REPUBLIC OF KENYA

High Court of Kisii

Criminal Appeal 183 of 2011

J.O.L.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of SRM's Court at Ndhiwa

Hon. B. Omwanza in SRMCRC Case no.86 of 2010 dated 8th September 2011)

JUDGMENT

1. The appellant herein J.O. L. has filed this appeal against his conviction and sentence by the learned Resident Magistrate sitting at Ndhiwa Law Courts. The appellant was arraigned in court and he was charged with Incest by male contrary to **section 20 (1)** of the **Sexual Offences Act 2006**. The particulars of the offence were that:-

"On the 5th day of February 2010 at [particulars withheld] sub location in Ndhiwa District within Nyanza Province, the accused unlawfully and intentionally committed an act which caused penetration of his penis into the vagina of R. A. L., a child of 12 years whom to his knowledge is his step sister."

2. The appellant also faced an alternative charge of committing an indecent Act with a child contrary to **section 11 (1)** of the**Sexual Offences Act No. 3 of 2006**. The particulars of the offence were that the appellant unlawfully and intentionally on the 5th day of February at [particulars withheld] sub location in Ndhiwa District within Nyanza Province committed an indecent act with R. A. L. a child aged 12 years by touching her vagina, breasts and buttocks."

3. The prosecution called 4 witnesses. The prosecution's case was that on 5th February 2010 at around 10.00 p.m., PW1 R. A. L.was at home with her 4 year old brother O. and her brother's wife one C. A. The brother's wife went home and since it was raining PW1 went outside where the appellant found her tapping water. It was then that the appellant got hold of her and took her to the bush which was 100 m from the house. She did not raise alarm as the appellant had threatened to stab her with a knife. She

however managed to recognize the appellant's voice as he was her step brother. The appellant then pushed her down on the mud and defiled her.

4. PW2 was one Stephen Kerario a clinical officer who came to produce the P3 form on behalf of Jared Opondo (Clinical Officer who examined the complainant). Though the examination was conducted 5 days after the defilement, he stated that the complainant's hymen was broken and the perineum was partially torn and there was whitish discharge from the vagina. He also produced a medical examination done on the appellant which showed that he was HIV +ve.

5. PW3 was Number 92341 the police constable one Rose Cheptoo of Ndhiwa police station. She stated that on 18th February 2010 the complainant of about 12 years came to the station in company of her mother and reported that she was defiled by appellant who was her step brother. PW3 showed the MF1P1 which she identified as the torn jeans trouser which complainant was wearing on the material night. She then issued them with a P3 form and referred them to Ndhiwa District Hospital where the minor was treated and examined.

6. Upon the close of the prosecution case, the court ruled that the appellant had a case to answer and was accordingly put on his defence. He chose to give an unsworn statement and called 2 witnesses.

7. DW1 (the appellant) stated that on 8th February 2010 he was at home, and that nothing unusual happened. He stated that on 2nd February 2010 at 8.00 p.m. he heard dogs barking and on going outside he found PW1 with a gentleman and on asking PW1 who the gentleman was she said nothing as the gentleman disappeared. On 9th February 2010 there was a report to the chief that he had defiled PW1, which report he dismissed as a mere fabrication. On 12th February 2010 he was arrested by police and taken to Ndhiwa police station. He was shocked when the charges were read to him in court. He denied committing the alleged offences.

8. DW2 was one P. O. L. He testified that on 5th February 2010 he was at home when he was informed by PW1 that she had been beaten by appellant. The appellant was DW2's elder brother. At around 9.00. DW2, the appellant and PW1 together with their father held a family meeting at which they ironed out the issue.

9. DW3 was one M. J. O. who is the appellant's brother in law. He stated that on 5th February 2010 at about 8.00 a.m., the appellant's father went to him and informed him that PW1 had been defiled by the appellant. DW3 accompanied PW1's father back to the latter's home. DW3 interrogated PW1 who confirmed that the appellant had defiled her some 3 days before, and that the incident took place in the bush. The appellant was also interrogated by DW3, but he denied the allegations. DW3 took PW1, the appellant and PW1's mother and father to the area Chief who advised the parties to go to hospital.

10. After carefully analyzing the evidence that was placed before him, the learned trial magistrate was satisfied that the prosecution had proved its case against the appellant beyond any reasonable doubt on the main count. The court accordingly found the appellant guilty as charged, convicted him and sentenced him to life imprisonment.

11. The appellant was aggrieved by both conviction and sentence. In his petition of appeal dated 13th September 2010 the appellant sets out 5 grounds against the above conviction and sentence.

1. *That the trial magistrate misdirected himself when evaluating evidence on record before occasioning miscarriage of justice.*

2. *The learned trial magistrate failed to consider the evidence adduced by the appellant by merely*

dismissing it without considering and giving its due effect.

3. *The learned trial magistrate erred in law and fact by finding the appellant guilty of offence charged when the evidence on record never supported charge.*

4. *The trial magistrate never considered the evidence adduced as a whole in his judgment.*

5. *That the learned trial magistrate sentenced imposed was harsh depending in the circumstances of the said alleged offence.(sic)*

12. When this appeal came up for hearing before me, I heard submissions from learned counsel S.M. Sagwe on behalf of the appellant and also heard submissions from learned Principal State Counsel, Jacob Mutai. Counsel for the appellant condensed all the 5 grounds of appeal into one and submitted that the main contention by the appellant was that the trial court, being a Resident Magistrate's Court had no jurisdiction to impose a life sentence upon the appellant.

13. Secondly, counsel argued that there was no documentary evidence to support the contention that PW1 was 12 years old. Further that the medical examination on PW1 was done some 5 days after the alleged incident and that in the circumstances the findings by the clinical officer could not be relied on.

14. Counsel submitted that the whole of the prosecution evidence was lopsided and that the investigations were not properly done. He urged the court to find that the conviction of the appellant was not safe and that the attendant sentence was unlawful. Counsel urged the court to allow the appeal, quash the conviction and set the sentence of life imprisonment aside.

15. Mr. Mutai for the respondent strongly opposed the appeal and submitted that the conviction of the appellant was based on sound evidence. He urged the court to consider the fact that the trial court came face to face with the witnesses who testified, that even if the trial court had no power to impose the life sentence, this court on first appeal can set aside that sentence and impose an appropriate sentence.

He further submitted that the trial court evaluate the evidence before it including the evidence tendered on behalf of the appellant. On the issue of sentence, counsel submitted that the sentence cannot be said to be unlawful because it was prescribed by law. Counsel urged this court to find that the appeal lacks merit and to dismiss the same.

16. Mr. Sagwe in reply to Mr. Mutai's submission maintained that this case was not proved beyond reasonable doubt and that there was no proper investigation and maintained that the court had no jurisdiction to impose the sentence of life imprisonment.

17. This is a first appeal and because of that fact, this court is under a duty to reconsider and evaluate the whole of the evidence with a view to reaching its own conclusions in the matter. As this court exercises the jurisdiction of rehearing the case, two things must remain upper most in the mind of the court: one is that this court has no advantage of seeing and hearing the witnesses who testified during the trial in the court below; two that it is a strong thing for an appellate court to overturn the findings of a trial court which had the advantage of seeing and hearing witnesses, especially if any of the issues on appeal turn on the question of an impression formed by the trial court based on the demeanor of a witness or of witnesses. See **Mwangi –vs- Republic [2004] 2 KLR 28**and **Okeno –vs- Republic [1972] EA 32**. This court is also expected to consider and weigh the judgment of the trial court with a view to determining whether the conclusions reached therein should be supported.

18. I have done all the above and what comes out from the same is that the prosecution case against the appellant is centred on evidence of identification/recognition. From the evidence on record, the only evidence against the appellant in that regard is the testimony of PW1. The following issues arise:- **(a)** were the circumstances prevailing on the night of the alleged offence conducive for positive recognition

of the appellant? **(b)** Was the age of PW1 ascertained so as to warrant a finding of guilty under the stated sections of the law and was there evidence of penetration? **(c)** Did the trial court have jurisdiction to impose a life sentence?

19. It has been held by the courts that a court which bases the conviction of an accused person on the evidence of identification/

recognition must be extremely cautious in accepting such evidence because a blind reliance on the same can result in miscarriage of justice. It has also been held that though it is easier for a victim to recognize a person they know than it is to identify a stranger, the court must remain alive to the fact that mistakes still do occur where a witness purports to recognize a close relative, neighbour or friend. See generally **Wamunga –vs- Republic [1989] KLR 424**.

20. In the instant case, the evidence of recognition of the appellant is that of PW1. She testified that the time was 10.00 p.m. It was raining. She was in the house with her 4 years old brother who was asleep. She then went outside to tap the rain water and it was there that the appellant found her. She said the appellant got hold of her and dragged her to a bush which was about 100 metres away from the house. She did not scream because the appellant told her he would stab her if she screamed and that if she told her parents anything thereafter, he would kill her. PW1 stated that she recognized the appellant's voice because she knew it as the voice of her step brother.

21. PW1 further stated that as the appellant dragged her into the bush, he asked her what she was wearing but when she did not respond, the appellant started removing the failed blue jeans trouser she was wearing. In the bush, the appellant threw PW1 to the ground, removed her bikers and the under pant after which he inserted his penis into her vagina. He penetrated her several times before he stopped and fled. PW1 stated that she felt much pain during the ordeal and the appellant kept asking her what she was feeling as he continued to defile her.

22. PW1 stated that after the appellant fled, she picked up her clothes, went home, wash her legs and went to sleep. Before she left the scene, she put on her pant and biker. When PW1's mother returned the following day, PW1 gave her the story and on 7th February 2010, PW1's mother reported the matter to the police.

23. On the basis of the above evidence, I am satisfied that PW1 was able to recognize the appellant by his voice. There is other evidence on the file, especially the evidence of DW3 that the issue of what the appellant did to PW1 was the subject of family meeting but the same could not be resolved. This court is therefore satisfied that there was no mistaken identity of the appellant by PW1.

24. Concerning the second issue, PW2, Stephen Kerario, a clinical officer told the court that upon examination of PW1, it was found that PW1 had tenderness and scratches around the neck. He also said that the hymen was broken and the perineum was partially torn. the examination also revealed a whitish discharge from PW1's vagina but she was HIV negative. PW2 also stated that he examined the appellant on 5th February 2010. He was found to be HIV Positive. The P3 forms on PW1 and the appellant were produced as **P. Exhibits 3** and **4** respectively.

25. From the above evidence, there is no doubt that there was penetration which led to the rapture of the hymen and the presence of the whitish discharge from PW1's vagina. According to **P. Exhibit 3**, the age of PW1 was given as 12 years, while the age of the appellant was given as 27 years. Though no other documentary evidence was adduced, this court has no reason to doubt that PW1 was 12 years old. Infact, the issue did not arise at all during the hearing. PW1 was herself confident about her age when she told the court in her evidence in chief as follows:-

"I am R.A. I am 12 years old."

The **P. Exhibit 3** also gives the age as 12 years. In the circumstances, this court rejects submissions by counsel for the appellant that PW1's age was not ascertained. The trial court noted in its judgment that it did not doubt the age of PW1.

26. The last issue for determination is whether the trial court had the jurisdiction to impose the life sentence upon the appellant though the trial court may not have had the power to mete out a life sentence. That notwithstanding, this court has the power to impose the proper sentence where there is an error on the part of the trial court.

27. In this case, this court, being satisfied that the conviction for the offence of incest contrary to **section 20 (1)** was well founded, and it having been established that PW1 was aged 12 years, I set aside the sentence by the trial court and proceed to sentence the appellant to a term of life imprisonment pursuant to the provisions of **section 20 (1)** of **Sexual Offences Act**.

28. In the premises, I find that this appeal has no merit on both conviction and sentence. It is accordingly dismissed. R/A within 14 days.

Dated and delivered at Kisii this 1st day of November, 2012

RUTH NEKOYE SITATI

JUDGE.

In the presence of:

Present in person for Appellant

Mr. Mutua (present) for Respondent

Mr. Bibu - Court Clerk

RUTH NEKOYE SITATI

JUDGE.