



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

CRIMINAL APPEAL NO. 32 OF 2019

CMN.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an Appeal from the Judgment of Hon. J. N. Mwaniki (SPM) in the Senior Principal

Magistrate's Court at Makueni Criminal Case No.691 of 2015, delivered on 25th October, 2018)

JUDGEMENT

1. The appellant was charged with the offence of incest by male person contrary to section 20(1) of the Sexual Offences Act No. 3 of 2006.
 - Particulars being that on 13th day of November 2015 in Makueni District within Makueni County intentionally and unlawfully caused his penis to penetrate the vagina of MM who was to his knowledge his daughter aged 8 years.
2. On the alternative charge he was charged of committing an indecent act with a child contrary to section 11 (1) of the Sexual Offences Act No. 3 of 2006.
 - Particulars being that on the 13th day of November 2015 in Makueni District within Makueni County intentionally caused his penis to touch the vagina of MM.
3. He pleaded not guilty and was convicted after full trial and sentenced to serve 20 years imprisonment.
4. Being aggrieved by the above decision he lodged instant appeal and set out 6 grounds of appeal. Later he lodged amended grounds of appeal which he argued via written submissions attached to the same grounds.
5. The amended grounds are:-
 - (1) That the learned trial magistrate erred in law and facts when he failed to note that due process was not followed during the day of plea.
 - (2) That the learned trial magistrate erred in law when he conducted an unfair trial which breached section 207 (1) of the CPC.
 - (3) That the learned trial magistrate erred in law by failing to find that the age of PW1 was not proved beyond reasonable doubt.
 - (4) That the learned trial magistrate erred in law and facts when he accepted and relied on contradictory evidence that lacked credibility to base and sustain conviction and sentence.
 - (5) That the learned trial magistrate erred in law and fact by finding appellant guilty without taking into consideration the possibility of the entire matter wasn't affirmatively proved on medical evidence.
 - (6) That the learned trial magistrate erred in law and fact when he failed to take into account that the prosecution failed to produce crucial witnesses.

(7) That the learned trial magistrate erred in law and fact when he failed to consider his defence.

6. Parties agreed to canvass appeal via submissions. The prosecution relied on record and the appellant filed his submissions.

Appellant's Submissions:

7. The appellant submits that there wasn't recording of the language appellant used during the trial and on the day of the plea it wasn't shown if an interpreter was present, the nature of the interpretation if any. See the case of *Antony Njeru Kathiaru & Another vs Republic [2007] eKLR* and *David Waiganjo Wainaina vs Republic [2007] eKLR*.

8. The trial court conducted unfair trial contrary to Oaths and Statutory Declaration Act Cap 15 and the Evidence Act section 124 Cap 80. In this he submits that the witness was a child of 12 years old who was to be treated as a child of tender years when giving his evidence a voire dire examination was not done whereby PW2 was a child of 12 years as she had told the court that she did not know the meaning of swearing. Thus the reliance on her evidence and her brother's evidence (PW2), the learned trial magistrate ought to have cautioned himself. See also the case of *Oloos S/O Gai vs Republic [1960] EA 86* and also the case of *Woolmington vs The DPP [1935] AC 462*.

9. He therefore submits that fair trial was not conducted in a fair manner. On the other hand, on 11th May 2016 the Court Prosecutor applied to amend charges in the main count and the alternative count. The same were read but the plea was entered for Count 2 contrary to section 207 (1) of the CPC.

10. He submits that the age of PW1 was not affirmatively proved. There was no evidence tendered before court to ascertain the age of PW1 as at the time of the occurrence of the alleged offence. See the case of *John Otieno Obwar vs Republic HC Criminal Appeal No. 34B of 2010*.

11. The medical test done could not produce results that would prove the offence of defilements, and hence the medical tests done did not link the appellant to the offence. He further submits that the court erred in admitting the opinion evidence of PW4 without subjecting it to scrutiny; hence PW4 did not show that there was any penetration since the evidence demonstrates about vaginal walls not inside the vagina neither the brunt object mentioned was not defined, properly. If hymen was broken, it may well be that though if the complainant defiled she was so defiled by another person and not necessarily the appellant. From the evidence he submits that it was erroneous of the trial court satisfactorily hold that was penetration.

12. It is appellant's submission that essential witnesses were not summoned and produced before a court of law and give evidence. See the case of *Daniel Muli Mulyungi vs Republic HC Cr. No. 72 of 2012*.

13. He submits that he had serious grudges with PW3 and a neighbour to whom 1/3 of his land was sold by his relative. The said neighbour is a crucial witness mentioned as Rhoda.

14. He submits further that his defence was not given adequate consideration before being rejected as required. He says that he was arrested through fabrication to his children by the said Rhoda.

Duty of the First Appellate Court:

15. I am guided by the Court of Appeal case of *Okeno vs Republic (1972) E.A. 32* where the Court set out the duties of a first appellate court thus:-

"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs Republic (1957) E.A. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala vs R. (1957) E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, See Peters V. Sunday Post, (1958) E.A. 434."

Prosecution's Case:

16. PW1 the complainant was aged 12 years when she testified in court on 13/11/2017. She said appellant is her father. That on 13/11/15 she was at home in the kitchen chopping vegetables when the appellant went and told her to go to his house and pulled her onto his bed and had sex with her.

17. That J (PW2) and who is her brother went and found them in the act and said he would report the incident to the chief. That PW2 first reported the incident to their neighbour one Rhoda. Later police officers went to their home. The Area Chief, Mr. Musamba (PW3) also went and found her on the bed. Appellant had left then. She said she told PW2 about the incident but not her grandmother or her uncles.

18. She said she never conspired with one J to frame-up the appellant. That her mother died and she stays at children's home.

19. PW2 JM said on 13/11/15 he was at home cooking with the complainant when appellant called complainant and told her to go and arrange his (appellant's) things. He then found appellant who was on top of the complainant while she was naked. She saw complainant crying and told appellant he would report to the chief what he had witnesses. That he did report to the chief one Masamba (PW3) that he had

found the appellant raping the complainant. He said there was some boundary dispute and that appellant while in custody for raping his (PW2) other sister M had his land sold to one Rhoda.

20. PW3 Reuben Musamba, the Area Chief Itumbule said PW2 went to his home and told him that appellant had raped the complainant and urged him to go and save complainant. He said appellant has had other two allegations of rape leading to convictions and which were set aside on appeal. That he had allegations of having defiled his other daughter one M. He said he had no differences with the appellant person.

21. PW4 Doctor Emmanuel Loiposha identified and produced as exhibit complainant's PW3 form and post rape case form. He said complainant had fresh bruises on her outer vagina wall caused by a blunt object and had a broken hymen. He said there was high possibility complainant was defiled.

22. PW5 Corporal Cleophas Nyongesa said appellant had two previous allegations against him of defilement.

Defence Case:

23. In his unsworn defence the appellant said complainant is his daughter. That on 13/11/15 he went to the school where complainant and PW2 schooled. He found PW2 was not at school and left some shopping he had with the complainant. He went home and found PW2 planting and he joined him. He later went to a neighbour's home to teach for a fee and from where he was arrested. He met complainant by the road in company of a chief. That he was taken to a police patrol base and told that complainant had been defiled.

24. He said PW2 and complainant were bribed with food, money and clothes to implicate him. That complainant was taken to a neighbour's home, according to PW2, and had fingers inserted in her vagina to have him implicated. He said he has grudges with PW2 and a neighbour to whom 1/3 of his land was sold by a relative. He said his family only wants to grab his land.

Issues:

25. After going through the evidence and submissions on record, I find the issues are; ***whether the trial was fair and procedural? And whether prosecution proved its case beyond reasonable doubt?***

Analysis and Determination:

26. Under **Section 20 (1) of the Sexual Offences Act No. 3 of 2006.**

Section 20 (1) of The Sexual Offences Act provided:-

“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, granddaughter, 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 appellant 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.”

27. The ingredients of an offence of incest are as follows:- ***“relationship, within the meaning of the law and penetration”***

28. Section 22 of the Sexual Offences Act sets the test of specific relationships which may be considered for an offence of incest. **Section 22 (1) and (2)** provides:-

“(1) In cases of the offence of incest, brother and sister includes half- brother, half-sister and adoptive brother and adoptive sister and a father includes a half father and an uncle of the first degree and a mother includes a half mother and an aunt of the first degree whether through lawful wedlock or not.

(2) In this Act—

(a) “uncle” means the brother of a person's parent and “aunt” has a corresponding meaning;

(b) “nephew” means the child of a person's brother or sister and “niece” has a corresponding meaning;

(c) “half-brother” means a brother who shares only one parent with another;

(d) “half-sister” means a sister who shares only one parent with another; and

(e) “adoptive brother” means a brother who is related to another through adoption and “adoptive sister” has a corresponding meaning.”

29. The appellant and complainant have a father-daughter relationship. It is not in dispute both were together on 13/11/15. Appellant said he

met complainant at her school and gave her some shopping. He later in the evening found her along the roadside in company of a chief and did enquire what she was doing out at night.

30. On her part complainant said while at home in company of her brother PW2, the appellant sent her to his house to arrange some things and followed her, pulling her to his bed and defiled her. That PW2 found him in the act.

31. On his part PW2 said he found the appellant who is his father ‘*raping*’ the complainant and did tell him he would go to the Area Chief to report what he had witnessed.

32. PW3 said PW2 did report to him that he had found appellant ‘*raping*’ the complainant and urged him to go to her rescue.

33. PW4 who examined the complainant and completed her P3 form and post rape care form said there was high possibility she was defiled. He said he found she had fresh bruises on her outer vagina caused by a blunt object.

34. From the evidence on record and especially that of PW4, I have no doubt complainant had engaged in sexual intercourse. She said that she was with the appellant person. Appellant said he was implicated as he had some grudges with the PW2 and a neighbour to whom a portion of his land was sold.

35. He never said what was the exact nature of the grudges. He said it was PW2 who disclosed to him that complainant had fingers inserted in her vagina while at a neighbour’s home. That would not make PW2 sound it’s a person who had grudges with him. Appellant further said complainant and PW2 who are his children were bribed with food, clothes and money to implicate him.

36. He never said by who or how and where that was done. From the evidence on record there were no differences or hostilities that existed between appellant on one hand and PW2 and complainant on the other hand as would make the latter two make-up a case against the appellant.

37. From the totality of the evidence on record, there is no doubt it was appellant who engaged in sexual intercourse with the complainant. Complainant was aged 8 years and was his daughter. The appellant’s conduct was unlawful.

38. The prosecution proved its case beyond reasonable doubt and thus the appeal has no merits. Thus the court makes the following orders;

i) The appeal is dismissed, conviction is affirmed, and sentence confirmed.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKUENI THIS 11TH DAY OF OCTOBER, 2019.

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C. KARIUKI

JUDGE