



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT VOI
CRIMINAL APPEAL NO. 169 OF 2014

T M M APPELLANT

VERSUS

REPUBLIC RESPONDENT

[Being appeal from original conviction and sentence in Criminal Case No. 495 of 2013 made on 16th August 2013 by the Senior Principal Magistrate's Court at Voi (the Hon. Nyakundi L.M.- Ag. PM)]

JUDGMENT

Introduction

1. This is a judgment on first appeal from original conviction and sentence of the Senior Principal Magistrate's Court at Voi Criminal Case No. 495 of 2013. The appellant was convicted for the offence of incest by male person contrary to section 20 (1) of the Sexual Offences Act No. 3 of 2006 and sentenced to imprisonment for 20 years on 16th August 2013.

2. *The particulars of the offence were that –*

“PARTICULARS OF OFFENCE: *T M M On the 12th day of June 2013 at [Particulars Withheld] village within Taita Taveta County being a male person caused his penis to penetrate in the vagina of S M who is to his knowledge his daughter.”*

1. The appellant pleaded guilty to the charge and the facts relied upon by the prosecution were read out in court and the relevant Medical Examination Report Police P3 produced in court and upon confirmation of the correctness of the facts as set out by the prosecution, the appellant was convicted for the offence of incest sentenced to serve imprisonment for 20 years.

The prosecution's case

1. In brief, the prosecution's case was set out in the **statement of facts** as shown in the following full record of proceedings in the trial court:

“REPUBLIC OF KENYA

IN THE SENIOR PRINCIPAL MAGISTRATE'S COURT

AT VOI

CRIMINAL CASE NO. 495 OF 2013

REPUBLIC

VERSUS

T M M.....ACCUSED

Date- 26/7/13

Magistrate- Hon. L.M Nyakundi

Prosecutor- I P Mwangi

Court interpreter- J. Kambi

Accused represented/unrepresented

.....

Interpretation- English/Kiswahili

Charge read over and explained to accused in Kiswahili and accused replies in Kiswahili.

Main Count

Accused- Ni kweli (it is true)

Court- Plea of guilty entered against the accused person.

Court prosecutor- I pray that the accused person be remanded in police custody to facilitate compilation of the case file. I pray the matter be mentioned on the 29/7/2013.

Court

The accused person to be remanded at Voi Police Station for one day to facilitate compilation for the police file.

Mention on 29/0713.

29/7/13

Magistrate- Hon. L.M Nyakundi

Prosecutor- I P Mwangi

Court interpreter- J. Kambi

Accused- Present

Court

Charge read out and every element thereof explained to the accused person in Kiswahili who upon being asked to answer replies in Kiswahili.

Accused- Ni kweli.

Court

Plea of guilty entered against the accused person.

FACTS

On the morning of 12/6/13, the complainants mother one C K left for Mwatate to search for her lost brother leaving the complainant S M and other children at home under the care of the complainant. In the evening they retired to bed at around 22.00hrs, the complainant shared her bed with her sister by the name V C. After they had slept, the complainant heard the father calling her but she did not respond. The accused person then left. In the morning at around 3.00hrs, the accused person went to the complainant room and forced her daughter to have sex with him. The complainant did not raise any alarm. She later alleged that she feared her father could harm her. The accused had sex with the complainant to his satisfaction until he left on his own. Later in the morning, the complainant sought assistance from the village chairlady who escorted her to Sagalla dispensary for medical attention.

The case was reported to Voi Police Station on the 17/7/13 and necessary action was taken. A P3 form was issued which was filled on 27/7/13 in which the injury was assessed as harm. A pregnancy test also turned positive. I wish to produce the P3 form as PEX- 1 and the age assessment as PEX-2.

Upon completion of investigations, the accused person was charged with the offence before court.

NYAKUNDI L.M- Ag. PM

29/7/13

Accused- The facts are true.

Court

The accused person is convicted on his own plea of guilty.

MITIGATION

I am the one who takes care of the family. I urge the court to grant me a sentence that will allow me to go back and take care of my family.

Court

Before the accused person, he is referred for psychiatric evaluation.

Sentencing on 12/8/13.

NYAKUNDI L.M- Ag. PM

29/7/13

12/8/13

Before- Hon. L.M Nyakundi- Ag. PM

Prosecutor- I P Mwangi

Court interpreter- J. Kambi

Accused- Present

Court prosecutor

The accused had been referred for psychiatric evaluation but the accused has been in police custody for the last 2 weeks. We have not been informed why the accused person was not escorted to Port Reitz. The OCS is in a better position to explain.

Court

Summons to issue to the OCS Voi Police Station.

Mention on 13/8/13.

In the meantime the accused person to be remanded at Voi Prison.

NYAKUNDI L.M- Ag. PM

12/8/13

13/8/13

Before- Hon. L.M Nyakundi- Ag. PM

Prosecutor- I P Mwangi

Court interpreter- J. Kambi

Accused- Present

Court prosecutor

This is the case where the accused was to be escorted for mental evaluation. The OCS Voi police station is in court to explain why the accused was not placed before a psychiatrist.

OCS Voi Police Station Christian male duly sworn in and states in Kiswahili as follows:-

I am No. 217429 CIP Duncan Ngiki. I am the OCS Voi police station.

I wish to inform the court that the accused person was not taken to the psychiatrist as ordered by the court because Dr. Mwang'ombe was attending a seminar in Nairobi. We have now booked the patient on 15/8/13.

NYAKUNDI L.M – Ag. PM

13/8/13

Court

The accused person to be remanded at Voi Police Station to facilitate him to be escorted for psychiatric evaluation.

Mention on 16/8/13.

NYAKUNDI L.M- Ag. PM

13/8/13

16/8/13

Coram

Before- Hon. L.M Nyakundi- Ag. PM

Prosecutor- I P Mwangi

Court interpreter- J. Kambi

Accused- Present

Interpretation- English/Kiswahili

Court prosecutor

The psychiatric evaluation report is ready.

Court

The court has taken into consideration the offence committed by the accused person and the circumstances under which the offence was committed. The law provides for a maximum sentence of life in prison for an offence similar to the one committed by the accused person.

Considering that the accused person was honest enough to plead guilty at the first instance as well as the fact that the child did not lodge a complaint until it was too late, the court feels that a sentence of 20 years in prison will suffice the accused person. By the time the accused person completes the sentence, all his children will be adults and he will have no opportunity to take advantage of them.

I accordingly sentence the accused person to 20 years in prison.

Right of appeal within 14 days.

NYAKUNDI L.M- Ag. PM

16/8/13”

1. Prior to conviction and sentence, the court order a psychiatric examination on the appellant to confirm his soundness of mind and when this was confirmed by Doctor’s report, the learned trial magistrate considered the evidence finding the charge proved against the accused on his own plea of guilty and sentenced him to imprisonment for 20 years.

The Appeal

1. The appellant, no doubt ware that his appeal on the merits of the appeal was barred by virtue of his plea of guilty pursuant to section 348 of the Criminal Procedure Code, raised the issue that his plea of guilty was not unequivocal and proceeded to challenge the trial on evidence presented by the prosecution through his ‘Mitigation Grounds of Appeal’ filed in court, as follows:

“Mitigation Ground for Appeal

The medical examination of the complainant was conducted after one week from when the alleged offence was committed.

In the instant case, the plea was equivocal, as I did not understand the language used by the court besides, the alleged offence was reported in the OB on the 12/6/13 while the complainant according to

part 1, of the P3 form as filled by the OCS, Voi Police Station was sent to the hospital on the 17/7/2013 to seek medical examination. More so, the said P3 form was filled on the 27/7/13. However, the age of the pregnancy did not connect to the date of the alleged incident or offence. The prosecution in their particulars of the preferred charge had stated that the offence was committed on 12th day of June, 2013 whereas upon medical examination on the complainant, she was found to be 20 weeks pregnant (5 months) as is filled in the P3 form No. 6 inter alia “The girl was 20 weeks pregnant reports last monthly period to be in March, 2013. According to No. 6 of the P3 form, produced as exhibit PEX 1. If the alleged offence was committed on the 12th June, 2013 and the complainant was medically examined on the 27th July, 2013 and found to be 5 months or 20 weeks pregnant then the age of the pregnancy did not connect to the date of the alleged offence. In fact the complainants last monthly periods were in March before the date of the alleged incident. Meaning that the complainant was already pregnant during when she alleged the offence was committed on her. I mitigate that this discrepancies and disparities in the medical evidence as herein above, I do hereby beg leave of this Hon. Court to allow my mitigation.”

1. During the hearing of the appeal, the appellant filed written submissions in court while, Mr. Sirima, Counsel for the Director of Public Prosecution (DPP) made oral submissions in response thereto, and judgment was reserved.

THE ISSUE FOR DETERMINATION BEFORE THE COURT

1. The issue for determination before the court is whether on the evidence presented before the court the plea of guilty the appellant to charge of incest by a male person contrary to section 20 (1) of the Sexual Offences Act 2006 was unequivocal.

DETERMINATION

1. Section 348 of the Criminal Procedure Code provides that no appeal shall lie against a plea of guilty save to the severity of the sentence in these specific terms:

“348. No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence.”

1. However, since the unequivocality of the plea was raised as aground of appeal, the court will examine the evidence to determine whether the plea was unequivocal and, therefore, barred by section 348 of the Criminal Procedure Code. Consistently with the duty of the Court on first appeal as set out in **Okeno v. R.**, 1972 EA 32, this court has reevaluated the evidence presented before the trial court and found that the plea of guilty by the appellant in this case was unequivocal.

2. As shown in the proceedings of the court set out above, the court went to proper lengths in ascertaining the accused’s plea to the charge which together with the facts relied on by the prosecution were explained to the accused on two occasions in Kiswahili and he responded in the same language. The court went further to require that before sentencing the accused be examined by a psychiatrist who report signed by Dr. C. M. Mwangome, M. Med, consultant psychiatrist of 15th August 2013 was to the effect that the accused was “on examination, his appearance, behaviour, mood, speech and cognition were normal.” The then proceeded to sentence him accordingly to law.

3. There is no merit in the issues of merit raised by the appellant:

a. That the medical examination was conducted one week after the alleged offence of incest took place and medical evidence showed that the girl was 20 weeks pregnant does not in any way affect the charge of incest. What was before the court is not whether the appellant was the person responsible for the pregnancy. The charge of incest could well exist independent of the pregnancy, or lack of it, of the girl victim.

b. The different dates on the Medical Examination Report Police Form P3 clearly show that the Police

OB no. was 21/17/7/2013 that is to say report made on 17th July 2013 as no. 21 on the OB for an alleged offence on 12th June 2013; the victim being referred to hospital for examination on 17th July 2013 and the report being filled on 27 July 2013. It would only show that the incident was not reported for about one month and the examination and completion of the P3 report was not done until 10 days after the victim was issued with the P3 form and sent to hospital for purposes of examination. There is no material discrepancy.

4. The appellant pleaded guilty to the charge of Incest contrary to section 20 (1) of the Sexual Offences Act. Section 21 of the Sexual Offence act which provides for the offence of incest by female persons is clearly not applicable in the matter and the reference to the section in the charge did not invalidate the charge as the particulars of the offence clearly indicated that the charge was against the appellant and therefore incest by a male person for which offence the correct section was 20 (1) of the act. In charging the offence of Incest contrary to section 21 as read with section 20(1) of the Sexual Offences Act No. 2006, the drafter of the charge was clearly wrong but the particulars of the offence, as set out above, left no ambiguity that it was a male person who was charge for incest on his own daughter. The appellant was no prejudiced by the wrongful reference to section 21 which relates to incest by female person alongside section 20 (1) which relates to incest by male person. No prejudice within the meaning of section 382 of the Criminal Procedure Code justify the setting aside of a conviction on account of reference to the wrong provision of law in addition to the correct one in a charge sheet whose particulars are clear and unambiguous and to which an appellant has pleaded guilty in clear and unequivocal language.

5. Section 20 (1) of the Sexual Offences Act is in the following terms:

“20. (1) Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years:

Provided that, if it is alleged in the information or charge and proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person.”

1. The complainant was 15 years old, as shown in the P3 Report and the trial court appears to have taken the view, which I agree with, that the life imprisonment sentence is *maximum* rather than a *mandatory* sentence. Significantly, in section 20 (1) of the Sexual Offences Act, there is no mandatory provision *“shall be sentenced to”* as with the death sentence in section 296 (2) of the Penal Code. Although the appellant who is the father of the girl admitted the facts of the case including the contents of the P3 form which showed the age of the girl as 15 years, the age was not pleaded in the charge, and the court would in any event be right not to sentence the appellant on the basis of the age of the victim, which was not stated in the charge sheet.

2. Be that as it may, as conceded by the DPP in seeking enhancement of the sentence to life imprisonment, because notice of intention to seek enhancement of the sentence was not given to the appellant, and he, therefore, had no opportunity to reconsider his appeal, the Court would not impose the sentence of imprisonment for life. The court will therefore not interfere with the sentence imposed by the trial court and rather let the appellant serve the remainder of the 20 year jail term.

ORDERS

1. Accordingly, for the reasons set out above, I find that appellant’s appeal herein is without merit and dismiss the same.

DATED AND DELIVERED THIS 9TH DAY OF JULY 2015.

EDWARD M. MURIITHI

JUDGE

In the presence of: -

Appellant in person

Ms. Karani for the Respondent

Ms. Linda Court Assistant.