



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO 149 OF 2016

B J B.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal against the original conviction and sentence of Hon R.K Ondieki PM,

delivered on 9th March 2016 in Criminal Case No. 176 of 2015

in the Principal Magistrate's Court at Kaloleni)

JUDGMENT

The Appeal

1. The Appellant was charged with a main count of incest contrary to section 20 (1) of the Sexual Offences Act. The particulars of the charge were that on diverse dates between 2008 and 2013 at [Particulars Withheld] village, Mwawesa Location in Rabai Sub-County in Kilifi County within Coast Region, the Appellant, being a male person, caused his penis to penetrate the vagina of A U J a child then aged between 11 and 16 years, who was to his knowledge his daughter.

2. In the alternative to the main count, the Appellant was charged with committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act, 2006. The Appellant pleaded not guilty to both counts, and was after full trial, convicted on the main count of incest and sentenced to serve life imprisonment.

3. The Appellant is aggrieved by the judgment of the trial magistrate and has preferred this appeal against the conviction and sentence. The Appellant's grounds of appeal as stated in his Petition of Appeal and Grounds of Appeal that he filed in Court are as follows:

- a) That the learned trial Magistrate erred in law and fact by convicting the Appellant to life imprisonment on the charges of incest that was not proved to the standard required by law.
- b) That the learned trial Magistrate erred in law and fact by conviction the Appellant to life imprisonment without noting that the prosecution case was governed by mass contradictions.
- c) That the learned trial Magistrate erred in law and fact by convicting the Appellant to life imprisonment without noting that the findings in the P3 form do not support.
- d) That the learned trial Magistrate erred in law and fact by convicting the Appellant to life imprisonment without putting into consideration his defence statement.

4. Okanga & Company Advocates for the Appellant filed written submissions in support of the said grounds, which were highlighted during the hearing of the appeal on 20th July 2017. Mr. Okanga in his submissions indicated that they were abandoning the second ground of appeal. On the ground that the prosecution did not prove their case beyond reasonable doubt, it was urged that the offence was reported, and the complainant examined by the medical doctor seven years after its commission. Therefore, that it was not safe for the trial judge to have relied on the said medical evidence after such a long time.

5. In addition, that by the time the complainant was testifying in court, she was already 18 years old. He faulted the evidence of the

complainant who was PW1, and indicated that the prosecution had failed to show clearly where the Appellant committed the offence and what steps the complainant had taken to report the sexual offences he committed. The evidence of the complainant's mother, who was PW3 was also faulted on the ground that it was hard to believe that she had not noticed that the daughter was being defiled for such a long time, and only come to learn about this act 7 years later.

6. Furthermore, that the complainant's sister who was PW2 indicated in here evidence that she heard the Appellant tell the complainant how he loved her more than the mother, but PW2 did not specifically state that she witnessed the Appellant defile the complainant. On the evidence produced by PW4, which was a letter written by the complainant, the Appellant submitted that the contents of the letter did not explicitly state that the complainant was defiled by the Appellant.

7. The Appellant also relied on his defence in the trial Court, where he denied having committed the offence and indicated that he was being framed. Further, that the Appellant's wife had admitted that they were having marital problems with the Appellant, and she was contemplating divorcing the husband in the year 2008, the same year that the Appellant was accused of having committed the offence.

8. Lastly, the Appellant indicated that the trial court judgment had not given reasons why it had proceeded to sentence him to the maximum sentence of life imprisonment, yet the charges had been preferred 7 years later. The Appellant submitted that that the punishment meted upon him was thus manifestly excessive, and relied on the case of **M.K vs Republic (2015) eKLR**.

9. Mr. Fundi, the learned prosecution counsel, made oral submissions at the hearing of the appeal, and indicated that the age of the complainant had been proved by the birth certificate produced as an exhibit in court, and that all the ingredients of the offence of incest had been proved by the evidence presented. In addition, that the evidence of the complainant was corroborated by that of PW2 who was her sister, and that of the Doctor who confirmed penetration of the complainant. Further, that the relationship of the Appellant and the complainant was that of daughter and father and was proved by PW1 and PW2.

10. Finally, on the issue of the sentence of life imprisonment, Mr. Fundi submitted that the same was appropriate, considering that the offence was committed by a person who ought to have been a role model to the victim, and over a period of years.

11. My duty as the first Appellate court is to re-evaluate the evidence and draw independent conclusions as held in **Okeno v Republic (1972) E.A. 32**. However, I am alive to the fact that I did not have the advantages enjoyed by the trial court of seeing and hearing the witnesses, as was observed in **Soki v Republic (2004) 2 KLR 21** and **Kimeu v/s Republic (2003) 1 KLR 756**.

The Evidence

12. A brief summary of the evidence adduced before the trial court is as follows. The prosecution called six witnesses. PW1 was A U J, the complainant, who testified that the Appellant was her father, and used to play sex with her between 2008, when she was aged 9 years old, and 2013. She testified that the Appellant used to suckle her breasts, and to kiss and suckle her tongue. Further, that he used to defile her at night and her sister witnessed it once, and that she wrote a letter to her mother informing her of the same.

13. The complainant's sister, W M J, testified as PW2, and also testified that the Appellant was her father, and that while asleep she would sometimes be woken up in their bedroom by the sounds of her father telling the complainant that he loved her more than their mother. Further, that in April 2015, PW1 told her the Appellant had sworn to cut her into pieces.

14. PW3 was P M, the Appellant's wife, who testified that in 2008 she wanted to divorce her husband, and the complainant told her he used to touch her breasts. Further, that in June 2015 she was given a letter by one Ramadhani that was written by the complainant, to the effect that the Appellant was defiling her and sucking and touching her breasts. The said Ramadhani Nyae testified as PW4, and he confirmed that on 6th June 2015 while at a wedding ceremony, he found the said letter in the complainant's bag and gave it to PW3. The matter was then reported to the police, and the complainant taken to hospital and examined.

15. Balington Charo (PW5), who was a Clinical Officer at Mariakani Hospital, testified that he examined the complainant on 22nd June 2015, and that the examination showed that the complainant had no injury on her private parts, and that her hymen was absent. He produced the P3 form as Exhibit 2. The last prosecution witness (PW6) was IP Onyango Gucha who received the report of defilement from the complainant and her mother on 22nd June 2016, and charged the Appellant. He produced the letter written by the complainant to her mother, and the complainant's birth certificate as exhibits.

16. The trial court found that the Appellant had a case to answer and complied with section 211 of the Criminal Procedure Code in this respect. The Appellant gave unsworn testimony without calling any witnesses. He testified that his marriage has been on the rocks for a long time, and that he was being framed up with the charges by his wife.

The Determination

17. I have considered the arguments made by the Appellant and the Prosecution, as well as the evidence before the trial court. I find that there are two issues for determination in this appeal. These are whether the Appellant was convicted for the offence of incest on the basis of sufficient and satisfactory evidence, and if so, whether the sentence imposed on him by the trial Court was excessive.

18. On the first issue, the offence of incest is provided under section 20(1) of the Sexual Offences Act as follows:

“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.”

19. In order to prove incest under section 20(1) of the Sexual Offences Act, it is not necessary to prove penetration. The prosecution may prove either penetration or an indecent act to obtain a conviction. Penetration is defined under section 2 of the Sexual Offences Act as the partial or complete insertion of the genital organs of a person into the genital organs of another person. An indecent act is defined in the said section as an unlawful intentional act which causes—

(a) any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration;

(b) exposure or display of any pornographic material to any person against his or her will;

20. The relevant evidence adduced in the trial Court as to incest was that of PW1 and PW2, who stated in their testimony that the Appellant was the complainant's father. PW3 also corroborated this evidence. In addition, the Appellant did not dispute that the complainant was his daughter with PW3.

21. The complainant, who was PW1, also testified that the Appellant played sex with her, touched and suckled her breasts and her tongue and also defiled her. However, given that the complainant first informed PW3 of the alleged incest in 2008, and the offence was reported in June 2015 and testimony by the complainant given in Court on 7th October 2015, seven years later, it was necessary that the complainant's evidence be corroborated as the lapse of time between the time of commission of the offence and the reporting of the same affected her and PW3's credibility as witnesses.

22. I am in this respect persuaded by the holding by the English Court of Appeal in **R vs Makanjuola (1995) 1 WLR 1348**, that where there is evidential basis for suggesting that the evidence of a witness may be unreliable, then the Court should warn itself of the danger of relying on the uncorroborated evidence of such a witness.

23. The corroborating testimony by PW2 was to the effect that she heard the Appellant say some words, and she did not testify to witnessing any acts of penetration of the complainant and/or commission of indecent act by the Appellant. Likewise, PW3 also did not testify to being present or witnessing any such acts. In addition, the medical evidence adduced by PW5 is also not sufficient corroboration, as it only established that there was penetration of the complainant in terms of her hymen being absent, but not the time of the said penetration or the perpetrator.

24. The remaining supporting evidence of the Appellant's alleged acts of incest is the content of the letter that was testified to by PW3, PW4 and PW6, and that was produced in the trial Court as an exhibit. It is my finding that the said letter cannot discharge the requirement of corroboration, for reasons that it was not independent evidence, having been written by the complainant. The Kenyan Court of Appeal held in **Shah vs Republic (1984) KLR 674** that corroboration is some independent evidence of some material fact, which implicates an accused person and tends to confirm that he is guilty of the offence.

25. In the present appeal, the material fact is the penetration of the complainant and/or or commission of an indecent act with the complainant by the Appellant. The letter that was produced as an exhibit by PW4 did not present an independent witness to this fact, and on the contrary was a reiteration by the complainant of what she stated in her testimony.

26. I therefore find that there was insufficient evidence to convict the Appellant for the offence of incest, which was not proved beyond reasonable doubt. In the premises, his conviction and sentencing by the trial Court were unlawful.

27. I accordingly allow the Appellant's appeal for the foregoing reasons, and quash his conviction by the trial Court for the offence of incest contrary to Section 20(1) of the Sexual Offences Act. I also set aside the sentence of life imprisonment imposed upon the Appellant for this conviction, and order that the Appellant be and is hereby set at liberty forthwith unless otherwise lawfully held.

28. It is so ordered.

DATED AND SIGNED THIS 16TH DAY OF AUGUST 2018

P. NYAMWEYA

JUDGE

DELIVERED AT MOMBASA THIS THIS 3RD DAY OF OCTOBER 2018

D. O. CHEPKWONY

JUDGE