REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

CRIMINAL APPEAL NO. 48 OF 2018

FKK.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

Introduction:

1. The Appellant was charged with offence of Incest by male person Contrary to Section 20(1) of the Sexual Offence Act No. 3 of 2006.

2. Particulars being that on the diverse date between 15th January, 2018 and 8th February, 2018 at Ikomoa Village, Mukaa Location in Mukaa Sub-county within Makueni County, committed an act which causes penetration with MK a child aged 13 years who is to his knowledge his daughter.

3. He pleaded not guilty and matter was heard. He was convicted and sentenced to life imprisonment.

4. Being aggrieved by the said verdict, he lodged appeal and set out 5 grounds of appeal in the petition namely:-

*1) **That** the trial court failed to accord him adequate time to prepare his defense which was unconstitutional.*

*2) **That** the prosecution case was rindled with lots of malice contradictions and inconsistence which could be looked upon before arising the decision to convict.*

*3) **That** the learned magistrate was biased for he failed to read all the evidence that arose from the cross-examination of the witnesses.*

*4) **That** the Appellant pleaded not guilty to the charges.*

*5) **That** the trial court erred in law by failing to observe, analyze and evaluate the entire evidence and find that there was no evidence to convict.*

5. The parties agreed to canvass appeal via Submissions but only Appellant who lodged the same.

6. The prosecution relied on the evidence on record.

Appellant's Submissions:

7. The appellant submitted that he charges drawn against him did not disclose any offence from the way it was drafted, it has been said time and again when a charge is prepared without such words as intentionally and unlawfully it does not disclose any offence.

8. It is argued that ,form record the age of the victim was stated to be 13 years old as recorded by the clinical officer. She did not bring forward the age assessment report to ascertain the true age. He cites the case of ***Nyongesa –vs- Republic, Criminal Appeal No. 123 of 2009***

9. He contends that he was not informed of his rights as arrested person including right to communicate with advocate or any other person

whose assistance is necessary.

10. He also argues that he was not supplied with witness statements to adequately prepare for trial, and being a layman he did not raise query at trial. The Appellant supported his argument with a case reference of ***Simon Githaka Malombe –vs- Republic (2015) eKLR*** the court of appeal stated that;

> ***"the denial of witness statements in the present case reduced the trial to a farcical sham. The appellant finding himself incapacitated without the witness statement……"***

11. He complains that he was denied right to have an advocate which was to ensure that he got a state appointed lawyer as the situation required it.

12. He contends that the Charge and clinical officers report gives a different date compared to what other prosecution witnesses said. In addition to that the clinical officer stated that he conducted the medical examination on 12th February 2018, and he found swollen *labia*, whitish discharge and broken hymen, he formed an opinion of defilement.

13. It is the Appellant's contention that the findings are not conclusive proof of defilement as it is prudent to conduct medical examination 72 hours.

Duty of first Appellate Court:

14. The duty of the court of appeal has been established in a long line of cases. The position is that the court ought to subject the evidence tendered in the Trial Court to fresh scrutiny and subsequently determine whether the said court erred in both law and fact in arriving at the impugned decision.

Evidence Adduced:

15. PW1 stated that appellant was her father and that he used to call her to his bed. He removed her clothes and slept on her. She felt pain. He asked her to go and sleep with other children. She woke up the following day and was feeling a lot of pain.

16. PW1 informed her father who brushed it off insisting that she should go to school. She went to school and was walking with a limp and was called by her teacher Madam Kariuki. She asked her what had happened and PW1 informed what her father had done to her. Madam Kariuki asked her to go to class.

17. She was again called by Mr. Moseu who also wanted to know what had happened whom she also gave the story.

18. She was taken to the chief. She was later taken to the hospital by her mother. It was her testimony that the father was threatening to kill her if she said anything. She stated that her father used to beat them a lot together with her sister C.

19. It was her testimony that her father used to do bad things to her in the absence of her mother and it was the third time, he was doing the same to her.

20. She informed the trial court that her mother worked in Machakos and used to stay therein leaving them with their father alone. It was her testimony that her mother only came back at the end of the month.

21. PW2 stated that he received information from his teachers about the complainant who had been defiled by her father. He summoned the pupil in the presence of guidance and counseling teachers.

22. The pupil narrated to them again the story as to how her father was defiling her. It was his testimony that the child was walking while limping. He called his immediate county supervisor who advised him to report the case to the area chief.

23. PW3 received the report for PW2 and interrogated the complainant who also informed her that her father was defiling her. She reported the case and appellant was arrested.

24. PW4 carried investigations and escorted the complainant to the hospital where it was revealed that she had been defiled. She issued her with a P3 form which was filled at Kilungu hospital.

25. PW5 was able to medical examine the complainant. It was his testimony that the complainant gave history of sexual assault by her father. On examination of her *genitalia*; *labia majora* and *labia minora* were swollen and reddish.

26. It was also his testimony that hymen was broken and she had whitish discharges. He formed the opinion that this was a case of defilement. He tendered the P3 form as PEX 1, P3 form as PEX 2 and treatment notes as PEX 3.

27. DW1 stated that her daughter had a problem of not showering as per the report from the teachers. The teachers also informed him that the complainant did not have a school bag, and he asked the teachers to help. He was advised by the teachers to close the child inside the bathroom and have her take a shower and also to be patient with her.

28. It was also his testimony that he did not receive any information on what had happened on the 08/01/2018 and that his daughter had lied. It was his contention that his daughter slept in another room with her sisters. It was his testimony that he was the one who was taking care of his children and she had been guided on what to say.

29. She informed the trial court it was a curse to do such a thing.

ISSUES:

31. After going through the evidence on record and the submissions filed, I find the issues are; ***whether appellant was given adequate time to prepare for trial, whether the prosecution proved its case beyond reasonable doubt.***

Analysis and Determination:

Whether the child was a female relative within the prohibited degrees?

30. In cases of incest with a minor the prove is based on ingredients of defilement on and above the prove of the degree of prohibited consanguity. See the case of the ***High Court at Machakos Criminal Appeal No. 296 of 2010, Fappyton Mutuku Ngui –vs- Republic;*** where the court held that ***the ingredients to look out for in a defilement case are; The first is whether there was penetration of the Complainant's genitalia; the second is whether the complainant is a child; and finally, whether the penetration was by the Appellant.***

31. It was the prosecution's case that the appellant had a carnal knowledge of his daughter who is the complainant herein. The defence denied the contention.

32. Having held as above, the trial court was required to establish whether the two were actually related as defined within the prohibited degrees of consanguinity (blood relatedness).

33. PW1 stated that the appellant was her biological father, a fact that the defence admitted expressly. It was his contention that indeed the complainant was her daughter who he was living with. The trial court therefore found that indeed the child was related to the appellant within the prohibited degree of relationship (consanguinity).

34. The prosecution adduced evidence that the complainant was a child aged 13 years, a fact that the defence did not at any time dispute. This was via testimony of PW1 her mother and production of the P3 form and the defence did not dispute the same.

35. The holding is supported by the case of ***JWA –vs- Republic Court of Appeal at Nairobi*** before ***Hon. J. Koome, Musinga and Otieno-Odek JJA in Criminal Appeal No. 100 of 2013*** held that;

> ***"…… The complainant testified that she was 10 years old; the medical report produced by Dr. Kalumbe who examined the complainant indicates that she was born in 1999 and was thus 10 years in the year 2009, when the offence was committed; the P3 form tendered in evidence as exhibit 2 shows that the complainant was 10 years old at the time of the offence. On our part, we see no reason to disturb the findings of fact made by the two courts below and we are satisfied that the evidence on record shows that the age of the complainant was proved to be 10 years."***

36. The court is therefore satisfied that the child was aged 13 years old and was a daughter to the appellant herein.

Whether the child was had carnal knowledge of?

37. It was the prosecution's case that the minor was had carnal knowledge of. In proof of their assertion they summoned oral and documentary evidence in support of that claim, suffice to note that appellant concentrated on the fact that the child was not taking a shower as per his purported information from school.

38. The court analysed the evidence in regard to that fact and observed the following;

39. PW1 stated that she was defiled by DW1 who summoned her to his bedroom and removed her clothes before sleeping in rebuttal only concentrated on the alleged unhygienic tendencies of the child and where her mother was but he did not challenge the fact that this child was stating in no uncertain terms that he was doing bad things to her while sleeping on her without clothes on.

40. PW2 stated that the complainant confided on her about the incident and she took the case as an emergency and rushed the latter to the area chief for onward action. It was PW2's evidence that this child repeated the same story she had given to other teachers. He also stated that the child had come to school while limping while walking which raised their suspicion.

41. Appellant in cross examination concentrated on whether he had been summoned to the school over any other issue involving this child, which court did not find relevant. The witness was stating in clear terms that the minor mentioned appellant as the perpetrator but the latter did not find it wise to rebut the same, making his testimony to stand out.

42. PW3 received the report from PW2 when she saw and interrogated the child, the same story of the father defiling her was unraveled. It was her testimony that the complainant repeated the same statement to her as the area chief of how the father had been defiling her. In cross examination, appellant only wanted to know whether the witness had searched for the mother to the children who was not around.

43. PW5 examined the complainant as a medical officer and noted the following findings;

That the child was in fair general condition.

Labia majora and labia minora were swollen.

Labia majora and labia minora were oedematous (reddish).

The hymen was torn and was perforated.

Introitus was opened.

Whitish discharge noted.

44. The court carefully analysed the evidence on penetration and observed that, as per the medical opinion taking into consideration that there was no dispute from the defence on the same findings;

a) The condition of the minor having her vaginal opening wide opened clearly demonstrated that she had had penetration.

b) The hymen being torn also corroborated the act of penetration.

c) The swelling of the labia majora and labia minora also indicated a sexual activity.

d) The reddening of the labia majora and labia minora also confirmed the penetration.

45. The court was aware of the fact that the vaginal opening of the complainant was wide a few hours after the incident which clearly proved penetration beyond reasonable doubt, as per the definition as envisaged under Section 2 of the Sexual Offences Act No. 3 of 2006 which provides insertion of the genitals whether partial or full amounts to penetration.

46. The findings to the extent that introitus of the vagina was wide open, was enough corroboration of penetration. The fact that this child was walking with a lot of difficulties was also enough demonstration of a violation on her body.

47. The court is convinced with the evidence as presented by the prosecution that the girl was had carnal knowledge of. It is worth noting that she was had carnal knowledge of yet she did not have the legal consenting age as discussed above and further under the provision of Section 20(1) of the Sexual Offences Act, consent is not a prerequisite issue in dispute.

48. Under the provisions of Section 124 of the Evidence Act, Chapter 80 Laws of Kenya it is provided that;

"Notwithstanding the provisions of Section 19 of Oaths and statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the appellant shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him. Provided that, where in a criminal case involving a sexual offence, the court shall receive the evidence of the alleged victim and proceed to convict the appellant person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

49. The complainant stated that she was defiled and the medical examination confirmed that indeed her vaginal opening was wide opened indicative of penetrative act. She was being truthful.

50. In this case, there was sufficient corroborative facts on the act of penetration which further compounded the testimony of the complainant and which was not disputed by the defence, which supports court finding on the complainant being had carnal knowledge of.

Who had carnal knowledge of the complainant?

51. It was the prosecution's case that it was the appellant who had carnal knowledge of the complainant, though he denied committing the same offence.

52. The analysed the evidence and made the following deductions;

a) PW1stated that she was defiled by her father who happens to be appellant herein, a fact that the defence did not challenge at all. Appellant admitted that the complainant was her daughter but did not dispute the clear and concise evidence of the complainant who insisted that he had done bad things when they were both naked.

b) In her testimony which had not been disputed, the complainant stated that when appellant was doing bad things to her while both were naked she felt pain, the latter did not challenge that piece of evidence.

c) In the morning when she woke up and was to go to school but was feeling pain, she informed appellant but was brushed off,

further compounds that the latter knew exactly what the complaint was.

d) It is with fatherly love to check on your child complaints but to wish it away the way appellant did shows that he was actually the cause.

e) PW2 stated that appellant was identified by the daughter as to have sexually assaulted her, a fact that appellant did not dispute. He concentrated on the alleged summons by the former earlier to report "unhygienic" tendencies of the complainant.

f) DW1 stated that the complainant was not taking a shower. He also blamed the complainant for not having a school bag. The question before this court was not on how hygienic the complainant was or whether she was performing well in school but on sexual abuse.

g) The defence was a mere denials without challenging the evidence as presented herein, since the minor stated her evidence in a more cogent and consistent manner. The trial court found complainant was truthful. The defence had not alluded to the complainant having any grudge against him to warrant her to fabricate this case on him.

53. It was clear from the evidence on record that the identification of the appellant was without any doubt owing to recognition and the impeccable recollection of the complainant who was able to identify appellant as her perpetrator.

54. Appellant was the father to the complainant and so there was no error apparent to warrant this court to doubt her testimony.

55. The court did not find any hint of fabrication by the prosecution but on the converse, it was the appellant who was fabricating issues to mislead the court. The defence was an afterthought tailor made to confuse this court.

56. The court finds that the appeal has no merit and makes the following orders;

i. The appeal is dismissed, conviction affirmed and sentence confirmed.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKUENI THIS 31ST DAY OF MAY, 2019.

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C. KARIUKI

JUDGE