



**REPUBLIC OF KENYA**

**IN THE HIGH OF KENYA AT NYERI**

**CRIMINAL APPEAL NO. 30 OF 2012**

**PKK.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(Appeal from the original conviction and sentence of the Hon, M.Nyakundi Resident Magistrate Nyeri Law Courts delivered on 3/02/2012 in S.O Case No. 11 of 2011)**

**JUDGMENT**

1. The appellant, **PKK**, was charged with the offence of incest by a male person contrary to **Section 20(1)** of the **Sexual Offences Act**. The particulars of the charge was that on the 20<sup>th</sup> February, 2011 at Mathakwaini area within Nyeri County he intentionally and unlawfully caused his member to penetrate the member of **BWK** a child aged 3 years who was to his knowledge his grand-daughter.

2. In the alternative, the appellant was charged with Indecent Act with a child aged 3 years contrary to **Section 11(1)** of the **Sexual Offences Act, 2006**.

**FACTS**

3. The evidence of the minor was that on that material date whilst her mother was at church the appellant whom she referred to as “**guka**” touched her “**susu**” using his finger which was covered with a blackish paper; the mother (**PW2**) of the minor testified and stated that on the 23/02/2011 at about 6.00pm whilst bathing the minor, she was told by the minor not to touch her private part as she was feeling pain; the minor went on to tell her that the appellant had touched her private parts using his finger and a piece of paper;

4. The minor was taken the next day for examination at the Nyeri Provincial General Hospital; where a P3 Form was completed by **PW4**; the appellant was arrested and subsequently charged and was found guilty and convicted on two counts the sentence imposed on the main charge was ten (10) years imprisonment; and the sentence imposed for the purported second count was a term of five (5) years; both sentences were to run concurrently;

5. Being aggrieved by both convictions and sentences, the appellant filed his Petition of Appeal on the 17<sup>th</sup> February, 2012 and raised the grounds of appeal as summarized hereunder;

(i) The evidence presented by the prosecution was at variance with the particulars on the Charge Sheet;

(ii) There was inconsistent and contradictory evidence; the trial court relied on hearsay evidence; there was insufficient evidence to sustain the conviction;

(iii) The prosecution did not prove the ingredients to the charge to the desired threshold;

(iv) That the trial magistrate disregarded the appellant’s defence on the existence of a grudge.

8. At the hearing hereof the appellant was represented by learned Counsel Mr.Wachira whereas Prosecuting Counsel for the State Mrs. Gicheha appeared for the State; both counsel made oral presentations hereunder is a brief summary of their rival submissions;

**APPELLANTS SUBMISSIONS**

9. The evidence of the minor (**PW1**) was that the appellant used the finger of his left hand and a blackish paper; the mother (**PW2**) also stated that the minor had told her that the grand-father had used his finger and a blackish paper; whereas the particulars state that the

appellant intentionally did an act of penetration with his member to a minor of three (3) years of age who was his grand-child the Charge Sheet; the appellant contends that the evidence that was tendered was at variance when looked at with the particulars set out in the Charge Sheet thereby rendering the Charge as defective;

10. A defective Charge Sheet is one which does not accord with the evidence in the committal proceedings because of the inaccuracies and deficiencies in the charge; by reason of the Charge Sheet being defective the appellant was denied a right to a fair trial;

11. In her evidence **PW2** confirmed the existence of a grudge between herself and the appellant who was her father in law; that the grudge was over the ploughing of a shamba; the appellant submitted that the presence of this grudge fuelled the accusations levelled against him;

12. The appellants prayer was that the appeal be allowed and the conviction be quashed and the sentence set aside;

### **RESPONDENTS SUBMISSIONS**

13. In response Prosecuting Counsel for the State submitted that in her evidence the minor repeatedly stated that her grandfather used his left finger to touch her; counsel conceded that the evidence on record did not support Count I on Incest; but is supportive of the alternative charge of Committing an Indecent Act with a Child;

14. The Charge Sheet was not defective as the Sexual Offences Act states that the offence can be committed if any part of the body is used to touch the genitalia of another;

15. The evidence of the doctor was that the minors genitalia was tender and the hymen was broken; it could not be ruled out that the finger could have caused such injuries;

16. The contention that a grudge fuelled the accusations was unfounded as the matter was not reported by the mother (**PW2**); that it was **PW3** a children's officer who was notified by the hospital who the referred the mother to the police;

17. That the minor was too young to implicate the grand-father due to the adults grudges; the minor was not privy to the grudge;

18. The fact that the appellant was granted bail pending appeal is not grounded on the fact that the appeal had overwhelming chances of success; but to the fact that the court was exercising its right to grant bail;

19. Counsel prayed that the conviction and sentence on the alternative count be upheld;

### **REJOINDER**

20. Even on the alternative count the particulars reads

***“... By causing his penis to touch the vagina...”***

21. The evidence tendered pointed to the finger used;

### **ISSUES FOR DETERMINATION**

22. After taking into consideration the submissions of both the Appellant and Respondent this court has framed the following issues for determination;

- (i) Whether the Charge Sheet was defective;
- (ii) Whether the appellant was positively identified;
- (iii) Whether the prosecution proved the key ingredients of penetration and age to the desired threshold;
- (iv) Whether the trial court disregarded the appellants defence;
- (v) Whether the sentences imposed were lawful;
- (vi) Whether to substitute the Charge.

### **ANALYSIS**

23. This court being the first appellate court it is incumbent upon it to re-evaluate and re-assess the evidence on record and arrive at its own independent conclusion bearing in mind that this court did not have the opportunity or benefit of hearing and seeing the witnesses as they testified. Refer to the case of **Okeno vs Republic (1972) EA 32**.

**Whether the Charge Sheet was defective:**

24. With regard to the allegations of the defective Charge, counsel for the appellant argued that there was a variance between the Charge Sheet and the prosecution evidence; that in her evidence the minor repeatedly stated that her grandfather used his left finger to touch her; whereas the particulars for the main charge and even on the alternative count read as follows;

**“... by causing his penis to touch the vagina...”**

25. All the evidence tendered by the witnesses pointed to a finger being used; counsel for the appellant submitted that this defect rendered the proceedings and conviction a nullity; Counsel for the State conceded that the evidence on record did not support the particulars; but that no prejudice was occasioned by the omission and that the evidence was supportive of the alternative charge of Committing an Indecent Act with a child;

26. Section 134 of the Criminal Procedure Code provides that the charge shall state the specific offence and the particulars shall give reasonable information on the nature of the offence; this means that the Charge Sheet is defective when it fails to disclose an offence;

27. Upon perusal of the Charge Sheet it is noted that it makes a clear reference to the offence of incest and the particulars also relate to the incest and thus discloses the offence;

28. A charge can be defective if it is at variance with the evidence adduced in support; but a defect in the charge does not necessarily lead to the automatic quashing of the conviction; the appellant must demonstrate that by reason of the of the defect/variance he was denied a right to a fair trial and was prejudiced; in this instance the appellant does not give details of the prejudice that was occasioned;

29. The court record shows that the plea was taken in a language the appellant understood; to which a plea of **“Not Guilty”** was entered; the record also shows that he participated in the proceedings through-out and was invited to defend himself; which goes to demonstrate that he was fully aware and was not in any way misled as to the nature of the offence with which he had been charged with; the sections of the offence and the Statement of Facts in Count I were sufficiently disclosed and established the nature of the offence that the appellant was faced with; which was that of Incest; and the appellant knew the exact offence that he was alleged to have committed and faced with;

30. As such this court is satisfied that the variance did not render the Charge Sheet incurably defective; this court finds no evidence of miscarriage of justice or prejudice occasioned to the appellant;

31. This ground of appeal is found lacking in merit and is disallowed.

**Whether the appellant was positively identified:**

32. The incident happened during the day and the evidence of the minor was that on that material date whilst her mother was at church the appellant whom she referred to as **“guka”** (grandfather); the minor stated that she was with her grandfather in **“our house”** on that material date; **PW2** narrated that she had left the minor in the custody of the grandfather as she went to attend church;

1. The fact that the minor mentioned that the appellant was her grandfather leaves no doubt that the minor was sure of the assailants identity; her evidence was corroborated by **PW2** in that she left the minor in the appellants custody who was the minors grandfather; from the evidence adduced this court is satisfied that evidence against the appellant on identification is credible and that this was a case of recognition; and that there was no mistake as to the identity of the appellant;

33. This court finds that the appellant was positively identified by way of recognition.

**Whether the prosecution proved the key ingredients of penetration and age beyond reasonable doubt:**

34. The key ingredients of the offence of incest are penetration and age; the appellant in his submissions stated that both had not been proved to the desired threshold;

35. **On penetration:** **PW1** stated that the appellant who was her grandfather was at their home when he touched her on her **“susu”** that is her private parts with his left hand finger which he had covered with a blackish paper and that she had felt pain during the act; **PW2** who was the mother of the minor told the court of her discovery when she was bathing the minor; she then took the minor to Nyeri Provincial Hospital for examination and treatment;

36. The doctor (**PW4**) who examined the minor found that the hymen was broken and made a finding that the minor had been defiled on several occasions; she tendered into court the P3 Form as an exhibit (**PExb.3**);

37. The trial court in its judgment made the following observation;

**“The doctor’s evidence that the hymen was broken and tenderness to the genitalia indeed is proof that there was some penetration into PW1’s vagina.....”**

**I have evaluated the evidence on record. The P3Form and the doctors report the hymen as broken. This is certain that there was penetration into PW1’s vagina.”**

38. This court is satisfied that from the narrative and description of the ordeal by the minor there was sufficient evidence on penetration; and that the medical evidence of **PW4** corroborated the evidence of the minor on penetration;

39. This court finds no reason to interfere with the trial courts finding that the appellant engaged in an act that caused penetration; and is satisfied that the prosecution proved this key ingredient to the desired threshold;

40. **On age;** The Charge Sheet reads three (3) years and in the '*voire dire*' test and in her testimony **PW1** states that she was three (3) years of age; her mother **PW2** stated that **PW1** was three (3) years and four months and she tendered into evidence the minor's Notification of Birth (**PExh.4**); the evidence of **PW4** the Doctor who testified and produced the medical evidence was that **PW1**'s estimated age was three (3) years at the time when the examination was carried out. This court has had occasion to peruse the P3 Form and confirms that the age of the minor indicated therein as being three (3) years.

41. The age of the victim is a crucial factor as it determines the sentence to be imposed. Age can be proved by medical evidence and it can also be proved by either a Birth Certificate or a Notification of Birth. In this instance there was the medical evidence of **PW4** who was a medical officer based at Nyeri Provincial Hospital who gave the estimated age of the minor as being three (3) years at the time the offence was committed and also at the time of the medical examination; there is also the Notification of Birth and together with the medical evidence tendered by **PW4** this was sufficient proof of the age of the minor.

42. This court is satisfied that the prosecution proved identification, penetration and the age of the minor to the desired threshold;

43. This ground of appeal is found lacking in merit and is disallowed;

**Whether the trial court disregarded the appellants defence;**

44. The appellant argues that the trial court failed to consider his defence on the existence of a grudge between himself and **PW2**;

45. The record shows that the trial court noted that it was the hospital which reported the matter to **PW3** the Children's Officer who then directed **PW2** to report to the police; it made the following observation in its judgment which reads as follows;

**"The other persons leave alone the minor could not have incriminated the accused person since they did not know him and have no interest in this matter and are not related to the minor...."**

46. This court is satisfied that the trial court properly directed its mind to the defence which it found to be lacking in merit as it was not **PW2** who initiated the first report; that it was the hospital which reported the matter to **PW3** the Children's Officer who then directed **PW2** to report to the police; as stated by the trial court in its judgment these other people had no interest in the matter; the minor was also found not to be privy to the grudge; and was also found to be too young to have implicated her grand-father due to the adults grudges;

47. The trial court found the defence to be a mere denial and upon having weighed the appellants defence as against the prosecutions the court was satisfied that the defence did not displace the prosecution's case and that the evidence overwhelmingly and directly pointed to the appellant as the assailant;

48. The trial court is found to have arrived at a correct conclusion;

49. This ground of appeal is found lacking in merit and is disallowed.

**Whether the sentences imposed were lawful.**

50. In this instance the trial court convicted the appellant after finding him guilty on two counts; and also sentenced him on two counts; this court has perused the court record at length and has not sighted the purported second count that the trial court proceeded to convict and sentence the appellant; there is an error that is plainly obvious as the appellant was only charged on one main count which was on the offence of incest; what exists is an alternative count arising from the same facts; it is this courts considered view that the trial court acted in error in deeming the alternative charge to be a second count;

51. This court finds that the decision of the trial court to convict the appellant on both the main charge and the alternative charge to be irregular and bad in law;

**Whether to substitute the charge;**

52. The above notwithstanding the evidence also discloses an offence that is minor and cognate to the main charge; this court being an appellate court has powers to invoke the provisions of Sections 179 and 186 of the Criminal Procedure Code and to substitute the conviction with an offence that is minor and cognate to the offence the appellant was charged with; particularly where all the key ingredients are in common and have been proved by the prosecution the appellant can be convicted of the minor offence although he was not charged with it;

53. This court reiterates that the facts and the evidence adduced herein are found to sufficiently prove the offence of Sexual Assault contrary to Section 5(1)(b) of the Sexual Offences Act; this court is therefore satisfied that this is a suitable case for substitution of the offence under the provisions of Section 179 and 186 of the Criminal Procedure Code which allow for the conviction on an offence even though the appellant was not charged with it;

54. The authorized sentence for Incest under proviso to Section 20 of the Sexual Offences Act which provides that where the minor is less than eighteen (18) years the sentence shall be life imprisonment; whereas Section 5(2) of the Act provides for a less severe sentence as it carries a minimum sentence of ten (10) years;

55. The appellant was the grandfather of the minor and being in a position of trust he breached this trust by perpetuating a heinous crime on a minor of a very tender age; this court will take into consideration the fact that the appellant was a first time offender and in sentencing him will impose the minimum term as provided by the law; that is a term of ten (10) years to run from the 3/02/2012;

### **FINDINGS**

56. For the forgoing reasons this court makes the following findings;

- (i) The appellant is found to have been positively identified; the prosecution is found to have proved the key ingredients that is penetration and age of the minor to the desired threshold;
- (ii) This is a suitable case for the substitution of the Charge as the facts as proved are sufficient to prove the offence of Sexual Assault contrary to Section 5(1)(b).
- (iii) The trial magistrate gave sound reasons for rejecting the appellants defence.
- (iv) The convictions and sentences on both the main charge and the alternative charge are found to be erroneous;

### **DETERMINATION**

15. The convictions on the main charge and the alternative charge are hereby quashed and sentences set aside;

16. In exercise of the power of the appellate court under Section 179 and 186 of the Criminal Procedure Code this court enters a conviction for the offence of Sexual Assault contrary to Section 5(1)(b) of the Sexual Offences Act; and sentences the appellant to serve a term of ten (10) years imprisonment to run from the 3<sup>rd</sup> February, 2012.

Orders accordingly.

**Dated, Signed and Delivered at Nyeri 1<sup>ST</sup> day of March, 2018.**

**HON.A. MSHILA**

**JUDGE.**