



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CRIMINAL APPEAL NO. 89 OF 2016

(From Original Conviction and Sentence in Criminal Case No. 18 of 2016 of the PM's Court at Kaloleni: Hon. L. K. Sindani RM)

DBM.....APPELLANT/APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. This is an appeal from the Judgment of Hon. Sindani (RM Kaloleni) delivered on 13th July, 2016.
2. The Appellant was charged in the trial court with defilement contrary to Section 8(1) as read with Section 8 (3) of the Sexual Offences Act No. 3 of 2016. The charge was subsequently substituted with that of incest contrary to Section 20 (1) of the said Act. The particulars were that between the 18th and 20th January, 2016, in Kilifi County within Coast Region, the Appellant intentionally and unlawfully touched the vagina of FAD a child aged 12 years.
3. To prove the offences the prosecution called a total of four witnesses among them the complainant, (12 years), her sister PW 2 (15 years), clinical Officer (PW 3) and area Assistant Chief PW 5.
4. The trial court conducted a *voire dire* exercise and established that the complainant minor was able to understand and comprehend the court proceedings and to know the reasons why she was in court and the value of the evidence and oath taking.
5. The complainant's testimony was that she was defiled by the Appellant, who was her step father. They shared a room, but slept on different beds. However, on the particular night, she woke up under the weight of her step father who defiled her and told her not to inform anybody of what had transpired. The complainant, however, when she went to school the next day, was feeling pain in her private parts and she informed her elder sister who was in the same school. The elder sister then triggered the process by informing her teachers who in turn informed the area chief who arranged to arrest the Appellant.
6. The complainant was the sole witness to her ordeal. All other witnesses did not have firsthand experience of the crime. PW 2 was the sister of the complainant whom the complainant informed of what had happened to her. It is PW 2 who reported the offence to her teachers. PW 3 was a Clinical Officer who examined the complainant and established that she had been defiled severally. But PW 3 was not able to tell who defiled the complainant. PW 5 was the area Assistant Chief who arrested the Appellant.
7. The Court, after considering the entire evidence found that the prosecution had proved its case beyond reasonable doubt and convicted the Appellant under Section 215 of the Criminal Procedure Code and sentenced him to 20 years in prison.
8. The Appellant not being satisfied with the entire Judgment appealed against both the conviction and sentencing.
9. The Appellant has raised three grounds in his appeal. These are:
 - (a) There was no evidence upon which he was convicted.
 - (b) Relevant witnesses, like the complainant's mother was not called to testify.
 - (c) The matter before the court was a fabrication to nail the Appellant.
10. The Appellant's case is that there was not adequate evidence to prove that he committed the alleged offence to deserve being imprisoned for 20 years. The Appellant submitted that the prosecution failed to prove that he defiled his step daughter. He submitted that the treatment

notes produced in court did not show who defiled the minor. Further, the allegations by the Clinical Officer that the age of the injury was six days and that the hymen was not intact were attributes which cannot be blamed on the Appellant as other factors could be responsible for breakage of hymen e.g. bicycle riding.

11. The Appellant submitted that the entire prosecution was based on fabrication, and that a crucial witness, being the mother of the complainant, ought to have been called to testify. The Appellant urged the court to set aside the conviction and sentence, and set free the Appellant.

12. The prosecution, led by Mr. Jami, opposed the appeal, and dismissed all the three grounds set forth in the appeal. Mr. Jami submitted that the allegation that the charges were fabricated and a witch hunt was not true, and was also not raised during the trial and so cannot be raised at this stage. On the allegation that the mother of the witness was not called upon to testify Mr. Jami submitted that the mother was not a relevant witness since she did not witness the crime.

13. As for adequacy of evidence Mr. Jami submitted that the complainant's sister corroborated the evidence of the complainant. Further, the age of the complainant was authenticated and corroborated by the age assessment report filed by the Clinical Officer. The allegation that the Appellant's defence was not considered by the court was also refuted by the prosecution since the record shows that the defence was considered.

14. The State in reference to the sentence, submitted that under the law the sentence provided for is up to life in prison. So the sentence of 20 years was quite lenient and should not be interfered with.

The Determination

15. I have carefully considered the appeal. I have also reviewed and reevaluated the entire evidence presented in the trial court. The issues that I raise for determination are whether the prosecution proved its case beyond reasonable doubt and whether the sentence of 20 years was proper.

16. On the first issue, I have already stated that the evidence presented before the court was that of four witnesses. None of them apart from the complainant, witnessed the commission of the offence. So the issue is whether or not the sole evidence of the complainant, a minor of 12 years, without corroboration, is adequate proof of the commission of the offence.

17. The starting point is the evidence. The learned trial magistrate on 17th June, 2016 conducted a *voire dire* to establish the capacity of the complainant to give evidence. The exercise was as follows:

“PW 1 Voire:

1. My name is FAD

2. I school at B. Primary School

3. I am in class two

4. I am a Christian at Umoja Privers Church

- God is in heaven

- Any person who says lies will be burned and he belongs to the devil

- Any person who says the truth belongs to God and will go to heaven

- Today is a Monday

- A flag has four colours

- Colours are black, white, red and green.”

18. I have found it necessary to reproduce the entire testimony of the complainant.

“My name is FAD I school at B. Primary School. I am 12 years old in class two. I stay with Chief Jao. He took me from the police station after the case. Before the case I was staying with my mother and Dena. The accused here in D is my step father. My biological father died. My brothers stays with pastor. I don't know where mum stays. I am told she is in Mombasa. I was staying in Mombasa. My mother took me there so that this case cannot proceed. Before that Dena did bad things to me. I remember between 18th and 20th January, 2016 it was at 9.00 p.m. we were at Ganga. I was asleep Dena came to me by force. It was I and D in the house. Mum had gone to Mombasa to another man.

I was on my bed in a room where we normally sleep. We have two rooms. So we all sleep in one room. The other room is a

store. So I and D were in the same room but different beds. I was asleep I woke up and he told me to keep quiet. When he came to my bed “Alinibaka”. He defiled me. When I woke up I found him on top of me doing bad manners to me. I had cloths on. He removed my inner wear. He had done such a thing to my sister before. He closed my mouth and told me not to scream. He inserted his private part into mine. He took like two hours on top of me. I woke up and went to school. I was feeling pains. I then told my brother. We don’t stay in the same house. My brother stays with pastor but we school in the same school. My brother told teachers. The teachers told the Chief. I went and slept at Chief Dzuya. Then the next day Chief Chao came and asked me to take him where I stay. I took him and found Dena sleeping with mother. It was on 19th. That is when they arrested him.

Dad had told me not to tell it to anyone. He did the act on two occasions which is on 18th and 19th January. I was feeling pain in my private parts.

We then went to Rabai Police Station after D was arrested. I was sent to hospital near our school. I was injected I have treatment notes and P3 Form P3 form MFI 1 No. 1.

Treatment Notes – MFI No. 2

Post Rape Care Form – MFI No. 3

PNC consent Form – MFI No. 4

The person who defiled me is in court and he is my step father. I have stayed with him for like one year. The said person is in court pointing the accused.

There was an age assessment report and I was found to be 12 years old. Age assessment report – MFI No. 5.

State – For clarity this matter had already proceeded before Court No. 1 and only one witness had testified. I seek court’s direction on how to proceed.”

19. From the analysis of above evidence I am able to draw the following findings:

- that the complainant understands the value of her testimony
- that she understands the penalty of telling a lie
- that she understands the need to be truthful
- that she comes across as candid and truthful
- that she does not appear to be a person who can intentionally lie
- that she identified the Appellant as the person who defiled her
- that she does not appear to have been coached to testify
- that she was testifying to the truth of what happened.

20. The complainant’s evidence was also partly corroborated by the evidence of PW 2 – her elder sister. The issue for this court to consider then is whether it was safe for the trial court to convict the Appellant on the largely uncorroborated evidence of a complainant minor of tender years?

21. After carefully evaluating the evidence it is the finding of this court that the trial court was in order to convict the Appellant on such evidence, and that the conviction was safe.

22. The other issue raised was whether the prosecution proved its case beyond reasonable doubt. On this, it must be noted that a court will convict an accused person on the evidence whose quality allows the conviction. It is to be noted that in his cross-examination of the complainant the Appellant only dwelt on the domestic issues in the family and did not dwell on the allegation of defilement. And even in his defence the Appellant merely denied the commission of the offence but did not really seek to explicate himself from the offence. He tried to imply that the charges were framed by his enemies who were allegedly jealous of his son’s achievement in school.

23. The Appellant also sought to demean the trial process because the complainant’s mother was not called to testify. It is to be noted, carefully, that the prosecution is entitled to call only those witnesses that would help the prosecution to prove its case. Secondly, it is clear from the record of trial proceedings that the Appellant and the complainant’s mother were not keen on these proceedings. It is easy to infer that the mother did not mind what the Appellant, her husband, did to her daughter. This court therefore rejects the ground that, the complainant’s mother ought to have been called to testify.

24. Lastly, there were issues raised concerning penetration and validity of the medical records submitted. It is the finding of this court that the testimonies of PW 3 and PW 5 were not shaken by the defence and hence firmly stand in this appeal.

25. It is the finding of this court that the prosecution proved the case beyond reasonable doubt, and that the conviction was safely landed.

26. As for the sentencing of 20 years, it is the opinion of this court that the same was excessive, and almost amounts to life in jail which is

the highest for the offence herein. The trial magistrate was within her right to give 20 years. However, the learned magistrate stated that she was giving 20 years inter alia because the offence is prevalent in the region. It is the view of this court that sentencing is a very personal penalty to be meted to an accused person who alone will suffer its consequences and should not be seen to be paying penalty for other people. This court herewith reduces the sentence meted from 20 years to 12 years.

The Result is that the conviction herein is upheld. The sentence is reduced to 12 years.]

That is the Judgment of the Court.

Dated, Signed and Delivered in Mombasa this 13th day of December, 2018.

E. K. O. OGOLA

JUDGE

In the presence of:

Mr. Jami for the State

Appellant in person

Mr. Kaunda Court Assistant