



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MALINDI

APPELLATE SIDE

CRIMINAL APPEAL NO. 3 OF 2014

(From original sentence and conviction of the Principal Magistrate's court at Kilifi

Criminal Case no. 610 of 2012 before Hon. A. M. Obura – PM)

M K K.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant was charged with the offence of Incest contrary to Section 20(1) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that the Appellant on the 8th of June, 2012 at [particulars withheld] location in Kilifi County within Coast Province, intentionally and unlawfully caused his penis to penetrate into the vagina of F B G a person who is to his knowledge his niece and aged 14 years.

The Appellant was convicted and sentenced to serve ten years imprisonment. The grounds of appeal are that the Appellant pleaded not guilty to the charge, that the Complainant was under the influence of alcohol, that Section 36 of the Sexual Offences Act was not complied with, the source of his arrest was not established, that the trial was not fair and that his sworn defence was not considered. The Appellant filed his submissions with the further grounds of appeal. It is further submitted that the charge sheet contradicted the occurrence book number. It is also stated that the age of the Complainant was not proved and that the prosecution did not prove its case.

The Appellant further contends that the charge sheet gave the date of the incident as 8th of June, 2012 while the occurrence book shows that it was 18th June, 2012. There was no birth certificate or age assessment report produced in court to prove that the Complainant was under age. It is also submitted that the Complainant's hymen was broken and there was no prove that it was fresh. The case was only built on suspicion and was not proved.

Mr. Nyongesa for the State opposed the appeal. Counsel submitted that the case was proved beyond reasonable doubt. The Complainant testified that the Appellant is her uncle. There was evidence of penetration and that the Complainant's age was ascertained to be fourteen (14) years. The mother of the minor also gave the age of the Complainant and it was not challenged. Counsel urged the court to

enhance the sentence as the Complainant was below eighteen years old.

Four witnesses testified before the trial magistrate. PW1 was the Complainant. The trial magistrate allowed her to give unsworn statement although she was fourteen years old. She was however cross-examined by the Appellant. Her evidence was that she was 14 years old and a standard 2 pupil. On the 8th June, 2012 at about 8.30pm she was heading to a shop with her aunt when they met the Appellant on the way taking alcohol with his colleagues. The Appellant had a chicken and he told them to go with him to his house to slaughter it for him. They went to the Appellant's house and his wife was there. The Appellant was told by his wife that there was no matchstick to light fire. The Appellant asked PW1 to accompany him to the shop. The Appellant's wife told PW1 not to accompany him. The Appellant's baby started crying and the Appellant's wife went to check on her. PW1 went with the Appellant but before reaching the shop the Appellant tricked her and defiled her.

It is the evidence of PW1 that the Appellant covered her mouth as she tried to scream. The Appellant fell down and was defiled. She was alone as her aunt had remained at the Appellant's place. The Appellant warned her not to tell anyone. After the incident they did not go to the shop and the Appellant took her to her grandmother's home. She slept that night. The following morning her grandmother woke her to go to the shamba. The Appellant's wife went there and enquired as to what had happened the previous evening. She narrated to the Appellant's wife and the grandmother that the Appellant had sexual intercourse with her. The matter was reported to the police then she was taken to Kilifi hospital for examination. She was later issued with a P3 form. It is her further evidence that the Appellant is her uncle as he is married to her mother's sister. The incident occurred at night.

PW2 was H H. It was her evidence that PW1 is her grandchild who is fourteen years old. She woke up PW1 to go to the farm but noticed that PW1 was walking slowly. While at the farm the Appellant's wife went there and told her that her husband returned home in the morning. PW1 informed them that the Appellant had defiled her. They decided to report the matter to the police. According to her, PW1 had not taken a shower. The Appellant is an uncle to PW1. She further testified that PW1 went home at about 4.00am. They took PW1 to hospital and a P3 form was issued. PW4DR. HASHIM SULEIMAN was based at the Kilifi District Hospital. He examined PW1 and assessed her age at fourteen years. PW1's hymen was broken and she had a discharge that was thick and whitish. No sperms were noted. He concluded that PW1 was defiled. Other tests like pregnancy and HIV were negative.

PW4 CORPORAL DORCAS KAGWIRIA was based at the Kilifi Police Station. The report was made on the 9th June, 2012 and she investigated the case. She referred PW1 for medical examination and caused the Appellant to be arrested. According to her the Appellant is a blood relative of the Complainant.

The Appellant was put on his defence and he gave sworn testimony. It is his evidence that he is a stone digger. He never saw the Complainant's clothes in court and was not taken for medical examination. No one saw him defiling the Complainant. The Complainant is a niece to his wife's aunt. It is true that the Complainant met him while drinking *mnazi* at a club. They went to buy matchstick but found the shop closed. He went to the Complainant as her aunt was drunk. It was about 10.00pm. He was so drunk but he took PW1 home and while on his way he fell down. He reached home late. He had disagreement with his wife who promised to teach him a lesson. They had no disagreement with the Complainant.

The main issue for determination is whether the Appellant defiled PW1 and whether PW1 is related to the Appellant. From the medical evidence it is clear that PW1 was indeed defiled. According to the doctor who examined PW1, the hymen was broken and there was white discharge. The doctor concluded that PW1 was defiled. This is in line with the evidence of PW1 who told the court that she was defiled. It is clear from the evidence that there was not eye witness. According to PW1 it was at night and she knew the Appellant. The two of them went to the shop and the Appellant tripped her while on the way. There were bushes on the way. It is also established that PW1 reached home late that night.

The defence evidence is to the effect that the Appellant went to the shops with PW1 but found the shops closed. The Appellant took PW1 home. It is clear that the incident was known to PW2 the following day

after she was informed by PW1 in the presence of the Appellant's wife as to what had happened the previous night. The prosecution evidence does prove that indeed PW1 was defiled on the 8th June, 2012. It is also clear from the prosecution evidence that the Appellant was with PW1 at about 10.00pm on the 8th June, 2012. Given the evidence on record, I am satisfied that it is the Appellant who defiled PW1. There is no evidence that the Appellant left PW1 to go home on her own. He took her to her grandmother's place where she used to reside.

The Appellant contends that the age of the Complainant was not ascertained. According to PW3, Dr. Hashim he gave the approximate age of PW1 as fourteen years. There was no need for an age assessment report. The Appellant also contends that it is not established whether the hymen that was broken was fresh or not. It does not matter whether the hymen was fresh or not so long as the act of penetration was proved. It is the evidence of PW4 that the Appellant was arrested after a period of 72 hours and could therefore not be taken for medical examination. There is no denial of that evidence. I therefore find that there was no violation of Section 36 of the Sexual Offences Act.

According to PW1, the Appellant is her uncle. The same evidence was given by PW2. The defence evidence does not deny that the Appellant is related to PW1. Under Section 20 (1) it is indicated that where a male person commits an indecent act which causes penetration who to his knowledge is his daughter, granddaughter, niece, aunt or grandmother is guilty of incest. I am satisfied that the Appellant is related to PW1 within the relationship under Section 20 of the Act. There is no anomaly on the charge sheet. The OB number would have been wrongly entered but that cannot be a reason for acquittal even if the date is given as 18th June, 2012.

I have gone through the judgment of the trial magistrate and I am satisfied that the magistrate properly analysed the evidence on record. The defence evidence was properly analysed and was considered. The court noted that the Appellant took PW1 home after defiling her. I do find that the conviction is proper.

In the end, I find the Appeal lacks merit and is hereby disallowed. The sentence of ten years imprisonment was imposed by the trial court. The Appellant could have been sentenced to serve life imprisonment. I do not wish to disturb the sentence and will leave it at ten years imprisonment.

Delivered and dated this **3rd** day of **March, 2015**.

Said J. Chitembwe

JUDGE