



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CRIMINAL APPEAL NO.28 OF 2015

(Appeal from original conviction and sentence by Hon. L. N. Kiniale in Kericho CM Sexual Offence No.75 of 2012)

JKL.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The appellant was charged in Kericho CM Sexual Offence Case No.75 of 2012 with incest contrary to section 20 (1) of the Sexual Offences Act No.3 of 2006. The particulars of the offence were that on the night of 29th and 30th November 2012 at unknown time in Kericho West District within Kericho County being a male person caused his penis to penetrate the vagina FC (name withheld) a female person aged 7 years who in his knowledge was his daughter.
2. In the alternative, he was charged with committing an indecent act with a child contrary to section 11 (1) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on the same day and time intentionally touched the vagina of FC a child aged 7 years with his penis.
3. After a full trial, he was convicted on the main charge of incest and sentenced to life imprisonment. He has now come to this court on appeal. He listed five grounds of appeal. His grounds of appeal are in summary that the prosecution evidence was inconsistent and contradictory, that he was not positively identified, that the complainant and her mother(PW3) who was declared a hostile witness were not credible witness, that there was a grudge between the appellant and PW1, and lastly that the trial was unfair.
4. The appellant also filed written submissions which he relied upon. He opted to make no oral submissions. I have perused and considered the written submissions.
5. The learned Assistant Director of Public Prosecutions Mr. Ayodo opposed the appeal and said that there was a reason why the complainant was declared a vulnerable witness but she gave believable evidence. Counsel also stated that PW2 the Clinical Officer Willy Kitur confirmed that there was sexual penetration of the victim. Counsel also stated that PW3 the mother of the complainant was declared a hostile witness and put in prison for 8 days before testifying because she was deliberately changing her story from that in her written witness statement. Counsel stated therefore that the conviction was safe and should be upheld.
6. This being her first appellate court, I am required to evaluate all evidence on record afresh and come to my own conclusion and inferences. See the Case of **Okeno vs Republic [1972] EA 32**.
7. I have evaluated the evidence on record. This is a case of a serious offence, a sexual offence on a minor of tender years – below 10 years. It is also a serious offence in the sense that the culprit is the father of the victim. It has a lot of consequences on the family relations.
8. Indeed the Clinical Officer PW2 found that there were lacerations in the private parts of the complainant; In my view, such injuries including the perforation of the hymen were consistent with penetration of the vagina of the complainant, possibly sexual penetration. I do not have any issue with the trial court's finding on that.
9. The prosecution in all criminal cases is required to prove their case against an accused person beyond any reasonable doubt. If there is any reasonable doubt existing after the valuation of evidence on record, the benefit of such doubt has to be given to the accused.
10. In this case, the crucial thing is who caused the injuries to the victim. It was clearly established by the Clinical Officer that injuries were actually caused to the vagina of the victim.
11. The investigating officer PW5 stated that he was told by PW3 that she had quarrelled with her husband the appellant and she left the

house at night. She went back there the next morning, but the husband was not there. After preparing breakfast she found that the complainant had difficulty in walking and when she inquired the complainant said the father attacked her.

12. PW3 however initially denied in court that there was such an incident and had to be put in prison for days and though she later came back and testified, her evidence was still that of a reluctant witness. It is not clear from the evidence of the investigating officer how the appellant was arrested. However, it is stated that one Willy Too PW1 was told by somebody else who did not testify in court that the appellant had defiled the complainant. Willy Too who testified as PW1 said that he was told by a village elder that the appellant had defiled his daughter, but that village elder did not testify in court.

13. Considering the evidence of Willy Too PW1 and the mother of the complainant who testified as PW3, it is not clear how the conclusion that the injuries on the complainant were caused and by whom was established. Looking at the evidence of PW3, it is also surprising that she was imprisoned for not talking about the defilement, while in fact she had previously fully testified before another magistrate and never talked about the appellant defiling the complainant before the appellant asked for a fresh trial when a new magistrate took over the case. She did not say that the appellant committed a sexual act with the complainant before the previous magistrate yet she was not declared a hostile witness. In my view, the evidence of PW3 cannot be relied upon to support the conviction of the appellant, as it was coerced evidence. The evidence of PW1 also was hearsay evidence as he said that he was told by the village elder who did not testify, that the appellant had defiled his daughter and went ahead and arrested him. The village elder should have testified to explain how he came to know that the appellant defiled the daughter.

14. The only evidence that could support a conviction against the appellant was that of the complainant. Under section 124 of the Evidence Act (cap. 80) such evidence of a minor victim of a sexual offence needs no corroboration for it to found a conviction so long as the trial court believes in the same and records the reason for such belief.

15. From the evidence of the complainant it is clear that the incident occurred at night and she said very clearly with the assistance of the grandmother that after the appellant and PW3 quarrelled, PW3 the mother left the house and went away. The appellant also went away and locked the house. Though she said that he came back later and defiled her, she does not say that there was light in the room when the appellant defiled or how she came to know that it was the appellant who “did bad manners” to her. It follows from that evidence that the identity of the person who committed the act was not established. Even if the evidence of the complainant is to be believed, it cannot be presumed that the person who committed the act was the appellant without any evidence to support the allegation that he was the culprit.

16. In my view therefore, even if the magistrate found that a sexual assault was committed on the complainant, there was no evidence that such act was committed by the appellant other than mere perception or guesswork. Such perception or guesswork cannot be the basis for finding a conviction especially for such serious offence.

17. I thus find that the conviction herein is not safe. The sentence can also not be sustained. I allow the appeal, quash the conviction of the trial court and set aside the sentence. I order that the appellant be set at liberty unless otherwise lawfully held.

Dated and delivered at Kericho this 30th day of October 2019.

George Dulu

JUDGE