



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MALINDI**

**CRIMINAL APPEAL NO. 78 OF 2015**

**SKK.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal against the conviction and sentence from original trial in Criminal Case No. 4 of 2012 in a judgment delivered on 24/7/2017)*

**CORAM: Justice R. Nyakundi**

**Ms. Sombo for the State**

**Accused present in person**

**JUDGEMENT**

The appellant was convicted of the charge of incest with his mother. The particulars of the charge were that on the 4/1/2012 at [particulars withheld] Village in Dabaso – Kilifi County, a male person unlawfully and intentionally caused his penis to penetrate the female genital organ of his mother **J Y** who, to his knowledge, was his mother. On conviction after the conclusion of the trial appellant was sentenced to ten (10) years imprisonment. Being aggrieved with the conviction and sentence he filed an appeal based on the following grounds:

- (1) That the learned trial magistrate erred in law and fact by convicting and sentencing the appellant on shaky evidence*
- (2) That the learned trial magistrate erred in law and fact by considering the frail and shaky investigations*
- (3) That the learned trial magistrate erred in law and fact by failing to acknowledge that the doctor's report did not incriminate him whatsoever*
- (4) That the learned trial magistrate erred in law and fact by slapping him with excessive sentence*

The Prosecution Case was that the complainant (**PW1**) **J Y** testified that on 4/1/2012 she retired to bed at about 11.00pm by locking the door to her house. That the appellant entered into the house where he had carnal knowledge. On realizing that there was an intruder **PW1** told the court that she raised an alarm and neighbours like **Merceline** responded to the screams. It was **PW1**. That on arrival the appellant managed to take flight from the scene.

**PW2** who testified as the niece of **PW1** together with her sister **Z PW3** rushed to the house of the complainant to establish the cause of an alarm. **PW2** and **PW3** evidence was to the effect that immediately they arrived and made entry into the house appellant was having carnal knowledge with the complainant. The witnesses **PW2** and **PW3** further testified that initially the appellant went under the bed but he sneaked out before he could be arrested.

The evidence of **PW4 PC Nyongesa**, of Watamu police station was that while at the police station on 5/1/2012 an incest report by the complainant was booked in the occurrence book. **PW4** recalled that on the same day the appellant was brought into the station by members of the public as a suspect who committed the offence.

**PW5 – Ibrahim testified** as a clinical Officer attached to Malindi hospital and the examination carried out on the person of the complainant following a rape report made to the police station. On examination and findings documented in the P3. **PW5** further noted that there were no lacerations or tears to the genitalia but could not rule out sexual intercourse.

The appellant gave an unsworn defence where he denied being at the scene of the crime as alleged by the prosecution. The learned trial

magistrate considered the entire evidence and held that the prosecution had discharged the burden of proof beyond reasonable doubt.

On appeal the appellant has attacked the findings of the learned trial magistrate mainly on identification evidence adduced by the prosecution. His main contention was that there was no proper source of light and therefore circumstances not favourable for a positive identification to take place. On this legal proposition the appellant placed reliance on the authorities of **Wamanga v Republic 1989 KLR**, **Mailanyi v Republic 1986 KLR**. The appellant based on these principles argued and submitted that the identification evidence was erroneous and unreliable.

This being a first appeal the guiding principles in **Okeno v Republic EA 32** point out that this court is entitled to evaluate the evidence of the trial court as a whole and make up its own findings. When the question turns on the credibility and demeanor of the witnesses, the appellate court must be guided by the impressions made by the trial court by virtue of its advantage of observing and seeing witnesses. These principles were as earlier followed in the case of (**Pandya v Republic 1957 EA 336**).

I have considered the evidence on record, the submissions by appellant and the authorities cited in relation to identification evidence and the standard of proof required of the offence.

### **The Law, Analysis and determination**

For purposes of section 20(1) of the Sexual Offences Act the prosecution was required to prove the following elements.

- (1) That there was an act of penetration by the appellant genitalia to the female genitalia of the complainant**
- (2) That in committing the sexual act the appellant had knowledge that the victim was his mother/or prohibited degree of marriage**
- (3) That the appellant had formed the necessary intention to commit the unlawful act**
- (4) That the appellant was positively identified as the perpetrator**
- (5) The age of the complainant would also be a factor in this offence**

It would therefore be appropriate to consider each singular element and the evidence adduced before the trial court.

#### **1. The act of penetration**

Section 2 of the Sexual Offences Act defines penetration to mean the partial or complete insertion of the genital organs of a person into the genital organs of another person.

As identified under section 20(1) of the Act Sexual penetration between adult close family members as defined is therefore forbidden by law. On this ingredient, as far as I can see from the evidence, the complainant had just gone to her house for a quiet night. With regard to carnal knowledge, it happened while in the course of her sleep. It was upon intrusion of her privacy that she woke up to realize that her son was on top of her engaged in sexual intercourse.

While the primary motivation is not clear from the testimony of prosecution witnesses, screams from the house caught the attention of PW2 and PW3 who rushed to the bedroom of the complainant. Further, PW2 and PW3 stated in court that they identify the appellant in close contact with the complainant where upon noticing them he disengaged and hid himself under the bed. In this case therefore, the evidence of PW 2 and PW 3 corroborated the testimony of the complainant on both the sexual act and the identity of the appellant. Thus the thrust of carnal knowledge has been positively proved by the testimony of the complainant. As a general rule even if one was to rule out the medical evidence by PW5, there is specific evidence by the complainant that she had been sexually penetrated by the appellant. A man could still have sexual intercourse with the victim without necessarily any lacerations, tears or abrasions occurring to the genitalia.

It is pertinent to assess each of the evidence adduced by the complainant as supported with that of PW2 and PW3. The evidence of PW2 and PW3 is significant because they responded to the distress screams. On that night they found the appellant in the house who left soon thereafter to avoid immediate arrest at the scene. There was no possibility of error or honest mistake as to who entered the house of the complainant to commit the sexual act. This ground therefore fails.

The second element which criminalizes the offence of incest is the relationship between the victim and the appellant. These provisions on incest take into account a number of factors like the abuse of position of trust and blood line that make sexual activity illegal. Section 20 (1) (2) of the Sexual Offences Act substantially categorizes the level of affinity who fall within the prohibited familial or relationship who in the event commit a sexual act it will automatically leads to a prosecution of the offence.

In the instant case the facts of this case are that PW1 – positively confirmed that on the fateful night she had penetrative sex with the appellant. By her own admission and complainant to the investigative agency the existence of familial affinity with the appellant is not disputed. This evidence of a relationship between the appellant was proved by oral testimonies adduced through PW1, PW2 and PW3. The appellant never disputed paternity. This prima facie evidence was never controverted by the appellant in his defence. His silence therefore manifested an irresistible inference that while committing the offence he had knowledge that the act of incest was against his own mother. It is therefore immaterial that the sexual intercourse was with the consent of the complainant.

## **2. On the critical issue of identification by the trial court**

The appellant claimed that there was no positive identification that he was in the house of the complainant. Further the appellant submitted that he was not within the home of the complainant when the alleged offence is stated by the prosecution witnesses to have taken place.

The evidence upon which the appellant's conviction was founded, in my view depends on identification by PW1 – complainant as corroborated by PW2 and PW3. The appellant put up a defence of alibi in his unsworn statement but fell short of giving the brief particulars of his whereabouts between 10.00pm – 2.00am on 4/1/2012.

The evidence which positively identified the appellant was that of recognition. The trial court examined carefully the evidence of PW1, PW2 and PW3 and reached a conclusion that the circumstances were favorable and free from any error or mistaken identity.

Applying the well-known principles in the case of **Abdallah Bin Wedo v Republic 20 EACA, Wamunga v Republic 1989 KLR 424 Maitanyi v Republic 1986 IKLR**. For all matters incidental to recognition I am of the conceded opinion that there is no possibility of mistake or error on the part of PW1, PW2 and PW3 in recognition, of the appellant who was well known to them prior to this fateful day. As far as recognition of the appellant by PW1 is concerned I do not believe the appellant testimony.

As the son to the complainant there are always distinctive stimuli features which biologically do connect them in a manner that the possibility of her mistaking her own child with another person is almost to nil. This was therefore overwhelming evidence on the offence of incest and the perpetrator being the appellant.

I have reviewed the evidence of PW 1, PW 2 and PW 3 concerning the sexual act against the complainant and the appellant as the perpetrator. I find no reason to doubt the findings by the Learned trial Magistrate which I accept that there is no intervening factor that anyone else apart from the appellant committed this offence.

It is trite that an alibi defence has to be weighed against the standard of proof in the prosecution case pertaining to the commission of the offence. As required of this court, the reevaluation of the evidence is consistent with the Judgment of the trial court and incompatible with the innocence of the appellant. The trial Magistrate imposed a sentence of 10 years imprisonment, I agree with the order on sentence for this is a serious offence that the appellant took part as against his own mother. The sentence is neither excessive or punitive in the circumstances of this offence. In short I am satisfied that the prosecution discharged heavy burden of proof by establishing the appellant's guilty on the whole case beyond reasonable doubt. For these reasons the appeal on both conviction and sentence is dismissed. It is so ordered.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 17<sup>TH</sup> DAY OF JULY, 2019.**

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**R. NYAKUNDI**

**JUDGE**