



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

(CORAM: CHERERE-J)

CRIMINAL APPEAL NO.40 OF 2019

PMM.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against Conviction and Sentence in SO Criminal Case No. 12A OF 2016

in Principal Magistrate's Court at Gatundu by Hon. C.M.Makari (RM)

on 21st March, 2018)

JUDGMENT

The Trial

1. **PMM (hereinafter referred to as the Appellant)** has filed this appeal against conviction and sentence on a charge of incest by male contrary to section 20(1) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge are that
2. The prosecution called 4 witnesses and the defence 5 witnesses. **PW1 EWM**, the complainant stated that on 05.05.16 at about 05.00 pm, the Appellant who is her father asked her to accompany him to a place near Githotokoni river to collect firewood and when they got there he defiled her. She stated that she reported the matter to her mother the same day and she was escorted to the police station and to hospital the following day.
3. **PW2 AWM**, the complainant's mother stated that when she arrived home on 05.05.16 at about 07.30 pm, complainant told her that she had been defiled by the Appellant. She stated that she escorted complainant to the police station and to hospital the following day and Appellant was arrested a week later and charged.
4. **PW3 Dr. Wycliffe Omol**, produced the complainant's P3 form **PEXH. 5** he filled on 10th May, 2016 and it showed that the complainant had a freshly torn hymen and was bleeding from the genitalia as a result of which he concluded that there was evidence of penetration.
5. **PW4 CPL URBANUS NDOLO**, the investigating officer investigated the complainant and charged the Appellant.

THE DEFENCE CASE

6. When the Appellant was put on his defence, he gave a sworn defence and denied the offence. He stated that he was at Kanyoni Shopping Centre with Mwangi and Gitau on the date and time that the offence was allegedly committed and did not return home until after 08.30 pm. He told court that complainant complained of stomach ache the following morning and he asked his wife to take her to hospital and was surprised when he was later arrested and charged with an offence that he did not commit.
7. **DW2 SAMUEL MWANGI WAWERU** and **DW3 DOMINIC MWAURA CHEGE** stated that on the material date, they were with the Appellate at Kanyoni Shopping Centre up to about 5.30 pm. **DW4 JOHN GITAU KIMONDO** stated that he was with the Appellate at Kanyoni shopping Centre upto about 08.00 pm. **DW5 JN** stated that complainant was her sister and the Appellant her father. She stated that she was at home with the complainant on the material date and denied that Appellant and complainant had left home together to go and collect firewood on that date.

8. The learned trial magistrate considered the evidence and finding the charge proved sentenced Appellant to 20 years' imprisonment.

The Appeal

9. Aggrieved by the conviction and sentence, the appellant lodged the instant appeal on 23rd April, 2018. From the amended grounds of appeal and written submissions by the appellant, I have deduced the following issues: -

- i. That he was not properly identified**
- ii. That the prosecution case was contradictory and inconsistent**
- iii. That there was a grudge between Appellant and his wife PW2**
- iv. That the defence was not rebutted**

10. When the appeal came up for hearing on 11th September, 2019, Appellant submitted that he was wholly relying on the written submissions filed on same date.

11. *Ms. Ndombi, learned State Counsel submitted that the charge was proved; that age was proved by way of a certificate of birth and that the issue of identification did not arise because the Appellant is complainant's father. Counsel also submitted that penetration was proved by way of a P3 form **PEXH. 5**.*

12. *This being a first Appeal, this Court has a duty to evaluate the evidence, analyze it afresh and draw its own conclusion, while bearing in mind that it did not have the advantage of seeing and hearing the witnesses testify as did the trial Court, and give due allowance for that (See **Isaac Ng'ang'aKahiga v Republic [2006] eKLR**).*

13. I have considered the evidence on record in the light of the grounds of appeal and the submission on behalf of both and I will address the issues as hereunder.

i. Identification

14. The complainant stated that she is Appellant's daughter a fact that was confirmed by the Appellant and the issue of identification does therefore not arise.

ii. That the prosecution case was contradictory and inconsistent

15. Appellant stated that there was contradiction concerning the time that him and his wife arrived home on the material date but that in my considered view is a non-issue that does not go to the core of the charge.

iii. Grudge between Appellant and his wife PW2

16. Although there is evidence that the Appellant and his wife have since parted ways, there is no evidence of existence of any grudge between them at the material time.

vi. That the defence was not rebutted

17. Complainant was the sole witnesses to the commission of the offence. I have considered the provisions of **Section 124** of the Evidence Act Cap 80 Laws of Kenya which provides that:

notwithstanding the provision of section 19 of the Oath and Statutory Declaration Act, where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in a proceeding against any person for an offence, the accused person shall not be liable to conviction of such evidence unless it is corroborated with other material therefore implicating him.

18. **Further; Section 124** of the Evidence Act Cap 80 Laws of Kenya provides that:

Provided that in criminal cases involving a sexual offence the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings the court is satisfied that the alleged victim is telling the truth.

In light of section 19 of the Oath and Statutory Declaration Act, if the court is receiving the evidence of a child of tender age, it must be of the opinion that she/he possessed of sufficient intelligence to understand the duty of speaking the truth. If such a child willfully gives false evidence on oath, he/she will be guilty of perjury.

19. Whereas it is on record that the complainant was indeed defiled, the trial court did not make a finding or record in the proceedings the basis on which it satisfied itself that the complainant was telling the truth.

20. The issue in question is whether it was the Appellant who committed the sexual assault against the complainant. The Appellant denied the offence and raised the defence of alibi. Appellant called witnesses including one of his daughters who was at home with the complainant on the date that she alleges to have been defiled all of whom corroborated his defence of alibi.

21. The trial court rejected the Appellant's defence of alibi on the ground that the Appellant did not give notice of the same to the prosecution. The Court of Appeal in the case of **Kiarie v Republic [1984] KLR** held:

“An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable.”

22. In the case of **Victor Mwendwa Mulinge vs Republic [2014] eKLR** the Court of Appeal held: -

“Even if the appellant raised the defence of alibi for the first time during the trial, the prosecution ought to have applied to adduce further evidence in accordance with Section 309 of the Criminal Procedure Code to rebut the appellant's defence”.

23. Section 309 of the Criminal Procedure Code provides that: -

“If the accused person adduces evidence in his defence introducing new matter which the advocate for the prosecution could not by the exercise of reasonable diligence have foreseen, the court may allow the advocate for the prosecution to adduce evidence in reply to rebut it.”

24. The prosecution did not apply to the court to obtain evidence for the purpose of rebutting the alibi of the Appellant. With due respect, the magistrate fell into error in disregarding the alibi on the ground that the prosecution had not been given notice of the same whereas the law mandated the prosecution to apply to adduce further evidence in accordance with Section 309 of the Criminal Procedure Code to rebut the Appellant's defence which they failed to do.

25. I have considered the judgment of the trial court and I find that the Appellant's defence of alibi was not appropriately considered. I am of the considered opinion that the alibi which was well corroborated cast a reasonable doubt on the uncorroborated prosecution case and the learned trial magistrate ought to have given the Appellant the benefit of the doubt.

Disposition

26. In the end; I hereby reach a conclusion that the case against the Appellant was not proved beyond any reasonable doubt rendering the conviction unsafe. Accordingly, the conviction is hereby quashed and the sentence set aside. The appellant is set at liberty unless otherwise lawfully held. It is hereby so ordered.

DATED, DELIVERED AND SIGNED IN KIAMBU THIS 13th DAY OF September 2019

T. W. CHERERE

JUDGE

IN THE PRESENCE OF

Court Assistant - Nancy & Morris

Appellant - Present

For the state: - Mr. Kasyoka