REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 187 OF 2013

JMM.....APPELLANT

-VERSUS-

THE REPUBLIC.....RESPONDENT

(*Being an appeal against conviction and sentence of the trial magistrate at Machakos in Criminal Case No. 110 of 2013 delivered on 20/8/2013*)

JUDGEMENT

1. The appellant was tried and convicted of incest contrary to Section 20(1) of the Sexual Offences Act. The particulars of the offence alleged that the appellant, between November 2011 and 26th January, 2013 in Kathiani District within Machakos County intentionally and indecently caused his penis to touch the vagina of JM without her consent. He was also charged with the offence of an indecent act contrary to Section 11(1) of the Sexual Offences Act. No finding was made on the alternative charge. He was sentenced to 15 years imprisonment by the Learned Resident Magistrate A. Odawo. He now appeals to this court against the entire judgement, his conviction and the sentence imposed on him.

2. The grounds of appeal as contained in the Petition of Appeal and as amended are summarized as follows:

(i) *The Learned Magistrate erred in finding that the appellant had a case to answer when the prosecution evidence contained fatal contradictions.*

(ii) *The Learned Magistrate contradicted himself in the final part of the judgement.*

(iii) *The Learned Magistrate erred in relying on hearsay evidence.*

(iv) *The Learned Magistrate erred in wrongfully applying section 124 of the Evidence Act.*

(v) *The Learned Magistrate erred in failing to find that the prosecution case was not proven beyond reasonable doubt.*

(vi) *The Learned Magistrate erred in totally disregarding the defence of the appellant.*

3. In submitting in support of the appeal, the appellant stated categorically that he did not understand the nature of charges facing him; he was not supplied with witness statements and was not accorded legal representation hence there was a breach of his right to fair trial under Article 50 of the Constitution. It is contended that the prosecution evidence was contradictory and hence unreliable as per the finding in **Ramkrishan v Pandya (1967) EACA 339** and further that the said evidence was not corroborated and therefore not enough to sustain a conviction as per Section 162 to 164 of the Evidence Act. It was further contended that there was evidence of bad blood because the appellant refused to buy the complainant an under pant hence under Section 14(1) of the Evidence Act the said evidence is relevant. It was submitted that in terms of Section 124 of the Evidence Act, the complainant was the only eye witness and the trial court failed to satisfy itself that the appellant was properly identified. Finally it was submitted that the trial magistrate observed that K ought to have been charged and the appellant was of the same view.

4. The prosecution counsel conceded to the appeal and submitted that there was no fair trial because the proceedings do not indicate that the appellant was given the services of an interpreter and further the appellant was not supplied with witness statements. Therefore the whole trial was rendered an illegality and a retrial is not possible because the trial was conducted six years ago and witnesses will not be available hence the appellant be set at liberty.

5. Having considered the issues raised in the grounds of appeal and the respective submissions, this is an appeal that must be treated by way of rehearing and I proceed to do so. For that reason I would not have to deal with each and every single ground of appeal but look at the

entire proceedings. The issue that I shall address is based on the ground that the decision of the trial Magistrate to convict and sentence the appellant as he did was against the weight of the evidence and circumstances of the case. Therefore the entire evidence must be analyzed and scrutinized and eventually, if it came to that, the sentence must be reconsidered against the mitigating factors. I should therefore immediately proceed to outline the essential testimony and the evidence from the witnesses on both sides of the case.

6. The first witness for the prosecution was Dr. Emmanuel Loipoisha who testified in English that he had a P3 form in respect of the complainant aged 19 years who alleged to have been raped by her brother on 27.1.2013. He testified that the patient was mentally retarded and a psychiatric report was necessary to confirm her lucid moments. Examination of the victim revealed that the external genitalia was normal; there was tenderness on the external part of the urethra and when urine comes out it was red, painful to touch; vaginal swab indicated red epithelial cells and he could not tell when the hymen was ruptured but from the tenderness of the urethra, he could tell it was no more than one week old. He also had an age assessment that indicated that the complainant was 16 years old. On cross-examination, he testified that he was not present when the offence was committed.

7. Pw2 was the complainant and a voir dire examination revealed that she was a standard 7 pupil at [particulars withheld] Primary School aged 17 years and the court was satisfied that she was of sufficient intelligence hence she was sworn in. She testified in Kamba that she used to live with the appellant and that on 26.1.2013 the appellant came to the room where she was sleeping and told her brother called KM to sleep on her. She testified that as KM was defiling her, the appellant was watching and also that this also happened in 2011 and that the appellant also defiled her but she could not remember the date. She told the court that on the material date, the appellant and KM defiled her.

8. The prosecution then sought to amend the charge sheet to include KM and later changed their mind and did not include KM as a co-accused. Pw2 continued to testify that after she was defiled by the appellant she reported to her teacher. On cross-examination, she testified that she lived with K but did not know why he did not come to court. She told the court that the appellant lived in another house and reiterated this evidence in re-examination.

9. Pw3 was CN who testified on translation to Kamba that the complainant was an orphan who lived with her two brothers namely the appellant and KM. She testified that in August, 2012, the complainant's sister N told her that the appellant was defiling the complainant and thus the complainant was taken to live with her uncle's wife. She told the court that on 27.1.2013 the complainant told her that the appellant had taken her to go back and stay with him and she ran away and stayed at a teacher M's house. She stated that the complainant informed her that when she went to pick her clothes the appellant beat her and locked the house and that night, they went and reported to the assistant chief. On cross-examination, she testified that the complainant was scared of the appellant and that the complainant told her that the appellant used to beat her and she did not know where the appellant had sexual relations with the complainant. On reexamination, she told the court that the complainant reported to her that on 28.1.2013 she was beaten and that the appellant was defiling her and told her not to tell anyone.

10. Pw4 EMK testified on translation to Kamba that in November 2012, the complainant reported to her that the appellant refused to buy her underwear unless she slept in his house. She told the court that on 28.1.2013 she was summoned by the head teacher on the grounds that the complainant was raped by the appellant and she noticed that the complainant had visible marks on her legs and further that the doctor confirmed that she was raped. On cross-examination, she testified that she knew the complainant as her student and that she saw the appellant together with KM at the cells at Mitaboni.

11. Pw5, FKM testified on translation to Kamba that the school used to assist the complainant by paying fees and in November, 2012 it was reported that the complainant had no underwear and that the appellant refused to buy. He testified that the complainant was a beneficiary of a grant for orphans and later the appellant agreed to buy underwear for the complainant. It was his testimony that in January, 2013, the appellant admitted to the assistant chief to have raped the complainant together with his brother. He told the court that the appellant was forwarded to the police and Pw4 took the complainant to hospital. He testified that the complainant told him that the appellant raped her and was beating her and that the complainant was not in the character of lying. On cross-examination, he testified that it was known to the appellant's uncle that the appellant did not want people to know what was happening in his house and that he did not witness the act but that it was done on diverse dates.

12. Pw6 was Pc Grace Otieno, the investigating officer who testified on translation to Kamba that on 28.1.2013, EK (PW4) came with the complainant and an AP officer together with the appellant and it was reported that the appellant had severally defiled the complainant. The complainant reported that from November, 2011 to 2013 the appellant had been going to her room and defiling her and that they lived in the same compound but there was no report that KM was defiling her thus he was not arrested. She told the court that a medical examination was conducted on the complainant and on cross examination, she testified that the same revealed that the complainant was raped. The trial court found that a prima facie case was established against the appellant and he was put on his defence.

13. After section 211 of the CPC was explained to him, the appellant opted to keep quiet.

14. In the usual manner as I approach this case I remind myself of a number of key principles which guide the determination of criminal cases. It is now more than a well- trodden path that the burden of proof in criminal cases is on the prosecution throughout the case. Secondly the burden on the prosecution is to establish the case to a requisite standard which is proof beyond reasonable doubt; see the cases of **Woolmington v Director of Public Prosecutions (1935) AC 462** and **Miller v Minister of Pensions (1947) 2ALL ER 372**. The standard of proof in these cases is what is also translated in Section 3(2) of the Evidence Act which states:

> *A fact is said to be proved when, after considering the matter before it, the court or jury, as the case may be, either believes it to exist or to have existed or considers its existence at the relevant time so probable that a prudent man aught, under the circumstances of the particular case, to act upon the supposition that it exists or existed.*

In **Woolmington** (Supra) the test was expressed in this way:

Throughout the web of the English Criminal Law one golden thread is always to be seen that it is the duty of the prosecution to prove the prisoner's guilt, subject to the qualification involving the defence of insanity and to any statutory exception. If at the end of the whole case, there is a reasonable doubt, created by the evidence given either by the prosecution or by the prisoner as to whether the offence was committed by him, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law and no attempt to whittle it down can be entertained.

15. From the summary of the facts of this whole case as laid out above certain basic facts emerge. It emerges from the facts that the appellant is brother of the complainant, a girl of 16 years of age at the time of the alleged offence. The appellant and the complainant are reported to be orphans. Both the appellant and the complainant lived in the same compound. The appellant appeared to have been the guardian of the complainant. This is why the allegations in this case are extremely difficult to analyze. It is indeed for this reason that I have taken considerable time, thought and care to find my way through the matter to come to the findings that I do. I felt in the nature of the case itself, besides anything else, I needed to proceed with extreme caution. The complainant is said to have been severally defiled by the appellant and his brother between 2011 and 2013 and in 2012 there appeared to have been a report that the appellant refused to buy underwear for the complainant. On 11.2.2013 PW1 checked the little girl's genitalia and according to him the girl's hymen was ruptured and her urethral orifice was tender. PW6 Woman detective received a report that the appellant severally defiled the complainant.

16. The issue, and this is the real issue in this matter, is whether the abnormality with the complainants genitalia can be attributed to the appellant having carnal knowledge of his own sister. According to Pw3, a report was made that the appellant defiled Pw2. A similar statement was made to Pw4 and Pw6 by the girl. Pw1 testified that the injuries he noted were not more than a week old.

17. I have myself carefully gone through the complainant's testimony. It was simple and clear testimony. For the most part what she told Pw3 is what she told PW4; it is what she told PW1 and Pw6 and that is what she told the trial court. Her simple story is that her brother raped her; that she could not remember the exact date, however it was done severally. It is clear that she was afraid of him because it was alleged that he beat her and therefore on 27.1.2013 she ran away from the appellant's home and went to stay with the teacher and that she had no underpants and the appellant had refused to buy them for a while.

18. The appellant has zeroed in on these apparently contradictory bad blood evidence and submitted very strongly that this whole matter is a fabrication. But surely these statements should not be taken out of context. Perhaps we should remind ourselves of what the complainant said is that she lived in the same compound as the appellant and he severally did the act. PW3 testified that the complainant did not wish to stay with the appellant and she was taken to her uncle's house. What is coming out very clearly to me is that even though there is a difference in dates of the examination of the victim Pw2 is clear that it was the appellant and the trial Magistrate describes the complainant as a girl of sufficient intelligence. A trial Magistrate is entitled to make findings of credibility because of the advantage of seeing and hearing witnesses. While this appeal is by way of rehearing I must not lose sight of the advantage enjoyed by the trial Magistrate in seeing and hearing the witnesses who testified before him.

19. As I pointed out earlier to impugn a witness on credibility the entire testimony must be put in context. Even a lie will not automatically discredit the entire testimony of a witness. Dixon C.J. in **Nominal Defendant v Clements (1960) 104 CLR 479 at 79-80 stated**:

"If the credit of a witness is impugned as to some material fact in which he deposes upon the ground that his account is a late invention or has been lately advised or reconstructed, even though not with conscious dishonesty, that makes admissible statement to the same effect as the account he gave as a witness if it was made by the witness contemporaneously with the event or at a time sufficiently early to be inconsistent with the suggestion that his account is a late invention or reconstruction. But, in as much as the rule forms a definite exception to the general principle excluding statements made out of court and admits a possibly self- serving statement made by the witness, great care is called for in applying it. The judge at the trial must determine for himself upon the conduct of the trial before him whether the case for applying the rule of evidence has arisen and, from the nature of the matter, if there be an appeal, great weight should be given to his opinion by the appellate court. It is evident however that the judge at the trial must exercise care in assuring himself not only that the account given by the witness in his testimony is attacked on the ground of recent invention or reconstructions or that a foundation for such an attack has been laid by the party but also that the contents of the statement are in fact to the like effect as his account given in his evidence and that having regard to the time and circumstances in which it was made it rationally tends to answer the attack."

20. As pointed out earlier the complainant and the prosecution story has been consistent both before trial and during trial. I would therefore not consider the complainant's credibility impugned merely by reason of the statement which suggests that she had a grudge because the appellant did not buy her underpants. The complainant gave her testimony after being sworn despite the fact that she is a child though not of tender years and case law is to the effect that evidence of a child should not be taken on oath but should be taken unsworn. I note that there was no other eye witness and this leaves the prosecution with the burden of providing such corroboration as may be necessary.

21. Furthermore corroboration is required as a matter of law under Section 19 of the Oaths and Statutory Declarations Act which stresses that an accused shall not be liable to be convicted on such evidence unless it is corroborated by some other material evidence implicating him.

22. For evidence to be capable of being corroborated it must:

(a) be relevant and admissible, **R v Scarrot, [1978]QB 1016**;

(b) be credible, **DPP v Kilbourne [1973)AC 729**;

(c) be independent, that is, emanating from a source other than the witness requiring to be corroborated, **R v Whitehead [1929] I KB 99**,

(d) Implicate the accused.

23. As stated above for evidence to be capable of corroboration it must be independent, that is, emanating from a source other than the witness to be corroborated. It will not be enough that the prosecution calls several witnesses who merely repeat what they were told by the complainant because that might as well have been the complainant's testimony.

24. As observed earlier the complainant was consistent in what she told Pw6, Pw1, PW3, PW4 and Pw5 and that these witnesses repeated what Pw2 told them in court. But from what is discussed above, the testimony of these witnesses could not in themselves have amounted to corroboration of the complainant's testimony. It is however submitted that there are instances when evidence emanating from the complainant may amount to corroboration. Evidence of the complainant's distress or physical manifestation, although emanating from the complainant, could amount to corroboration. **R v Redpath [1962] 46 Cr. APP Rep 319**.

25. The complainant was found with a tender urethral orifice, with a ruptured hymen by PW1 and he gave no opinion, however I find that the condition was definitely as a result of numerous penetrations. It comes out very clear to this court that the complainant's own physical manifestation corroborated her consistent testimony.

26. The appellant's testimony was silence and nothing more.

27. Having come this far, my conclusion is more than evident. The complainant's testimony, supported by that of the rest of the prosecution witnesses coupled with her physical manifestation of being afraid and scared correctly left no doubt in the mind of the trial magistrate that the complainant was penetrated by the appellant and as a result of the penetration she was found with tender urethral orifice, with a ruptured hymen. In the circumstances of this case I am left in no doubt that the complainant was sexually penetrated and molested by the appellant. I am unable to find any reason to fault the findings of the trial Magistrate. I therefore confirm that the charge against the appellant was more than well established. I accordingly dismiss the appeal against conviction.

28. Finally I should turn to the appeal against sentence. I have every sympathy for the appellant as a first offender. I would however resign to the elaborate exposition and considerations made by the trial magistrate in arriving at the sentence that he did. Unless I found the sentence offensive in some material particular I should be slow to tamper with it. Section 20 of the Sexual Offences Act provides for a mandatory sentence of life imprisonment if the victim is below 18 years and a minimum sentence of ten years. I note that the appellant was a first offender and that he together with the complainant were orphans. Even though the circumstances bedeviling these orphans were dire, the appellant whose mental faculties were normal ought to have been his sister's keeper but not her tormentor. I find that the appellant being a first offender ought to have been given the minimum sentence. Therefore the 15 years is excessive. A sentence of ten years is reasonable in the circumstances.

29. In the result the appeal partly succeeds. The conviction by the trial court is upheld. However the sentence of 15 years is set aside and substituted with a sentence of ten years imprisonment from the date of arraignment namely 1.2.2013.

It is so ordered.

Dated and delivered at Machakos this 17th day of September, 2019.

D. K. Kemei

Judge