



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CORAM: R MWONGO, J

CRIMINAL APPEAL NO. 27 OF 2016

(Being an Appeal from the Original Conviction and Sentence in Criminal Case No 436 of 2015 in the Senior Resident Magistrate's Court, Engineer, (G N Opakasi-RM)

L E.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

Background

1. The appellant L E was charged with incest contrary to **section 20** as read with **section 20(1)** of the **Sexual Offences Act, 2006**. The particulars were that on the 12th day of May 2015 at 4 PM within Nyandarua County being a male person, caused his penis to penetrate the vagina of G A a child aged seven (7) years who to his knowledge is his daughter. There was also an alternative charge of causing his genital organs to come into contact with the genital organs of G A, a child aged seven years, contrary to **section 11** read together with **section 11(1)** of the **Sexual Offences Act**.

2. In the trial court the appellant denied the charges and a full hearing proceeded culminating in his being convicted and sentenced to life imprisonment. Aggrieved by the judgement of the trial court, the appellant has appealed on the following amended grounds of appeal:

- a. that the learned Magistrate erred in law and fact in failing to find that the age of the complainant was not conclusively proved;*
- b. the learned Magistrate erred in law and in fact in failing to find the charge sheet was defective;*
- c. the learned Magistrate erred in law and fact when he failed to find that the medical documents relied on to convict were defective;*
- d. the Learned Magistrate erred in law and fact by failing to find that, the appellant did not cross-examine PW5 on his further clarification of the court;*
- e. the learned Magistrate erred in law and fact in failing to find that penetration was not proved;*
- f. the Learned Magistrate erred in law by dismissing the appellant's defence and in convicting the appellant in reliance of fabricated and contradictory evidence.*

3. From the above grounds, it is clear that the appellant essentially impugns the entire findings on conviction made by the trial court. In respect of the age of the complainant, the appellant asserts that age was unproved in that whilst she stated that she was seven years old, her mother did not indicate her age, no birth certificate or immunisation card was produced, and that PC Adhiambo, PW6 who indicated her age as nine years had no expertise in assessing age.

4. In respect of defects in the charge sheet, the appellant argues that it was acknowledged during the hearing that the appellant was not the complainant's biological father. As such the charge of incest could not stand as the penalty for incest and that for defilement are different. The trial magistrate thus had no basis for making the conviction of incest.

5. On evidence, the appellant argued that although the complainant was taken to Munyuaini Health Centre, the post care report was filled in

an unknown location; further that the clinical officer who saw the complainant testified that he is from J M Kariuki hospital; and the P3 form originated at Ol Kalau District hospital. According to the appellant, PW1 testified that they went to Mawingu Health Centre; PW2 testified that they went to Munyuaini Health Centre; PW5 testified that he was from JM Kariuki hospital. These discrepancies, asserts the appellant, indicated that the evidence is not only inconsistent but also unreliable.

Background

6. The brief background in this matter is that the appellant, who was a watchman at [particulars withheld] Primary School, was at home at around 4.00pm when his seven year old daughter, PW1, entered the house. He told her to go to the bedroom and remove her panty and get onto the bed. She did. He came in and also removed his underwear and began defiling her. The appellant's wife came home and, lifting the sheet separating the bedroom from the rest of the house, saw the shocking scene of her husband defiling their daughter. She quickly went out and called a neighbour.

7. The neighbour, PW3, came into the house and also found the appellant in the act, and immediately went out to call a school teacher, PW4, who also came to the house and saw the appellant still in the act. PW4 interrupted the appellant asking him what he was doing. Both PW 3 and 4 gave detailed evidence of what they witnessed. The complainant PW1, also gave graphic evidence of what the appellant had done to her. Later, she was taken to hospital, treated and the clinical officer gave evidence.

8. At the hearing, the appellant filed written submissions and Mr Koima for the DPP made oral submissions.

9. The role of this court in the first appeal is to reconsider the views and evidence of the trial court as a whole, evaluate the same and make its own conclusion thereon. It has the duty, as it were, to rehear the case and consider the evidence of the witnesses with such other material as may have been admitted. The appellate court must then make up its own mind not disregarding the judgement appeal from carefully weighing in considering it. It must be guided by the impressions made on the judge or magistrate who saw the witnesses noting that it has not itself heard the witnesses and assessed their demeanour. See **Pandya v Republic [1957 EA 336]**.

10. I have carefully perused the proceedings, documents and evidence and make my analysis and determination as follows.

Age of the Complainant

11. PW 1 was a minor who was taken through a voire dire examination. She said that she was in standard 1 at [particulars withheld] Primary School, and aged seven years. After the voire dire, the trial court was satisfied that she could testify as she understands the meaning of telling the truth. The trial court however directed give unsworn testimony.

12. Her mother, PW2 M D, gave no evidence concerning the age of the child. PW6 Policewoman, Constable Adhiambo, also gave the age of the complainant as seven years and referred to the age assessment by the medical officer. PW5, the Clinical Officer at Engineer District Hospital who formerly worked at J M Kariuki Hospital, produced the P3 form. He stated the age of the child as seven, and recorded the same in the P3 form as seven. An outpatient card from J M Kariuki (Ol Kalau) County Hospital shows that on 14th January, 2016, an age assessment was done on the complainant and produced as PExh 3 (although it is marked as PExb 2 on its face), showing the age of the complainant to be nine (9) years of age in 2016. This assessment was made by the Dental Officer J M Kariuki (Ol Kalau) County Hospital who noted that complainant's lower canines are beginning to erupt which is usual at ages 9-10.

13. From the above evidence, there is no doubt that the child was under nine years of age in 2015 when the incident occurred. The complainant was a child of tender years properly so described under the Children Act, Cap 141. I find and hold this to be the factual position.

Evidence of Penetration and whether complainant was a child of the Appellant

14. The appellant argued that there was no proof of penetration, and that even if there was, as he was not liable to be convicted for incest as he was not the biological father of the complainant. Consequently, he argued, the conviction for incest was unlawful, and could not stand.

15. At the trial PW1 gave clear evidence that:

“the accused who is my father called me (pointing to the accused in the dock).... He then told me to remove my pant. I removed my pant and he told me to lie on the bed. The accused removed his thing for urinating and put it inside my part of urinating..... I felt pain when he put his thing for urinating inside my thing for urinating...

My mother found my father (accused) lying on me putting his thing for urinating inside me ”

16. The complainant's mother, PW2, entered the room and saw what was happening. She ran out and called for PW3 who also came and saw the accused defile the complainant. He went out and called PW4 a teacher who saw the defilement taking place. All these witnesses give direct graphic evidence of the act which they witnessed as it progressed. Without more, this evidence was sufficient to prove the case. However, it was also corroborated by the medical evidence in the P3 form and Post Care Report marked as PExhibits 1 and 2 tendered by PW5, the clinical officer. He examined the genitalia and labia majora of the complainant and found that both were lacerated. He also found that the hymen was freshly perforated. He concluded that the presence of lacerations in the vulva and tenderness, and a freshly perforated hymen were clear evidence of forceful penetration.

17. I have no doubt in my mind that there was the clearest evidence of penetration of the genitalia of the accused in that of the complainant.

18. With regard to the parentage of the complainant, the evidence is as follows: PW2 testified that the accused was her husband, and that she was the mother of the complainant. As already noted, PW1 testified that the accused was her father and PW2 her mother. When cross-examining either PW1 or PW2, the accused did not suggest that he was not the child's father, nor that he and the accused were not married. PW3 and PW4 who were neighbours of the accused, knew him and referred to him as the father of the complainant and the husband of PW2.

19. It was the prosecutor who came up with the possibility of substituting the charge defilement because he had come to the understanding that the accused was not the biological father of the complainant. This issue was not followed up, and no evidence was adduced on this point. In his unsworn testimony the accused affirmed that PW2 was his wife, and did not disown his fatherhood of the complainant. At worst therefore, the evidence confirms that he is either the father or stepfather of the complainant.

20. At the trial, the Magistrate recalled that the prosecution had discovered that the accused was not the biological father of the complainant and sought to amend the charge sheet. The Magistrate stated at pages 43-44 of the judgment:

“ In the course of the trial, the prosecutor intimated that the complainant is not the biological daughter of the accused. He therefore wanted to amend the charge. However, I have realised that, that is not done. The question therefore is whether that invalidates the trial. My answer is that it does not. I agree that the complainant is not the accused's child the charge should have been defilement.

Be that as it may both defilement and incest require penetration as an element to be proved. The penalty is also the same. In my view the evidence against the accused is overwhelming. To acquit him on that error unknown will amount to injustice to the complainant. Justice can be paid on a technical error in the trial. The child on her part identified in court the accused father the accused on her (sic) part did not object that he is the complainant's father.”

21. The trial court had in mind **section 8(2)** of the **Sexual Offences Act** when referring to defilement. That section provides that a person who commits an offence of defilement with a child aged 11 years or less shall upon conviction be sentenced to imprisonment for life.

22. There is no definition in the **Sexual Offences Act** for father or daughter. Instead, there is a definition for parent under **section 2** of the **Children Act** as follows:

“ ‘parent’ means the mother or father of a child and includes any person who is liable by law to maintain the child or is entitled to his custody”:

23. In light of all the foregoing, I have no doubt that the appellant was either the father or the stepfather of the complainant. He is the husband of the complainant's mother. Absent any evidence that he is not the biological father of the complainant, he is in law deemed to be the person who maintains the child, has the child's custody, and is liable in law to maintain the child. He is at worst the complainant's stepfather.

24. It is not my understanding that **section 20** of the **Sexual Offences Act** suggests that daughter does not include stepdaughter, or a person who because of the closeness of the relationship between him and his spouse and his spouse's child, must be treated in law, as the child of the person. **Black's Law dictionary**, 10th edition, defines parent to include a step-parent or what is described as *“equitable parent”* defined as follows:

“a husband who, though not the biological father, is treated by the court as the father in an action for custody or visitation usually when the husband (1) has treated the child as his own while married to the child's mother,(2) is the only father the child has ever known, and (3) seeks the rights of fatherhood. A mother or father, not by blood or adoption by virtue of the close parent-like relationship exists between that person and the child. The status of equitable parent is a legal fiction that is used as an equitable remedy. Most commonly, the status of equitable parent arises when a person, living with a child and one of his or her legal or natural parents, formed a close bond with the child and assumes the duties and responsibilities of a parent”

25. Given the foregoing, and in the circumstances of this case, I am prepared to treat the complainant as the appellant's daughter, and I saw hold. I therefore agree with the trial magistrate, and find that the conviction for incest was sound.

Medical and other evidence

26. I have carefully considered the evidence of the appellant, and particularly the medical evidence, and find that the trial magistrate conscientiously and thoroughly considered the same. A re-assessment would add nothing new, and In that light I would add nothing, save to say that I do not find that the trial court's findings can be impugned.

Disposition

27. Having considered all the appellant's grounds of appeal, and also having carefully reviewed the evidence on record, I find that on the basis of the available evidence, that the learned magistrate correctly convicted the appellant.

28. Accordingly, the appeal is dismissed.

29. Orders accordingly.

Dated and Delivered at Naivasha this 6th Day of November, 2018

RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. L E – Appellant in person
2. Mr. Koima for the State
3. Court Clerk – Quinter Ogutu