



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO. 231 OF 2014

N WAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of Honourable J. Nthuku Senior Resident Magistrate, delivered on 11th September, 2014 in Nakuru Chief Magistrate's Court Adult Criminal Case No. 234 of 2013)

JUDGMENT

1. The Appellant, Nahashon Wang'ombe, was arraigned before the Chief Magistrate's Court, Nakuru charged with the principal count of incest contrary to section 20(1) of the Sexual Offences Act. The facts alleged in the charge sheet were that on diverse dates between 01/01/2013 and 03/11/2013 at Mti Moja in Rongai District within Nakuru County, the Appellant caused his penis to penetrate the vagina of MM, a female person who was, to his knowledge, his sister.

2. The Appellant faced an alternative charge of committing an indecent act with the same MM by touching her buttocks with his hands on the same dates and place.

3. The Appellant pleaded not guilty and the case went on to full trial. The Prosecution called five witnesses. When put on his defence, the Appellant gave an unsworn statement and called one witness. The Learned Trial Magistrate was persuaded that a case had been made beyond reasonable doubt and convicted on the principal count. She then imposed a sentence of life imprisonment – the only sentence allowed by the statute for the offence where the victim is less than eighteen years old.

4. The Appellant is aggrieved and has appealed to this Court raising the following grounds of appeal:

1. That the trial magistrate erred in law and in fact by relying on medical evidence adduced by the prosecution yet it was not corroborative to the charge.

2. That the learned trial magistrate erred in law and in fact by failing to appreciate that vital witnesses were not called upon by the prosecution.

3. That the learned trial magistrate erred in law and in fact by incurably defective

4. That the trial magistrate erred in law and in facts by relying on the evidence of a single witness that was not corroborated.

5. That the learned trial magistrate erred in law and in fact by relying on contradicting and incredible pieces of evidence.

5. As the first appellate Court, I am duty bound to re-evaluate and reconsider all the evidence adduced during the hearing afresh and come to my own conclusions about all the elements of the crimes charged. In doing so, I am to be guided by two principles. First, I must recall that I must make appropriate allowance for the fact that I did not have a chance to see or hear the witnesses. This means that I must give due deference to the findings of the Trial Court on certain aspects of the case. Second, in re-evaluating and re-considering all the evidence, I must consider the evidence on any issue in its totality and not any piece in isolation. This principle constrains me to reach my own conclusions on the totality of the evidence as opposed to merely using the Trial Court's findings as a foil to endorse or reject its findings. See ***Okeno v Republic* [1973] E.A. 32; *Pandya vs. R* (1957) EA 336, *Ruwala vs. R* (1957) EA 570.**

6. The Appellant filed written submissions and during the hearing of the appeal, informed the Court that he did not wish to add anything orally.

7. Mr. Chigiti, Prosecution Counsel, argued the appeal on behalf of the State. He submitted that there was sufficient evidence to convict in

the case. First, he submitted that the relationship between the Appellant and the Complainant was not disputed. Second, Mr. Chigiti submitted that penetration was proved through the oral testimony of the Complainant and the medical documents produced as exhibits. Third, Mr. Chigiti submitted that the age of the victim was proved through an age assessment form.

8. To establish the charged offence, the Prosecution needed to prove beyond reasonable doubt the three ingredients alluded to by Mr. Chigiti:

- a. That there was blood relationship between the Appellant and the Complainant – in this case sibling relationship;
- b. That there was penetration;
- c. That the penetration was caused by the Appellant;

9. Additionally, for sentencing purposes, the Prosecution needed to establish that the Complainant was less than eighteen years old. The age of the Complainant also has implications for the third element of the offence: whether penetration was caused by the Appellant. Where the Complainant is less than eighteen years old which is the age of consent and the person charged with the offence of incest is an adult, and penetration is established there is an irrebuttable presumption that penetration was caused by the adult since the minor is incapable of consenting to the act. In the present case, the claim was one of forcible penetration anyway.

10. MM, the Complainant, testified that the Appellant had raped at least five times. She is a Standard 2 pupil. She testified that she at least recalled 03/02/2013. On that day, at around 3:00pm, she was at home with the Appellant and her younger siblings. She told the Court that the Appellant, who is her eldest brother, asked the other siblings to go out of the house. He then locked the house. According to MM, the Appellant proceeded to remove her panties and then removed his trousers. He made her lie on the ground where they usually slept (they had no beds in the house). He then inserted “his thing for urinating in [her] thing for urinating” while covering her face. MM testified that all in all, the Appellant had done “tabia mbaya” to her five times. Further, she testified that the Appellant warned her that he would kill her if she ever told anyone about it. Finally, MM testified that despite the threat she told her mother but her mother elected to do nothing about it. It was only after the last time when it happened that her mother finally told her other brother, K, who, then informed the Area Chief and action was taken.

11. F K is the other brother MM referred to in her testimony. He testified that he got a call from a neighbor – Mama Dennis – to tell him that the Appellant had raped his sister. That was on 03/11/2013. K works in Nairobi. He went home three days later. Upon talking to MM, he learnt from her that the Appellant had raped her four other times. He reported the matter to the Area Chief then crafted a trick to get the Appellant to go to the Chief’s office so that he could be arrested.

12. The Area Chief, Evans Onger, confirmed this account stating that K tricked the Appellant that he (the Chief) was going to give the Appellant a recommendation letter so that he could get a job in Nairobi. When the Appellant showed up at the Chief’s office, he was arrested and handed over to the Police.

13. Meanwhile, MM was taken for medical examination. This was done by Dr. Justus Nondi of the PGH Nakuru. Upon examination done on 04/03/2014, he found that MM had an old broken hymen. She also had urinary tract infection (UTI). All the other tests were negative and had no injuries. The doctor concluded that there had been defilement. He produced the P3 Form he filled up; the PRC Form and the results of the lab tests. The doctor also produced an age assessment report showing that MM was thirteen years old.

14. The final witness was the Investigating Officer, Corporal Judy Nyangure of Menengai Police Station. She testified about getting a call from the Area Chief about the arrest of the Appellant who was at the Chief’s office, Kiamunyi. She went there, collected him and commenced investigations. Cpl Nyangure also arranged for MM to be taken to the hospital for examination, and then made the charging decision.

15. Put on his defence, the Appellant denied that he ever raped his sister. He told the Court that it was his brother, K, who had hatched this plan and put MM onto it to settle scores with him because of a land dispute they had. The Appellant’s only witness, Dora Nyakinyua’s only testimony was that she had employed the Appellant who remained her employee until the day K came and told her that he wanted to go somewhere with the Appellant.

16. Based on this evidence tendered, the Learned Trial Magistrate had no hesitation in reaching a guilty verdict. The Learned Trial Magistrate dismissed the defence finding it implausible in the following terms:

The child [Complainant] had no grudge against her brother [Appellant]. The allegation by the Accused that [the Complainant] was poisoned against him by his other brother cannot hold any water because, first of all, the brother learnt about his sisters ordeal from a neighbor, secondly the evidence of the Complainant coupled with the broken hymen confirms that these are not stories fabricated to suit the Accused brother...I am not persuaded that the [Appellant] was framed by the brother. It defeats reason that one would involve his sister with such traumatic and heinous allegation which impacts negatively in order to fix his brother for whatever reason. I am convinced that the Complainant was cogent and truthful. I believe her evidence.

17. After carefully sifting through the evidence and re-evaluating it, I am equally satisfied that the offence of incest was proved beyond reasonable doubt. First, the sibling relationship between the Appellant and the Complainant was not in dispute – and the oral evidence of PW1 (Complainant) and PW2 (brother to Appellant) is sufficient.

18. On penetration, the oral testimony of the Complainant and the medical evidence seen together prove the fact of penetration. As the Learned Trial Magistrate who saw and heard the witnesses concluded, the Complainant, though young, gave very cogent and straightforward evidence. She was a truthful witness.

19. This analysis goes to the third element of the link between the penetration and the Appellant. The Complainant was quite categorical that it was the Appellant who did “tabia mbaya” to her and that he had done it four other times before. Her testimony remained unshaken during cross-examination.

20. It was proper for the Learned Trial Magistrate to dismiss the defence narrative as so implausible as to have no inherent possibility that it could be true. First, if the Complainant had been coached by K to make up the story, as a child, some material inconsistencies would have come up during examination-in-chief or cross examination. None did. In fact, the Complainant struck the Learned Trial Magistrate as completely truthful. Second, it is noteworthy that the Appellant asked K no question at all during cross examination. This would have been his opportunity to pursue his theory that they had a land dispute. He asked no question at all in this regard. Third, the Appellant did not as much as carry his burden of production to show that there was a land dispute in order to trigger the Prosecution’s burden of persuasion to disprove it. It was his mere say-so when put on his defence. Indeed, the theory finds its first utterance or inkling when the Appellant is put on his defence.

21. The Appellant complains that the medical evidence only showed a broken hymen but did not necessarily prove penetration. He is wrong. The medical evidence is mutually reinforced by the oral evidence of the Complainant which the Court believed, with reasons, to be truthful.

22. The Appellant also complains that the mother (whom the Complainant first reported the rapes) and a certain Mama Dennis (who reportedly called K to tell him about the rapes) were not called as witnesses and invites the Court to make an adverse inference against the Prosecution for their absence. The Appellant relies on *Bukenya & Another v Republic (1972) EA 549*. The rule is that the Prosecution has no obligation to call witnesses who are not essential to its case. It may be that the mother was uncooperative as hinted at by the Complainant or not available – but she was not essential to prove the elements of the crime charged. The same applies to the mentioned Mama Dennis.

23. The Appellant further protests that the charge sheet was defective. He says so for two reasons: first, that the count did not contain the age of the Complainant, and, second, that it did not contain the words “intentionally” and “unlawfully”.

24. There is no requirement to include the age of the Complainant or victim in the charge in an offence for incest. It is a complete offence punishable by law to commit an incest act with a blood relation irregardless of the age of the other person. However, the penalty is enhanced if the Complainant is less than eighteen years old as was the case here. Hence, not explicitly mentioning the age of the Complainant in the charge sheet does not render it fatally defective.

25. In my view, there is also no need to include the words “intentionally” and “unlawful” in the charge sheet when charging incest. These are categorical offences created by the statute and any penetration done with the knowledge that the complainant is a sister is unlawful.

26. In any event, these would be minor defects in the charge sheet which would have been curable under section 382 of the Criminal Procedure Code. The Court of Appeal had occasion to deal with this question in *JMA vs Republic [2009] KLR 671*. The High Court had quashed a conviction on the main charge of defilement and found the appellant guilty on the alternative charge because the charge sheet did not contain the words “intentionally and unlawfully” making the main charge fatally defective. On that question, the Court of Appeal held that:

This was a case in which the superior court should have invoked the provisions of Section 382 of the Criminal Procedure Code to cure the irregularity which on the facts and circumstances of this matter was minor.

27. The same applies here.

28. Lastly, the Appellant thinks that it was an error for the Learned Trial Magistrate to convict based on the evidence of a single witness who was a child. He cited *Musikiri v R (Nyeri High Court Criminal App. No. 120 of 1986)* and *Roria v Republic (1967) EA 583*.

29. Unfortunately for the Appellant, the position in our law has since changed. In 2003, the Kenyan Parliament passed Criminal Law (Amendment) Act 2003 in Legal Notice No. 5 of 2003 which amended Section 124 of the Evidence Act. The proviso to that section now states:

Provided that where in a criminal case involving a sexual offence the only evidence is that of a child of tender years who is the alleged victim of the offence, the court shall receive the evidence of the child and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the child is telling the truth.

30. One need not belabour this point. The only issue is whether the Trial Court was persuaded, for reasons recorded, that the child was telling the truth. In the section of the judgment reproduced above, the Learned Trial Magistrate was quite explicit in giving the reasons why she believed the Complainant was telling the truth.

31. The upshot is that the Appeal herein is wholly without merit and it is hereby dismissed. As the Appellant received the only sentence allowable under the statute given the age of the Complainant – no appeal against sentence can lie.

32. Orders accordingly.

Delivered at Nakuru this 20th day of September, 2018

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JOEL NGUGI

JUDGE