



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, MUSINGA & J. MOHAMMED, J.J.A.)

CRIMINAL APPEAL NO. 7 OF 2019

BETWEEN

DM.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the Conviction and Sentence of the High Court of Kenya at Kiambu (Nagillah, J.) delivered on 10th May 2017

in

H.C. CRA. No 111 of 2016)

JUDGMENT OF THE COURT

1. The appellant was convicted of the offence of incest contrary to **section 20(1)** of the **Sexual Offences Act** by the Chief Magistrates' Court at Thika and sentenced to life imprisonment. His first appeal to the High Court against both conviction and sentence was unsuccessful, hence this second appeal.

2. The jurisdiction of this Court on a second appeal is well settled. In ***Karani v Republic [2010] 1 KLR 73***, the Court expressed itself as follows: -

“This is a second appeal. By dint of the provisions of section 361 of the Criminal Procedure Code, we are enjoined to consider only matters of law. We cannot interfere with the decision of the Superior Court on facts unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law.”

3. It is against that jurisdictional remit that we shall briefly examine the evidence that was tendered before the trial court and re-examined by the High Court in reaching the impugned judgment.

4. The particulars of the offence of incest were that on 25th September, 2014 at [Particulars Withheld], Ruiru, the appellant unlawfully caused his penis to penetrate the vagina of CW, a child of 10 years, who to his knowledge was his own daughter.

5. The complainant testified that on the material day at about 9 p.m., the appellant moved her to his bed, undressed both her and himself and proceeded to defile her. The appellant's wife had left him with their children.

6. When the complainant went to school on the following day, she told her teacher, **EN, PW3**, what her father had done to her. PW3 reported the incident to the Children's office,

Ruiru. Subsequently, a report was made to the police and the appellant was arrested.

7. **Joan Munene, PW5**, a Clinical Officer at Ruiru Sub-District Hospital, testified that the complainant was examined by **Samuel Kariuki**, a fellow Clinical Officer, who had since left the hospital. The examination revealed that the complainant's hymen was missing, and she had

vaginal discharge. Apparently, the appellant had earlier defiled the child several times. PW4 produced the Medical Examination Report (P3 Form) which clearly showed that the complainant had been subjected to sexual violence.

8. In his defence, the appellant simply denied having committed the offence but did not deny that the complainant was his child.

9. The High Court, (*Nagillah, J.*), was satisfied that the appellant's conviction and sentence were well founded and dismissed the first appeal, as earlier stated.

10. In his second appeal, the appellant contends that there were inconsistencies and contradictions in the prosecution evidence and faults the learned judge for failing to hold that such evidence could not found a conviction; he further faulted the learned judge for affirming the conviction which he contends was premised on faulty medical evidence.

11. This appeal was heard on 28th April 2020 by use of technology (skype video conference) pursuant to the practice directions for the protection of judges, judicial officers, judiciary staff, other court users and the general public from the risks associated with the global corona virus pandemic issued by the Chief Justice on 20th March, 2020 vide **Gazette Notice No.3137** on 17th April 2020.

12. In his submissions, the appellant who was unrepresented, argued that he did not know Kiswahili language and was not allowed to address the trial court in his native language, Gikuyu language. He further submitted that the prosecution evidence had material contradictions, which he was however unable to point out.

13. *Mr. Obiri*, learned counsel for the respondents, submitted that the appellant told the trial court (and it was so recorded at page 4 of the proceedings), that he understood both Kiswahili and English language; that the proceedings were conducted in Kiswahili language which the appellant understood; that the appellant fully participated in the proceedings and was able to cross examine witnesses.

14. *Mr. Obiri* further submitted that there were no material defects in the charge sheet; and that there were no contradictions in the prosecution evidence. He urged us to dismiss the appeal.

15. We have carefully considered the record of appeal as well as the submissions by both parties. The appellant was charged with the offence of incest. To prove the offence, the prosecution had to demonstrate that the relationship between the accused and the victim fell under **section 20(1)** of the **Sexual Offences Act** as read with **section 22** of the Act. **Section 20(1)** states as follows: -

“(1) Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years:

Provided that, if it is alleged in the information or charge and proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person.”

16. The second ingredient of the offence of incest that had to be proved is commission of an indecent act or an act that causes penetration with the complainant.

17. In the matter under consideration, there was no denial by the appellant that the complainant was his daughter and that she was 10 years old at the material time.

18. As regards the second ingredient of the offence, the complainant testified as to how her father, the appellant, defiled her. That evidence was corroborated by the medical examination that was done on 7th October 2014. The young girl's hymen was missing and she had vaginal discharge. The two ingredients of the offence of incest were therefore proved.

19. The appellant was unable to point out any material contradictions or inconsistencies in the prosecution evidence. We have no basis of faulting the learned judge for upholding the appellant's conviction. The appeal against conviction must therefore fail.

20. As regards sentence, in his mitigation, the appellant told the trial court that he is H.I.V. positive. The age of the complainant was proved to be under 18 years. The sentence to life imprisonment that was affirmed by the High Court was therefore properly founded in law.

21. All in all, we find this appeal bereft of merit and dismiss it in its entirety.

Dated and delivered at Nairobi this 24th day of July, 2020.

M.K. KOOME

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true

copy of the original

Signed

DEPUTY REGISTRAR