



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIMINAL APPEAL NO. 1 OF 2019

NMK.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(Being an Appeal from Original Conviction and Sentence in **Thika Chief Magistrate's Court Criminal Case No. 517/2017 (S.O)** by **Hon. G. Omodho (SRM)** on 2/7/2018)*

J U D G M E N T

1. **NMK**, the Appellant was charged with **Incest** Contrary to **Section 20(1)** of the **Sexual Offences Act**. Particulars of the offence were that on **29th January 2017** at **Greystone area** in **Gatanga District** within **Muranga County** being a male person caused his penis to penetrate the vagina of **S.W.** a girl child **aged 12 years** who was to his knowledge his daughter.
2. In the alternative he faced the charge of **Committing an Indecent Act** Contrary to **Section 6 (a) of the Sexual Offences Act No. 3 of 2006**. Particulars of the charge were that on **29th January 2017** at **Greystone area** in **Gatanga District** within **Murang'a County** intentionally and unlawfully touched the private parts including the breasts of **S.W.** a girl **aged 12 years**.
3. After being taken through full trial he was convicted on the main count and sentenced to **twenty (20) years imprisonment**.
4. Aggrieved, he appeals on grounds that: elements of the offence of incest were not conclusively proved; essential witnesses were not called to testify; crucial exhibits were not availed; PW1's evidence was obtained through coercion; failing to reach a finding that the Appellant was implicated was an omission by the trial court.
5. Facts of the case as presented by the prosecution were that PW1, SW, the complainant, was at home washing clothes as instructed by her mother when the Appellant, her father called her. Upon entering the house he pulled her onto the bed and threatened to stab her if she screamed. He removed her pants and violated her sexually amidst threats of killing her if she made any noise. On completion of the process he ordered her to leave and not to disclose what transpired. She ran to a friend's place but fearing dire consequences, did not divulge what had befallen her, neither did she tell her mother.
6. On the **29/1/2017 at 2.00 a.m.** the Appellant went onto her bed, used a T-shirt to stifle her and had carnal knowledge of her then went back to his bed. Fearing to be stabbed, she did not tell her mother. The following day, on a Monday, when she returned from school, PW2, her mother AMK asked her to check on what was on the bed, only to find two (2) panties that were blood stained. She removed the pant she wore as directed by her mother and it also turned out to be blood stained. She went to call a neighbour, Mama Jose, who would assist her as she divulged the information but her father walked in therefore she did not say anything.
7. The following day, on a Tuesday, she returned from school and narrated to her mother what happened. They reported the matter to the police, the Appellant was arrested and charged.
8. Upon being put on his defence the appellant denied having committed the offence in issue. He stated that he did separate with PW2 in 2007 and married another wife but reconciled with her in 2015. When he told her of the other woman, she was bitter and had a grudge against him. In February 2014 he got a job on contract basis at Murang'a. On 5/8/2016 they disagreed following accusations that he had come from a prostitute's place and he slapped her. On 28/1/2017 he returned home at 6.30pm but did not find complainant. She returned home at 9.00p.m and upon enquiring she refused to give any explanation therefore he slapped her twice. His action angered PW2 who left with the complainant. They returned on the 29.1.2017 and the following day he was arrested.
9. It was the contention of the Appellant that it was not conclusively proved that the Appellant '*caused penetration into the genital organs of the complainant*'; Allegations were untrue: the defence put up that was cogent was disregarded; essential witnesses were not called to testify therefore the court should have drawn an inference that the defence would have been adverse to the prosecution's case; the alleged panties (Exhibits) should have been adduced in evidence. That evidence adduced by PW1 was purely given following coercion/intimidation, and

existence of the grudge between the Appellant and PW2 was disregarded.

10. The respondent through the learned Counsel, **Mr. Mokuu** opposed the appeal. He urged that the Appellant was identified as the perpetrator of the offence as it happened during daytime; Age was confirmed by production of the birth certificate and evidence of the complainant and the fact of corroboration was by evidence of the P3 and the complainant testified willingly without coercion.

11. 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**).

12. **Section 20 (1) of the Sexual Offences Act** provides thus:

(1) 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, 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:

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”.

13. It is not in dispute that the complainant was the Appellant’s biological daughter. A birth certificate was issued to the complainant that bore the name of the Appellant as her father which was confirmation of what was stated by the victim.

14. The Appellant’s main complaint was that he did not act indecently by committing an act that caused penetration with the complainant. Penetration is defined by **Section 2 of the Sexual Offences Act** as:

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

15. It was the complainant’s evidence that it happened on the **29th January 2017**, but that was not the first time as it had happened previously on the **6th August 2016**. He had violated her sexually when the two (2) of them were at home. As he held her on the bed he threatened to stab her with a knife if she screamed. She alluded to having seen his father, the Appellant, hold a knife severally threatening to kill her mother whenever they fought therefore she suffered in silence. That he penetrated her by inserting his genital organs into hers amidst pain but she persevered and as he committed the act he threatened to kill her if she divulged the information to any person.

16. The next episode is stated to have happened on the **29th January 2019** when he sneaked into her bed at the time she approximated to have been **2.00a.m.** as her mother slept in their bed. He is alleged to have blocked her mouth using a T-shirt and whispered into her ear the threat that he would kill her if she made noise. She remained mum until her mother found her two (2) panties that had blood stains on the bed. She was examined on **1st February 2017**. Her hymen was perforated and she had lacerations and swellings on the labia majora and minora, the lower limbs on the medial aspect of the thighs (bilaterally) had pain and especially on movement. This was evidence of penetration.

17. The complainant identified the appellant as the person who violated her innocence being a child aged twelve (12) years then. The Appellant however argued that the whole story was a frame up as PW2 suspected that he had committed the alleged offence. That the only offence he committed was to slap the complainant after she returned home late and following the grudge that existed between him and PW2 the child was intimidated into lying. He alleged that the problem came up after he married another wife, issues that were not suggested to the complainant and PW2 in cross examination. The complainant explained circumstances that made her not reveal what was going on at the outset. On cross examination she explained that the Appellant would be violent and on several occasions he threatened to kill PW2 using a knife and as he committed the heinous act he threatened her as well. On further cross-examination the complainant was categorical that there was some light from the moon that was bright. The same drifted in through the window which enabled her to see him and that the Appellant also whispered threats into her ear hence she recognised his voice. The Appellant being her father, it was unlikely that she could be mistaken about his voice.

18. The trial Magistrate had the opportunity of seeing and hearing the complainant testify. He noted her demeanour and believed her having weighed her evidence against that of the Appellant. This was in accordance with **Section 124 of the Evidence Act**. From the foregoing I affirm the conviction.

19. On sentence, the Complainant was a child of tender years, the trial Magistrate having taken into consideration circumstances in which the offence was committed did not misdirect himself. Although the minimum sentence provided by **Section 20 (1) of the Sexual Offences Act** is ten (10) years imprisonment, the sentence imposed of **twenty (20) years** was reasonable. In the premises, I confirm the sentence. In the result, the appeal is dismissed in its entirety.

20. It is so ordered.

Dated, Signed and Delivered in Kiambu this 12th day of September, 2019

L.N. MUTENDE

JUDGE