



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL APPEAL NO. 7 OF 2016

M M APPELLANT

VERSUS

REPUBLICRESPONDENT

*(Being an appeal from the original conviction and sentence in **Mwingi Senior Resident Magistrate's Court Criminal Case No. 94 of 2015 by G. W. Kirugumi R M on 27/01/16**)*

J U D G M E N T

1. **M M**, the Appellant, was charged with the offence of **Incest** contrary to **Section 20(1)** of the **Sexual Offences Act No. 3 of 2006**. Particulars of the offence were that on the **23rd day of August, 2015** at **[particulars withheld]** within **Kitui County** being a male person, caused his penis to penetrate the vagina of **K M** a female person who was to his knowledge his daughter.

2. Facts of the case were that on the **2nd September, 2015** screams were heard emanating from the Appellant's home. Neighbours rushed there, amongst them **PW3 Naomi Musyoka, PW6 Rose Mwangangi** and **PW7 Fernandes Mutisya Nguo**. They found the Appellant assaulting his wife. The wife escaped. The Appellant was arrested and taken to the police station. A report was made that he was defiling the Complainant, his daughter. She was subjected to medical examination by **Dr. Wahinya**. She had a ruptured hymen. Consequently the Appellant was charged.

3. When put on his defence the Appellant denied having committed the offence. He stated that the Complainant was convinced to frame him up by **Rose Mwangangi** a person with whom they had a land dispute. He denied having created any disturbance.

4. The trial Magistrate considered evidence adduced and reached a finding that the weight of the Prosecution's evidence was sufficient to prove that indeed the Appellant defiled the Complainant knowing that she was his daughter. She convicted and sentenced him to **Life imprisonment**.

5. Being dissatisfied with the conviction and sentence the Appellant appealed on grounds that:

- The Complainant and her mother's evidence were rejected which was erroneous.
- There was no evidence that he defiled the Complainant.

6. The Appellant was stated to have contravened **Section 20(1)** of the **Sexual Offences Act (Act)**. Therefore the Prosecution in the instant case was duty bound to prove that: The Appellant was a male person and he committed an act of penetration into the Complainant's genitalia with full knowledge that she was his daughter.

7. PW2 **J K M** stated that when she married the Appellant she had sired the Complainant herein. This means that the Appellant was the Complainant's step father. **Section 22** of the **Act** defines a father to include a half father. Therefore the Appellant herein was the Complainant's father, a fact within his knowledge.

8. A perusal of the Medical Examination Report filed (P3) reveals that the Complainant's age was estimated as **16 years**. At the time of examination on **3rd September, 2011** the approximate age of injuries the Complainant sustained was one week. The description of injuries sustained was a ruptured hymen. Presence of foul smelling discharge was also noted. This was proof of the fact that the Complainant engaged in penetrative sexual intercourse.

9. The Prosecution endeavoured to prove that the Appellant was the person who penetrated the Complainant's genitalia thereby rupturing her hymen. There was no eye witness to what transpired. In her testimony, the crucial witness, the Complainant herein denied having been defiled by the Appellant. She stated that she was forced to state that she was defiled by the Appellant by one **Mama Mwende**. She testified that the statement was read to her and when she disagreed with the content the Police Officer (woman) beat her up. She went on to state that she told the Doctor who examined her that she had engaged in coitus previously with one **Jose** long before the Appellant was arrested.

10. In reaching her decision the learned trial Magistrate stated thus:

“The Complainant rendered sworn evidence. She was about sixteen years old. She recanted her evidence and disowned her statement. The complainant claimed Mama Mwende wanted her to frame her father. However she gave a consistent account of defilement to the Doctor when she gave him her medical history. Her statement was produced as evidence. Some information in her statement would not been (sic) known by the police officer or Mama Mwende. For instance it is clear the mother was being beaten because she defended her when she refused to go to her grandmother's house. In her statement she said she refused to go because her father would defile her while on the way....”

11. What can be deduced from the analysis of the learned trial Magistrate is that the Complainant actually turned out to be a hostile witness. However, when she gave evidence on oath there was no insinuation by the Prosecuting Counsel that she had turned hostile. Procedurally if the Prosecuting Counsel who was in a position to tell if she had turned adverse found so, he would have made an application to the trial Magistrate to declare her hostile. This would have given him an opportunity to ask her leading questions and even cross examine her to challenge what she stated in her testimony. Subsequently he would cause her to produce the statement recorded in evidence.

12. The statement of the Complainant was adduced in evidence by the Investigation Officer without being shown to the witness to confirm whether or not it was what was recorded at the police station.

13. Cross examination as to previous written statements is provided for in **Section 153** of the **Evidence Act** that stipulate thus:

“A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him or being proved, but if it is intended to contradict a witness by a previous written statement, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.”

It was erroneous on the part of the learned trial Magistrate to allow production of the statement in evidence and even rely on it as the basis of her conviction without calling the Complainant to comment on the statement.

14. It was imperative for the witness to be cross examined to test her credibility or even accuracy in regard to the statement (**Also see Section 154 of the Evidence Act**).

15. In the Court of Appeal case of **Maghanda vs. Republic (1986) KLR 255** at **Page 257** it was stated that:

“.....The evidence of a hostile witness must be evaluated, in particular if it tends to favour the accused though it may not necessarily be acted upon by the court.”

16. The evidence of the Complainant was favourable to the Appellant. Prior to disregarding evidence adduced by the Complainant in examination in chief and solely relying on the statement purportedly written by the Complainant it should have been subjected to evaluation.

17. The learned trial Magistrate also misdirected herself by failing to appreciate that evidence of such a witness is of very little value. In the case of **Abel Monari Nyanamba & 4 Others vs. Republic (1996) eKLR** the Court stated that:

“The evidence of a hostile witness is indeed evidence though generally of little value obviously, no court found a conviction solely on the evidence of a hostile witness because his unreliability must itself introduce an element of reasonable doubt.”

18. In conclusion, the learned trial Magistrate stated thus:

“However, inspite of her saying she was compelled to lie, PW8 confirmed the complainant gave a statement free from compulsion. In addition neighbours who were witnesses confirmed on 2/9/2015 they came to rescue the mother who confirmed she was beaten that day and escaped to the neighbours house..... I find the weight of the prosecution evidence sufficient to prove the accused indeed defiled his daughter knowing that she was his daughter.”

19. Following the reasoning above, it is apparent that the ultimate finding was erroneous. Evidence adduced by the Prosecution was not sufficient to prove the case against the Appellant. In the result, the Appeal is meritorious. The conviction is quashed and sentence imposed set aside. The Appellant shall be released forthwith unless otherwise lawfully held.

20. It is so ordered.

Dated, Signed and Delivered at Kitui this 4th day of May, 2017.

L. N. MUTENDE

JUDGE