



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MURANG'A
CRIMINAL APPEAL NO. 30 OF 2017

A M M.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[An appeal from the judgment in Criminal Case No. 1833 of 2014 in the Senior Principal Magistrates' Court at Kigumo by A. Ogonda, Resident Magistrate, dated 23rd December 2016]

JUDGMENT

1. The appellant was adjudged guilty of *incest* of a minor contrary to section 20 (1) of the Sexual Offences Act, No. 3 of 2006. He was sentenced to *life imprisonment*.

2. The particulars were as follows-

“On the night of 27th and 28th July 2014 at unknown time at K [particulars withheld] within Murang’a County, being a male person caused his penis to penetrate the vagina of J.W.W [particulars withheld] a female person aged 7 years who was to his knowledge, his daughter.”

3. The appellant has preferred an appeal. There are *four* grounds. First, that the charge was invented by his estranged wife. Secondly, that there was insufficient medical evidence to support the charge. Thirdly, that the learned trial magistrate disregarded the defence proffered by the appellant; and, fourthly, that the sentence was harsh and excessive. In a synopsis, the appellant contends that the prosecution did *not* prove the charge beyond reasonable doubt.

4. The appeal is contested by the State. Learned State Counsel, *Mr. Mutinda*, submitted that all the ingredients of the offence were proved beyond reasonable doubt. Regarding the sentence, he submitted that the penalty given was the minimum sentence provided by the Act. I was beseeched to dismiss the appeal.

5. This is a first appeal to the High Court. I have re-evaluated all the evidence on record and drawn my own conclusions. In doing so, I have been careful because I neither saw nor heard the witnesses. See *Pandya v Republic* [1957] E.A 336, *Okeno v Republic* [1972] EA 32, *Felix Kanda v Republic* Eldoret, High Court Criminal Appeal 177 of 2011 [2013] eKLR.

6. The complainant was a class one pupil. She was unaware of her age. After a brief *voire dire* examination, the learned trial magistrate formed the opinion that she did not comprehend the nature of an oath. The minor gave *unsworn* evidence.

7. I am satisfied that the trial court complied fully with the procedure of taking the evidence of the minor. See *Republic v Peter Kiriga Kiune* Criminal appeal 77 of 1982 (unreported), *Johnson Muiruri v Republic* [1983] KLR 445.

8. The complainant said that the appellant was her father. She could not remember the date of the incident. On the material night, the complainant and the appellant were asleep in their house. It a two-roomed dwelling. They were the only ones in the bedroom but occupying separate beds. She said that at about 4:00 a.m., the appellant crept into her bed. He was naked. He did “bad manners” to her.

9. She testified that-

“I was in extreme pain. He [points to accused] was lying on top of me. I was asleep. I know he put something inside me...I don’t know what he was doing down there but it was bad manners...I did not tell anyone until my mum came back”

10. When the appellant cross examined the minor, she said she knew it was the appellant because they were the only ones in the room; and, that she heard his voice. He told her not to tell anyone about the incident.

11. PW2 was the complainant’s mother. In her testimony, she said they were separated. She denied any knowledge of the incident. She went as far as stating that the complainant was *lying*. This was in contrast to her earlier statement to the police. She was declared a *hostile witness* and cross examined by the prosecution. It is only after extensive cross examination that she conceded that the complainant went to visit her father (the appellant) on the material day; and, that the complainant spent the night there.

12. The following day, she consulted an unnamed lady. The latter advised her to report the matter to the chief. She reported the matter to the police who issued her with a P3 form. She took her daughter to Maragua Hospital. When cross examined further by the appellant, she denied that she had fabricated the charges to tarnish the name of the appellant.

13. PW3 was Charles Kamotho. He was a clinical officer at Maragua Hospital. The complainant was examined on 28th July 2014. PW3 prepared the P3 form (exhibit 2). He also produced the treatment notes (exhibit 1) and the Post Rape Care Form (exhibit 3). He testified that the complainant’s hymen was broken. HIV was negative. There were no spermatozoa. But a high vaginal swab showed some pus cells. He administered some antibiotics and anti-retroviral drugs. The appellant was not examined at the hospital.

14. PW4 was Corporal Olale. He said the age of the complainant was provided by her mother. PW4 arrested the appellant. He said that at the time of the arrest, he “*did not find anything on the [appellant] that [he] could collect as an exhibit*”. He was aware that the appellant and PW2 were estranged; but he denied that the charges were driven by malice.

15. When the appellant was placed on his defence, he gave an *unsworn* statement. He denied the charge. He stated that he has six children. He said that he was at a loss why he was arrested and charged.

16. A number of issues arise from that evidence. I will deal first with the age of the complainant. The age of the complainants is *material* in offences of this nature. See *John Wagner v Republic* [2010] eKLR, *Macharia Kangi v Republic* Nyeri, Court of Appeal, Criminal Appeal 346 of 2006 (unreported).

17. The age of the complainant was not proved. However, she fell within the *bracket* of a child of *below* eighteen years. She was a toddler in class one. I am fortified in that conclusion from the recent decision of the Court of Appeal in *Martin Wanyonyi Nyongesa v Republic*, Eldoret, Criminal Appeal 661 of 2010 [2015] eKLR.

18. I am also satisfied that the complainant was a *daughter* of the appellant. The appellant never contested the matter.

19. From the evidence of the clinical officer and the complainant, I entertain *no* doubt whatsoever that the complainant was defiled. Her hymen was broken; a high vaginal swab showed some pus cells.

20. The only other question is whether the appellant perpetrated this heinous crime. The issue is intertwined with *identification* of the appellant. Although the incident took place in pitch darkness, the complainant was emphatic that she recognized her father from his voice.

21. In *Limbambula v Republic* [2003] KLR 683, the Court of Appeal stated that evidence of voice identification is receivable so long as the person giving the evidence is familiar with it, recognizes it and there is no *mistake in testifying to that which was said and who said it*.

22. However, there is some lingering doubt left by the complainant's mother. The mother was declared a *hostile witness*. With respect, it was erroneous for the learned trial magistrate to rely at all on her evidence. It is only after extensive cross examination that the mother conceded that the complainant went to visit her father (the appellant) on the material day and spent the night there. Her evidence is completely *unreliable*. PW1 gave *unsworn* evidence. Her mother *forsook* her in her hour of need.

23. The appellant contends that the charges were *fabricated*. He is *estranged* from his wife. He flatly denied committing the offence. Our criminal justice system places the *burden of proof* firmly upon the shoulders of the Republic. *Woolmington v DPP* [1935] AC 462, *R v Kipkering arap Koske & another* 16 EACA 135 (1949), *Bhatt v Republic* [1957] E.A. 332.

24. Granted the conflicting evidence between the complainant and her mother, I am afraid there is some *doubt* whether the appellant defiled the minor. In the end I cannot confidently say that the prosecution proved the offence beyond *reasonable doubt*. It must follow as a corollary that the conviction was *unsafe*.

25. The upshot is that the appeal is allowed. The conviction and sentence are *set aside*. The appellant shall be released *forthwith* unless otherwise lawfully held.

It is so ordered.

DATED, SIGNED and DELIVERED at MURANG'A this 5th day of July 2018.

KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of-

The appellant (in person).

Mr. Mutinda for the Republic.

Ms. Dorcas and Mr. Kiberenge, Court Clerks.