



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.191 OF 2018

SOM.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal arising out of the conviction and sentence of Hon.

Onkwani - SRM delivered on 19th October 2018 in Nairobi CM. CR. (SO). Case No.39 of 2017)

JUDGMENT

The Appellant, SOM was charged with the offence of **incest** contrary to **Section 20(1)** of the **Sexual Offences Act**. The particulars of the offence were that on unknown dates between 1st January 2017 and 29th September 2017 in Ruaraka within Nairobi County, the Appellant, being a male person, had carnal knowledge of EO, a female person aged nine (9) years who was to his knowledge his daughter. In the alternative charge, the Appellant was charged with the offence of **committing an indecent act with a child**, contrary to **Section 11(1)** of the **Sexual Offences Act**. The particulars of the offence were that on unknown dates between 1st January 2017 and 29th September 2017 in Ruaraka within Nairobi County, the Appellant unlawfully and intentionally committed an indecent act with EO, a child aged nine (9) years by touching her privates parts namely vagina. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charges. After full trial, the Appellant was convicted as charged on the main charge and sentenced to life imprisonment.

In his petition of Appeal, the Appellant raised several grounds of appeal, challenging his conviction and sentence. He faulted the trial court for convicting him yet the prosecution failed to prove its case to the required standard of proof beyond any reasonable doubt. He was aggrieved that the trial court failed to consider his defence in arriving at its decision. He complained that the trial magistrate shifted the burden of proof from the prosecution to the defence. He took issue with his conviction stating that the trial court relied on the evidence of the prosecution witnesses which was full of contradictions. He asserted that the element of penetration was not established by the prosecution. He was of the view that the trial court did not exhaustively evaluate the evidence by the prosecution witnesses hence failed to give him the benefit of doubt to the defence. He was aggrieved that the trial magistrate failed to acknowledge that failure by the prosecution to call material witnesses fatally weakened their case. In the premises therefore, the Appellant urged the court to allow the appeal, quash the conviction and set aside the sentence that was imposed on him.

During the hearing of the appeal, this court heard oral submissions from Mr. Wanyanga for the Appellant and Mr. Momanyi for the State. Counsel for the Appellant submitted that the prosecution failed to discharge its burden of proof to the required standard of proof beyond any reasonable doubt. He asserted that the evidence of PW1 was inconsistent with that of PW3 and PW5. He pointed out that medical evidence presented before the trial court failed to establish the element of penetration. He averred that the complainant was not a credible witness. She was a problematic child. She spent several nights away from home. It was his opinion that her testimony was incredible. He added that her testimony was also uncorroborated. In the premises, he urged this court to allow the Appellant's appeal. Mr. Momanyi for the State conceded to the appeal. He urged this court to allow the Appellant's appeal.

The facts of the case according to the prosecution are as follows. The complainant, EO (PW1) stated that at all material times she lived with her father (the Appellant), her younger brother and her younger sister. They lived in a two-roomed house. Their mother lived in Migori. She told the court that her father and brother used to sleep in the sitting room while she and her sister slept in the bedroom. On one Friday night, as they were all sleeping, her father came to the bedroom and woke her up. They went to the sitting room. He instructed her to remove her clothes. She hesitated and asked why he wanted her to undress. He threatened to beat her up if she did not obey him. She undressed. He also removed his clothes. He instructed her to lie on top of him. She declined. He told her that he would give her Ksh.100/- if she had sex with him. She however did not move. He left the room. She dressed up and went to use the restroom. She testified that her father did not sexually assault her that night.

The following night, he again woke her up and took her to the sitting room. He forced her to undress. He laid her on the seat. He inserted his

penis in her anus. She complained that she was in pain. He stopped when she told him that she felt pain. When she went to school the following Monday, she informed her teacher Amina of the incident that occurred that Saturday night. That evening when she got back from school, her father beat her up and accused her of visiting the neighbour's house. He injured her hand. Later on, the teacher informed a parent at the school. They reported the matter to Ruaraka Police Station. Her father was arrested. She was taken to hospital for medical treatment.

PW4, AL, was a standard two teacher at [Particulars Withheld] Primary School. She was the complainant's teacher. She told the court that on 28th September 2017, the complainant informed her that her father had sexually assaulted her. She explained that he inserted his penis in her anus. PW4 informed the school headteacher. The following day she reported the incident to the standard two parents' representative (PW2). PW2 Isaiah Waku Khangati reported the matter at Ruaraka Police Station. PW4 stated that she knew the Appellant as the complainant's father.

PW2, Isaiah Weku Khangati worked as a children officer at the World Vision offices in West Pokot Central. He was also a parents' representative at [Particulars Withheld] Primary School. On 29th September 2017, a teacher at the said school (PW4) requested him to go to the school. She informed him that one of the children in her class had reported that her father had sexually assaulted her. She told him that she had informed the headteacher but they were afraid of reporting the matter since the child's father was violent. The said child was the complainant. He approached the complainant and interrogated her on the alleged claims. The complainant told him that her father forced her to undress. He ordered her to lie on the sofa and told her to bend. He then inserted his penis in her anus. PW2 reported the matter to Ruaraka Police Station. He also took the complainant to MSF Clinic in Eastleigh for medical examination.

PW3, Emmy Kosgei was a clinical officer at MSF Clinic in Eastleigh. She adduced evidence on behalf of her colleague Moureen Akeega who examined the complainant on 29th September 2017 at about 3.00 p.m. The complainant was alleged to have been severely sexually assaulted. The medical examination took place six days after her last known sexual assault. PW3 stated that the complainant had no visible physical injuries. Her external genitalia was normal. No vaginal discharge was noted. Her hymen was intact. Her anal region was normal with no visible physical injuries. PW3 produced the Post Rape Care Form into evidence.

The police doctor, Dr. Joseph Maundu (PW7), examined the complainant on 3rd October 2017. He stated that the complainant had no visible physical injuries. Her private parts were normal. Her hymen was intact. No injuries were noted on her anal region. He produced a P3 form in evidence. PC James (PW5) was the arresting officer. He was based at Ruaraka Police Station. A report was made to the station on 29th September 2017 that a child who attended [Particulars Withheld] Primary School had been sexually assaulted. On 2nd October 2017, he went to the said school and met with PW2. PW2 informed him that the child had been taken to hospital. PW2 identified the child's father who is the Appellant. PW5 arrested the Appellant and took him to Ruaraka Police Station.

This case was investigated by PW6, PC Jenifer Mukoko stationed at Ruaraka Police Station. She was assigned the case on 2nd October 2017. She went to [Particulars Withheld] Primary School and spoke to the headteacher. She also interrogated PW2 who had reported the incident. PW2 told her that the complainant reported that she was being sexually assaulted by her father. He told her that the child had been sexually assaulted on several occasions. The complainant was admitted at MSF clinic in Eastleigh. PW6 visited the said clinic. He interrogated the complainant and recorded her statement. The complainant identified the Appellant as her father. She also escorted the complainant to the police doctor where she was issued with a P3 form. She later charged the Appellant with the present offences.

The Appellant gave a sworn defence. He told the court that he had six children, three of whom he lived with. He stated that the complainant was his daughter. She attended school at [Particulars Withheld] Primary School. He stated that teachers at the said school wanted custody of his children. He however told them that he could take care of his own children. He stated that the complainant visited Ruaraka Police Station on several occasions. When he inquired why she was going to the police station, she informed him that the teacher at her school had instructed to report that her father was beating her. Sometime in September 2017, the complainant disappeared from home. He went to her school but was unable to locate her. He reported that the complainant was missing at Ruaraka Police Station. He was however not issued with an OB number. He also reported the matter to his bishop. The police told him to get a letter from the complainant's school confirming that she was missing. When he went to pick the letter from the school, he was arrested by police officers and escorted to Ruaraka Police Station. He was later charged with the present offences. He denied sexually assaulting the complainant.

As the first appellate court, it is the duty of this court to subject the evidence adduced before the trial court to fresh scrutiny and re-evaluation, before reaching its own independent determination whether or not to uphold the conviction and sentence of the Appellant. In doing so, this court is required to bear in mind that it neither saw nor heard the witnesses as they testified and cannot therefore make any comments regarding the demeanour of the witnesses (See David Agwata Achira –vs- Republic [2003] eKLR). The issue for determination by this court is whether the prosecution adduced sufficient evidence to secure the conviction of the Appellant on the charge of incest contrary to Section 20(1) of the Sexual Offences Act.

This court has re-evaluated the facts of this case. For the prosecution to establish the charge of incest against the Appellant, it was required to establish the following: that the Appellant was related to the complainant, that there was penetration, and in the case where the complainant is a minor, the age of the complainant. Section 22 of the Sexual Offences Act sets out the specific relationships that may be considered as constituting an offence of incest. Section 22(1) of the Act identifies a father as among the relationships where a sexual relationship is prohibited with a daughter. In the present appeal, the complainant stated that the Appellant is her father. The Appellant did not challenge the same. In his defence, he confirmed that the complainant is his daughter. It was therefore established that there existed a father-daughter relationship between the Appellant and the complainant.

With regards to the age of the complainant, no documentary evidence was availed by the prosecution to establish the same. Where this best evidence is not available, the prosecution can also rely on the testimony of the parents of the complainant and also by the court visually satisfying itself as to the apparent age of the complainant. This position was held by the Court of Appeal in Nyeri C.A Criminal Appeal No. 61 of 2014, Richard Wahome Chege vs Republic (unreported). The complainant testified that she was ten (10) years old at the time of giving evidence. She was in Class two. The P3 form indicated that the complainant was nine (9) years of age at the time of the sexual assault. The Appellant in his defence stated that the complainant was twelve (12) years old. The trial magistrate, who had the benefit of seeing the complainant testify, assessed the complainant's age to be that of a child. This is evident since the trial magistrate deemed it necessary to

conduct a *voire dire* examination on the complainant before proceeding to take her evidence. In the face of the evidence laid before the trial court, the apparent age of the complainant when the sexual assault occurred was established to be that of a child. She was a human being below the age of eighteen (18) years old. This court therefore holds that the prosecution did establish that the complainant was a child within the meaning of **Section 2(1)** of the Children Act.

With regards to penetration, **Section 2(1)** of the **Sexual Offences Act** defines the same as:

“the partial or complete insertion of the genital organ of a person into the genital organs of another person.”

This court is of the view that the element of penetration was not established by the prosecution. The medical evidence presented before the trial court was inconclusive regarding penetration, which might be attributable to the fact that the minor was examined approximately six days after the incident occurred. Both PW3 and PW7 testified that no visible physical injuries were noted on the complainant’s vagina or anal region. Her hymen was also intact. The Appellant’s conviction on the main charge of incest was therefore unsupported by medical evidence.

As regard whether the Appellant defiled the complainant, from the evidence adduced, it was clear that the complainant’s narrative regarding what took place is not supported by other evidence. The complainant testified that she was sodomized by the Appellant. Although the complainant was seen by two medical officers i.e. PW3 and PW4, they were of concurrent opinion that the complainant had not been sexually assaulted. There were no physical injuries to confirm the complainant’s evidence. This court, taking into consideration the totality of the evidence adduced, was not convinced by the truthfulness of the complainant’s testimony to allow it to invoke the Proviso of Section 124 of the Evidence Act. It was clear to this court that the complainant’s testimony may have been embellished. In that regard, the caution observed by the court in the case of **FAPPYTON MUTUKU NGUI –VS- REPUBLIC – CRIMINAL APPEAL NO.296 OF 2010** applies. In that case, the court held thus:

“Indeed courts should be cautious before convicting on the uncorroborated evidence of minors. There are many reasons for this. In J Heydon Evidence: Cases and material 2nd ed Butterworths London 1984, 84, the reasons were put this:

First, a child’s power of observation and memory are less reliable than on adult’s. Secondly, children are prone to live in a make-believe world, so that they magnify incidents which happen to them or invent them completely. Thirdly, they are also very egocentric, so that details seemingly unrelated to their own world are quickly forgotten by them. Fourthly, because of their immaturity they are very suggestible and can easily be influenced by adults and other children.”

In the present appeal, it cannot be ruled out that the complainant may have been influenced by those people who interacted with her to make allegations against the Appellant which had no basis in the truth. The Appellant’s defence that he did not commit the offence has a ring of truth in it.

In the premises therefore, this court will allow the Appellant’s appeal. The conviction is quashed. The custodial sentence imposed on him is set aside. He is acquitted of the charge. He is ordered set at liberty forthwith and released from prison unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 16TH DAY OF JULY 2019

L. KIMARU

JUDGE