



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL APPEAL NO. 15 OF 2018

PNM.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from Original Conviction and Sentence in Kyuso Principal

Magistrate's Court Criminal Case No. 107 of 2016 by Hon. B. M. Kimtai (SRM) on 13/07/16)

J U D G M E N T

1. Upon arraignment in Court, **PNM**, the Appellant, was charged with the offence of **Incest** contrary to **Section 20(1)** of the **Sexual Offences Act No. 3 of 2006**. Particulars of the offence were that on the **22nd** day of **March, 2016** in **Ngomeni Location** of **Kyuso Sub-County** within **Kitui County** being a male person, intentionally caused his penis to penetrate the vagina of **BJ** a female person who was to his knowledge his granddaughter.
2. In the alternative he was charged with the offence of **Committing an Indecent Act with a Child** contrary to **Section 11(1)** of the **Sexual Offences Act No. 3 of 2006**. Particulars of the offence were that on **22nd** day of **March, 2016** in **Ngomeni Location** of **Kyuso Sub-County** within **Kitui County**, intentionally touched the vagina of **BJ** a child aged **12 years** with his penis.
3. After full trial he was convicted and sentenced to **life imprisonment**.
4. Aggrieved, he appeals on grounds that; He was not granted sufficient time to prepare for his case and defence; he was not given a lawyer and the enmity between him and PW2 was not considered.
5. Facts of the case were that on the **22nd** day of **March, 2016** PW2 **EP**, the wife of the Appellant and grandmother of the Complainant respectively left them at home at about **8.00 a.m.**, going to the Chief's formal gathering (Baraza). In the meantime, the Appellant sent the Complainant's siblings, **J, K** and **M** to go and tether cows at the field and asked her to heat some food for him. She complied but when she took the food to him he held her hand, led her to his house and locked the door. He went ahead to violate her sexually. She screamed and her grandmother who decided to return home after the Chief's Baraza was postponed ran to her aid. She opened the door and found them inside the house on the bed. She went and told PW3 **Rhoda Muthui** who went and examined the child. She was taken to **Kyuso District Hospital** where she was examined by PW4, **Francis Sako** a Clinician who found her having a freshly broken hymen. The matter was reported to the police. PW5 **No. 102032 PC (W) Esther Wairimu** investigated the matter, caused the Appellant to be arrested and charged.
6. Upon being put on his defence, the Appellant who made an unsworn statement stated that he returned home on the material day to be confronted with allegations that he had defiled his granddaughter. His relatives escorted him to the police station where he was arrested and subsequently charged.
7. The Appeal was canvassed by way of written submissions. It was urged by the Appellant that he was not given enough time to prepare for his defence as his first appearance in Court was on **5th April, 2019**, the case proceeded to hearing on the **4th May, 2019** and the Judgment was delivered on the **13th July 2016**. This, in his opinion was in contravention of **Article 51(1)** and **25(a)(c) & (d)** of the **Constitution**. That the trial was not fair since **Article 50(2)(h)** of the **Constitution** was not complied with and some of the questions that were asked on cross examination were not recorded. And, that his defence in respect of the enmity between him and PW2 was disregarded a factor that has enabled her to take his parcel of land which is in violation of **Section 152** of the **Criminal Procedure Code**.
8. The Appeal is opposed by the Respondent/State. It is urged that the Appellant was aware of the charges he was facing therefore he was at liberty to choose counsel of his choice and that the issue of a grudge having existed was not mentioned in the entire process therefore was an afterthought.

9. This being a first appeal, I am under a duty to subject evidence adduced before the trial Court to a fresh evaluation and analysis and draw my own conclusions. In doing so I must bear in mind the fact that I neither saw nor heard any of the witnesses therefore unable to comment on their demeanor (**See Kiilu & Another vs. Republic (2005) 1 KLR 174**).

10. The learned trial Magistrate has been faulted for fast tracking the case by concluding it in less than six (6) months. A speedy disposition of a case is called for purposes of accessing justice. This is an essential ingredient of the rule of law. It enables an Accused person's rights to be upheld. When the Appellant was arraigned in Court, charges were read to him and a date was given for pre-trial directions. This was a date set aside to deal with preliminary issues prior to the trial commencing which did take off on the **26th May, 2019** which was more than a month later.

11. The Applicant however contends that the time given was not sufficient for him to prepare for his case. **Article 50(2)(c)** of the **Constitution** provides thus:

“(2) Every accused person has the right to a fair trial, which includes the right—

(c) to have adequate time and facilities to prepare a defence;”

Throughout the proceedings it was not alleged by the Appellant that he was not provided with facilities that would enable him prepare for his defence. Witnesses testified and were cross examined as required by the law. In the premises, the allegation must fail.

12. The Appellant also complains that he was not informed of the right to be represented by an advocate of his choice and he was not provided with any.

Article 50(2)(g)(h) provides thus:

“(2) Every accused person has the right to a fair trial, which includes the right—

(g) to choose, and be represented by, an advocate, and to be informed of this right promptly;

(h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;”

13. The Court is expected to notify the Accused person of his right to be represented by an Advocate of his choice and where substantial injustice may result he ought to be provided with an Advocate retained by the State as expressly stated by the Constitution. It has been held that legal representation will be achieved progressively and not instantaneously. Currently Accused persons who may suffer prejudice as a result of having been charged with capital offences and in particular murder, are accorded representation. Children in conflict with the law are assigned Advocates on pro bono basis. The instant case does not attract a death penalty therefore failure to be assigned an Advocate retained by the State did not prejudice the Appellant.

14. It is alleged that the enmity between the Appellant and his wife was not considered as his arrest was beneficial to her. When PW2 testified, it was not suggested to her that she had taken what belonged to the Appellant and that she was even disposing off his land. In his defence he came up with the allegation of his wife selling off his properties after he was arrested. It was not alleged that there had been any disagreement between them prior to his arrest.

15. It was not in dispute that the Complainant was the Appellant's granddaughter and this was a fact within his knowledge.

16. The minor stated that the Appellant committed an act that caused penetration into her genital organs. She was examined and found to have bruised labias and a recently broken hymen. Her evidence as to the perpetrator of the act of the penetration was corroborated by evidence adduced by PW2 who found them in a compromising situation on the bed. The trial Court did not misdirect itself in concluding that the Appellant committed an incestuous act as alleged. Therefore, I confirm the conviction.

17. On sentence, it is contended that it was harsh and cruel. The proviso to **Section 20(1)** of the **Sexual Offences Act** stipulates as follows:

“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.”

The provision of law gives the Court the discretion of imposing a sentence of less than life imprisonment.

18. The minor told the Court that she was 12 years old and in standard six (6). The Appellant did not challenge her age. This being the case, I set aside the sentence imposed and substitute it with **fifteen (15) years imprisonment** to be effective from the **date of conviction and sentence** by the trial Court.

19. It is so ordered.

Dated, Signed and Delivered at Kitui this 11th day of September, 2019.

L. N. MUTENDE

JUDGE