



IN THE COURT OF APPEAL

AT NYERI

CRIMINAL APPEAL NO. 235 OF 2012

(CORAM: WAKI, NAMBUYE, & KIAGE, JJA)

BETWEEN

J M MAPPELLANT

AND

REPUBLIC..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Nyeri (Sergon, J.) dated on 8th day of June, 2012

in

H. C. Cr. A. No. 62 of 2011

JUDGMENT OF THE COURT

1. Learned Senior Assistant Director of Public Prosecutions, (SADPP) **Mr. Kaigai** had partly argued in opposition to this appeal but finally reconsidered it and conceded. The concession is, of course, not binding on the court and we must still consider the legal issues raised in the appeal and come to our own conclusions.

2. The appellant was charged and tried before Othaya Resident Magistrate’s Court on the following charges of defilement, indecent assault, and incest which may be summarized:

“On the 5th day of March 2010, he:

i). intentionally and unlawfully caused his penis to penetrate the vagina of CW a girl aged 4 years, contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act (SOA).

ii) alternatively, committed an indecent act with CW by rubbing his penis against her vagina contrary to Section 11(1) of SOA.

iii). intentionally and unlawfully caused his penis to penetrate the vagina of SWK a girl aged 4 years contrary to Section 8(2) of SOA.

iv). ***alternatively, committed an indecent act with SWK by rubbing his penis against her vagina.***

v) ***intentionally and unlawfully caused his penis to penetrate the vagina of his daughter, PW, aged 7 years contrary to Section 22(1) of SOA.***”

3. The three children were in nursery school and did not make those specific allegations against the appellant. The allegations came from the mother of CW (PW4), the mother of SWK (PW5) who was also her teacher, and (PW6), who also taught at the nursery school. All of them questioned the children on why they went to school late on the material day and the children were not making sense in their explanations. The parents and teacher concluded that the children had been defiled and made that report to Police Constables **Julian Chepkoros** (PW7) and **Jafred Asacha** (PW8) who framed the charges against the appellant. PC Julian was positive about the report she received from the three ladies when she responded in cross- examination by the appellant:

“You caused your penis to penetrate in their vagina and they were under age and they never gave consent”.

PC Asacha on his part quoted the children as reporting:-

“The children told us that the accused would call them one by one to the room and defile them. The others would peep through the spaces on the timber walls. On the alleged day, the accused did not defile his daughter. She told us he used to defile her every day.”

4. The evidence elicited from the children in court did not make much sense either. CW and SWK, were not tested in ***voire dire*** as required under **Section 19** of the **Oaths and Statutory Declarations Act** to ascertain, first whether they understood the nature of an oath and if not, whether they were possessed of sufficient intelligence to justify reception of the evidence and understood the duty of speaking the truth. They made short statements which the appellant was not given an opportunity to question. PWM, the appellant’s daughter, was not even seven years old as stated in the charge sheet but she said she was 3 years old, in the same class with CW and SWK, and was afraid to talk in front of her father. On application by the prosecution, an order was made declaring her a vulnerable witness under **Section 31(1) (2)** of SOA and for appointment of an intermediary to testify on her behalf. But no intermediary was called to testify. Without setting aside the earlier order, the trial court administered the ***voire dire*** on the child and found that she did not know the meaning of an oath. Nevertheless she was allowed to make an unsworn statement upon which she was cross examined by the appellant.

Worse still, the medical evidence did not support the charges made against the appellant.

5. It was no wonder, therefore, that the trial court found no proof of the charges laid and dismissed them all in the following manner:-

“PW1, CW said she could not remember anything happening to her. The medical examinations report indicated that her genital organs were normal and no injuries noted. Even though the doctor gave an opinion that there was “possible defilement without penetration based on the” psychological aspect of the child, based on the evidence on record and the definition of defilement under Sec. 8 (1) of the Sexual Offences Act as read with the definition of the term “penetration”, the main charge in count 1 has not been proved and the accused is hereby acquitted under Section 215 of CPC. Neither PW2 and PW3 stated that the accused did penetrate their genital organs with his genital organ. In respect to their respective medical reports form, details of specimens or smears collected for examination showed that no spermatozoa or organisms were seen in the vaginal swabs.

In the absence of direct or indirect evidence that the accused used his genital organ to penetrate PW2 and PW3, I find that the main charge in count II and III has not been proved and the accused is acquitted under Section 215 of CPC. In respect to the second issue for determination, the accused person had been charged with alternative charge of indecent act c/s 11(1) of the

Sexual Offences Act. This is in respect to count I and count II. The complainant in count I having given no evidence implicating the accused as she could not recall what happened and there having been no credible eye witness, the alternative charge of indecent act with a child c/s 11(1) of Sexual Offences Act has not been proved. The accused is acquitted under sec. 215 of the CPC. The evidence of PW2 did not state that the accused used any part of his body to make contact with her genital organ, breast or buttocks. The complainant PW2 said that the accused had inserted a stick in her private part. That statement does not meet the ingredients for the offence of “indecent act” as required in the law. On that ground the accused is acquitted on the alternative charge in count II, under sec. 215 of the CPC. In respect to the 3rd issue, the evidence of PW1 is not applicable as she gave no evidence against the accused. PW2 said that the accused inserted a stick on her private part. Even though the rest of the prosecution witnesses said the complainants had told them that they had been “defiled”, they did not tell the court the exact words that were used by the complainants for them to conclude that they had been “defiled”. The accused did not cross-examine the witness PW2 on her allegations that he had inserted a stick. I did not get the opportunity to look at the demeanor of the witness while she was giving her evidence as my predecessor B. M. Nzakyo (RM) recorded her evidence. Her (PW2) evidence having not been challenged by way of cross-examination, I find it unsafe to make a finding that the accused did insert a stick or any other object in the genitalia of PW2. I am doing so in putting into consideration the fact that the PW2's hymen was broken, and the evidence given by the doctor that a hymen can be broken through other means such as exercises and injury on the private part”.

6. That would have been the end of the trial. But the trial court, on its own motion, found instead that an offence of sexual assault contrary to **Section 5(1)(a)(ii)** of SOA was proved by the prosecution. It convicted the appellant and sentenced him to serve 15 years in prison. In so doing, the court invoked **Section 186** of the **Criminal Procedure Code** (CPC). On first appeal, the High Court (**Sergon J.**) affirmed the acquittal of the appellant on the charges laid before the trial court, but upheld the conviction for a different offence pursuant to **Section 186**, CPC. That is why the appellant is before us on this second and final appeal.

7. In his home made memorandum of appeal and submissions which were written on his behalf, the appellant complains that he was convicted on defective charges which were never amended under **Section 214** of the CPC; that his conviction for an offence which had no evidential basis was in contravention of the law; that he was deprived of the opportunity to cross examine two prosecution witnesses; that there was no link between the offences for which he was arrested and tried and the offence for which he was convicted; and that the High Court made no attempt to discharge its duty of re-evaluating the evidence on record to reach its own conclusions or did so in a perfunctory manner.

8. The germane issue of law and the sole issue that will engage us in this appeal is whether the appellant was lawfully convicted for an offence for which he was not charged or, put differently, whether the two courts below were right in invoking **Section 186** of the CPC in the circumstances of this case. If the answer is in the affirmative, we shall go further and examine whether the High Court discharged its duty of re-evaluation of the record to reach its own conclusions in the matter, which is an issue of law.

9. There can be no doubt that trial courts have the power to convict for offences other than those charged. The question is how and when that can be done. The express provisions are in **PART IV** of the CPC and are covered in **Sections 179 to 190**. The manner of construction of those sections is also expressly provided for in **Section 191** which states as follows:

“The provisions of sections 179 to 190, both inclusive, shall be construed as in addition to, and not in derogation of, the provisions of any other Act and the other provisions of this Code, and the provisions of sections 180 to 190, both inclusive, shall be construed as being without prejudice to the generality of the provisions of section 179.” (Emphasis added.)

As construed by this Court in the case of **Rashid Mwinyi Nguisa & another v Republic [1997] eKLR, Section 191**

“...means that apart from recognizing that section 179 sets out the general principle of law applicable in a trial with respect to convictions for offences other than those charged, and that this general principle shall apply as such, notwithstanding that sections 180 - 190 deal with special cases in a trial such as conviction for the attempt to commit an offence when the charge is for the commission of the substantive offence, and convictions for minor offences when the charges are for rape, incest or defilement of girls etc. Section 179 cannot be in derogation of any of the powers of the High Court in Section 353(3)(a) of the same Code.”

10. So that, Section 179, the generality of whose provisions is preserved, deals with situations in which a court is entitled to convict on a minor and cognate offence where a person is charged with a more serious offence. It states as follows:

“When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it”.

11. There are many illustrations on the application of the Section but the observation of this court in Kalu –Vs- Republic (2010) 1 KLR will suffice to drive the point home:-

“.....there was no law which would authorize a judge on appeal to convict a person with an offence with which that person was never charged. All the provisions of the Criminal Procedure Code which are under the heading:-“Convictions for Offences Other than Those Charged” and beginning with Section 179 up to Section 190 deal with situations in which a court is entitled to convict on a minor and cognate offence where a person is charged with a more serious offence.”

12. Which brings us to Section 186 of the CPC which was invoked in this case and provides as follows:

“When a person is charged with the defilement of a girl under the age of fourteen years and the court is of the opinion that he is not guilty of that offence but that he is guilty of an offence under the Sexual Offences Act, he may be convicted of that offence although he was not charged with it.”

12. The offence which the appellant faced before the trial court was “Incest contrary to Section 22(1) of SOA”. In the judgments of both courts below, Section 22(1) was quoted without the realization that it merely provides for the “Test of relationship.” The offence of incest by male persons is created under Section 20(1) of SOA which provides in relevant part:-

“Any person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter,is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years”.

The trial court has the discretion to consider any sentence between 10 years and life imprisonment where the female person is under the age of 18. See proviso to **Section (1)**.

13. The appellant was convicted for the offence of “Sexual assault contrary to Section 5(1)(a)(ii) which provides in relevant part as follows:-

“5(1) Any person who unlawfully -

(a) Penetrates the genital organs of another person with -

(i)

(ii) an object manipulated by.....that person.....

(b) is guilty of an offence termed sexual assault”

The sentence for that offence is not less than 10 years but it may be enhanced to imprisonment for life.

14. The question therefore arises: is the offence of sexual assault as defined above minor and cognate to the offence of incest? We think not.

In the case of Francis Kahindi Mwaiha v Republic [2015] eKLR this Court considered a situation where a conviction for the offence of defilement of a girl contrary to *Section 8(3)* of the SOA was quashed on appeal and substituted with a conviction for the offence of administering a substance with intent contrary to *Section 27* of the SOA which the evidence on record elicited. Upon such conviction, the same sentence which had been imposed for the initial offence of defilement was retained. In allowing the appeal, the court stated as follows:-

“The emphasis here therefore appears to be that before a court invokes the provisions of Section 179 of the Criminal Procedure Code to substitute the initial charge with another, the court must be satisfied first of all that the evidence tendered does not disclose or support the offence charged but instead proves the commission of a lesser offence of the same genus. In other words, the substituted offence must be both a minor and cognate offence to the one charged. As it were, Section 179 looks downwards to lesser offences than that charged.

In the circumstances of this case, the offence for which the appellant was called upon to defend himself attracted a sentence of ten (10) years. The substituted charge similarly attracted a sentence of not less than ten (10) years. As can readily be seen, both offences attracted the same penalty. Accordingly, it cannot be said that the offence for which the appellant was subsequently convicted of by the High Court was minor nor cognate to the offence for which he was called upon to defend himself initially. It is instructive that Mr. Musyoki admitted in his submissions that based on the sentence imposed, the substituted charge was neither a minor or cognate offence. Indeed, we would go further and state that the offence was totally different and even fell under a different specie. Accordingly, the learned Judge fell into error when she undertook the course aforesaid.

15. And so it is in the case before us. Sexual assault is a substantive offence under SOA which has serious consequences; as serious as the offence of incest and attracting similar sentence. Black’s Law Dictionary 9th Edition page 1186 defines a cognate offence as:-

“A lesser offence that is related to the greater offence because it shares several of the elements of the greater offence and is of the same class or category.”

The appellant was prepared to meet the charge of incest which he successfully did. No notice or particulars were given to him to prepare for another equally substantial charge of sexual assault which in our view was neither minor nor cognate to the offence of incest as the elements of the offences are not shared, except that they both fall under the SOA. The trial court and the High Court therefore fell into error in convicting the appellant for the offence of sexual assault, and we so find.

16. At all events, the evidence relied on to convict for that offence was largely incomprehensible and a reasonable tribunal properly directing its mind to such evidence would be slow to convict. It will be recalled that the prosecution set out to prove incest committed on 5th March 2010 when the three children were together. The complainant was found to be too young to understand the purpose of an oath and instead gave the following statement:-

“I remember when I was with CW and SWK. My father called me to a nappier grass plantation. He told me to lie down. He removed my clothes. He was having a very big stick. I saw it. He inserted the stick in my vagina. He picked me from my grandmother's house. I was with CW and SWK. They were told to lie down. My father told them to lie down. He took a blanket and he started to cover us. He did not do anything. We were still in the nappier grass. My father went

and bought sweets. He inserted the sweet in my vagina. We then went to my grandmother's house. We went and sat down. We did not do anything. We then went to school. We were taken to hospital at Othaya and then Nyeri. We were given medicine. I was with Teacher Ann and Teacher Kiama. They did not ask me anything. My father is the one who inserted a stick in me."

In cross examination and re-examination she stated, thus:-

"We have never shared your bed. You have never come to sleep in my bed or Dan's. I have never seen you naked. I have never come with friends at home. I only used to visit my grandmother. M had told me he would remove my clothes and then insert a very big stick. My grandmother, Teacher Kiama and Rosemary came to visit me. I had an injury in my leg after falling down. The stick I was inserted was very big. You inserted it in my vagina."

17. Neither CW nor SWK nor indeed any other witness including medical evidence supported that theory and it was difficult to say that the complainant was truthful and therefore believable even in the absence of any other evidence. In our view, the two courts below did not correctly apply the proviso to *Section 124 of the Evidence Act*, which 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." (Emphasis added).

18. For those reasons we allow this appeal, quash the conviction and set aside the sentence imposed on the appellant. He shall be set at liberty forthwith unless he is otherwise lawfully held . We so order.

Dated and delivered at Nyeri this 6th day of July, 2016

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true

copy of the original

DEPUTY REGISTRAR