



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MIGORI
CRIMINAL APPEAL NO. 13 OF 2016

BETWEEN

R J M APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from original conviction and sentence in Criminal Case No.688 of 2014 by Hon. D.K. Kemei, CM dated 8th January, 2015)

JUDGMENT

1. R J M (the appellant) was convicted on a charge of incest by males contrary to **Section 20 (1)** of the **Sexual Offences Act No.3 of 2006** and sentenced to serve 10 years imprisonment.

The charge against him stated that on 20th October 2014 at *particulars withheld* within MIGORI County, being a male person, he intentionally and unlawfully caused his penis to penetrate the vagina of D K, a female child aged 9 years who was to his knowledge, his daughter.

2. The appellant denied the charge and the prosecution called a total of 4 witnesses in support of its case. D K narrated to the court that she had lived with her mother and the appellant whom she referred to as her father although he was not her biological father.

On 20th October 2014 the appellant told her mother to go to her parents' home and leave the youngest child who was about 1 year as a way of weaning off the child from breast feeding. D K's mother obliged and left alone.

3. The next day, the appellant entered D K's room and closed the door while armed with a panga and a stick. D K stated:-

“He removed my underpant and lay on top of me before inserting his penis into my vagina.”

4. He threatened her with a beating in the event that she told her mother what happened. When he left, D K went and informed a neighbor and she was taken to hospital. On re-examination she stated that the appellant gave her Kshs.100/= to buy milk.

5. D K's mother L M (PW2) confirmed that she got married to the appellant AFTER she had conceived D K and she later got one child with the appellant who as at the time of the trial was aged 1 year. She confirmed that she had gone to her parents' rural home to buy bananas, leaving the appellant and the

children. She got to learn that while she was away the appellant defiled D K and threatened her with death if she disclosed the ordeal.

6. PW2 checked D K's genitals and noticed bruises.

DR. NIRAV CHAUHAN (PW3) who examined the minor told the trial court that the girl was in a lot of pain and had bled. A high vaginal swab showed epithelial cells and the hymen was broken and the cervix showed evidence of penetration.

7. PC DERRICK MOSHI (P4) who received the report about the incident confirmed that the girl who was accompanied by her mother appeared to be in great pain. The information he was given was that D K had been defiled by her step father (the appellant) while her mother was away. He was given a red shirt and underwear which D K had worn during the incident, and which he noted had blood stains. The garments were produced in court as exhibits.

8. In his unsworn testimony the appellant stated that there was no way he could have defiled D K as he had been taking care of young children belonging to other people yet he had never defiled them. While confirming that he was married to D K's mother, he said that one day she went to her parents' home in Narok to get maize. She spent the night there and he was alone in the home.

9. The trial magistrate found that D K related with and recognized the appellant as her father and for all intents and purposes had a filial relationship with him even though he was not her biological parent. Further that D K was a step daughter and as such the relationship fell within the category covered by the offence of incest – because the appellant was her mother's husband and she looked up to him as a father.

10. The trial magistrate pointed out that even though D K was described in the charge sheet as a daughter, that error was not fatal to the prosecution's case as whatever description was used would still lead to an offence of incest once penetration was proved.

11. It was also pointed out by the trial magistrate that opportunity for the mischief presented itself by the absence of the mother and D K's mother who left the house at 5.00 a.m. – so there was no adult to act as a restraint to the appellant.

12. The trial magistrate observed that D K was forthright and quite steady in her testimony which was corroborated by the medical evidence and there was no suggestion whatsoever why the child would frame up the appellant as there was even no evidence nor did the appellant allude that he and D K's mother had any differences. The appellant's defence about a frame up was thus rejected.

13. In challenging the findings of the trial court, the appellant stated that the trial magistrate failed to consider his defence and mitigation, resulting in a harsh and excessive sentence.

14. The oral submissions made by the appellant basically amounted to mitigation where he urged the court to review and reduce the sentence. He also complained that he was not subjected to any medical examination although D K was examined.

15. In opposing the appeal, MR. OLUOCH submitted on behalf of the State that there was sufficient evidence linking the appellant to the offence, and the victim gave an account of how the incident happened. Counsel described her evidence as clear, coherent and believable pointing out that the appellant was well known to her and she had trusted him as her father. MR. OLUOCH submitted that the appellant broke that trust and the medical evidence confirmed that the girl had been defiled.

He argued that the sentence was neither harsh nor excessive and urged the court to dismiss the appeal.

16. I have re-considered the evidence on record – indeed D K remained unshaken even in cross examination. She was very detailed and specific as to how the incident occurred. Indeed the appellant took advantage of the absence of any other adult member within the house to abuse his daughter.

17. The medical evidence confirmed that sexual intercourse had taken place – the appellant was not a stranger to D K and there is no evidence suggesting that D K would frame him up or make up such detailed description of the sexual act.

18. The appellant was married to D K's mother and she regarded and identified with him as her father. The Sexual Offences Act Section 20(1) provides as follows:-

“20(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 ... is guilty of an offence termed incest and liable to imprisonment 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 shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration ... was obtained with the consent of the female person.

19. The test of relationship in cases of incest is addressed under **Section 22 (1)** of the **Sexual Offences Act** to include a half father. In my understanding a half father does not share a blood relationship with the female but assumes the position of a father because of the relationship he has with the female's mother and his manner of conduct and relations with the female person. I therefore find that the trial magistrate rightly found that the appellant had a filled relationship with D K.

20. As regards the sentence, it was infact lenient, but bearing in mind that the appellant was not warned of the likelihood of enhancement of sentence before prosecuting his appeal, he will benefit from that omission. I confirm the sentence as legal.

21. Consequently the appeal is dismissed.

Written and dated this 21st day of February, 2017 at Homa Bay

H.A. OMONDI

JUDGE

Delivered and dated this 21st day of February, 2017 at Migori

A.C. MRIMA

JUDGE