



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

HIGH COURT CRIMINAL APPEAL NO. 111 OF 2016

FROM ORG. CR. CASE NO. 3772 OF 2014 – THIKA

D M.....APPELLANT

-V E R S U S-

REPUBLIC.....RESPONDENT

J U D G M E N T

1. This is the judgment of the **Criminal Appeal No. 111 of 2016**. The appellant is **D M**.

DANIEL MWANGI was charged on **30th September, 2014** of the offence of **INCEST** Contrary to **Section 20(1)**. The Sexual Offences Act **No. 3 of 2006**.

The particulars thereof were that on **25th day of September, 2014** within **Kiambu county** intentionally and unlawfully caused your penis to penetrate the vagina of **C W** a child aged **10 years** who is to your knowledge of your daughter.

2. An alternative charge was indecent act with a child contrary to **Section 11 (1)** of the Sexual Offences Act **No. 3 of 2006**.

The particulars thereof were that on the **25th day of September 2014** within **Kiambu County** intentionally and unlawfully caused a contact with your penis with the vagina of **C W** a child aged **10 years**.

3. The accused denied the charge and a plea of not guilty was subsequently entered.

4. After a full hearing The Trial Magistrate convicted the accused who was also **HIV** positive, and knowingly had carnal knowledge with his daughter, was sentenced to **life imprisonment**.

5. THE APPEAL:

Being aggrieved and dissatisfied has now appealed against both conviction and sentence.

HIS GROUNDS ARE:

1. **The** Trial Magistrate failed to consider the inconsistencies and contradictions in the evidence by the prosecution.
2. **The** Trial Court failed to observe that the medical evidence was not weighty to sustain a conviction.
3. **The** Trial Magistrate failed to observe that the conviction was manifested unsafe as the evidence linking me with the offence was doubtful and unreliable.
4. **The** Trial Court failed to note that the case for the prosecution was not proved beyond reasonable doubt as required by law.
5. **The** Trial Court failed to observe that provisions of **Section 169 (1)** of the **Criminal Penal Code** was not considered.

The appellant abandoned his earlier grounds, above filed on **14th October, 2016** and now relies wholly on the supplementary grounds here below:

6. SUPPLEMENTARY GROUNDS ARE:

1. **The** trial process was a nullity as it proceeded on a defective charges.
2. **That** I was unable to prepare my defence due to irregularity in the charge sheet.
3. **The** trial court failed to note inconsistencies and contradictions in the evidence of **PW1**.
4. **The** burden of proof was not discharged to required standards.
5. **The** age of the complainant was not proved and it was unjustifiable and unfair to sentence me to life imprisonment.

7. SUBMISSIONS.

a) By the Appellant through his written submissions submitted that:

- i) The trial proceeded on defective charge.
- ii) The prosecution did not discharge burden of proof beyond reasonable doubt.
- iii) The prosecution did not prove the age of the complainant.
- iv) It was unfair to imprison me for life. There were contradictions and inconsistencies.

b) By the Respondent, Learned Counsel **Madam Wambua** submitted that:

1. On grounds 1 & 2 of Appeal; I concede the year is not indicated in the particulars of the charge. However the same if curable if detected earlier would have been rectified during the trial.

However, the alternative charge states the full date when the offence took place. **PW3 & PW4** confirmed the dates and the appellant cross-examined. Thus the appellant had sufficient information to prepare for his defence. This erred under **Section 382** of the **Criminal Penal Code** is not fatal to the case.

2. On grounds 3; we submit that **PW1** was not inconsistent in her testimony, investigating officer to Doctor **PW4** the defilement was continuous. The last time was on **25th September, 2014**. If there was any minute to effect the testimony tendered.

3. On grounds 4; the burden was not shifted. The prosecution

proved that the minor, the **appellant's daughter, PW3, investigating officer** and **record** shows the appellant was arrested when he was looking for her.

Penetration was proved, **Doctor, PW4** confirmed that the hymen of the minor was broken. She testified that the child had a lot of bruises and a lot of discharge, the doctor produced **P3** that shows the age of the minor to be ten (**10**) years, **Exhibit I**.

Prosecution relies on **Case No. 100 of 2013, J.W.A VS Republic**.

Therefore the prosecution discharged the burden of proof.

4. Grounds 5 – Spent.

In his submissions, the appellant said that there was no spermatozoa, I submit that there is no requirement to confirm the presence of spermatozoa. The requirement is penetration which the victim and the doctor proved. The case where the act is not complete spermatozoa will not be present.

We therefore, support the lower court's finding for conviction and sentence. We urge the court to uphold the same and dismiss the appeal.

8. First Appeal.

This being a first appeal, this court has the duty of reconsidering and evaluating the evidence afresh with view to reaching its own conclusions in the matter making allowance only for the fact that it neither saw nor heard the parties when they appeared before the trial court.

See generally Okeno -Vs- Republic [1972] E.A 32.

9. Questions for Determinations.

1. Did the appellant’s genital organ i.e. the penis penetrate the genital organ i.e. vagina of the victim **C W**?
2. Was the victim related to the appellant?

10. Court Proceedings: the Analysis.

PW1’s evidence is clear and unambiguous as narrated in her testimony. That on **25/09/2014** at **9p.m.** her father **D M** moved her to his bed, undressed her and undressed himself and had sex with her. She felt pain but was warned against revealing the information to anybody.

This was corroborated **PW4-** the Clinical Officer, **JOAN MUNENE**. Physical examination revealed that hymen was absent. There were bruises around the vaginal opening with oedema/swelling. There was a lot of discharge around the vagina opening. The defilement was repetative. This was a third time she was being defiled. She had a lot of vaginal discharge. The hymen was absent.

The appellant’s wife had left him. These children lived at home with their father, **D M**.

FINDINGS.

Penetration by the appellant was clearly proved. The appellant was a father to the victim. The victim was aged **10** years. Therefore there is no merit in this appeal. The court upholds the lower court’s conviction and sentence. This appeal is hereby dismissed.

Right of Appeal – **14** days.

JUDGMENT WRITTEN AND SIGNED BY:

C. B. NAGILLAH

JUDGE

JUDGMENT DELIVERED, DATED AND COUNTERSIGNED IN KIAMBU BY:

THIS 10TH DAY OF MAY 2017

JOEL NGUGI

JUDGE

In the Presence of:

.....the Appellant

.....for the Respondent

.....for the Court Assistant