REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CRIMINAL APPEAL NO.198 OF 2017

(Appeal Originating from Nyahururu CM's Court Criminal.107 of 2015 by: Hon. A.W. Mukenga– S.R.M.)

VNO.....APPELLANT

- V E R S U S –

REPUBLIC.....RESPONDENT

J U D G M E N T

VNO, the appellant preferred an appeal against the judgment of Hon. Mukenga which was delivered on 18/10/2017.

The appellant was charged with an offence of incest contrary to section 20(1) of the Sexual Offences Act.

The particulars of the charge are that on 7/1/2015 in Nyahururu, Laikipia County, Intentionally and unlawfully caused his genital organ, penis, to come into contact with the vagina of JOO a girl aged 17 years old.

Upon conviction, he was sentenced to serve 10 years imprisonment. He is aggrieved by both the conviction and sentence and preferred this appeal citing the following summarized grounds:

(1) That the court failed to consider that PW5's evidence was contradictory;

(2) That the court failed to consider the fact that some crucial witnesses were not called;

(3) That there was no medical evidence linking the appellant to the offence;

(4) That the prosecution evidence was not sufficient to prove the offence charged;

(5) The magistrate failed to appreciate that this was a fabricated case.

The appellant therefore prays that the court do allow the appeal, quash the conviction and set aside the sentence.

In support of the appeal, the appellant filed submissions on 21/12/2017 which are basically a repetition of the grounds filed.

Ms. Rugut, learned counsel for the State opposed the appeal. She submitted that PW1, a niece to the appellant vividly described what transpired on 7/1/2015.

As regards the age of the complainant, counsel submitted that the complainant was deemed to be an adult because the birth certificate was obtained in January, 2016 even after the complainant had testified; that the doctor concluded that there was no evidence of vaginal penetration; that under Section 20(1) of the Sexual Offences Act, there is no requirement of penetration and the court properly convicted the appellant.

As regards the allegation of there being a grudge between the appellant and complainant's father, there was no evidence of such grudge and counsel urged the court to dismiss the appeal.

This is a first appeal and it is the duty of this court to re-examine all the evidence that was tendered in the trial court, evaluate it and arrive at its own determinations. This court should however bear in mind that it did not have the opportunity to see or hear the witnesses testify in order to appreciate their demeanor. *See* ***Kiilu v Republic (2005) KLR 114***.

The prosecution case was that **PW1 JOO,** the complainant, went to visit his uncle, a brother to his mother, the appellant, in Nyahururu after she had finished her fourth form. She went to help with house chores because the appellant's wife was pregnant. On 7/1/2015, she was at the appellant's two roomed house; that the appellant left with the wife at 3.00 p.m., but came back to the house and she served him with food; that the appellant sent his son B to go for the other son J from School. When she was collecting utensils from the appellant's bedroom which served as a kitchen, the appellant locked the door, pushed her on the bed, lifted her skirt. She started having tremors and became weak.

Whenever she tried to scream, he would cover her with mouth by kissing her; he lifted her top and brazier, removed her pant and had sex with her for about thirty minutes against her will. His son came back home and found her crying. She went outside and informed a lady by name Mama Njeri about it. She called her father on phone to whom she reported the incident. She went to Nyahururu hospital where the appellant found her and told her to say that she had been affected by her illness and told her how he loves her. She went to sleep at the house of her other uncle J who told her to take a shower ad she did; that J took her to a private hospital and told the doctor not to indicate that it was rape. She reported to the police, was issued with a P3 form, tests were done on her and she was sent for trauma counseling.

PW2 IO, a father to PW1, recalled that on 7/1/2015 while at work, he received a call from PW1. She was crying and told her that the appellant who is her uncle had done to her.

PW2 travelled to Nyahururu the next day, went to the police station and found PW1 had made a report. They took her to hospital where she was examined and sent for counseling. He said that she was born 13/10/1998 and was therefore 17 years at the time.

PW3 RN recalled the 8/1/2015 when her brother in law called to tell her to take the complainant to hospital and she took her to Good Hope Hospital, that the complainant alleged to have been raped; that she was examined then they were sent to Nyahururu Hospital and she was referred to counseling.

PW4 Dr. Karimi of Nyahururu County Hospital on 8/1/2015, examined PW1 and found the hymen broken, which was evidence of penetration.

PW5, Sgt Mark Marube investigated the case and preferred these charges against the appellant.

When called upon to defend himself, the appellant said that in 2014, he disagreed with PW1's father, his brother in law, who alleged that the appellant had stolen a cow; that after PW1 completed her fourth form, the parents requested him to allow her to come and stay with him because she was misbehaving with boys at home; that the complainant came to his home in December, 2014; that he was operating a hotel at Kasuku with the wife; that they used to cook the food at home and transport it to the hotel; that on 7/1/2015, they cooked from 4.30 a.m. to 11.00 a.m.; he left for the hotel with the wife, where they sold food till 1.00 p.m. when the wife went back home. The appellant went home later at 3.30 p.m. after the food got finished. He found the wife lying on the couch and PW1 washing clothes; he left to check on his construction site at Maina Village; after an hour, his brother JM who lived in Nyahururu called him where they found his other brother MN and PW1; that PW1 had said that when in school, she used to wake up and find as if she had been defiled, while at the Cleanshelf Super market, he was informed by one of the brothers that PW1's parents had called and alleged that he, the appellant, had defiled PW1; that PW2 told him that she was making those allegation so that she could go back home; that PW2 told them not to take the girl to hospital till he arrived.

DW2 MWN, the appellant's wife testified that PW1 was staying with them after the in laws insisted she comes to live with them because she was playing with boys at home; DW2 was aware that PW1 had a health problem; that on 7/1/2015, her and the appellant cooked food for the hotel, transported it to the hotel on a motor cycle; they sold food till 1.30 p.m. and she went back home to rest.

DW2 found PW1 talking to other women which she warned her not to be doing but she did not listen; the appellant came back home at 3.00 p.m. and left again. She went to buy food for cooking at 5.30 p.m. leaving PW1 at home. She returned home at 7.30 p.m. but did not find PW1 and when the appellant came back home, he told her that PW1 had alleged that he had raped her but she was at home all the time she alleged to have been raped.

I have considered the grounds of appeal. The offence of incest is provided for under Section 20(1) of Sexual Offences Act which reads:

"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."

To prove an offence of incest, the prosecution must ensure that the following ingredients exist:

(1) That there was penetration; or

(2) An indecent act was committed;

(3) Proof of the identity of the perpetrator;

(4) The relationship between the complainant and accused must be one of those listed under Section 20(1);

(5) Proof of the age of the complainant.

The identity of the appellant is not in question. It is common ground that PW1 is the niece of the appellant and at the time this incident allegedly happened, PW1 was living in the appellant's house in Nyahururu.

According to PW1, the incident occurred in broad daylight after 3.00 p.m. The issue of identification would not therefore arise.

As to whether there was penetration, PW1 narrated in detail what transpired when the appellant came back home, attacked her by pushing her on the bed, later undressed her. She told the court that the applicant raped her or had sex with her. Rape or sex are legal terms which in my view, should have been explained. The prosecution should have led evidence to explain exactly what the appellant did to PW1, if at all.

PW1 told the court that her uncle J later asked her to bath. She was taken to see the doctor the next day on 8/1/2015. Dr. Karimi (PW4) who examined her found that the hymen was absent, no bruises were seen and he opined that there was vaginal penetration. PW4 produced the outpatient card which indicates that indeed the hymen was absent but it was difficult to ascertain freshness as there were no bruises or injuries to the genitalia.

The above findings by the medical doctor and the fact that PW1 did not tell the court, what the actual act done to her was, it was difficult to ascertain whether indeed there was penetration.

Of course, absence of hymen per see is not evidence that penetration did not take place. A hymen can be raptured in many ways while some girls are not even born with it. The trial court rightly relied on the case of ***P.K.W. v Republic (2012) eKLR*** where the court said that:

> ***"15. In their analysis of the evidence on record, the two courts below do not seem to have directed their minds to these details. They appear to have placed a high premium on the finding that the child's hymen had been broken. Was this justified? Is hymen only ruptured by sexual intercourse?***
>
> ***16. Hymen, also known as vaginal membrane, is a thin mucous membrane found at the orifice of the female vagina (sic) with which most female infants are born. In most cases of sexual offences we have dealt with, courts tend to assume that absence of hymen in the vagina of a girl child alleged to have been defiled is proof of the charge. That is however an erroneous assumption. Scientific and medical evidence has proved that some girls are not even born with hymen. Those who are, there are times when hymen is broken by factors other than sexual intercourse. These include insertion into the vagina of any other object capable of tearing it like the use of tampons, masturbation injury, and medical examinations can also rupture the hymen when a girl engages in vigorous physical activities like horseback riding, bicycle riding, and gymnastics, there can also be a natural tearing of the hymen.***

Since PW1 told the court that it was her first time to engage in sex and that the appellant forcibly had sex with her against her will and she felt pain, one would have expected to find some bruising or swelling or generally interference with PW1's genitalia a day after the incident but was not the case. So far, there was no proof of penetration.

Whether there was proof that an indecent act was committed on PW1; Section 2 of the Sexual Offences Act defines an indecent act ***"an unlawful intent act which causes inter alia, any contact between any part of the body of a person with the genital organ, breasts, buttocks of another, but does not include an act that causes penetration."***

It was the complainant's evidence that the appellant pushed her to the bed, lifted her top and brazier, removed her pant and had sex with her against her will; that whenever she tried to scream, he covered her mouth by kissing her. She felt a lot of pain and suffered tremors and weakness, a condition she suffered from and fell unconscious.

The appellant denied ever committing the offence and raised an alibi defence. He told the court that he has a hotel business and cooks the food at home; that he cooked food with his wife DW2, upto 11.00 a.m. they took the food to the hotel where he remained till about 3.00 p.m. while the wife went back home to rest at 1.30 p.m.; that he only passed by his house about 3.30 p.m. found PW1 and the wife and left to go to his construction site. His defence is therefore that he was never at home at the time PW1 alleged he raped her. DW2's evidence tallied with the appellant's.

The law is that an accused person does not assume any burden to prove his alibi defence. This was stated in the case of ***Kairie v Republic (1984) KLR*** where the court said:

> ***"An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable. The judge had erred in accepting the trial magistrate's findings on the alibi because the finding was not supported by any reasons."***

The trial court considered the complainant's testimony and the defence. The appellant alleged that he was framed because of an existing grudge between him and PW2, the complainant's father. The appellant and DW2 said that because of the grudge, they did not want PW1 to come to stay with them as requested by PW2. On the other hand, PW1 and PW2 were categorical that it is the appellant who requested PW2 to allow PW1 to come to Nyahururu to help with DW2 who was pregnant. Indeed DW2 was pregnant. PW1 & PW2 testified before this court and the appellant never cross examined them on those allegations of grudges. The allegations of there being a grudge came too late in the defence when PW1 and 2 could not answer to those allegations.

Further, on the allegations that the appellant and PW2 were not in good terms, I agree with the trial court's finding that it is unbelievable that PW2 had a grudge with the appellant and at the same time insist on his daughter going to live with the appellant. That line of defence did just not make sense.

The appellant also alleged that when in school, PW1 used to wake up in the morning and would allege that she had been raped in the night but the problem had ceased since she came to his house.in Nyahururu. Again this is an issue that the appellant would have raised with the

complainant when she testified and even PW2, but he did not. Again it is an afterthought.

The appellant also alleged that PW2 told him that he knew PW1 had made up the story of being raped so that she could go back home to Kisii. Again the appellant never put these questions to PW1 or PW2.

I find that the appellant's defence was an afterthought and unbelievable on what happened to PW1. PW1's evidence thereafter was cogent and consistent and the complainant's testimony was not at all dislodged by the alibi raised in the defence.

Having agreed with the trial court and dismissed the defence as untrue, I am satisfied that by removing the complainant's clothes, brazier, underpants, the appellant must have touched her breasts and buttocks or genitalia. I find that the prosecution proved beyond any reasonable doubt that the appellant committed an indecent act on the complainant.

The complainant, at the time of testifying told the court that she was 18 years old. PW2 told the court that PW1 was born on 13/10/1998. The post rape forms indicated that PW1 was born 13/10/1996 and the P3 estimated PW1's age to be 18 years old. The prosecution purported to produce a birth certificate (P.Exh.No.5) which was procured on 29/1/2019 which indicates that the complainant was born on 13/10/1998. PW1 had testified on 21/7/2015 and said she was 18 years. The trial court was correct in finding that the complainant was an adult at the time of the incident.

The appellant has complained that crucial witnesses were not called, that is the women who PW2 said called him on phone and other people from the plot where they lived. PW1 did tell court that she informed one Mama Njeri of her ordeal. PW2 said he was also called by a woman, neighbor. He did not name the lady.

The law as regards calling of witnesses is well settled. Section 143 of the Evidence Act provides that no particular number of witness is required to prove a fact.

This fact was considered in the case of ***Benson Mbugua v Republic CRA.257/2009*** where the court held that the prosecution has the discretion to call whoever they wish to call as a witness and it is not for the defence to determine that issue for the prosecution. However, the prosecution should not fail to call relevant witnesses for ulterior motives, for example, if they know that the evidence will be adverse to support their case. The prosecution has a duty to call all relevant witnesses to their case whether or not the evidence may tend to be adverse to the case, provided that the witnesses will assist the court in arriving at a just and fair decision. In ***Bukenya v Republic (1972) the E.A***. Court of Appeal stated as follows:

> ***"While the Director is not required to call a superfluity of witnesses, if he calls evidence which is barely adequate and it appears that there were other witnesses available who were not called, the court is entitled under general law of evidence to draw an inference that the evidence of these witnesses, if called, would have tended to be adverse to the prosecution case."***

From PW1's testimony, she was alone in the house with the appellant. She said that her efforts to scream were thwarted by the appellant blocking her mouth by kissing her. What the woman whom PW1 talked to and probably the one who called PW2, is hearsay, which she was told. The appellant himself admitted that if anything happens in a neighbour's house in the plot one may or may not hear. So, although there were many people in the plot, it may be that they did not hear the commotion. Apart from PW1 saying that the woman claimed to have heard her scream, there is no such evidence. It would have been superfluous for the prosecution to call witnesses who would only give hearsay evidence.

Having reviewed all the evidence on record and considered all the grounds of appeal, I am of the view that the trial court arrived at the correct finding that the appellant committed an indecent act against his sister's child, who is his niece and who falls within the degrees of relationships under Section 22 of the Sexual Offences Act.

The appellant therefore committed the offence of incest contrary to section 20(1) of the Sexual Offences Act. The conviction is well founded and I affirm it.

The appellant was sentenced to 10 years imprisonment. It is the minimum sentence under Section 20(1) of the Act and this court has no discretion to interfere with the sentence. The appeal is therefore dismissed in its entirety.

Dated, Signed and Delivered at *NYAHURURU* this *30th* day of *April*, 2019.

……..

R.P.V. Wendoh

JUDGE

PRESENT:

Rugut – Prosecution Counsel

Soi - Court Assistant

Appellant - present

.....