



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: GITHINJI, MAKHANDIA & SICHALE, J.J.A.)

CRIMINAL APPEAL NO. 181 OF 2012

BETWEEN

M K M APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT OF THE COURT

The appellant was convicted by the resident Magistrate Kwale of the offence of incest by a male contrary to **section 20(1)** of the penal code and sentenced to 20 years imprisonment. His appeal to the High Court against both conviction and sentence was dismissed hence the present appeal.

The charge stated in essence that on 6th May 2008 he unlawfully and intentionally had sexual intercourse with **K M**, a juvenile aged 11 years who to his knowledge was his daughter.

Four witnesses gave evidence in support of the charge at the trial namely, KM (PW1) the complainant, K K (PW2, (K) the complainant's mother, Dr Steven Mangi (PW3) and P.C. Mary Marete (PW4).

K testified at the trial thus. She was lying with the appellant as husband and wife and that they had children including the complainant who was 11 years old. On 6th May 2008 the appellant returned home at 4.00 a.m. and assaulted her for no apparent reason. She fled into the bush and in the morning she returned to the house and found her children outside the house. She beckoned the children and told them that she would leave with the infant as she was tired of beatings from their father. The complainant started crying upon hearing that. According to K:

“She asked me not to leave as the father sleeps with her every time I go. I asked her why she never revealed to me. She said she was threatened.”

The complainant's mother reported to P.C. Mary Marete at Kinango Police Station who issued the complainant with a P3 form. The complainant was examined by *Dr Stephen Muchiri Mangi* who found the hymen absent. The complainant gave evidence at the trial after a brief *voire dire* examination. She described how the appellant defiled her on 6th May, 2008 inside the house at 4.00 pm after she left school and stated that the appellant threatened to kill her if she told anyone. She also testified that the appellant had defiled her in the house on another occasion before and that on another occasion he had sodomised her in the bush. She continued:

“I broke my silence when dada came home drunk. He beat my siblings. My mother cried. They quarreled and my mother started leaving. I cried and told her not to leave me behind. I explained.”

The appellant made unworn statement at the trial. He stated on 4th May 2008 he had found his wife K in her uncle’s house with a man he had “caught” her with many years ago and on the following day he asked her about the man and chased her away but she refused to leave because of the children. On the next day he returned home to find his wife gone. He looked for her and found her in her brother’s house with two children. They claimed that the appellant had defiled his daughter but he denied.

The trial magistrate cautioned herself of the dangers of relying solely on the evidence of the complainant in implicating the appellant after which she made a finding that the complainant was shy but honest and that her evidence was consistent with that of the mother. She rejected the appellant’s defence that the charge was fabricated because of the difference between him and his wife and stated:

“According to the complainant and PW2 the offence was committed before their differences erupted and the child mentioned the issue out of fear of being left alone with her father who had a habit of defiling her.”

It is true that the *voire dire* examination was not exhaustive. The trial magistrate rejected the defence as fabrication.

The appellant relies on four main grounds of appeal namely, that the High Court erred in law in relying on inadequate *voire dire* examination; in failing to find that the appellant was not given a fair trial in that he was not supplied with witness statements; in failing to appreciate that the charge was a shoddy fabrication and in failing to appreciate that the appellant had given a reasonable defence.

It is true that the *voire dire* examination was not exhaustive. The trial magistrate did not make a finding whether or not the complainant knew the nature of the oath. However, the trial magistrate did make a finding that the child was intelligent and understood the duty of telling the truth. The complainant was not a child of tender years as she was above the age of 10 years. The trial magistrate was to find later that she gave graphic details of the defilement.

Further the High Court made a finding that it was unlikely that so young child would have dreamt an incident in such detail.

In the circumstances the brief *voire dire* examination was cured by the exhaustive narrative of the defilement which impressed the two courts below.

The complaint that the appellant was not given witness statements is not supported by the record as the record does not show that he requested for the witnesses statements either before or after trial.

The defence of the appellant that the charge has been fabricated because of his differences with his wife considered by the court below and rejected. The appellant according to his own statement was informed of the allegation by his wife and the brother’s wife even before the case was reported to police. Although the complainant gave detailed evidence of defilement the appellant did briefly cross-examine her without any attempt to discredit her evidence. Both the trial court and the first appellate court made a finding that the differences between the appellant and his wife arose after the defilement and accepted the reason given by complainant why she had not reported before. The complainant’s evidence of the circumstances in which she reported to her mother was found to be consistent with the evidence of her mother which showed that she had genuine fear of being left with the appellant.

That the complainant had been defiled was supported by medical evidence.

In conclusion this was a case where there was concurrent finding of fact that the appellant had incestuously defiled the complainant which finding was supported by unshaken and credible evidence of

the complainant.

In the light of the foregoing the appeal has no merit. Accordingly the appeal is dismissed.

Dated and delivered at Malindi this 15th day of November, 2013.

E. M. GITHINJI

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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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.

DEPUTY REGISTRAR