



REPUBLIC OF KENYA
IN THE HIGH OF KENYA AT NYERI
CRIMINAL APPEAL NO. 2 OF 2013

JOHN MUREITHI MATHAIYA..... APPELLANT

V

REPUBLICRESPONDENT

(Appeal from the judgment of the Resident Magistrate's Court at Karatina (H.M.Onkwani R.M.) delivered on 18/12/2012 in Criminal Case No. 11 of 2012)

JUDGMENT

1. The appellant, **John Mureithi Mathaiya**, was charged with the offence of incest by male persons contrary to **Section 20(10) the Sexual Offences Act**. The particulars of the charge were that on the 23rd August, 2012 at Gachuku Village in Mathira East District within Nyeri County he intentionally penetrated the anus of MWM who was to his knowledge his daughter.
2. In the alternative, the appellant was charged with indecent act with a child aged 8 years contrary to **Section 11(1) of the Sexual Offences Act, 2006**.

FACTS

3. The facts of the case as recorded by the trial magistrate are that the case proceeded to hearing with the prosecution calling a total of five (5) witnesses; the evidence of the mother (PW1) was that on the 23.08.2012 she was at work with the complainant (who shall hereinafter also be referred to as the minor); the minor left at 10.00 a.m. with another child to drink porridge at 10.00am.
4. Later the minor came back and requested for the house keys stating she had been sent by the appellant; at around 1.00pm PW1 headed home and found the minor lying on a chair whilst the appellant was lounging outside under an avocado tree.
5. She enquired from the minor on how she was feeling and was told by the minor that she had a pain in her rectum; upon examining the minor PW1 found blood on her legs and a protruding rectum; the minor informed her that the appellant had placed her on the bed and had removed his member and inserted it into her rectum.
6. The minor was examined at the Karatina District Hospital, where a P3 form was completed by PW4; the appellant was arrested and subsequently charged and tried at the Resident Magistrate's Court and was found guilty on the main charge; and was convicted and sentenced to life imprisonment.
7. Being aggrieved by both conviction and sentence, the appellant filed a Petition of Appeal on the 3rd November, 2011 raising three (3) grounds of appeal summarized hereunder;
 - i. That the prosecution did not prove its case beyond reasonable doubt;
 - ii. that the trial magistrate disregarded the appellant's defence.

8. The appeal was heard on the 12th November, 2015 with Mr. Njue appearing for the State and the appellant appeared in person. Prosecuting Counsel for the State made an oral presentation whereas the appellant relied on his written submissions; hereunder is a brief summary of the parties submissions;

APPELLANTS SUBMISSIONS

9. The prosecutions' theories were not proved to the required standard; that the evidence minor was found inside the house on the bench whereas the appellant was found sleeping outside under an avocado tree; that PW1 only enquired from the minor as to what had transpired whereas no enquiry was made to him about the minors injuries and who may have done it.
10. That PW1s evidence on the fact that my former wife had divorced me due to the same conduct being committed on his daughter
11. is not true as the area chief testified holds no was.

RESPONDENTS SUBMISSIONS

12. The appeal was opposed; the evidence of PW1 was that the appellant was her husband and they had been married for two (2) years; that the minor was her child from a previous marriage; the minor testified that the appellant was her father; therefore on the relationship between the minor and the appellant was as defined under Section 22(1) Sexual Offences Act.
13. As to whether incest occurred; the evidence of PW2 was consistent; that the appellant led her to the bed and proceeded to defile her; her evidence is supported by that of the Doctor (PW4) who examined the minor and found that had a prolapsed rectum and had to undergo reconstructive surgery

ISSUES FOR DETERMINATION

- i. Whether the prosecution proved incest beyond reasonable doubt;
- ii. Whether the trial court disregarded the appellants defence

ANALYSIS

14. This being the first appellate court it behoves me to re-evaluate the evidence on record and to reach an independent conclusion. Refer to the case of Okeno vs R (1972) EA 32.

FINDINGS

15. For those reasons this court makes the following findings;
- i. This court finds that the appellant was positively identified.
 - ii. That the prosecution proved its case to the desired threshold.
 - iii. The trial magistrate gave sound reasons for rejecting the appellants defence.

DETERMINATION

16. The appeal is found lacking in merit in its entirety and is hereby dismissed.
17. On the main charge the conviction is found to be safe and the sentence, lawful and both are upheld.
18. Orders accordingly.

Dated, Signed and Delivered at NYERI 12th day of May, 2016.

A. MSHILA

JUDGE