



REPUBLIC OF KENYA

High Court at Garissa

Criminal Appeal 66 of 2012

An Appeal from the original conviction and sentence in Criminal Case No 532 of 2011

of the Principal Magistrate at Mwingi (H.M Nyaberi)

JNM.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

1. JNM (the appellant) is the father to **K.N (PW2)**, the complainant who is a minor aged 9 years at the time of the alleged offence and **K.N (PW3)** whose age is given as 6 years. PW3 is the younger sister to the complainant. Both girls were herding family goats in company of the appellant and their two other siblings identified in evidence by one name as **S** and **M** respectively. The date was 14th August 2011, a Sunday. While in the bush the appellant sent the children in different directions to collect firewood. The complainant was in the process of tying her bundle of firewood when the appellant approached and grabbed her by her right hand and knocked her down. He removed the black biker she was wearing, lowered his trousers to the knees and defiled her. The complainant was struggling to free herself and at the same time screaming for help. When the appellant released her, she stood up, wore her biker and went home. At home were her older sister and her mother **M.N (PW4)**. The complainant reported what had happened to them. The matter was reported to the chief and later to the police leading to the arrest of the appellant. The complainant was referred to hospital for treatment.

2. The police charged the appellant with committing an indecent act with a child under section 11 (1) of the Sexual Offences Act. The trial magistrate received evidence of six witnesses. He examined and analysed the evidence and was convinced that an offence of incest under section 20 (1) of the Sexual Offences Act had been proved. He amended the charge from the original offence of committing an indecent act with a child and substituted it with the offence of incest under section 20 (1) of the same Act. He convicted the appellant under the substituted offence and sentenced him to life imprisonment. Is the act of substituting the charge by the trial magistrate within the law? This is one of the issues I will be addressing in this judgement. It is worth noting that the defence counsel did not raise it as one of the grounds of appeal even though he is challenging the sentence as being harsh and excessive. The learned State Counsel did not mention the issue in his response either.

3. In his Petition of Appeal, the appellant has raised six grounds of appeal although ground number five

is a repetition of ground number two. The appellant is challenging the lower court for not appreciating that he did not commit the offence; for not appreciating his defence/or not taking into consideration his defence; for considering the medical evidence in the form of P3 form tendered by a Clinical Officer instead of a Medical Officer; for misdirecting himself in failing to find that the evidence was contradictory and in meeting out harsh and excessive sentence.

4. The appellant through his Counsel contends that the medical evidence was tendered by a Clinical Officer instead of a Medical Practitioner as provided for under the Evidence Act; that the medical evidence was contradictory and did not support the evidence of the complainant that she had been defiled since no injuries were found in her genitalia and that the medical examination revealed no presence of spermatozoa; that the evidence of the complainant required corroboration and therefore because of these shortcomings in the evidence the case was not proved beyond reasonable doubt.

5. Counsel for the appellant prepared written submissions which he highlighted in court. He dropped ground number two which automatically affected ground number five which was a repetition. This left four grounds of appeal. Counsel for the appellant introduced another ground of appeal at the time of submissions. In addition to challenging the evidence for being contradictory, he also challenges it for lack of corroboration. Counsel also raised the issue of non compliance with section 211 of the Criminal Procedure Code by the court. It was submitted that the trial magistrate did not show how he complied with this provision of the law and as a result he denied the appellant an opportunity to defend himself. Further submission related to the age of the complainant. Counsel for the appellant claimed that the age of the appellant was not ascertained. Again this was not included in the grounds of appeal. Counsel for the appellant asked the court to allow the appeal and set the appellant free.

6. The appeal has been opposed by the learned State Counsel who orally submitted that the appellant was facing a charge of incest which did not lay emphasis on age of the complainant. I wish to point out that the appellant was not charged with incest but committing an indecent act. The charge of incest was self created by the trial magistrate and I have stated elsewhere in this judgement that I will address that issue. Learned State Counsel further submitted that the medical evidence was adduced by Dr. Indumwa on behalf of the doctor who had examined the complainant and not a Clinical Officer; that courts can convict on uncorroborated evidence where it is convinced that a minor complainant is telling the truth; that section 211 of the Criminal Procedure Code was complied with and that penetration is defined under the Sexual Offences Act to include partial penetration. He asked the court to dismiss the appeal.

7. The court is under a duty when sitting on first appeal to examine and evaluate afresh all the evidence tendered in the trial court with a view to arriving at its own independent conclusion as regards the guilt or innocence of an appellant.

8. PW2 testified in the lower court that while herding goats with the appellant and other siblings on 14th August 2011 the appellant told the children to go in different directions to gather firewood. It is when she was tying her bundle of firewood that the appellant suddenly appeared next to her and grabbed her right hand and knocked her down. She puts the time at about 1.00pm and in her own words:

“He removed my black biker completely. I started screaming. He removed his long trousers and lowered it to the knees. He made me lie down by my back (sic). He came on top of me and he inserted his penis into my vagina. I felt pain and I started struggling to remove myself while screaming. He poured something onto my vagina (sic). He released me. I stood up and wore my biker. He told me to see where the goats were. Instead I went home.”

9. The evidence of PW3 confirms that the children were herding goats with their father the appellant on 14th August 2011; that he sent them in different directions to collect firewood; that she heard her sister PW2 screaming and saw her going home at about 1.00pm afterwards and saw the appellant sitting on a stone; that the appellant told them to take the goats home and they left him behind. PW3 did not know what had happened to PW2 as she was not told. Their mother PW4's evidence is that PW2 went home crying around 1.00pm on 14th August 2011; that PW2 told her that she had been raped by her father and she said she would commit suicide; that she saw the biker PW2 had been wearing and noticed it was wet;

that she told PW2 to go and report to the chief and she left to her parents home from where she was summoned by the police to take PW2 to hospital.

10. Further evidence is by **Regina Kivwea, PW1**, who told the court that she is a village elder and that she learned from the members of public and the police that PW2 had been defiled by her father; that she was told by the police to take into her custody PW2 and PW3. She said she did not see the mother of the two children. She further testified that she accompanied the police and members of public in looking for the appellant who was not found until three days later. She also accompanied PW2 to the police station and to hospital. She said police asked her to get some samples from PW2 and while doing so she noted that PW2 had some discharge mixed with blood in her genitalia.

11. Medical evidence was adduced by **Dr. Indumwa (PW6)** of Mwingi District Hospital on behalf of Dr. Barongo of the same hospital and who was not available. His evidence is that PW2 was examined two days after the alleged offence and the doctor found no physical injuries on her genitalia. No discharge and/or spermatozoa were noted. The investigating officer, **PC Beatrice Waithera (PW5)** testified to the steps she took to gather evidence and finally charge the appellant. The trial magistrate was convinced that the evidence was sufficient.

12. The police charged the appellant with committing an indecent act with a child contrary to section 11 (1) of the Sexual Offences Act. I am not able to understand why police found it fit to prefer charges under this section instead of defilement under section 8 or incest under section 20. Perhaps their decision was informed by what they thought was lack of medical evidence supporting those charges. Medical evidence shows there were no injuries on the girl's genitalia or any other evidence to point to the commission of this offence. I wish to state that PW2 was taken to hospital 2 days later and she must have washed off the evidence. The trial court was impressed by her demeanour and the doctor too was impressed by the manner the girl confidently and in a composed manner narrated what had happened to her. This coupled with her evidence that she was defiled and experienced pain; that the appellant even ejaculated on her; her going home while crying and her wanting to commit suicide is convincing evidence that she was sexually molested by her father. It is unfortunate that the medical evidence does not support PW2's evidence. However, despite medical evidence not showing bruises this court has no reason to doubt the evidence of PW2.

13. In view of the definition contained in section 2 of the Sexual Offences Act penetration can be partial or complete insertion of the genital organs of a person into the genital organs of another person and to me there is ample evidence to support that there was penetration. However, the charges facing the appellant were not those that require proof of penetration.

14. Other than the medical evidence that did not support the evidence of PW2 I find that there are no contradictions in the rest of the evidence. The evidence of PW2 is well corroborated by that of PW3, PW4 and even PW1. PW2 narrated what happened to her to her mother PW4 and to PW1 into whose custody the police put PW2 after her mother left. The same story was narrated to the doctor. Even if the evidence had been lacking in corroboration under section 124 of the Evidence Act a court can convict without corroboration in certain cases specified in the proviso to that section. The proviso states:

“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.”

15. It is noteworthy that counsel for the appellant conveniently left out this proviso when he quoted section 124 of the Evidence Act in support of his submissions on lack of corroboration. In this case the trial court was impressed by the demeanour of PW2 and even if her evidence had not been corroborated the court would still have convicted after warning itself and after being satisfied that the witness was telling the truth.

16. On the issue that the medical evidence was produced by a clinical officer instead of a doctor, I have

confirmed that indeed this is not the case as the evidence was produced by Dr. Indumwa on behalf of Dr. Barongo and not by a clinical officer.

17. I have perused the record of the lower court and I have confirmed that the court complied with section 211 of the Criminal Procedure Code. Record shows that after this was done the appellant opted to remain silent. I do not find merit in this ground of appeal.

18. On issue of age of the complainant, there is no evidence confirming when she was born. PW2 told the court that she was 9 years old and in standard 4. Her mother testified that PW2 was aged 9 years although she did not say which year PW2 was born. In the absence of any other evidence to the contrary, I find that I have no reason to doubt a mother about the age of her child. But again, the charge of committing an indecent act under section 11 (1) of the Sexual Offences Act does not dwell specifically on the age of the complainant the way a charge of defilement under section 8 of the same Act requires.

19. Now I wish to turn to the issue of substitution of the charge by the trial magistrate at judgement stage. The trial magistrate pronounced himself thus:

“In totality, the evidence tendered is overwhelming beyond any shadow of doubt (sic) hence I find the accused guilty to the offence of incest by a male person contrary to section 20 (1) of the Sexual Offences Act. The charge under section 11 (1) of the Sexual Offences Act is hereby amended and substituted accordingly.”

20. Courts have power under the law to amend charges. This power is donated by section 214 (1) of the Criminal Procedure Code which states thus:

“Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:

Provided that -

(i) where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;

(ii) where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination.

21. Simply put this provision of the law was flouted by the trial magistrate in this case. He amended the charges at the stage of delivering his judgement and substituted the initial charges with the amended charges. He went ahead and convicted on the substituted charges. This is in total disregard of the law as stipulated in the above section. Our courts have pronounced themselves on this issue and the law on the same is now settled (**see Yongo v. Republic 1983 KLR**). Any amendment that does not take into account this requirement is prejudicial to the rights of an accused person (**see Chengo v. Republic 1964 EA on that point.**) The trial magistrate was wrong in handling this case in this manner and his action has prejudiced the appellant. Further on this point an offence of incest is not a minor offence to committing an indecent act in the manner contemplated by **section 179 of the Criminal Procedure Code**. Besides the trial magistrate did not even address the issue to explain what informed his decision to decide as he did. To my mind the issue of substituting the charge was casually handled. It is also illegal.

22. The above finding notwithstanding, this court has carefully considered the initial charges preferred against the appellant; to wit, committing an indecent act with a child contrary to section 11 (1) of the Sexual Offences Act, against the weight of the evidence. Section 2 of the Sexual Offences Act defines **“indecent act”** to mean any unlawful intentional act which causes any contact between the genital organs

of a person, his or her breasts and buttocks with that of another person. This offence has been proved because as I have explained in this judgement I have no doubt that the appellant caused his penis to touch the complainant's vagina. It was more than that because I believe the evidence of PW2 when she testified that the appellant ejaculated on her. It is a pity that she was taken to hospital after the evidence had been destroyed due to passage of time.

23. My conclusion of this matter is that the appellant has failed to convince this court that his appeal is meritorious. All the grounds of appeal he raised have failed. The sentence imposed on him on account of the amended charge is wrong and illegal. I stated elsewhere in this judgment that the appellant through his counsel did not raise the issue of substituted charge nor did he address this court on the same. Counsel for the state too overlooked this issue. This court has a duty to look at the record in totality and address all the issues that emerge whether those issues have been raised or not in order to accord the appellant justice which he seeks by coming to this court on appeal.

24. The upshot of my findings is that this appeal succeeds only to the extent of quashing the conviction under the wrongly amended charge under section 20 (1) of the Sexual Offences Act and set aside the sentence of life imprisonment. This court instead convicts the appellant on the initial charge of committing an indecent act with a child under section 11 (1) of the Sexual Offences Act. The sentence prescribed under this section is a minimum of 10 years. The upper limit is not given. The appellant is hereby sentenced to serve 20 years imprisonment. It is so ordered.

S.N. MUTUKU
JUDGE

Signed dated and delivered on 9th May 2013 in open court in the presence of the Appellant and Mr. Mulama for the State. Counsel for the Appellant was absent.