REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAHURURU

CRIMINAL APPEAL NO.60 OF 2017

(Appeal Originating from Nyahururu CM's Court Cr.No.1841 of 2013 by: Hon. A. Mukenga – R.M.)

MKN.....APPELLANT

- V E R S U S –

REPUBLIC....RESPONDENT

J U D G M E N T

MKN, the appellant, was convicted by Hon. Mukenga R.M on 29/7/2015, for the offence of incest contrary to Section 20(1) of the Sexual Offences Act.

The particulars of the charge are that on diverse dates between May, 2013 and 23/10/2013 in Nyandarua Central being a male person, caused his penis to penetrate the vagina of CW a female person who to his knowledge was his daughter.

In the alternative, he faced a charge of committing an indecent act contrary to Section 11(1) of the Sexual Offences Act.

He was alleged to have unlawfully and intentionally touched the vagina of CW a child aged 12 years with his penis.

Upon conviction, the appellant was sentenced to life imprisonment. No finding was made on the alternative charge.

The appellant is aggrieved by the judgment of the trial court and filed this appeal. He filed amended grounds of appeal which he relied upon. The grounds are as follows:

> **1. That the court erred by ordering the key witnesses to be tortured;**
>
> **2. That the court erred by failing to consider that a grudge existed between PW4 and the appellant;**
>
> **3. That the trial court violated the appellant's constitutional rights to fair hearing under Article 50(4), 25(c) of the Constitution;**
>
> **4. That the court misinterpreted the law relating to hostile witnesses.**

He prays that the conviction be quashed, sentence set aside and he be released forthwith.

This is a first appeal and it behoves this court to examine all the evidence tendered in the trial court, analyze it and arrive at its own findings. The court will however bear in mind that this court neither saw nor heard the witnesses testifying, an opportunity which the trial court had and was better placed to assess the demeanor of the witnesses. I am guided by the decision in ***Kiilu v Republic (2005) 1 KLR 174*** where the Court of Appeal stated:

> **"(i) An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to afresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions;**
>
> **(ii) 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 findings and 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."

To prove their case, the prosecution called a total of five witnesses. **PW1, CW** a standard 4 pupil stated that from May, 2013, her father, the appellant used to rape her in their bedroom; that on one occasssion, while in her bedroom, the father lifted her, placed her on her bed, asked her to remove her inner pant, he unzipped his trouser and lay on top of her; inserted his thing for urinating into hers as a result of which she felt pain. She did not tell anyone because he warned her not to.

On 22/10/2013, PW1 was sent by her mother to get a cut from the bedroom. She found the father in the room. He lifted her, placed her on his bed and just then, the mother entered the room and warned her not to go near the father again; that her mother, PW2 went and informed their neighbor one Mama Muthoni that the appellant had raped PW1 and the said lady reported to her Deputy Teacher. The Head Teacher took her to the Police Station then to the Hospital. She went back home with the teacher, committee member of the school and police who arrested the appellant.

PW2, AW, mother to PW1 was on 22/10/2013 about 8.00 a.m., making tea and she sent PW1 for a cup; that the appellant and the other children were in the house asleep; that PW1 took too long to return and she followed to find out what had happened. PW2 found the appellant holding PW1 and on seeing PW2, put her down. PW2 demanded to know what they were doing. PW2 said that the appellant's hand was on PW1's pants and he was kissing her. She beat up PW1 who informed her that the appellant had defiled her in the bush and another time on the couch when PW2 was away. PW2 informed a neighbor and the teacher who took the complainant to Hospital and reported to the police and the appellant was arrested.

PW3, Paul Njoroge Waweru a Clinical Officer at OlKalou Hospital examined PW1 on 26/10/2013. He found the injuries to have been several weeks old, i.e. an old tear of the hymen and a small fresh bruise about a week old. He formed the opinion that the complainant had been defiled severally.

PW4 Yusuf Mwangi Mwathi received a report on 24/10/2013 that CW (PW1) had been defiled by her father. The child was interviewed by some teachers and they reported the matter to the Chief who recommended that the child be taken to Hospital after which the mother then reported to police.

Cpl. Mike Magenya of Ol Kalou Police Station was assigned this case as investigating officer. As a result he arrested the appellant.

When called upon to defend himself, the appellant gave unsworn evidence that in 2012, his friends told him to investigate the relationship between his wife and the headmaster; that he laid a trap and caught the headmaster in his house and warned the wife to stop working at the school; that on 24/12/2012, he also laid a trap for the headmaster and the wife where they were to meet in a hotel. He confronted them but did nothing and that PW2 came home and picked PW1 and stayed away for two months but PW2 was brother, they reconciled but PW2 had changed and made life difficult for him till he wanted to commit suicide; that on 23/10/2014, they harvested and sold maize together and on 24/11/2014, they went to bed but next morning, he did not get PW2. He peeped outside and saw her inserting fingers in PW1's private parts. Upon the appellant enquiring what was going on, PW2 denied and next day, she left with PW1 and came back at 4.00 p.m. After 30 minutes, her phone rang, somebody knocked, she opened and Administration Police entered and asked him to accompany then to the Police Station.

In his submissions, the appellant submitted that PW1 and PW2 were threatened and tortured before they testified against him which prejudicial to his case; that PW2 had to be remanded for 8 days and warned of consequences before he testified and therefore their evidence was not reliable.

On the alleged grudge between the appellant and PW4, he submitted that the court failed to consider the said allegations because it is PW2 and 4 who planned to frame him.

On violation of his rights under Article 50(4) of the Constitution, it was the appellant's submissions that the complainant was sworn to tell the truth after a voire dire examination and she denied having been defiled; that evidence was prejudicial to the appellant and should have been excluded from the courts judgment. It was his submission that the trial court was unfair and in breach of Article 25(c).

The appellant also argued that the prosecution having declared PW1 as a hostile witness should not have relied on her evidence; that PW1's evidence was contradictory, unreliable and her evidence should have been disregarded.

He relied on the decision in ***Shiguye v Republic (1975) EA 191*** where it was held that the effect of declaring a witness hostile was to render his entire evidence untrustworthy and that therefore the case against the appellant was not proved to the required standard of beyond reasonable doubt.

In reply, **Ms. Rugut** submitted that on 18/2/2014 when the complainant was put on the witness box, the prosecutor said she was hostile but the court stood her down and she was never declared a hostile witness; that on 13/5/2014, PW2 was put on the witness box and after she started testifying the court requested that she be remanded for 8 days because she was a refractory witness.

Counsel further submitted that PW1 identified the appellant as her father and narrated what he did to her; that PW2 corroborated PW1's evidence and so did the testimony of PW3 who examined PW1 who found the child to have bee defiled. As to the defence, counsel submitted that the court rejected it.

The appellant was charged with the offence of incest contrary to Section 20(1) of the Sexual Offences Act to establish a conviction under the above Section the prosecution must prove the following elements:

1. An indecent act or an act which causes penetration;

2. The victim must be a female who to the accused's knowledge is his daughter, granddaughter, sister, mother, niece, aunt, grandmother (S.22 Sexual Offences Act).

There is no doubt that PW1 is the daughter of the appellant. PW1 identified the appellant as the father and PW2, confirmed it. The appellant did not deny that fact.

An indecent act is defined under Section 2 of the Sexual Offences Act to mean ***"an unlawful intentional act which causes:***

a. Any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act of penetration;

b. .....

As regards penetration, it is also defined under Section 2 of the Sexual Offences Act to mean:

"The partial or complete insertion of the genital organs of a person into the genital organs of another person."

The trial court posed the question as to who defiled the complainant. The evidence of PW1 and 2 has been discredited by the appellant contending that PW1 and 2 were 'tortured' to testify against him and hence the testimonies are not creditworthy.

On 18/2/2014, after PW1 underwent a voire dire examination, was sworn and started to testifying, the prosecutor indicated that she had departed from her statement to the police and that she was hostile. The court stood down the witness.

Again on 13/5/2014, when PW1 started testifying, the prosecutor applied to do away with PW1's testimony and instead proceeded with the mother's, (PW2) testimony.

PW2 also started testifying contrary to her statement made to the police and the prosecutor applied to have her remanded for 8 days to ascertain whether she would tell the court the truth. The court obliged and ordered PW2 remanded for 8 days. On 20/5/2014, PW1 and 2 came to court and testified in line with their statements to the police.

The question is whether the PW2 was a hostile or refractory witness because by remanding PW2 for 8 days, it means that the witness was treated as a refractory witness though neither the prosecutor nor the court stated under what provision of law the application to remand PW2 was made.

Section 152 of the Criminal Procedure Code states as follows regarding a refractory witness:

1. Whenever a person, appearing either in obedience to a summons or by virtue of a warrant, or being present in court and being verbally required by the court to give evidence:-

a. Refuses to be sworn; or

b. Having been sworn, refuses to answer any question put to him; or

c. Refuses or neglects to produce any document or thing which he is required to produce; or

d. Refuses to sign his deposition.

Without offering sufficient excuse for his refusal or neglect, the court may adjourn the case for any period not exceeding eight days, and may in the meantime commit that person to prison, unless e sooner consents to do what is required for him.

2. If the person, upon being brought before the court at or before the adjourned hearing, again refuses to do what is required of him, the court may again adjourn the case and commit him for the same period, and so again from time to time until the person consents to do what is so required of him;

3. Nothing contained in this section shall affect the liability of any such person to any other punishment or proceeding for refusing or neglecting to do what is so required of him, or shall prevent the court from disposing of the case in the meantime according to any other sufficient evidence taken before it.

From the above provision, a refractory witness is one who, when summoned to appear in court to testify, refuses to be sworn, refuses to answer questions put to him/her; or refuses to produce any document or exhibit that he/she is required to. PW2 testified contrary to her statement and could not be said to be a refractory witness.

In ***Elly Otieno Ogwang v Republic (2018) eKLR*** J. Majanja stated:

> **"PW1 was not a refractory witness as she was able to answer questions put to her. The complaint by the prosecutor was that she was retracting the statements she had earlier made to the police. In substance she was a 'hostile' witness thus the trial magistrate erred in remanding her in custody. The trial magistrate ought to have declared her a hostile witness. Once the witness was declared hostile, the prosecutor was entitled to cross examine the witness by putting to her the previous statement she recorded with the police in accordance with Section 153, 154, 161 and 163 of the Evidence Act."**

In this case, the court did not end up declaring PW1 a hostile witness. As observed above, the trial court fell into serious error in the manner in which PW1 was handled as she should have been declared a hostile witness so that she could have been subjected to cross examination on her statement. The question is whether the error made by the court rendered the trial and the resultant conviction a nullity.

In my considered view, the court fell into very serious error in the manner in which the evidence of PW1 and 2 was received that it cannot be said to have been fair to the defence. PW1 and 2 had two conflicting testimonies on record because the court failed to invoke the appropriate provisions of the law to deal with them as hostile witnesses. In the end, the testimonies obtained from PW1 and 2 after PW2's detention must be seen as having been received under coercion. It is only after PW2 was remanded for 8 days that she came and changed her testimony. On PW2 changing her testimony, PW1 did likewise. I find that the evidence of PW1 and 2 should not have been relied upon by the trial court, taking into account the manner the evidence was obtained. The evidence is prejudicial to the appellant.

In **Batala v Uganda (1974) EA 402 (pg.405)** the court said:

> **"The giving of leave to treat a witness as hostile in equivalent to a finding that the witness is unreliable. It enables the party calling the witness to cross – examine him and destroy his evidence. If a witness is unreliable, none of his evidence can be relied on, whether given before or after he was treated as hostile, and it can be given little, if any weight."**

See also ***Shiguye (Supra).***

It follows that once PW1 and 2 demonstrated that they were hostile witnesses, their evidence was of very little worth if any.

Even though there was evidence showing that PW1 was defiled, yet the evidence as to the identity of the perpetrator remains suspect. It is very likely that the appellant influenced the witnesses PW1 and 2 to change their testimonies.

I therefore find that the trial court's finding that the offence of incest was proved beyond any reasonable doubt was made in error.

I must point out at this stage and especially to the police who prepare charge sheets, as I have pointed out in earlier decisions, that once one is charged with incest, there is no need to charge them with an alternative charge of committing an indecent act. This is because the ingredients of an offence of incest is either ***'penetration or an indecent act'.***

In sum, I find that the appeal has merit. The conviction is quashed, sentence set aside and the appellant is set at liberty forthwith unless otherwise lawfully held.

Dated, Signed and **Delivered** at ***NYAHURURU*** this **30th** day of ***April,*** 2020.

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R.P.V. Wendoh

JUDGE

PRESENT:

Ms. Angeline Chinga – State Counsel

Eric – Court Assistant

Appellant – MKN