified that he lives in Makuyuni Sub-Location and stated that she was informed by PW2 that the appellant has been defiling the minor. He recalled that he went to the appellant home where the minor confirmed to them that the appellant had been defiling her, and that the abuse began back in Thika as per the minor.
30. It was further his testimony that the minor confirmed the abuse in front of the appellant and that is when they took the appellant to Makuyuni Police station.
31. **PW5** PC Peter Wanjohi Wangatu testified that on 21/11/2017 the appellant and the complainant were escorted to the station by the village elders and PW2, and that upon interrogating the complainant, she stated that while asleep at her grandmother house, the appellant went and carried her and had carnal knowledge.
32. He found out that the appellant did not have a birth certificate and that is when they escorted her to Makueni Hospital. Further he testified that they examined the complainant only as the accused had already taken a bath.
33. **PW6** Doctor Muindi testified that he prepared a report on 20/11/2017. He stated that the complainant told him that the appellant had defiled him for several years and stated that on the material day he used a condom and threatened her with a knife.
34. He stated that there were no injuries visible on the neck, head or any part of the body, the genital was normal and the hymen broken. Further, he stated that the complainant demeanor was uneasy. He produced the P3 form.
35. The appellant was found to have a case to answer, and in his defence he opted to give sworn evidence. He stated that he has six children including the complainant, and the complainant was staying with him and his mother, as his wife and the other children remained in Thika.
36. He denied that he committed incest with the complainant stating that they have been staying with the complainant well. Additionally, he alleged that he has been fixed by the in laws because of family issues. It is his case that the entire thing is a fabrication of PW2.
37. The appellant herein was charged with the offence of Incest by Male Contrary to Section 20(1) of the Sexual Offences Act. Section 20(1) provides as follows:-

**“20(1) Any male person who commits an indecent act or an act which caused penetration with a female person who is to his knowledge his daughter, grand-daughter, 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.....”**

38. Consequently, in order to prove the offence of incest one must show that the victim was within the prohibited range of kinship with the appellant. In this case the minor child told the court that the appellant was his father. Indeed the appellant herein never disputed that fact. Therefore it is conclusive that the complainant is the child of the appellant.
39. Additionally, it is trite that apart from establishing the relationship between the complainant and the accused, the following ingredients of the offence must be proved. These are the fact of penetration, identification of the perpetrator and the age of the victim.

***i. Whether there was penetration:***

40. The complainant PW1 told the court that on the material day (the night of 18/11/2017 and 19/11/2017) the appellant went and took her at around 7.00pm while sleeping at her grandmother's house and lifted her to his house, where he defiled her. She recalled having told PC Wanjohi that the appellant had cut her with a knife at her place of peeing.

41. It was her testimony that on the material day in question the appellant placed the said knife on the top of the bed as he removed his place of peeing and placed in her place of peeing.

42. PW2 on the other hand testified that PW1 went to her house at 6.00am on 19/11/2017 and told her that she had been defiled by the appellant. She stated that on checking her she found a patch of sperms in her thighs. Additionally, she stated that the minor had previously told her that the appellant had turned her into a wife and had been having sex with her.

43. Further, it was PW2 evidence that she immediately called two other people PW3 and PW4 and together they went out looking for the appellant and upon finding him they questioned him in the presence of PW1, who further confirmed the allegation. It was at this point that they arrested him and took him to the police station.

44. PW6 who is the medical doctor in his testimony stated that he examined the minor and that in his report he concluded that the minor had been defiled for several years, and that the hymen was broken.

45. In my view the prosecution evidence as tendered establishes the first ingredient of the offence that there was indeed penetration. The complainant minor evidence was collaborated by the evidence of PW2, PW3, PW4 and PW6 which stands unchallenged.

46. PW2 evidence that she found a patch of sperms at the thighs of the minor gives credence to the minor testimony before the court, this is further buttressed by the minor statement in the presence of PW3 and PW4 when the appellant asked her in their presence whether he has defiled her and the minor retorted 'yes'.

47. Further, it must be noted that as per the testimony of PW2, she testified that the complainant had told her the previous day preceding the 18/11/2017 that the appellant had turned her into a wife, the complainant in her testimony before court stated that the abuse began way back when they were still in Thika, this is further corroborated by the doctor's testimony that the minor had been defiled severally. She however gave specific evidence regarding the incident which occurred on the night of 18/11/2017 and 19/11/2017.

48. Furthermore, the complainant was a young child. She stood to gain nothing by claiming to have been defiled if in fact no such incident had occurred. The child remained consistent and unshaken in giving her testimony in court. From the evidence tendered it is this court's view that the same satisfactorily confirm that the complainant was indeed defiled.

#### *ii. Whether the appellant was identified as the perpetrator:*

49. On this question the child identified the appellant as the man who defiled her. All this must have taken some period of time. The child was at all times in close proximity with the appellant. Therefore nothing has been tendered or alluded to by the appellant to displace this fact.

50. The complainant told the court that the appellant was her father, a fact not disputed by the appellant. **PW2** who is married to the brother of the appellant confirmed that the complainant was the daughter of the appellant and that the minor had told her that the appellant had been defiling her.

51. The Evidence of recognition has been held to be **'more satisfactory, more assuring and more reliable than identification of a stranger'** because it depends upon the personal knowledge of the assailants in some form or other as was noted in *Anjononi & Others Vs Republic (1980) KLR, 59*. The appellant is the father of the complainant and she personally knew him very well and therefore in my view there is no possibility of mistaken identity.

52. Additionally, at no time did the child allege that a person other than the appellant had defiled her. She was unwavering in her identification of the appellant as her assailant.

#### *iii. Age factor:*

53. In the instant charges in which the appellant herein was charged, age is an important aspect. He has been convicted and sentenced with the offence of Incest by Male. In this case the question of the age of the victim is relevant for purposes of sentencing. Section 20(1) of the Sexual Offences Act contains the following provisions

**“Provided that, if it is alleged in the information or charge and provided 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.”**

54. Consequently, this provision makes the age of the victim in a charge of Incest relevant as it will affect the nature of sentence to be handed down upon conviction. In this case the charge sheet gives the age of the child as 10 years. In her evidence the complainant herself gave her age as ten (10) years. The p3 form produced also showed the victim's age to be 10 years. The defence did not dispute or contest the same.

55. Therefore in the circumstances of this case, it is certain in my view that the complainant was well below the 18 years age limit provided in Section 20(1) of the Sexual Offences Act.

56. The appellant in his written submissions has faulted the trial court alleging that it did not consider his defence. In his defence the appellant claimed that the charges were fabricated against him over a disagreement he had with his family and relatives including PW2 over land.

57. This defence is clearly in my view an afterthought as the appellant did not substantiate nor raise this issue of a grudge when he was given an opportunity to cross examine the witnesses.

58. Additionally, even if **PW2** and the appellant had disagreed, one fails to connect how the complainant a mere child would be involved in their differences. This in my view does not hold. Further, when the child was asked this question under cross-examination by the appellant she categorically stated, **“no one told me to make false allegation”**.

59. Based on my own analysis of the evidence adduced during the trial I am satisfied that the charge of Incest was proved beyond reasonable doubt. The appellant’s conviction by the trial court was sound.

60. After listening to mitigation the learned trial magistrate sentenced the appellant to serve 50 years imprisonment. The sentence provided for by Section 20(1) in cases where the victim of incest is below 18 years of age is that one shall be liable to life imprisonment for life.

61. In view of the Supreme decision in ***Francis Karioko Muruatetu & another v Republic [2017] eKLR*** the mandatory nature of the life sentence imposed under section 20(1) is unconstitutional and therefore the court is obliged to take into consideration the accused mitigation and probation report.

62. In consideration of the circumstances of this case and the mitigation by the appellant and the probation report tendered, it is my view the 50 years sentence is too high, and a sentence of 25 years imprisonment would be sufficient.

63. Thus court makes the following orders;

*i. Appeal on conviction is dismissed and conviction is affirmed.*

*ii. Appeal on sentence succeeds partially, by substituting sentence of 50 years to one of 25 years to run from the date of conviction.*

**DATED, DELIVERED AND SIGNED IN OPEN COURT AT MAKUENI THIS 12<sup>TH</sup> DAY OF JULY, 2019.**

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**C. KARIUKI**

**JUDGE**