



**REPUBLIC OF KENYA**

**HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO. 54 OF 2015**

*(An Appeal arising out of the conviction and sentence of Hon. Linda C. Kosgei – RM delivered on 26<sup>th</sup> March 2015 in Makadara CM.C. CR. Case No.1005 of 2013)*

**ESM.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The Appellant, ESM was charged with **incest** contrary to **Section 20(1)** of the **Sexual Offences Act**. The particulars of the offence were that on 25<sup>th</sup> February 2013 Industrial Area in Nairobi County, the Appellant caused his male organ to penetrate the female organ of LA (the complainant), a child aged 12 years who was to his knowledge his daughter. He was alternatively charged with **committing an indecent act with a child** contrary to **Section 11(1)** of the **Sexual Offences Act**. The particulars of the offence were that on the same day and in the same place, the Appellant intentionally and unlawfully committed an indecent act with the complainant by touching her private parts namely vagina. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty. After full trial, he was convicted as charged on the main charge and sentenced to serve life imprisonment. The Appellant was aggrieved by his conviction and sentence. He has filed an appeal to this court.

In his petition of appeal, the Appellant raised six grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted on the basis of evidence that was conflicting and not conclusive to prove the offence that the Appellant was convicted of. The Appellant took issue in the manner in which the evidence by the government doctor was treated by the trial court. He was of the view that the evidence had been misunderstood by the trial court and thereby reached an erroneous determination. The Appellant stated that his right to fair trial had been infringed because he was not allowed to have his advocate present during trial. The Appellant was aggrieved that the trial court proceeded with the trial in the absence of his counsel without any justification. The Appellant faulted the trial magistrate for sentencing him to a harsh and excessive custodial sentence. In the premises therefore, he urged the court to allow the appeal, quash the conviction and set aside the sentence that was imposed upon him.

During the hearing of the appeal, this court heard oral rival arguments made by Dr. Mwimali for the Appellant and by Ms. Kimiri for the State. Counsel for the Appellant submitted that the trial court erroneously admitted medical evidence which was produced by a doctor who had not examined the complainant. He submitted that the medical report clearly showed that the complainant had not been

sexually assaulted because her external genitalia were normal during examination. This was three hours after the alleged incident. Learned counsel submitted that if indeed the complainant had been sexually assaulted, then the doctors would have observed male semen in the complainant's garments. This was not the case. The medical evidence did not also establish that indeed there was penetration. The Appellant urged that the medical evidence raised reasonable doubt that the complainant was sexually assaulted. Learned counsel urged the court to review the medical evidence and reach a determination that the prosecution had failed to prove an important plank in its case i.e. establish that there was penetration. As regard the right to fair trial, Dr. Mwimali submitted that the Appellant was not accorded fair trial in that he was denied the right to have an advocate of his choice present during trial. Learned counsel took issue with the fact that the trial court proceeded with the trial in his absence and thereby prejudiced the Appellant. He urged the court to allow the appeal.

Ms. Kimiri for the State opposed the appeal. She submitted that the medical evidence was produced in accordance with the law. The medical report was produced by a colleague of the doctor who had examined the complainant. No objection was raised to the production of the medical evidence by the Appellant during trial. Contrary to the submission made by the Appellant, Learned State Counsel submitted that the medical evidence did indeed prove to the required standard of proof that the Appellant was sexually molested. In particular, the medical examination established that the complainant's hymen had been broken and further there was blood in the vagina. This first medical report was confirmed by a subsequent medical examination which was done by Dr. Maundu at the Police Surgery. He also established that the complainant's hymen had been broken. Penetration was established to the required standard of proof.

Ms. Kimiri submitted that the evidence adduced by the prosecution witnesses established that the Appellant, the father of the complainant, sexually assaulted her when she returned home from school. The complainant narrated to her teacher of the sexual assault immediately she went back to school on the same day. It was on the same day that she was medically examined and established that she had been defiled. As regard the Appellant's right to be represented by counsel of his choice, Learned State Counsel submitted that although this right was provided for in the **Constitution**, it placed the responsibility on the advocate appointed by the Appellant to appear in court when so required. In any event, the Appellant chose to represent himself during the hearing of his defence when his advocate failed to attend court. In the premises therefore, the prosecution urged the court to dismiss the appeal as it lacked merit.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced so as to reach its own independent determination whether or not to uphold the conviction of the Appellant. As was held by the Court of Appeal in **Njoroge –Vs- Republic [1987] KLR 19 at P.22:**

***“As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect (see Pandya v R [1957] EA 336, Ruwala v R [1957] EA 570)”.***

In the present appeal, the issue for determination by this court is whether the prosecution adduced evidence which established the Appellant's guilt on the charge of **incest** contrary to **Section 20(1)** of the **Sexual Offences Act** to the required standard of proof beyond reasonable doubt.

The first issue that this court will address is the point raised by the Appellant regarding whether his constitutional right to be represented by an advocate of his choice was infringed when the trial court proceeded with the hearing of the case in the absence of his advocate. **Article 50(2)(g)** of the **Constitution** provides as follows:

***“Every accused person has the right to a fair trial, which includes the right to choose, and be represented by, an advocate, and to be informed of this right promptly.”***

In the present appeal, it was apparent from the proceedings of the trial court that from the time the trial started, the Appellant was represented by an advocate. This is the same advocate on this appeal. However, it was apparent that during the latter part of the trial, the Appellant's counsel failed to attend court. No reasons are apparent in the face of the record for counsel's failure to attend court. What is clear is that subsequently thereafter, the Appellant's counsel attended court and proceeded with the trial without making any application for the recall of the witnesses who had testified in his absence. During the hearing of the defence, the Appellant told the court that he was ready to proceed with the defence the absence of his advocate notwithstanding. The trial court acceded to this request.

In the circumstances of this appeal, the Appellant is not justified to complain that part of the trial proceeded to hearing in the absence of his advocate. It is trite that counsel must attend court during the trial without fail unless there is a reasonable explanation for his absence. In such circumstances, it behooves the advocate to inform the court either through his client or through another advocate holding his brief of his absence. In the present appeal, it was clear that the Appellant's counsel failed to attend court and did not give any reason for his failure to attend court. The advocate did not apply to the court for the witnesses who had testified in his absence to be recalled for the purposes of his cross-examination. Taking into consideration the arguments made on this issue, this court is not persuaded that the Appellant's right to be represented by counsel of his choice as provided under **Article 50(2)(g)** of the **Constitution** was infringed during trial. That ground of appeal fails.

The Appellant submitted that penetration was not proved by the medical evidence that was produced in this case. This court's re-evaluation of the medical evidence produced by the two doctors in this case clearly established there was penetration. The complainant was examined a few hours after the sexual assault by Dr. Kariuki at Nairobi Women's Hospital. In his report (which was produced in evidence), the doctor noted that the complainant had a torn distended hyperemic hymen which was proof that there was penetration. Dr. Maundu also noted that the complainant had a recently broken hymen. He examined the complainant two days after the alleged sexual assault. On re-evaluation of this evidence, it was clear to this court that the prosecution indeed established, by medical evidence, that the complainant had been sexually assaulted. Penetration was established to the required standard of proof beyond any reasonable doubt.

As regard the identity of the perpetrator, the complainant told the court that the Appellant was her father. There was no doubt that the complainant properly identified the father as the perpetrator of the offence. From the evidence, it was clear that there was no reason why the complainant would point her father as the perpetrator of the sexual assault if indeed he was not the one who committed the offence. No grudge existed between the complainant and the Appellant. Indeed from her testimony, it was apparent that their previous relationship prior to the material date was cordial. This court holds that the prosecution did indeed prove to the required standard of proof that the Appellant was the perpetrator of the offence. The age of the complainant was not in dispute. She was twelve years at the time of the incident. She was therefore a child within the meaning ascribed thereto under **Section 2** of the **Children Act**.

As regard sentence, the proviso to **Section 20(1)** of the **Sexual Offences Act** provides that where it is established that the victim of the sexual assault was less than eighteen years, upon conviction, the sentence shall be life imprisonment. The sentence that was imposed upon the Appellant was therefore lawful.

The upshot of the above reasons is that the appeal lodged by the Appellant lacks merit and is hereby dismissed. The conviction and sentence of the trial court is hereby upheld. It is so ordered.

**DATED AT NAIROBI THIS 2<sup>ND</sup> DAY OF FEBRUARY 2017**

**L. KIMARU**

**JUDGE**