



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 111 OF 2012

J K M APPELLANT

VERSUS

REPUBLIC

(Being an appeal from the conviction and sentence of Hon. S.K. Mutai Senior Resident Magistrate delivered on 27/6/2012 in Mutomo Senior Resident Magistrate Court Criminal Case No. 102 of 2012)

(Before Hon. B. Thurairaja Jaden J)

J U D G M E N T

1. The Appellant, **J K M** 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 the offence were that on the 26th day of May 2012 at around 5.00 p.m. at *[particulars withheld]* village, **Ikanga Location** in **Mutomo District** within the **Kitui County**, committed an act or indecency or an act namely incest which caused his penis to penetrate the vagina of a girl namely **E K** aged 11 years who to his knowledge the said girl was his daughter.

2. In the alternative, the Appellant was charged with the offence of committing an act of indecent with a child contrary to **section 11 (1)** of **Sexual Offences Act No. 3 of 2006**.

The particulars of the offence were that on the 26th day of May 2012 at about 5.00 p.m. at *[particulars withheld]* village, **Ikanga Location** in **Mutomo District** within the **Kitui** committed an act of indecency with **E K** by touching her private parts namely vagina and thighs.

3. When the Appellant was arraigned before the lower court, he pleaded not guilty. The case proceeded to a full hearing.
4. The case for the prosecution was that on the 26/5/2012 at about 5.00 p.m. the complainant, PW1 **E K** who was eleven (11) years old was left home with her siblings and her father (the Appellant). Her mother, PW2 **C M K** went to fetch water. The father called the complainant inside the house and told her to climb on the bed and remove her underpant. The father then removed his underpant and had sex with her, then told her not to tell the mother. The Appellant took a bath but later in the night she informed the mother what had transpired. The following day the mother reported the matter to the police. The complainant was issued with a P3 form and escorted to **Ikanga Sub-district Hospital** where she was examined, treated and the P3 form filled in as it was

- confirmed that the complainant had been defiled. The Appellant was arrested and charged.
5. In his defence, the Appellant gave unsworn evidence. No witnesses were called. The Appellant stated that he was a farmer. That since he married his wife he has had problems with her. He further testified that since the month of March 2012, he was always been in the farm the whole day. He stated that he was framed up with this case and described himself as a law abiding citizen who is God fearing.
 6. After the conclusion of the case, the trial magistrate found the Appellant guilty in the main count, convicted him and sentenced him to ten (10) years imprisonment. The Appellant was aggrieved by both the conviction and sentence and appealed to this court on the following grounds:-
 - v. **That the prosecution case was not proved to the required standard.**
 - v. **That the P3 form was filled and produced by a Clinical Officer who is not a medical officer.**
 - v. **That some parts of the trial were not conducted in a language that the Appellant understood.**
 - v. **That the age of the complainant was not proved.**
 - vi. **That the trial magistrate violated the provisions of section 169 of the Criminal Procedure Code.**
 7. During the hearing of the appeal, the Appellant opted to rely on written submissions. The said submissions essentially expounded the grounds of appeal.
 8. The learned counsel for the State opposed the appeal and gave notice of enhancement of the sentence stating that the sentence provided by the law is life imprisonment. Due to this turn of events, the court gave the Appellant time to consider whether he still wished to proceed with the appeal on sentence. When the appeal came up for hearing about ½ months later, the Appellant informed the court that he still wished to proceed on with the appeal, the notice by the State notwithstanding.
 9. The court proceeded to hear the appeal. The learned counsel for the State submitted that under **section 20 (1) of the Sexual Offences Act**, the sentence prescribed is twenty (20) years. That the complainant was eleven (11) years at the material time and the sentence ought to be enhanced. It was further submitted that the complainant was a daughter to the Appellant and therefore her evidence was that of recognition. That the time of the offence was during the day at about 5.00 p.m. That the complainant's evidence was corroborated by that of her mother (PW2) and that of the Clinical Officer (PW4). That the defence was not convincing and there was no reason why the minor (PW1) would frame up the Appellant.
 10. This being a first appeal, 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 (PW1) testified after the court carried out a *voire dire* and found her **“competent”** to give sworn evidence. This was however not necessary as the complainant was eleven (11) years old according to her evidence.
 12. **Section 19 of the Statutory Oaths and Declarations Act Cap 15 Laws of Kenya** which provides that:

“Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 233 of the Criminal Procedure Code, shall be deemed to be a deposition within the meaning of that section.”
 13. Under **Section 2 of the Children's Act Cap 141 Laws of Kenya**, a child of tender years is a child of ten years of age and below. (See also **Samson Oginga Ayieyo –vs- Republic – Criminal Appeal 165 of 2006**).
 14. The complainant (PW1) narrated to the court how the Appellant who was her father called her to

- bed, asked her to remove her pant, then removed his pants and had sex with her then told her not to tell the mother. The complainant's evidence is that of recognition in broad daylight at about 5.00 p.m. There is therefore no possibility of mistaken identity.
15. The complainant informed her mother that night what had befallen her. The mother's evidence was that the complainant who was eleven years old was born before she got married to the Appellant who then assumed the role of a father. It was the mother's evidence that she checked the complainant's private parts and saw a wound there. The mother then made a report to the police. The evidence of PW3 **PC Alfred Lessan** gave evidence that confirms a report was made and the Appellant arrested.
16. The Clinical Officer (PW4) gave evidence that confirmed that the complainant had been defiled. The treatment notes (exh.1) and the P3 form (Exh.2) were produced by the Clinical Officer. Both the treatment notes and the P3 form gave the complainant's age as eleven years at the time the complainant was examined and treated at **Ikanga Sub-District Hospital** just one day after the material date. The Clinical Officer testified that there was a slight laceration of the complainant's genital area and presence of spermatozoa. The Clinical Officer's conclusion was that the complainant had been defiled, stating that there was forceful penetration of the vagina.
17. Is a Clinical Officer a competent witness to give medical evidence? The answer is found in the Court of Appeal's dictum in the case of **Kavoi Kiilu –vs- Republic (2010) e KLR** the **Court of Appeal** state as follows:-

“Under section 2 of the Clinical Offences 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.”

18. The Appellant in his defence termed this case as a frame up by his wife with whom he had problems. There is however no reason why the complainant would frame up the Appellant. The evidence of the complainant (PW1), the mother (PW2) and the Clinical Officer (PW3) leaves no doubt that the complainant was defiled. The defilement was real and not a matter of conjecture. Although the Appellant stated that he was at the farm the whole day, this alibi did not dislodge the strong prosecution case.
19. The trial magistrate who had the advantage of seeing the complainant testify believed her. I have no reason to doubt the complainant's evidence. The proviso in **section 124** of the **Evidence Act** stipulates 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.”

20. The Appellant has raised the issue of the language used during the trial. The plea was taken in **Kikamba language**, which is reflected by the trial court as a language that the Appellant understood. The court clerk whose name is reflected as **“Wambua”** was present throughout the

court proceedings. As held by the Court of Appeal in **Said Hassan Nuno v Republic (2010) eKLR:-**

“We take judicial notice that one of the core duties of a court clerk is to offer interpretation services to accused or even to the court where it does not understand the language of the accused; or a witness to the case.”

The Court of Appeal proceeded to hold that the Appellant had followed the proceedings adequately.

21. Having re-evaluated the evidence on record afresh, I am satisfied that the conviction is based on sound evidence. The appeal has no merits and fails under the proviso to **section 20 (1)** of the **Sexual Offences Act** provides for a sentence of twenty years if the victim is below 18 years of age. Consequently, I substitute the sentence of ten years with that of life imprisonment.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 3rd day of June 2014.

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B. THURANIRA JADEN

JUDGE