



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL APPEAL NO. 31 OF 2017

DMNAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the Sentence in Mutomo Senior Resident Magistrate's Court Criminal Case (S.O.) No. 53 of 2014 by Sandra Ogot R M on 20/03/15)

J U D G M E N T

1. **DMN**, the Appellant, was charged with the offence of **Incest** contrary to **Section 20(1)** of the **Sexual Offences Act No. 3 of 2006**. Particulars of the offence were that on the **16th** day of **September, 2014** at about **9.00 p.m.** in **Ikutha District** within **Kitui County** intentionally caused his penis penetrate the vagina of **KN** who to his knowledge was his step sister.
2. In the alternative he was charged with the offence of **Committing an Indecent Act with a Child** contrary to **Section 11(1)** of the **Sexual Offences Act No. 3 of 2006**. Particulars of the offence were that on the **16th** day of **September, 2014** at about **9.00 p.m.** in **Ikutha Sub-County** within **Kitui County** intentionally touched the vagina of **KN** with his penis a child aged **13 years**.
3. Facts of the case were that **PW1**, the Complainant, **KN** was the step sister of the Appellant. On the **16th** day of **September, 2014** at about **7.00 p.m.** the Appellant went home with some alcohol and asked for some chapati that the Complainant and her siblings did not have. The Complainant and her biological siblings, **M, W** and **M** decided to go to bed. At about **1.00 a.m.** or thereabout the Complainant heard the Appellant calling her to collect the cup that was outside. She complied and as she entered the house the Appellant held her from behind covered her mouth with one hand, took her to bed and violated her sexually. The Complainant was sharing a bed with her siblings. In the course of the act **PW2 WN** her sibling was kicked and when she asked who was kicking her, a voice she believed was for the Appellant insulted her. **PW3 MZ** who was on the same bed was also pushed in the process but when she sought to know who did it there was no response. As events were unfolding **PW5 NM** their father heard **PW2** asking who was kicking her. He got up and heard the Appellant's voice. He asked her what he was doing in the girls' room and he said that he had no idea. He ordered him to stop pretending to be drunk and leave. He went to relieve himself only to find him lying at the door. In the meantime **PW9 AN** the mother of the Complainant was away from home. She returned home on the **15th** day of **October, 2014** when the Complainant informed her what had befallen her. They took the Complainant to hospital. On her examination her hymen was missing which was evidence of some penetration into her genitalia. The matter was reported to the police. **PW7 No. 83757 P C (W) Roselyn Nelima Wekesa** arrested the Appellant who was subsequently charged.
4. When put on his defence the Appellant stated that he was arrested following allegations that he had defiled the Complainant. Denying the charge, he stated that he has land issues with his father as he disposed off a parcel of land that his late mother left him and as a result they disagreed. He reported the matter to the clan and during the meeting, his father said he would sell the land. This made him to move to his own homestead. That his father was selling land because he had married another wife but he could not work. He argued that had he defiled the Complainant his father would have reported the incident to the village elder.
5. The learned trial Magistrate considered evidence adduced and reached a finding that the case had been proved against the Appellant beyond reasonable doubt. She convicted the Appellant on the main charge and sentenced him to **twenty (20) years imprisonment**.
6. Aggrieved, he appealed on the grounds that: Identification was not proved; evidence adduced was contradictory; medical evidence adduced was not satisfactory.
7. The Appeal was canvassed by written and oral submissions that I have considered.
8. This being the first Appellate Court, I am duty bound to re-evaluate and re-consider all evidence adduced at trial afresh bearing in mind that I had no opportunity of seeing or hearing witnesses who testified. I must therefore come to my own conclusion with that in mind. **(See Okeno vs. Republic (1973) EA 32)**.

9. This being a case of incest the Prosecution was duty bound to prove:

- (i) The relationship between the victim and the perpetrator of the act of defilement.
- (ii) Proof of the act of penetration.
- (iii) Identity of the perpetrator.
- (iv) The age of the victim (for purposes of sentencing).

10. The relationship of the Complainant and the Appellant was not in dispute. The Complainant was the Appellant's half sister as she shared one parent with him. And this was within the knowledge of the Appellant.

11. The Complainant was examined six (6) weeks later. Her hymen was not intact. A missing hymen may result from any object being inserted into the female genitalia including engaging in sexual intercourse. Penetration may be partial or complete insertion of a genital organ into another person's (**See Section 2 of the Sexual Offences Act**). The fact that the hymen was missing was proof of penetration into the genitalia of the Complainant.

12. The Prosecution called evidence to prove the fact that the Appellant was the perpetrator of the act of penetration into the Complainant's genitalia. It is however urged by the Appellant in his submissions that identification in the circumstances was not cogent.

13. The incident happened between **1.00 a.m. – 2.00 a.m.** It was dark but witnesses argue that they recognized the voice of the Appellant. In the case of **Chogo vs. Republic (1985) KLR 1** the Court of Appeal stated as follows:

“... There can be no doubt that the evidence of voice identification is receivable and admissible in evidence and it can, depending on the circumstances carry as much weight as visual identification, since it would be identification by recognition rather than at first sight. In Rosemary Njeri vs. Republic (1977) Criminal App. No. 27, a victim of the offence of grievous harm testified she heard the Appellant say “break her legs.” The reception of this evidence was upheld in the High Court on the first appeal and also on the second appeal in which this court stated:-

“Mr. Otieno has submitted that identification by voice is less satisfactory than visual identification. In our view, it can be equally safe and free from error, more so if the identification takes place at night. We agree with the two (2) lower courts that in the particular circumstances of this case, the appellant and the complainant being familiar with each other for many years, the possibility of error was excluded.... In relation to the identification by voice, care would obviously be necessary to ensure (a) that it was the accused person's voice (b) that the witness was familiar with it and recognized it and (c) that the conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who said it....”

14. All witnesses who testified were members of the Appellant's family and could not be doubted in the case of being familiar with his voice intonation. PW1 was a girl aged fifteen (15) years old. Prior to the fateful hour, she stated that at about **7.00 p.m.** the Appellant went to their house and he was drinking alcohol. They gave him a chair to sit on and a cup that he was using to drink alcohol. They (PW1, PW2 and PW3) went to sleep. By then per the evidence adduced the Appellant was staying at his own homestead with his family as he was already married. At about **1.00 a.m.** he called out PW1 by her name **“K”** and instructed her to go and collect the cup. He was outside the house. When she went to get the cup that is when he grabbed her from behind, took her to the bed as he covered her mouth. He lifted her clothes, tore her pant and pushed her onto the bed then inserted his penis into her vagina. It was dark but she recognized his voice.

15. PW2 was disturbed on the material night as she was kicked and when she sought to know who had kicked him the person whose voice intonation she identified as that of the Appellant insulted him. He called her an idiot.

16. PW3 on the other hand was not answered when she complained of being pushed but when their father asked about the person he identified himself by name therefore she recognized his voice.

17. PW5 their father woke up and heard a person asking who was kicking her. He heard the Appellant insulting PW2. He engaged the Appellant in a conversation. He asked him what he was doing there and he responded by stating that he had no idea. He ordered him to leave but when he came out the house he found him sleeping outside by the door. After relieving himself he went back to sleep. When he woke up he found him having left.

18. These were witnesses who could not be mistaken as to the voice of the Appellant. On cross examination PW5 denied having falsely accused him.

19. In his defence the Appellant came up with an explanation that the charges were trumped up because of land. He alleged that his father was selling land that belonged to his late mother that he was to inherit. It is however surprising that when PW5 testified he did not make any suggestion of the sort in cross examination this would have enabled the witness to respond to it. His allegation which should have been viewed as an afterthought could not be a basis for false accusation as alleged.

20. The Appellant also questioned why the matter was not reported to any administrator soon thereafter. It was explained by PW5 that he was an aged man and he could not interrogate his daughter about what happened. It was only after her mother returned home from her place of employment/engagement that she reported the matter to her.

21. It was not suggested that the Complainant was a wayward girl who could have had her hymen stretched as a result of perverse behaviour. Therefore she had to be believed when she stated that the person who violated her sexually was her elder brother.

22. Evidence adduced by the Prosecution proves the fact that the perpetrator of the act that caused penetration in the Complainant's genitalia was the Appellant.

23. On sentence, the Complainant was born on the **29th September, 1998** per the child health card that was availed. This implies that at the time of the offence she was sixteen (16) years old hence a minor below the age of 18 years. **Section 20(1)** of the **Sexual Offences Act** provides thus:

“(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.”

24. In the case of **Bernard Kimani Gacheru vs. Republic, Criminal Appeal No. 188 of 2000**, the Court of Appeal stated thus:

“It is now settled law, following several authorities..... that sentence is a matter of discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if the Appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.”

25. The Appellant was sentenced to serve twenty **(20) years imprisonment** which is a legal sentence. However, he was a first offender. In his mitigation he stated that his wife and five (5) children would be forced to go to her maiden home suggesting that they solely depended on him.

26. Considering all these circumstances, I dismiss the Appeal on conviction, which is hereby affirmed. However, I do set aside the sentence imposed and substitute it with a sentence of **fifteen years imprisonment**, effective from the date of conviction.

27. It is so ordered.

Dated, Signed and Delivered at Kitui this 13th day of November, 2018.

L. N. MUTENDE

JUDGE