



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
CRIMINAL APPEAL NO. 109 OF 2015

F K M APPELLANT

VERSUS

REPUBLIC RESPONDENT

(From the original conviction and sentence in Criminal Case No.609 of 2015 of the Senior Resident Magistrate's Court at Githongo by Hon. C.A Mayamba– Senior Resident Magistrate)

JUDGMENT

The appellant, **F K M**, was Charged with an Offence of incest contrary to section 20 (1) of the Sexual Offences Act No.3 of 2006. He was alternatively charged with an offence of indecent act with a child contrary to section 11 (1) of the Sexual Offences Act No.3 of 2006.

The particulars of the offence were that during the night of 5th, 6th and 7th days of July 2015 at Rwanderi sub location, in Imenti Central District of Meru County being a male person intentionally caused his penis to penetrate the vagina of **N.K** a female juvenile who was to his knowledge his daughter. Alternatively, he unlawfully and intentionally touched the complainant's buttocks, anus and vagina.

The appellant was tried and was convicted in the substantive charge and sentenced to serve life imprisonment. He now appeals against both conviction and sentence.

The appellant raised four grounds of appeal as follows:

- 1.That the proceedings were conducted in a language he did not understand.
- 2.That the learned trial magistrate failed to appreciate that there was a possibility of framing up the accused so that the complainant's mother could grab the appellant's land.
- 3.That the learned trial magistrate failed to appreciate that the complainant was couched by her mother.
- 4.That the learned trial magistrate erred both in law and fact by relying on false evidence.

The state opposed the appeal and was represented by Mrs. Matheka, the learned counsel.

The facts of the case are briefly as follows:

The complainant a girl aged about 7 years was sharing a bed with her parents. While she was sleeping, her father defiled her and she felt pain and cried.

On his part the appellant contended that the complainant was informed by her mother to implicate him. This is a first appellate court.

As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated Case of **OKENO VRS. REPUBLIC 1972 EA 32**.

The appellant contended that he did not follow the proceedings due to the language used. On 10/7/2015 when the plea was taken, the record indicates that the interpretation was done in Kimeru. Though the record does not show who did the actual interpretation, the accused responded to the charge before a plea of not guilty was entered. During the hearing of the case all the witnesses except the complainant testified in Kiswahili. When the appellant was placed on his defence he tendered a defence that indicate he was able to follow the proceedings. His claim on the issue of language is not tenable.

My perusal of the record indicates that the complainant's mother did not testify. She is introduced in the proceedings by **P.K (PW2)** her son who testified that he reported the incident to her and Gerald Mwirigi Marete (PW3), the area chief who testified that she accompanied the complainant when the matter was reported to him. During cross examination the appellant did not challenge witnesses with this allegation nor did he raise it in his defence. He is bringing it up in this appeal. This is clearly an afterthought and must be dismissed.

There is no evidence on record to support the appellant's contention that the complainant was coached by her mother. This ground of appeal is likewise dismissed.

Lastly, was there sufficient evidence on which to found a conviction?

N.K (PW1) testified that while sharing a bed with her parents, her father put his genitalia into hers. She cried due to pain. According to the evidence of **P.K (PW2)**, He was sharing a bed with the complainant and the appellant when the incident happened. He said that their mother was away.

The evidence of the complainant and that of her brother introduce some contradictions which were not reconciled by the prosecution. Whereas the complainant testified that their mother was present, **P.K (PW3)** testified that she had gone to Nyweri.

P.K's sequence of events that night introduces further doubts. He testified as follows:

"Yes, I saw my father removing the complainant's clothes at night. He started doing things to her. He slept on her. I was sleeping and was attracted by commotion of the complainant who was crying. She was asking my father to stop, but he insisted he had not finished. It was on a Monday and Tuesday and the same used to happen at night when he came home drunk."

One is not sure if **P.K** witnessed the incident right from the start or was woken up by his crying sister.

The Court of Appeal case of **NDUNGU KIMANYI –V- REPUBLIC [1979] KLR 283**, MADAN, MILLER and POTTER JJA held:

“The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.”

The complainant and her brother were the key witnesses and I find that it was unsafe to rely on their evidence.

According to the complainant and her brother, the appellant had defiled her on many occasions. Even if we have to go with the age assessment of the complainant that was given as 7 to 8 years, if indeed this is what had happened the medical evidence would have showed very serious physical injuries. Defilement of little children leaves prints that even a lay person as opposed to a medic is able to see.

In the instant case, the medical evidence does not support the complainant's claim and her brother's evidence.

The upshot of the foregoing analysis of the evidence on record is that it was unsafe to convict the appellant from the evidence on record. Consequently, the appeal is allowed. The conviction is quashed and the sentence set aside. He will be set at liberty unless if otherwise lawfully held.

DATED at Meru 11th day of May 2016

KIARIE WAWERU KIARIE

JUDGE