



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.157 OF 2014

(An Appeal arising out of the conviction and sentence of Hon. M. Kivuti (Ms.) –RM delivered on 9th October 2014 in Kiambu CMC. CR. Case No.2196 of 2013)

B M M.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, B M M was charged with two (2) counts of **incest by male person** contrary to **Section 20(1)** of the **Sexual Offences Act**. The particulars of the offence were that on 10th September 2013 and on diverse dates between 1st January and 15th August 2013 respectively at Kasarani in Nairobi County, the Appellant intentionally and unlawfully caused his penis to penetrate the vaginas of J M, a girl aged 17 years and PW, a girl aged 14 years (hereinafter referred to as the complainants), who are his daughters. He was alternatively charged with two (2) counts of **committing indecent acts with children** contrary to **Section 11(1)** of the **Sexual Offences Act**. The particulars of the offence were that on 10th September 2013 and on diverse dates between 1st January and 15th August 2013 respectively, the Appellant intentionally and unlawfully touched the vaginas of the complainants, knowing that they were his daughters. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was found guilty as charged on the main counts of **incest**. He was sentenced to serve life imprisonment. He was aggrieved by his conviction and sentence. He has filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted on the basis of a defective charge sheet. He took issue with the fact that his rights to fair hearing were violated during trial contrary to **Articles 50(2)(g), (h), and (j)** of the **Constitution**. The Appellant complained that all the ingredients necessary to prove the charge were not established before the trial magistrate to enable the court convict him. He faulted the trial magistrate for failing to appreciate that crucial witnesses and exhibits were not produced during trial thereby prejudicing him. He was aggrieved that his defence was not taken into account before the trial magistrate reached the erroneous determination convicting him. He took issue with the fact that medical evidence adduced was insufficient since it did not connect him with the crime. He was of the view that he should have been medically tested to either prove or disapprove the medical evidence that was adduced. He was finally aggrieved that he had been convicted on the basis of circumstantial evidence which did not establish his guilt to the required standard of proof. In the premises therefore, the Appellant prayed that the appeal be allowed, the conviction quashed and the sentence imposed on him set aside.

During the hearing of the appeal, this court heard oral rival submission made by Ms. Kibungi for the Appellant and by Ms. Atina for the State. Ms. Kibungi submitted, *inter alia*, that the Appellant's rights to fair trial were infringed as envisaged under **Article 50(2)(g)** of the **Constitution** in that the Appellant was not availed witnesses' statements in advance before trial. She submitted that the Appellant had complained about this omission, and despite the complaint, he was not availed the same. Regarding the merits of the appeal, she submitted that the evidence adduced by the complainants was contradictory and inconsistent that the only inference that can be drawn is that they were not telling the truth. She wondered why the spermatozoa found in the 1st complainant's vagina was not subjected to medical examination to determine from who it came from. She insisted that the particular spermatozoa was not established to have come from the complainant. As regard the 2nd complainant, she submitted that she had old hymenal tears. It was not established who caused penetration. She urged the court to negatively infer the prosecution's failure to call a witness by the name of N who was mentioned by the complainants as being present when they were actually being sexually assaulted. Learned counsel submitted that taking into consideration the totality of the evidence, it was clear that the prosecution had failed to establish a cogent case to find the Appellant guilty as charged. She urged the court to allow the appeal.

Ms. Atina for the State opposed the appeal. She pointed out the uncontroverted fact that the Appellant was the father of the complainants. The issue as to the identity of the perpetrator was therefore not in doubt. She submitted that the evidence adduced by the complainants proved to the required standard of proof that the Appellant penetrated the complainants on diverse dates as enumerated by the complainants in their evidence before court. She urged the court to find that the complainants were indeed telling the truth. The complainants' testimonies were corroborated by medical evidence which was produced and established that indeed the complainants had been penetrated. Regarding

the Appellant's complaint that he had not been served with witnesses' statements prior to the hearing of the case, learned state counsel submitted that the Appellant was served with the requested documents and therefore cannot be heard to say that his rights to fair trial had been infringed. She submitted that the Appellant's defence was considered before the trial magistrate reached her verdict. She reiterated that the sentence imposed on the Appellant was legal. She therefore urged the court to dismiss the appeal.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced before the trial court and reach its own independent determination whether or not to allow the appeal. In doing so, this court is required to always bear in mind that it neither saw nor heard the witnesses as they testified and therefore cannot make any comments regarding the demeanour of witnesses. (See **David Agwata Achira –vs- Republic Criminal Appeal No.47 of 2003 (Court of Appeal at Kisumu)**). The issue for determination by this court is whether the prosecution adduced sufficient evidence to secure the conviction of the Appellant on the charge of **incest** contrary to **Section 20(1)** of the **Sexual Offences Act**.

There are several issues that came to the fore for determination by this court during the hearing of the appeal. The first issue is whether the Appellant's right to fair trial was infringed during trial. The Appellant argued that his right to fair trial as enshrined in **Article 50(2)(j)** of the **Constitution** was contravened in that he was not availed the prosecution's witnesses' statements prior to commencement of trial. This court has perused the proceedings of the trial court. It was clear to this court that on commencement of the trial, the Appellant asked the court to be availed witnesses' statements by the prosecution. The court ordered the prosecution to supply the Appellant with the witnesses' statements. There was delay in the Appellant being supplied with the witnesses' statements. However, before commencement of trial on 6th January 2014, the Appellant was supplied with the said witnesses' statements. If the Appellant suffered any prejudice, that prejudice was remedied when he was allowed to recall the complainants and their mother for further cross-examination by the trial court. This court therefore, finds the claim by the Appellant that his constitutional right to fair trial were infringed due to not being provided with prosecution witnesses' statements to be unsubstantiated and without merit. That ground of appeal is disallowed.

As regards the merit of the appeal, for the prosecution to establish the charge of incest against the Appellant, it was required to establish the following: that the Appellant was related to the complainants, that there was penetration, and in the case where the complainants are minors, the age of the complainants. **Section 22** of the **Sexual Offences Act** sets out the specific relationships that may be considered as constituting an offence of incest. **Section 22(1)** of the **Act** identifies a father as among the relationship where sexual relationship is prohibited with a daughter. In the present appeal, the complainants both testified that the Appellant, their biological father, sexually assaulted them on various dates as stated in the charge sheet. The 1st complainant, J M was at the material time aged 17 years. She produced a birth certificate which indicated that she was born on 8th May 1997. She narrated how the Appellant lured her into his bedroom before forcefully removing her clothes and then having sexual intercourse with her. As fate would have it, the mother of the complainants had travelled to Murang'a County to attend a funeral of a relative. Although the 1st complainant attempted to resist, the Appellant held her by the neck and managed to subdue her.

When the 1st complainant was struggling with the Appellant, the 2nd complainant P W M was standing outside the door to the bedroom and heard the commotion. She told the court what she heard during the incident. The Appellant warned the 1st complainant not to tell anyone what he had done to her. The 1st complainant told the court that she did not shower. She slept, and on the following day went to school. While at the school, she told her guidance and counselling teacher who told PW4 Winnie Wanjiru Njoroge, a Social Worker, who thereafter reported the incident to the police based at Kiamumbi Police Station. The 1st complainant was collected from the school and taken to Medecins San Frontiers (MSF), a medical clinic based at Mathare. The 1st complainant was seen by a clinical officer by the name Nafisa Bakari. On examination, she noted that there were bruises around the labia minora, there was hymenal tear at 9 O'clock position and a laceration around the posterior fourchette. A high vaginal swab test was done. Spermatozoa was found in the urine upon laboratory examination. The 1st complainant was treated and discharged.

The medical report prepared by Nafisa Bakari was produced as an exhibit on her behalf by her colleague PW3 Barbara Salano Kere. The 1st complainant was seen by Dr. Shako based at the Police Surgery. She prepared a P3 form which indicated that the 1st complainant had tenderness on the supra pubic section and tenderness on the inner aspects of both thighs. Both labias were inflamed and were tender. The P3 form filled by Dr. Shako was produced on her behalf by PW7 Dr. Joseph Maundu.

The 2nd complainant testified that prior to the Appellant sexually assaulting the 1st complainant, he had earlier, on several occasions also sexually assaulted her. She produced her birth certificate which indicated that she was born on 23rd September 1999. She was therefore 14 years at the time of the sexual assault. Medical examination confirmed that her hymen was absent. The Appellant denied committing the offences. He infact accused the complainants of being pawns of their mother and her aunt who wanted to dispossess him of his land by having him imprisoned.

On re-evaluation of this evidence, this court finds that the prosecution established to the required standard of proof beyond any reasonable doubt that indeed the Appellant had sexual intercourse with the two complainants, who to his knowledge were his biological daughters. Penetration was established by the medical evidence that was produced before court by PW3 and PW7. Although the Appellant challenged this evidence, this court holds that the medical evidence corroborated the evidence that the complainants adduced before court. This court saw no reason why the complainants could deign to implicate their biological father whom they told the court they loved in such an offence if indeed he had not sexually assaulted them. The complainants' testimony before court had a ring of truth in them. The proviso to **Section 124** of the **Evidence Act** clearly applies. The complainants were obviously telling the truth when they testified that it was the Appellant who had sexually assaulted them.

For the above reasons, this court finds no merit with the appeal lodged by the Appellant against conviction. The appeal against conviction is dismissed. As regard sentence, this court holds that the sentence imposed on the Appellant is legal. The prosecution established to the required standard of proof that the complainants were minors at the time of the sexual assault. Under the Proviso to **Section 20(1)** of the **Sexual Offences Act**, where it is established that the complainants were children, then the sentence that will be imposed for an accused found guilty of incest is life imprisonment. The Appellant was therefore correctly sentenced to serve life imprisonment. The appeal against sentence is similarly dismissed. It is so ordered.

DATED AT NAIROBI THIS 7TH DAY OF JUNE 2018

L. KIMARU

JUDGE