



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIHARA KARIUKI (PCA), W. KARANJA & OKWENGU, JJ.A)

CRIMINAL APPEAL NO. 39 OF 2016

BETWEEN

M N.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from a Judgment of the High Court of Kenya

at Machakos (Thuranira, J.) dated 3rd July, 2014

in

H. C. CR. A. No. 141 of 2013)

JUDGMENT OF THE COURT

1. M N (the appellant) has brought this second appeal before us against his conviction and sentence for the offence of incest. As such, we are cognizant that we are restricted to address matters of law only as we consider the appeal. The basis of such consideration was aptly set out by this Court in Karingo vs. R [1982] KLR 213 thus-

“A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did (Reuben Karari C/O Karanja -vs- R (1956) 17 EACA 146)”

2. By way of background, the appellant was charged with one count of incest contrary to **Section 20(1)** of the **Sexual Offences Act** and with an alternative count of committing an indecent act with a child contrary to **Section 11 (1)** of the **Sexual Offences Act**. The particulars of the main count were that on divers days between the month of March, 2010 and the 29th December, 2012 at [particulars withheld]in Mbooni East District within Makueni County, the appellant caused his penis to penetrate the vagina of FWM, a child aged 17 years who to his knowledge is his daughter. In the alternative count, the particulars were that on the divers dates and at the place above mentioned, the appellant intentionally and unlawfully did an indecent act to FWM, a child aged 17 years, by touching her vagina with his penis.

3. The prosecution's evidence was that in or about March, 2000 at around 11:00 a.m. the appellant defiled FWM when she came back home from church. He then threatened that he would throw her out of the house, discontinue her education and even kill her if she told anyone what he had done to her. Due to the appellant's intimidation, the minor suffered in silence as he continued defiling her on divers dates. On the 26th January, 2012 FWM left for Nairobi to stay with her aunt, J N M who gave evidence as PW2, as she pursued her secondary school education at [particulars withheld]High School. At the instigation of the appellant, she went back home during the December school holidays when yet again, the appellant defiled her on the 29th December, 2012. Upon returning to her aunt in Nairobi the following day, J noticed that her niece's demeanour had changed- she looked withdrawn and sad. J asked the minor if anything was troubling her but she did not speak up. Ultimately, on the 13th January, 2013, distressed that she might be pregnant, FWM mustered courage and wrote her aunt a letter detailing the ordeal which had occurred on the 29th December, 2012. J then took her to two hospitals where she was examined. It was then that the minor opened up about the previous incidents. Thereafter, the appellant was arrested and charged.

4. In his sworn statement, the appellant denied the charges against him and maintained that he had been framed by J. He claimed that J, who was his sister-in-law, had a grudge against him; the grudge had arisen after he intervened in a disagreement between J and his mother. He argued that there was no reason why, if indeed he had been defiling the minor as alleged, she did not tell her mother, sisters or grandmother, all with whom she was in constant contact. It was suspicious that such allegations arose only after she went to live with J.

5. Based on the foregoing evidence, the trial court convicted the appellant for the offence of incest and sentenced him to life imprisonment. Aggrieved with the trial court's decision, the appellant filed an appeal in the High Court which was dismissed. Wishing to have a further bite at the cherry, he has now brought this second appeal faulting the first appellate court for not properly re-evaluating the evidence before the trial court. His appeal is predicated on the grounds that the learned Judge erred by-

- ***Failing to appreciate that the trial court had contravened the provision of Section 214(2) of the Criminal Procedure Code.***
- ***Failing to make a specific finding in relation to the requisite burden of proof.***
- ***Finding that the offence had been proved against the appellant.***
- ***Failing to consider the appellant's defence.***

6. At the hearing before us, the appellant appeared in person while Ms. Maina, Senior Prosecution Counsel, appeared for the State.

7. The appellant relied on two sets of written submissions. He submitted that the prosecution's evidence was not cogent to warrant his conviction. Buttressing that line of argument, he stated that the medical evidence was not conclusive on the fact that it was him who had penetrated FWM. In that, Dr. Shaaban examined FWM after a long period had lapsed and also relied on treatment notes from other medical facilities, of which the makers were not called to give evidence.

8. In his view, the trial court contravened the provisions of **Section 214(1) (ii)** of the **Criminal Procedure Code** by failing to inform him of his right to re-call FWM and J who had testified prior to the amendment of the charge sheet. More so, because the amendment related to the alleged dates the offence was committed. He challenged the sentence as being severe and unconstitutional. He was adamant that **Section 20 (1)** of the **Sexual offences Act** provides for two sentences for the offence of incest. One being a lesser term of imprisonment for 10 years and the other life imprisonment. He contended that the trial court issued the severe sentence against him without any reason. The appellant also urged that the two lower courts failed to consider his defence.

9. In response, Ms. Maina in opposing the appeal, stated that there were concurrent findings of fact by the

two lower courts and there was no cause for this Court to interfere with the same. In learned counsel's submissions, FWM's evidence was corroborated by her aunt, J, while the evidence of the clinical officer, George, corroborated that she had been defiled. She indicated that the sentence against the appellant was in accordance with the **Sexual Offences Act**.

10. We have considered the grounds of appeal in conjunction with the record, the submissions respectively tendered and the law. It is settled that a charge sheet can be amended at any stage of the proceedings before the conclusion of the trial. However, there are safeguards set in place to ensure that the rights of an accused person are not violated by such amendments. Of relevance to this case is **Section 214 (1)** of the **Criminal Procedure Code** which provides-

“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 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 witnesses on matters arising out of further cross examination.

11. It is clear from the record that the charge sheet was amended to reflect that the offence in question was committed on divers dates between March, 2010 and the 29th December, 2012. It is also not in dispute that after the amendment the appellant was called upon to take a fresh plea which he did. The bone of contention is whether the failure by the trial court to inform the appellant of his right to re-call the witnesses who had testified prior to the amendment was fatal. This Court, in **Josphat Karanja Muna vs. R [2009] eKLR** considered the issue and expressed itself thus,

“On non-compliance with section 214 of the Criminal Procedure Code, we observe that as far as the appellant is concerned, the substituted charge at page 5 of the record did not introduce any new matter into the main charge that would have necessitated recalling of witness. All the substituted charge did was to introduce an amended name of the complainant.That amended charge was read to the appellant and his co-accused and fresh plea taken. That the spirit of section 214 is to afford an accused person opportunity to recall and cross-examine witnesses where the amendments would introduce fresh element or ingredient into the offence with which an accused person is charged. It certainly was not meant to be invoked every time an amendment is made even if such an amendment is only to introduce a correction of name or of a word. Here the name Ben Chege Gikonyo was amended to read Ben Cheche Gikonyo. We do not accept that the non-compliance with the provisions of section 214 of the Criminal Procedure Code resulted into injustice to the appellant.” Emphasis added.

12. As far as FWM's evidence was concerned, she was categorical that the appellant had defiled her multiple times from March, 2010 to the 29th December, 2012. In our opinion, the amendment of the charge reflected FWM's evidence which she had earlier given and did not warrant her or her aunt being re-called. We find that the omission by the trial court was not prejudicial to the appellant.

13. In our respectful view, the fact that the minor was not medically examined soon after the incident did not negate the evidence of penetration. George testified that he examined the minor on the 21st January, 2012 and observed that her hymen was broken. There was no eye witness account and the only evidence in regard to what had actually happened was that of the minor. She testified in detail of how the appellant had defiled her and intimidated her not to tell anyone. The trial court in finding that the minor was a

credible witness stated,

“The complainant was consistent in her evidence and was not shaken during cross examination. The witness appeared confident and truthful.”

14. It is trite that an appellate court will hardly interfere with the findings of the trial court which relate to the credibility of witnesses for the simple reason that it is the trial court that had the opportunity to observe the witnesses demeanour. See ***Samuel Muriithi Mwangi vs. R [2016]***. This is such a case where there is no justification for interfering with such a finding. Consequently, the trial court as well the first appellate court did not err in relying on the minor’s evidence that it was the appellant who had defiled her on multiple occasions. The proviso to **Section 124** of the **Evidence Act** stipulates,

“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. Having perused the record and in particular judgments from the two lower courts we note that the appellant’s defence was considered and rightly rejected. The trial court in its own words observed that-

“The accused person in his defence testified that the plot was urged by PW2, his sister-in-law whom he said they had differences. The accused was however hard pressed during cross examination to explain how he had given out her daughter (sic), the complainant to stay with PW2 if indeed there were differences between him and PW2. His explanation that he gave the minor to PW2’s husband and not PW2 cannot make any reasonable sense at all as he even confirmed to court that it is PW2 who personally took the minor from his home to go to school in Nairobi (sic). That defence did not hold any water.

I have not seen any reason on record that could motivate the complainant and PW2 to frame up the accused.”

(16) On sentence, **Section 20(1)** of the **Sexual Offences Act** provides:-

“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.” Emphasis added.

The evidence is clear that F W M was under 18 years at the time of the sexual assault. It therefore follows that the sentence of life imprisonment issued against the appellant was sound in law.

17. Accordingly, the appeal herein lacks merit and is hereby dismissed.

Dated and delivered at Nairobi this 10th day of February, 2017.

P. KIHARA KARIUKI, PCA

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

H. M. OKWENGU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR