



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MALINDI**

**CRIMINAL APPEAL NO. 10 OF 2019**

DN.....APPELLANT

**VERSUS**

REPUBLIC.....RESPONDENT

*(An Appeal arising out of the conviction and sentence of Hon. L. N. Juma, RM delivered on 8.9.17 in Kilifi in Criminal Case No. 144 of 2016)*

**JUDGMENT**

1. The Appellant herein, DN was charged with the offence of incest contrary to Section 20(1) of the Sexual Offences Act. The particulars of the offence are that on 11.4.16 at around 16.00 hours in Kilifi Township within Kilifi County, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of RF, (the Complainant), a child of 6 years, who was to his knowledge, his niece. The Appellant also faced the alternative charge of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act. The particulars of this offence are that on the same day and in the same place, the Appellant intentionally and unlawfully touched with his penis, the vagina of the Complainant who was to his knowledge, his niece.

2. The facts of this case according to the prosecution are that on 11.4.16, the Complainant was playing outside her home with other children. Her home is in the same compound with the homes of her father's brothers and other relatives. As the complainant was playing, the Appellant, a brother to her father called her into his house. He then removed her clothes, placed her on a bed and inserted his penis into the vagina of the Complainant. The Appellant threatened her to say that she had fallen and hit a table which caused the bleeding. Thereafter the Complainant walked to her home bleeding from the vagina. At the Kilifi County Hospital where she was taken, her dress was found to be soaked in blood, there was laceration on the *labia minora* which was actively bleeding and needed suturing, bruising on the vaginal wall and the hymen was not intact. The Complainant told the doctor who attended to her that the Complainant who she referred to as "Uncle D" had defiled her. This led to the arrest of the Appellant and he was subsequently charged with the offences.

3. The Appellant denied the charges leading to a trial at which the prosecution called 4 witnesses. At the close of the prosecution case the trial Magistrate found the Appellant had a case to answer and placed him on his defence. The Appellant made a sworn statement and did not call any witnesses. In her judgment of 8.9.17, the learned Magistrate found the Appellant guilty of the main charge and sentenced him to life imprisonment.

4. Aggrieved by both the conviction and sentence, the Appellant preferred the Appeal herein. The grounds in his amended grounds of appeal are that the trial Magistrate erred in fact and in law in that she:

- i) failed to consider that the prosecution case was contained material contradictions and discrepancies.
- ii) failed to consider that the medical report was shoddy and inconsistent.

5. I have considered the submissions filed by the Appellant and the State. I have also subjected the evidence adduced before the trial magistrate to a fresh analysis and evaluation while giving due allowance for the fact that I neither saw nor see the witnesses. In this regard I am guided by the holding in the case of Okeno v. Republic [1972] EA 32 where the Court of Appeal stated:

***“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya Vs. Republic (1957) E.A. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, See Peters V. Sunday Post, (1958) E.A. 434”***

6. On the first ground, on contradictions and discrepancies, the Appellant submitted that PW1, the Complainant's intermediary could have implicated him as he had a grudge against him. He further contends that PW1 a key witness was not a straightforward person. He cited the case of Benard Kabiba v Rep. Cr. APP. No. 104 (2000) Kisumu in which he says the Court held that in sexual offences, where there is no corroboration after the Court forms the opinion that corroboration is necessary, *the benefit of doubt must be given to the accused and acquittal must result. The Appellant further submitted that PW1's evidence created an impression that he was a person of doubtful integrity. Citing Section 163(1) of the Evidence Act, the Appellant submitted that there was massive contradictions and discrepancies in the prosecution case.*

7. I have reexamined the testimony of all the witnesses. The record shows that the Complainant being a child of tender years, was unable to testify. The Court noted that she was traumatized and proceeded to declare her a vulnerable witness. She also directed that the Complainant be taken for counselling. The Court then appointed GB, the Complainant's father, PW1, as the intermediary through whom the Complainant gave evidence. PW1 stated that the Complainant was born on 1.3.10. On 11.4.16, while the Complainant played with other children in the compound, the Appellant signaled her to go to him. The Appellant removed her clothes, put her on a bed and inserted his penis in her vagina. When he was done with her, she left for home bleeding from the vagina. She told her mother that she had fallen and injured herself as she had been threatened by the Appellant to say so. When the father of the Complainant and neighbours came to their house, the Complainant stated that she had been with Uncle D. The Complainant's father protected the Appellant from being lynched. The Complainant's parents took her to the police who advised them to take her to hospital. She was found to have been defiled and seriously wounded and was stitched. The doctor asked the Complainant's father who Uncle D was, as the Complainant had told him that Uncle D had defiled her. The Complainant's father stated that he had a dispute with the Appellant who is his brother and known as DNB.

8. PW2, LAM, the mother of the Complainant stated that the Complainant was born on 1.3.10 and produced her baptismal card. Her testimony was that on 11.4.16, the Complainant came home bleeding from her privates. She told her mother that Uncle D had called her and told her to remove her clothes and put a stick. She went to the Appellant and asked if he had been with the Complainant which he denied. She then called her husband and together took the child to hospital. As she was in bad shape, her father took her to Kenyatta Hospital, where she was stitched. She stated that the Appellant used to visit them but due to a difference with the Complainant's father, he had stopped the visits about 2 months prior to the incident. PW2 stated that the Appellant had threatened the child with death if she testified against him.

9. The medical evidence was led by PW3 Dr. Noorein Abdultwalib, a doctor at Kilifi District Hospital produced the P3 form which he completed. On examination, he found that there was laceration of the labia, bruises in the vagina and the hymen was broken. The labia minora was actively bleeding. PW3 also produced the PRC form had been completed by Dr. Hashim Suleiman on 14.4.16. He has worked with Dr. Suleiman for 2 years and is familiar with his handwriting. PW3 took the Complainant to theatre where her labia was stitched. He also said that the Complainant's clothes were soaked in blood.

10. PW4 Cpl. Clara Bingo from Kilifi Police Station who took over the matter from Cpl. Zainab Daro stated that the police files indicated that following the report by the Complainant's father, the Complainant was taken to hospital, treated and P3 and PRC forms completed. The Appellant was arrested and charged in Court. PW4 stated that there was a delay in reporting the incident as the Appellant had threatened the Complainant and she was afraid.

11. In a bid to substantiate his claim that there were contradictions or gaps in the prosecution case, the Appellant contended that PW1 could have implicated him because of the grudge between them. Although I note that PW1 and PW2 stated that there was a grudge between the Appellant and PW1, the nature of the grudge was not indicated. In his sworn statement in his defence, the Appellant did not as much as suggest that PW1 implicated him because of the grudge between himself and PW1. The contention by the Appellant in this regard is therefore, in my view, an afterthought and farfetched.

12. What comes out in the evidence is that all the witnesses stated that it was the Appellant, or Uncle D who had defiled the Complainant. Dr. Suleiman, who examine the Complainant indicated in the PRC form that the relationship between the victim and the perpetrator as "uncle". This corroborates the testimony of PW1 that the doctor asked him who Uncle D was as the Complainant had told him that Uncle D had defiled her. The prosecution evidence is that the Appellant threatened the Complainant, a child of 6 years, with death if she testified. The record shows that the Complainant was too traumatized to testify in Court and was declared vulnerable witness thus confirming that the threats by the Appellant. Having reevaluated the evidence on record, I do not find any contradiction or gaps in the prosecution case as alleged by the Appellant.

13. The Appellant sought to discredit PW1, the intermediary for the Complainant, by submitting that he was not a straightforward person. Section 163 of the Evidence Act provides for the ways in which the credit of a witness may be impeached as follows:

***(1) The credit of a witness may be impeached in the following ways by the adverse party, or, with the consent of the court, by the party who calls him—***

***(a) by the evidence of persons who testify that they, from their knowledge of the witness, believe him to be unworthy of credit;***

***(b) by proof that the witness has been bribed, or has accepted the offer of a bribe, or has received any other corrupt inducement to give his evidence;***

***(c) by proof of former statements, whether written or oral, inconsistent with any part of his evidence which is liable to be contradicted;***

***(d) when a man is prosecuted for rape or an attempt to commit rape, it may be shown that the prosecutrix was of generally immoral character.***

14. For an adverse party like the Appellant herein to impeach the credit of a witness, in this case PW1, he must tender evidence from his

own knowledge, that he believes him to be unworthy of credit. It is not disputed that the Appellant and PW1 know each other as they are brothers. However, this is not enough. For the credit of PW1 to be impeached, evidence in that respect must be made available. The Appellant availed no evidence to substantiate his allegation that PW1 is not trustworthy. There was also no allegation of corruption, inconsistency between his testimony and previous statements. In the end I find the Appellant proffered nothing by way of evidence to persuade the Court that PW1 was not a straightforward person as alleged.

15. On the second ground, the Appellant contends that the trial Magistrate failed to consider that the medical report was shoddy and inconsistent. He contends that the specimen examination did not show spermatozoa on the Complainant's private parts, a critical element in ascertaining whether the Complainant was defiled the day she was examined. The medical report did not also connect the date and time of the alleged defilement and the age of the injuries thus rendering that evidence worthless. The medical report could not confirm that the Appellant was responsible for the defilement of the Complainant. He relied on the case of Ben Maina Mwangi v Republic [2006] eKLR and Philip Nzaka Watu v Republic [2016] eKLR to support his assertion.

16. In the Ben Maina Mwangi case (supra), Lesiit, J. stated:

***At the end of the day the Doctor's findings were very important, were positive to findings of defilement but fell short of connecting the findings to the Appellant by failing to connect the injuries to the time of the offence. The Doctor's findings did not connect the date of the alleged defilement of the Complainant with the age of the injuries noted. It was worthless evidence for purposes of this case.***

17. A careful reading of the foregoing case shows that the learned Judge found that the complainant therein a child of 4 years, did not accuse the appellant therein of anything that can be construed as defilement. There was no evidence adduced to show that any force was used on the complainant or something tending to show an assault or infliction of pain. The learned Judge was of the view that any attempt at penetrating the complainant's private parts would have resulted in excruciating pain. There was therefore no way the complainant would forget the experience or that detail in her evidence. In the present case however there was ample evidence of defilement. The Complainant's dress was found to be soaked in blood, there was laceration on the labia minora which was actively bleeding and needed suturing, bruising on the vaginal wall and the hymen was not intact. The Complainant further told the doctor examining her that Uncle D had defiled her.

18. It is the Appellant's further contention that there were contradictions on the date that the Complainant was examined. PW2 stated that she was examined on the day of the defilement but PW4 stated a different date. I have looked at the PRC form which was completed by Dr. Suleiman. The date of the form is indicated as 14.4.2016 which is also the date the form was signed. I do however note that the date of examination was given as 11.4.16 which is the date of the incident. While there is discrepancy in the dates, the same does not negate the fact that the child was defiled and that there was penetration which led to the laceration of the labia, bruising of the vagina and the rupture of her hymen. The discrepancy in the dates is not what the Court of Appeal had in mind where in the Philip Nzaka Watu case (supra) stated as follows:

***The first question in this appeal is whether the prosecution case was riddled with contradictions and inconsistencies of the magnitude that would make the conviction of the appellant unsafe. It cannot be gainsaid that to found a conviction in a criminal case, where the trial court has to be satisfied of the accused person's guilt beyond reasonable doubt, the prosecution evidence must be cogent, credible and trustworthy. Evidence that is obviously self contradictory in material particulars or which is a mere amalgam of inconsistent versions of the same event, differing fundamentally from one purported eyewitness to another, cannot give the assurance that a court needs to be satisfied beyond reasonable doubt.***

19. The discrepancies in the dates in the medical evidence herein are clearly not of such magnitude as would make the conviction of the Appellant unsafe.

20. Having reexamined the evidence by the prosecution witnesses and the Appellant's sworn statement, I am persuaded that the prosecution proved its case against the Appellant beyond reasonable doubt. The Appellant was properly convicted of the offence of incest. In line with the proviso to Section 20(1) of the Sexual Offences Act, the sentence of life imprisonment meted on the Appellant was proper.

21. Accordingly, both conviction and sentence are upheld and the Appeal herein which lacks merit is hereby dismissed.

22. It is so ordered.

DATED this 27<sup>th</sup> day of February 2020

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M. THANDE

JUDGE

SIGNED and DELIVERED in MALINDI this 28<sup>th</sup> day of February 2020

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NJOKI MWANGI

**JUDGE**

**In the presence of: -**

..... **for the Appellant**

..... **for the Respondent**

..... **Court Assistant**