



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 92 OF 2015

F M MAPPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an Appeal from the conviction and sentence of Hon. T. N. Sinkiyian (Resident Magistrate) in Kangundo Principal Magistrate's Court Criminal Case No. 27 of 2014 (S.O.) delivered on 29th May, 2015)

JUDGEMENT

1. The Appeal herein arises from the conviction of Hon T. N. Sinkiyian Resident Magistrate dated 29th May, 2015 in **Kangundo Principal Magistrate's Court Criminal Case Number 27 of 2014 (S.O.)** wherein the Appellant was sentenced to life imprisonment.

2. Being aggrieved by the said conviction and sentence, the Appellant raised the following grounds of appeal:-

- i. The trial magistrate erred in both law and facts by failing to observe that the charges were not proved beyond reasonable doubt as required by the law.
- ii. That the trial magistrate erred in both law and facts by failing to observe the many contradictions among the prosecution witnesses.
- iii. That the trial magistrate erred in law and facts by failing to observe that she did not consider the Appellant's defence.
- iv. The trial magistrate erred in law and facts in that she shifted the burden of proof to the Appellant against the practice of law.
- v. The trial magistrate erred in law and fact in that the medical evidence was unsatisfactory.
- vi. The trial magistrate erred in law and fact in that the charge sheet was defective in nature.

3. This being a first appeal, I am obligated to re-evaluate the evidence afresh and come to my independent conclusion bearing in mind the fact that I did not have the benefit of seeing or hearing the witnesses testify (See **OKENO =VS= REPUBLIC [1972] EA 32**).

4. The trial court conducted a *voire dire* examination on the complainant and established that she could not understand the meaning of an oath and was aged 3 years which was tender years and thus opted to rely on the evidence of the baby's mother. The mother of the complainant **I S N** testified that she had left her child to sleep and went to a nearby church for service and came back shortly and found her child crying and on checking on the bed she stumbled upon the naked body of a stranger who turned out to be the Appellant who was her bother in-law and who informed her that he had come to her house in search of food. The following day the mother noticed the child had some whitish discharge from her private parts and on inquiring from the child she claimed that "*M alimunga na mti kwa kasusu*" loosely translated as "*M pricked her vagina with a stick*".

5. **Dominic Mbindyo (PW.1)** a Clinical Officer at Kangundo District Hospital testified that he examined the complainant and established that the hymen was broken and that she experienced pain while passing urine and he concluded that the minor had been sexually assaulted. He produced the P.3 form and treatment notes as exhibits.

6. **Corporal Salome Mining (PW.4)** testified that she received the Appellant who had been apprehended by a village elder and after conducting investigations preferred the charge against the Appellant. She also produced the child's baptismal card which indicated the date of birth as 15/11/2011. Upon being cross-examined the witness confirmed that upon checking the P.3 form she was of the view that the same was not conclusive of defilement.

7. The Appellant upon being put on his defence tendered an unsworn statement. He confirmed that he was an uncle to the complainant. He denied the allegations of 29/11/2014 but was only aware of the 6/12/2014 when the area village elder took him to Kangundo police station where he learned of the charges. He denied committing the alleged offence.

Submissions

8. It was submitted by the Appellant that the Prosecution did not establish that there was penetration and further that the evidence of the witnesses was full of contradictions and hence the case had not been proved against him beyond any reasonable doubt. The Appellant finally submitted that the trial court did not fully comply with the provisions of Section 31(4) and 33 of the Sexual Offences Act where the mother of the complainant was taken in as an intermediary. The Appellant penned off his submissions by stating that the trial court erred in convicting him with an offence under Section 20(1) of the Sexual Offences Act that relates to incest yet he had not been charged for the same.

9. It was submitted for the Respondent that the prosecution's case against the Appellant had been proved beyond any reasonable doubt. It was further submitted that the critical ingredients of the offence namely age of the complainant, proof of penetration and positive identification of the assailant had been proved. On the issue of age, it was submitted that a baptismal card was produced by the investigating officer (PW.4) which established the minor's age as 3 years. On the issue of penetration, it was submitted that the evidence of the doctor and the complainant's mother proved that there had been defilement. On identification, it was submitted that the mother of the complainant found the Appellant in bed with the minor and who engaged her in some conversation and therefore she was able to recognize him as her brother in -law and passed the name to the clan elder who apprehended him. The case of **ANJONONI & OTHERS =VS= REPUBLIC [1981] eKLR** was relied upon.

Determination

10. I have considered the submissions presented herein as well as the evidence adduced at the trial court. I find the following issues necessary for determination:-

i. Whether the prosecution's case had been proved against the Appellant beyond any reasonable doubt.

ii. Whether the sentence meted out on the Appellant was appropriate.

11. As regards the first issue, it is noted that the Appellant had been charged with an offence of defilement contrary to Section 8(1) (2) of the Sexual Offences Act No. 3 of 2006 as well as an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006. The trial court upon analyzing the evidence established that the Appellant had defiled the complainant but however went ahead to convict him for the offence of incest contrary to Section 20(1) of the Sexual Offences Act on the basis that the Appellant was an uncle to the minor.

The offences of defilement and incest entail the elements of penetration, age of the victim, positive identification of the assailant and the relationship of the assailant to the victim if it is on incest as the most essential ingredients which must be proved so as to sustain a conviction against the assailant. There is need to analyze each of these ingredients so as to establish whether or not the case against the Appellant had been proved against him beyond any reasonable doubt. Likewise there is need to establish whether the alternative charge of committing an indecent act with a child had been established by the prosecution.

On the issue of penetration, Section 2 of the Sexual Offences Act defines it as the ***"partial or complete insertion of the genital organ of a person into the genital organ of another person."*** The mother of the complainant (PW.2) stated that the child's vagina had some discharge and took her to hospital where Dominic Mbindyo (PW.1) a Clinical Officer attended to her and established that there were some lacerations and hymen was missing. The said clinical officer filled the P.3 form. The investigating officer Salome Mining (PW.4) who preferred the charges against the Appellant admitted on cross – examination that the details on the P.3 form was not conclusive of defilement. Indeed the clinical officer indicated on the P.3 form that there were neither tear nor discharge save only for a few epithelial cells which are naturally occurring. The mother to the minor stated that the minor informed her that the Appellant had pricked her vagina with a stick. The minor (PW.3) was called to the witness stand but could not testify and the trial court stood her down and relied on the testimony of her mother as an intermediary. As the clinical officer did not come out quite clearly regarding the issue of penetration and coupled by the fact that the investigating officer felt that there was no conclusive proof of defilement, I find that the issue of penetration had not been established to the required standard by the Prosecution.

On the issue of the age of the complainant, the charge sheet indicated her to be three (3) years old. A baptismal card was produced by the investigating officer which indicated the minor's date of birth as 15/11/2011 which tallied with the age shown on the charge sheet and hence I find the aspect of the age was established.

On the issue of identification, it was the evidence of the mother of the minor that on rushing home from church, she found her door had been opened and on entering inside and approaching the bed where her daughter was sleeping, she stumbled upon the Appellant who was then naked. The Appellant who was her brother in law engaged her in a conversation and assured her that he had entered the house in search of food. The mother to the minor later established that the Appellant had molested her daughter and lodged a complaint which led to his arrest. The Appellant was properly recognized by the Complainant's mother and therefore he was squarely placed at the scene of crime. He was well known to her and was not mistaken for somebody else and the two even conversed together. In the case of **ANJONONI & OTHERS =VS= REPUBLIC [1981] eKLR** the court stated as follows:-

"..... recognition of assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailants in some form or other."

On the issue of the relationship of the assailant to the victim, the mother to the complainant stated that the Appellant was her brother in law and hence the victim was the Appellant's niece. The Appellant in his unsworn statement stated that he knew the child he was alleged to have defiled. He confirmed that the child's mother I S N is married to his brother and so he was the uncle to the child named E. Section 20 of the Sexual Offences Act deals with incest by male persons. The same provides as follows:-

Section 20(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, 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 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.

(2) If any male person attempts to commit the offence specified in subsection (1), he is guilty of an offence of attempted incest and is liable upon conviction to a term of imprisonment of not less than ten years.

The complainant minor did not manage to tender her evidence even after the trial court had conducted a *voire dire* examination as it was established that she was of tender years and the court proceeded to treat the evidence of the mother of the minor as that of an intermediary. Indeed the minor's mother had earlier testified as prosecution witness number two after the doctor and when it was the turn of the minor to testify, it became difficult and hence her mother was to testify as an intermediary pursuant to Section 31(4) of the Sexual Offences Act due to the vulnerability of the minor. Since the minor was unable to testify further, the trial court was left with no option but to fall back on the evidence of the mother who had earlier testified. There was no prejudice suffered by the Appellant since he had cross-examined the mother of the minor at length and thus there was no miscarriage of justice. I am guided by the court of Appeal decision in the case of **M.M. =Vs= REPUBLIC -C.A. NBI Criminal Appeal No. 42 of 2003** [2014] eKLR where it was held thus:-

“Any requirement that insists on a child victim of defilement, irrespective of his or her age to testify in order to found a conviction would occasion serious miscarriage of justice. Section 33(a) of the Sexual Offences Act allows the court to rely on evidence of the surrounding circumstances of an alleged sexual offence in determining whether a sexual offence is likely have been committed.”

Going by the above authority, I find the evidence of the mother of the minor provided the surrounding circumstances of the alleged sexual offence. She found the Appellant naked on her bed ensconced with the child. The child later claimed that the Appellant had pricked her private parts with a stick. The question to be asked is ***“what was the Appellant doing at the home of his sister in law and more specifically lying naked on a bed with the complainant yet that was not his own house?”*** The irresistible conclusion one makes is that he must have sneaked into the home with the aim of molesting the minor while her parents were away. I am therefore not persuaded by the Appellant's unsworn statement that the charges against him were a frame up. It is instructive that as soon as he was arrested, he later ganged up with the complainant's father and had the mother of the minor kicked out of her matrimonial home for having pursued the case of the minor.

As the issue of penetration was not conclusively established by the Prosecution witnesses, I find the evidence adduced before the trial court established an offence of attempted incest upon the minor. The evidence of the doctor and mother of the minor established that there had been an indecent act by the Appellant upon the complainant. He was found by the minor's mother in flagrant delicto as he was lying naked with the minor. The evidence therefore proved an offence under Section 20(2) of the Sexual Offences Act.

Even though the Appellant had not been charged with the said offence, the provisions of Section 179 of the Criminal Procedure Code allows the court to proceed and convict an accused person for an offence not preferred but for which the evidence tendered proves the same. The evidence that had been tendered before the trial court established an offence of attempted incest contrary to Section 20(2) of the Sexual Offences Act No.3 of 2006 against the Appellant beyond any reasonable doubt.

12. As regards the second issue and in light of the foregoing observations, I find that the sentence meted out against the Appellant by the trial court was not appropriate since the issue of penetration had not been properly proved. The appropriate sentence should have been imprisonment for a term of not less than ten (10) years. The trial court had imposed a sentence of life imprisonment. The Appellant had presented his mitigation. I find the Appellant having been a first offender ought to have been given a lesser sentence. I am of the view that a sentence of ten years imprisonment would have been appropriate.

13. In the result, the appeal herein partly succeeds. The conviction and sentence of the trial court is hereby set aside and substituted with a conviction for the offence of attempted incest and the Appellant ordered to serve a sentence of ten (10) years from the 29/05/2015.

Orders accordingly.

Dated and delivered at Machakos this 16th day of May, 2018.

D. K. KEMEI

JUDGE

In the presence of:-

F M M - for the Appellant

Machogu - for the Respondent

Kituva - Court Assistant