



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: OUKO, (P), OKWENGU & SICHALE, JJ.A.)

CRIMINAL APPEAL NO. 22 OF 2016

BETWEEN

JM.....APPELLANT

AND

REPUBLICRESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Kakamega (*Njoki Mwangi, J*) dated 18th December, 2015 in HC.CR. A. No.3 of 2011)

JUDGMENT OF THE COURT

[1] This is a second appeal originating from the judgment of the Senior Resident Magistrate's Court at Mumias, in which **JM**, the appellant was tried, convicted and sentenced to 20 years imprisonment for the offence of rape of a person with mental disability, contrary to section 7 of the Sexual Offences Act. The appellant's first appeal was heard and dismissed by the High Court at Kakamega (**Njoki Mwangi, J**) resulting in the current appeal.[2] During the trial, four witnesses testified against the appellant. These were; **PA**, mother to the victim whom we shall call **Janet** (though not her real name), Janet's ten year old younger brother EO, **Raphael Oduor (Raphael)** a clinical officer attached to Siaya District Hospital, and **Police Constable Sabian Odongo (PC Sabian)** of Musanda Police Post.

[3] The evidence of the witnesses was that on 8th January, 2009 at about 8.00 am, Janet and EO were in their house. Their mother PA had gone to the shamba. The appellant, who is an uncle to Janet and EO, asked Janet to go to his house which was just 20 metres away. EO remained outside the appellant's house and shortly thereafter Janet came out of the appellant's house crying and holding her black pair of pants.

[4] At about 10.00 a.m. PA came back from the shamba. EO informed PA how Janet had come out of the appellant's house crying and carrying her black pair of pants. PA talked to Janet and she informed her that the appellant had pushed her onto to his bed, pulled out her panties and proceeded to penetrate her vagina using his penis. PA reported the matter to the Assistant Chief who referred her to hospital.

[5] Janet was examined by Raphael who was on duty at Bukhaya Health Centre. Raphael noted that Janet was mentally retarded and was not in a position to give any information. She had some vaginal discharge, so she was referred for laboratory examination, and the report showed that there were some sperms and epithelial cells in the discharge. Raphael concluded that there was vaginal penetration due to the presence of the sperms and bruises which were present on the wall of the vagina.

[6] PA reported the matter to the police and the appellant was arrested and charged. PA forwarded a clinic card to PC Sabian who produced it in evidence, together with the panty and the mental assessment report.

[7] In his defence, the appellant denied having committed the offence. He said that on the material day, he left his house in the morning and was away until evening. He learnt that it was being alleged that he had raped Janet, and shortly thereafter officers from Itenge police post came and searched his house, where they found some bhang. He was then arrested and taken to Musanda police post. It was there that he was informed of the allegations that he had raped Janet. He maintained that those allegations were not true.

[8] In his judgment the trial magistrate believed the prosecution evidence particularly the evidence of EO which he found to be credible, clear, cogent and consistent. He rejected the alibi of the appellant and convicted the appellant of the offence charged.

[9] In his first appeal, the appellant contended *inter alia*, that the charge sheet against him was defective; that the court failed to ascertain the age and sanity of Janet; and that the evidence of EO was wanting. During the hearing of his appeal the appellant relied on written submissions in which he highlighted the grounds.

[10] The learned Judge having re-evaluated and assessed the evidence that was adduced in the trial court, was satisfied that although there was no eye witness to the incident, Janet having been certified as being mentally retarded and unable to give evidence, the evidence of EO was credible and was corroborated by medical evidence that was adduced by Raphael. The learned Judge found that the appellant was the one who had the opportunity to rape Janet as Janet was in his house and came out of the house crying and holding her black panties. The learned Judge relying on section 184 of the Criminal Procedure Code, substituted the charge the appellant was originally charged with, with that of incest by male persons contrary to the provisions of section 20(1) of the Sexual Offences Act, and sentenced him to serve 20 years imprisonment.

[11] In this second appeal, the appellant has challenged the judgment of the learned Judge contending *inter alia*, that the learned Judge wrongly applied section 184 of the Criminal Procedure Code, and that the substituted charge was not conclusively proved; that the learned Judge misapprehended the facts that were before her; that following a *voire dire* examination carried out by the trial court, Janet was referred for a mental psychiatric evaluation and age assessment, and there was therefore no reason for the High Court substituting the charge of incest. The appellant maintained that without the evidence of the alleged victim, it was not possible to ascertain the truth; that the alleged victim was not helped to communicate with the court through an intermediary; and that the evidence of EO required corroboration and could not have been used to found a conviction without the evidence of the Janet. In addition, the appellant submitted that under sections 7 and 20 of the Sexual Offences Act, the sentence prescribed was a sentence of not less than 10 years, and the Court should interfere with the sentence of 20 years and impose a more lenient sentence.

[12] **Mr. Kakoi** of the Office of the Director of Public Prosecution (ODPP) appeared for the respondent. He relied on written submission that had been filed by the ODPP. He maintained that the appellant's conviction was proper as the prosecution proved beyond reasonable doubt that he committed the offence through proof that: Janet was mentally challenged, and that her age was 20 years; that she was raped as confirmed by the evidence of Raphael; and that it was the appellant who had raped her as confirmed by the evidence of EO, and that the appellant was a brother in law to PA and therefore an uncle to Janet.

[13] As regards the sentence, it was submitted that the offence was serious given that Janet was mentally challenged and the Court was urged to uphold the sentence of 20 years' imprisonment.

[14] We have carefully considered this appeal and the submissions made before us. It is evident from the judgment of the learned Judge that she re-evaluated and analysed the evidence which was adduced in the trial court, and that she came to the conclusion that the appellant's conviction was proper, except for the charge which she substituted with a charge of incest by male persons contrary to section 20(1) of the Sexual Offences Act.

[15] It is evident that the appellant's conviction was hinged on the evidence of EO who was a minor aged 10 years, and therefore a child of tender age. The trial court examined the minor and proceeded to take his evidence as sworn. Under section 19 of the Oaths and Statutory Declarations Act, the purpose of *voire dire* examination is to confirm whether a minor witness understands the nature of an oath, in which case, he could give sworn evidence; or if he does not understand the nature of an oath, but is of sufficient intelligence and understands the importance of speaking the truth, his evidence would be received as unsworn. In this case, the trial magistrate did conduct an examination which in effect was a *voire dire* examination, but did not indicate his conclusion from the examination. That notwithstanding, it is apparent from the answers that the witness gave in response to the questions put to him by the trial court, and the fact that the trial court proceeded to take the evidence of the witness as sworn evidence, that the trial magistrate was satisfied that the witness understood the nature of an oath and the importance of speaking the truth. We find that the omission of the trial magistrate to record his conclusion in regard to *voire dire* examination did not in any way vitiate the proceedings or prejudice the appellant who had the opportunity to cross-examine the witness. The trial magistrate formed a clear impression that the evidence of the witness was credible, consistent and cogent. This impression was confirmed by the learned Judge of the first appellate court.

[16] We note that Janet did not give any evidence. The record shows that on 20th April, 2010, when the hearing of the case was set to commence, S. Atambo, SRM who was scheduled to hear the case, examined Janet who was to be the first prosecution witness. The magistrate noted as follows:

***“The child witness does not seem to comprehend the nature of an oath. She is totally lost and apart from knowing her name, she doesn't seem to know anything else. Her demeanor as noted further leads me to the conclusion that apart from not comprehending the nature of an oath, she does not seem to be of sound mind. Before I make my conclusion entirely, I make a finding that this witness needs to go for a mental psychiatric evaluation so that the finding thereof will lead to proper charges being filed if any, then the matter proceeding to age assessment, test be done (sic).*”**

Mention on 4th May, 2010. Confirm psychiatric evaluation report and age assessment. Thereafter further hearing.”

[17] A mental assessment report dated 28th April, 2010 was subsequently filed. This report confirmed that Janet, though aged 20 years, had mental retardation and was not able to express herself or reason without the help of a relative or caretaker.

[18] Under section 31 of the Sexual Offences Act, in criminal proceedings involving the alleged commission of a sexual offence, the court can declare a witness, a vulnerable witness if such witness is a person with mental disability. Such a witness can be protected by being allowed to give evidence through an intermediary. In this case, Janet was actually a vulnerable witness who needed the protection of the court as the trial court observed her and noted her mental incapacity and limitation in communication. The trial court proceeded to rely on the evidence of PA, Janet's mother who was able to communicate with her and to whom Janet communicated how the appellant had violated her. The court did not appoint PA as an intermediary. However, PA's evidence was crucial as it was the evidence of someone with whom Janet was able to communicate shortly after the incident. The evidence of PA was consistent with that of EO and Raphael. In the circumstances, the appellant's contention that Janet did not testify is not of any consequences as the evidence of PA, EO and Raphael was sufficient to prove the charge against the appellant.

[19] The final issue that needs consideration is the issue of the charge sheet. The learned Judge found that the charge leveled against the

appellant was defective, as he was charged with rape of a person with mental disability under section 7 of the Sexual Offences Act. That section provides as follows:

“A person who intentionally commits rape or an indecent act with another within the view of a family member, a child or a person with mental disabilities is guilty of an offence and is liable upon conviction to imprisonment for a term which shall not be less than ten years.” (Emphasis added)

[20] We agree with the learned Judge that the appellant did not commit the offence within the view of a family member as the only person present was EO, and he was outside the house when the offence was committed. The learned Judge was right in substituting that offence under section 184 of the Criminal Procedure Code with that of incest by male persons contrary to section 20(1) of the Sexual Offences Act, as the appellant committed an act which caused penetration with Janet, who to his knowledge was his niece, and he was therefore guilty of incest. Although the minimum sentence provided was 10 years, the learned Judge imposed a sentence of 20 years. This was consistent with the sentence earlier imposed by the trial magistrate who in exercising his discretion commented that:

“The accused committed the offence against a person with mental disability. It is unfortunate that the accused committed this offence against his relative, a person he calls a niece, his brother’s daughter. So in the circumstances, the accused deserves to be punished appropriately.”

[21] The circumstances of the offence which the learned Judge substituted remained the same and the sentence provided was exactly the same as that for the charge that the trial magistrate had convicted the appellant. In the circumstances, we find no reason to interfere with the sentence. This appeal has no merit. It is accordingly dismissed in its entirety.

DATED AND DELIVERED AT NAIROBI THIS 5TH DAY OF MARCH, 2021.

W. OUKO (P)

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR