



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 295 OF 2010

(From original conviction and sentence in Criminal Case No. 121 of 2010 of the Principal Magistrate's Court at Makueni, F. M. Nyakundi – P.M.)

M W.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Appellant, M W was charged with the offence of incest by male person contrary to Section 20(1) of the Sexual Offences Act No. 3 of 2006.

The particulars of offence being that “on the 12th day of March 2010 in Makueni District within Eastern Province unlawfully committed an indecent act which caused penetration of his male genital organs to a female person namely M M who is to his knowledge his daughter aged eleven years.”

2. In the alternative, the Appellant was charged with the offence of indecent assault of a female contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006.

The particulars of offence being that “on the 12th day of March, 2010 in Makueni District within Eastern Province unlawfully and indecently assaulted M M by touching her private parts.”

3. When the Appellant was arraigned before the trial court, he pleaded not guilty. The case proceeded to a full trial.

4. The prosecution called five (5) witnesses in support of their case. The prosecution case was that at the material time, the complainant, PW2 M M, an eleven year old primary school girl lived in **[particulars withheld]** area with her younger siblings and her father, the Appellant. Their mother had left the home. That whenever the Appellant came home drunk, he would take the naked complainant and her naked younger sister K to his bed. The Appellant would then strip naked and to use the complainant's words; “... remove his organ for urinating and put it in my organ for urinating. He would do the same to K”. The complainant and her sister would then scream in pain but nobody went to their rescue. After being defiled about 5 times, the complainant could not take it anymore. On the material day the complainant ran away and later reported the matter to some women in church.

5. PW3 V N M a member of the Redeemed Gospel Church, Kaumoni was in church on 13th March, 2010 when she heard the complainant narrate her ordeal. It turned out that the complainant had ran away from home and slept in the bush the previous night in a bid to escape from the father.

6. The church women reported the matter to the area Assistant Chief. PW3 took the complainant under her care and reported the matter to the Children's office. The matter was reported to the Police and the Appellant was arrested and escorted to Makueni police station. The Appellant's children were rescued from their home and taken to their aunt. The complainant was escorted to Makueni District Hospital where she was examined by a Clinical Officer. It was confirmed that the complainant had been defiled and was infected with a sexually transmitted disease. The Appellant was subsequently charged.

7. In his defence the Appellant gave sworn evidence. No witnesses were called. The Appellant denied the charge. He stated that on 9th March, 2010 he went to a certain place to carry out casual work. That when he returned home, he found a summons requiring him to go to the Office of the Assistant Chief with two other people – K K1 and K K 2. On 10th March 2010 the three of them went to see the Assistant Chief. The three of them were told to board a motor vehicle and were taken to the police station. That the wife of the Appellant had gone to visit her home and collect some Christmas items. The children were taken to their aunt's home. The Appellant was then brought to court with the other two men on allegations that he "sells" his children to the men. That the other two men were charged with the offence of being drunk and disorderly. The Appellant further stated that the complainant is his daughter but denied having defiled her.

8. The trial magistrate found the Appellant guilty in the main count of incest and convicted him to serve forty (40) years imprisonment. The Appellant was aggrieved by both the conviction and sentence and appealed to this court on grounds that can be summarized as follows:

- a. *That the prosecution case was not proved beyond reasonable doubt.*
- b. *That the Appellant was not taken for a medical examination.*
- c. *That the complainant's age was not ascertained.*
- d. *That the Clinical Officer was not competent to adduce medical evidence.*
- e. *That the defence case was not considered.*
- f. *That the Appellant was not accorded the opportunity to call his witnesses.*
- g. *That the sentence is harsh and excessive.*

9. During the hearing of the appeal, the Appellant relied on his written submissions. The learned counsel for the State submitted on the sufficiency of the prosecution evidence.

10. This being the 1st appellate court, this court is duty bound to re-evaluate the evidence and the record afresh and come to its own conclusions and inferences – See **Okeno –vs- Republic (1972) EA 32.**

11. The complainant (PW2) gave evidence that left no doubt that she was defiled. The complainant described the act constituting the offence as follows:

“.. he would remove his organ for urinating and put it in my organ for urinating ...”

Her evidence was corroborated by that of the Clinical Officer, PW1 Onesmus Katua. According to the Clinical Officer, when he examined the complainant he found the hymen broken and the laboratory examination showed pus cells which was an indication of a sexually transmitted disease (STD). The Clinical Officer produced a P3 form which gave the complainant's age as eleven (11) years.

12. A clinical officer is competent to give medical evidence. The Court of Appeal in the case of **Kavoi Kiilu -vs- Republic (2010) eKLR** held as follows:-

“Under section 2 of the Clinical Officers Act (Training, Registration and Licensing Act Cap 260 (LOK) a clinical officer means:-

“a person who, having successfully undergone a prescribed course of training in an approved training institution, is a holder of a certificate issued by that institution and is registered under the Act.....”

Section 7(4) of the Act states:-

“A person who is registered by the council shall be entitled to render medical or dental services in any medical institution in Kenya approved for the purposes of this section by the Minister by Notice in the Gazette.”

The Act goes further to provide that such officers may engage in private practice “in the practice of medicine, dentistry or health work for a fee.” It follows that the clinical officer did testify in this case on his area of competence.”

13. The Complainant knew her father and lived with him. The complainant’s evidence is therefore that of recognition. Although the Appellant was charged with the offence of the defilement that took place on the material date, the complainant’s evidence reveals that she was defiled severally on different days by the father. The complainant’s evidence was that their mother left the home during that period.

14. The complainant’s evidence in court is consistent with the report she made to PW3, the church member who rescued her. The evidence adduced by the police officer, PW4 APC Ali Dubat and PW5 Cpl (w) Agnes Ikiba confirms the report made to the police and the investigations carried out.

15. The defence by the Appellant confirms that the complainant is his daughter and that the complainant’s mother was not at home at the material time. Although the Appellant denied the offence, his defence case is not convincing in view of the strong prosecution evidence. There are no reasons why the complainant would plant this case on her father.

16. The complaint that the Appellant was not given a chance to call witnesses has no merits. The record shows that the Appellant dispensed with the calling of his witnesses and stated that he was unable to trace them.

17. On the issue raised concerning the STD and the Appellant having not been taken for a medical examination, the same is not fatal in the prosecution case. Section 124 of the Evidence Act provides as follows:

“Provided that where in a Criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

18. The trial magistrate believed the complainant, hence the conviction. The complainant gave unsworn evidence after the trial magistrate conducted a *voir dire*. However, the complainant was cross-examined. There was therefore no prejudice suffered by the defence. The holding of a *voir dire* by the trial court was superfluous as the complainant was 11 years old. Section 2 of the Children’s Act defines a child of tender age as one below ten (10) years of age. (See **Samson Oginga Ayieyo –vs- Republic – Criminal Appeal 165 of 2006**).

19. **Section 19 (1) of the Oaths and Statutory Declarations Act** requires that a *voir dire* be conducted by a trial court to justify the reception of evidence of a child of tender years.

20. Section 20(1) of the Sexual Offences Act provides for a sentence of up to life imprisonment if the victim is under the age of eighteen years. The sentence of 40 years is therefore illegal and I substitute the

same with a life sentence.

21. The appeal has no merits and is dismissed.

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B. THURANIRA JADEN

Dated and delivered at Machakos this 8th day of October, 2015

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B. THURANIRA JADEN

JUDGE