REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CRIMINAL APPEAL NO.35 OF 2017

(Appeal Originating from Nyahururu CM's Court SOA No.2264/2013 by: Hon. V. Ochanda – R.M.)

PKK.....APPELLANT

- V E R S U S –

REPUBLIC.....RESPONDENT

J U D G M E N T

The appellant, **PKK** was convicted of the offence of incest contrary to section 20(1) of the Sexual Offences Act No.3 of 2006.

The particulars of the charge are that on 18/12/2013 in Laikipia County, intentionally and unlawfully caused his penis to penetrate the vagina of M.C. a child aged 4 years, who was his daughter.

In the alternative, the appellant faced a charge of committing an indecent act contrary to Section 11(1) of the Sexual Offences Act in that he unlawfully caused his penis to come into contact with the vagina of MC, a girl aged 4 years.

He was sentenced to serve life imprisonment.

The appellant is dissatisfied with both conviction and sentence and preferred this appeal. M/s Wambeyi Advocate, filed amended grounds of appeal on 17/11/2017. They are as follows:

(1) That the court erred by relying on the evidence of a child of tender age;

(2) That the conviction went against the weight of the evidence;

(3) That the prosecution evidence was riddled with contradictions;

(4) That the court shifted the burden of proof onto the appellant;

(5) That key witnesses were not called;

(6) That the court erred in rejecting the applicant's defence of alibi;

(7) That the court failed to comply with Section 169 of the Criminal Procedure Code.

The appellant therefore prays that the conviction be quashed and sentence set aside.

This is the first appeal and it is the duty of this court to examine all the evidence tendered in the trial court, analyze it, then arrive at its own conclusions. *See* ***Okeno v Republic (1972)EA 32***.

The prosecution called a total of 6 witnesses in support of the prosecution case. The complainant **(MC) PW1** was examined by the court (*voire dire*) and the court was of the view that she did not understand the meaning of the oath. The court decided that she be affirmed. She told court that she was born in 2004 and by 2017: PW1 was therefore about 7 years. She told the court that on 18/12/2013, she was at home with her younger siblings playing outside when the appellant, her father, came, carried her into the grandmother's bedroom, removed her clothes, removed his clothes and slept on her and she felt pain in her private parts. He left her in the house. Later, she told her mother, M, Mama Rukinda and Emily; that people came and arrested her father from his house while she was taken to hospital.

PW2 SC is the mother of PW1. On 18/12/2014 she left home for work at 7.00 a.m. She returned home at 7.00 p.m. found C with her siblings and the grandparents. She took PW1 outside to urinate and she was in pain. PW1 informed PW2 that her father had defiled her. She went to inform M (PW4). PW2 took the child to Rumuruti where she was examined by a doctor. PW2 identified the appellant as the biological father of the complainant.

PW3 Jane Biwott heard screams on 18/12/2013 and on going to the scene, found the child had been taken to hospital and appellant arrested. On the next day, she examined the child and the child told her that the father did 'tabia mbaya' to her. She noted that the child had been defiled.

PW4 MC is a sister to PW2. On 18/2/2013 evening, PW2 went to inform her that the appellant had defiled their daughter (complainant). She was present when the members of public arrested the appellant while PW1 taken to hospital.

PW5 Cpl. Obiano Muthomi of Kinamba Police Station was at the Police Station about 10.00 p.m. when members of public took the appellant there on allegations of defiling the complainant. The complainant was treated at Salama Health Centre and referred to Rumuruti Hospital. He interrogated the complainant and arrested the appellant. He visited the scene. He issued the complainant with P3 and she was examined on 19/12/2013.

PW6 Dr. Arthur Mometo of Rumuruti District Hospital examined the complainant on 19/12/2013 and found bruises on her labia minora and vagina. She had a whitish discharge and he was of the view that she was defiled and that she was about 7 years old.

In his unsworn statement, the appellant denied the offence and said that he was not near that scene but was working at Kanderites farm, for a white man called John. The appellant called **DW2 Sositei Kimalel** as a witness. He is the elder at the appellant's village. DW2 denied knowing where the appellant was on 18/12/2013 and only heard screams and the appellant was found in his house and arrested.

M/S Kipngetich counsel for the appellant argued grounds 3, 5 and 6 together. She submitted that crucial evidence was not produced of the report from Salama Health Centre and blood stained clothes; that no spermatozoa was found on the swab taken from the complainant yet sperms can survive for 72 hours; that the children who were playing with the complainant when she was allegedly picked up were never called as witnesses; that the girl's grandmother whom PW1 had been left with was never called as a witness; that evidence of PW1 contradicts that of PW3, that PW3 examined the complainant.

As to ground 7, counsel submitted that it was never established whether the appellant was the only male present at the scene; that the doctor did not make any conclusive findings yet the trial court relied on the doctor's evidence to convict.

The appeal was opposed by Mr. Mutembei who submitted that it is PW1 who informed the mother of her ordeal; that PW1 was inspected by PW2 and who found the private parts to have been interfered with and evidence of penetration was corroborated by PW6; that the appellant was placed at the scene of crime and that the prosecution proved its case to the required standard.

The appellant was charged under Section 20(1) of the Sexual Offences Act which provides as follows:

> ***"20(1) any male person who commits an indecent act or an act which causes penetration with a female who to his knowledge is his daughter, granddaughter, sister, mother, niece, aunt, grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than 10 years:***
>
> ***Provided that, if it is alleged in the information or charge and proved that the female is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person."***

To prove the above offence, the prosecution has to prove:

> ***(1) Proof of relationship between accused falls under the category e.g. sister, mother, niece, grandmother;***
>
> ***(2) That the appellant committed an indecent act with the complainant or an act that causes penetration;***
>
> ***(3) Identity of the perpetrator;***
>
> ***(4) The age of the complainant.***

In this case, there is overwhelming evidence and the appellant also admitted that the complainant is his daughter. The complainant falls under the category of relations listed in Section 20(1) Sexual Offences Act.

PW1 told the court that she was born in 2007. PW2 confirmed that fact. Their evidence was further corroborated by the doctor's assessment of the age in the P3 form. At the time the offence was committed, PW1 was about 7 years old. In any case, it is not necessary that a birth certificate be produced to prove age. PW2, being the mother of PW1 knew her age. In ***Kassim Ali v Republic CR.A.84/2005***; the court held:

> ***"The absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by oral evidence of a victim of rape or circumstantial evidence."***

PW1 is the only witness to the offence as is common to many sexual offences. Ordinarily, such offences are committed in privacy as much as possible when nobody else is present. Because of her tender age PW1 did not give evidence on oath. After a *voire dire* examination, the court found that she did not understand the meaning of the oath. The court went on to affirm her which in my view was not proper. She should have given unsworn evidence.

Counsel for the appellant complained that crucial witnesses were not called and specifically the children PW1 was allegedly playing with before the incident and her grandmother.

In ***Mwangi v Republic 1984 KLR 595,*** the Court of Appeal said:

> ***"Whether a witness should be called by the prosecution is a matter within the discretion of the prosecution and the court will not interfere with that discretion unless it may be shown that the prosecution was influenced by some oblique motive."***

It is in the discretion of the court to decide which witnesses are relevant to their case and whom to call. The prosecution can only be faulted if they fail to call a relevant witness just because his evidence may have been adverse to their case.

PW1 told the court that she was playing with her younger siblings when the appellant came and carried her into the house. PW1 was less than 7 years then. It means the younger sibling is younger than that. It is unlikely that such a witness would have been helpful to the court. Besides, there is no evidence that the younger siblings saw what happened to the appellant when she was taken into the house. As regards whether Alice, PW1's grandmother should have been called; there is no evidence that the grandmother was aware of what had happened to PW1. PW2 said the grandmother told her that the child was sick, not that she had been defiled.

Section 143 of the Evidence Act provides that a fact can be proved with the testimony of one witness unless a particular law requires that there should be more than one witness. In this case, there was only one witness to the Act and the court had to decide whether such evidence can be the basis of a conviction.

PW1 vividly explained how the father found her outside, carried her to the grandmother's bedroom, removed her clothes, removed hers and lay on her and she felt pain in her private parts. When PW2 came back home later, she learnt that PW1 was unwell. PW2 escorted PW1 to urinate and she did so with difficulty.

PW3 said she examined PW1 next day and though she did not tell the court exactly what she saw, she was of the view that the child was defiled. PW6's evidence corroborated PW1's evidence. He found that PW1's labia and vagina had bruises, had a whitish discharge and she passed urine with pain. PW6 also saw PW1's bloody pant and dress although they were not produced in evidence. PW6 was of the view that PW1 was defiled. Ordinarily, experts will give their view as regards their findings. It was not necessary for the doctor to make a conclusive finding as submitted by the defence counsel.

Although the prosecution erred by not producing the complainant's clothing that was allegedly blood stained, this court is satisfied that PW1 was defiled. Failure to produce clothing was not fatal to the prosecution case.

The complainant was a child of tender age. Her testimony was straight forward and was not challenged. Under Section 124 of the Evidence Act it is no longer a requirement that the evidence of the victim of a sexual offence be corroborated, provided that the court believes that the complainant was truthful and records the reasons for so doing. Though the appellant seems to have been blaming his wife for influencing PW1, there is no evidence that he was framed. I have found earlier that there is overwhelming evidence on record to prove that the child was defiled and there would have been no reason for the complainant to frame the father – PW1 was forthright and truthful and the trial court was right in believing PW1.

The appellant also complained that his alibi defence was not taken into account. Where an accused raises an alibi defence in his defence, he never assumes the burden to prove the alibi but the burden is always upon the prosecution to prove its case beyond reasonable doubt. The burden to prove the case always remains on the prosecution and never shifts. In the case of ***Kiarie v Republic (1984) KLR 739***, the Court of Appeal held:

> ***"An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court, doubt that it is not unreasonable……"***

All that an alibi needs to do was raise a doubt in the prosecution case.

In the judgment of the trial court, the court tended to shift the burden on the appellant when the court stated that the appellant should have called John as a witness. In his defence the appellant raised an alibi that he had been at work at a White Man's farm by name, John. That alibi was never alluded to during the hearing of the prosecution's case. In cross examination of PW1, she was categorical that the appellant was at home that day.

The alibi was an afterthought and the accused never explained who John was or where he could be found so that if the prosecution may have called him to rebut the alibi they needed to. In my view the alibi raised did not dislodge the prosecution evidence.

The appellant called DW2 as a witness but he denied knowing where the appellant was on 18/12/2013. DW2 only learnt of the allegations against the appellant. The offence was committed in broad daylight and PW1 saw the father well. The issue of identification did not arise.

It was defence counsel's contention that had the appellant committed the offence, he would not have been found in his house. However, that is mere suspicion by counsel because she cannot tell the appellant's thinking.

Counsel for the defence seemed to argue that penetration was not proved. However, in an offence of incest, the prosecution needs to prove commission of either of an indecent act or penetration.

In this case penetration of PW1 was proved. PW1 is the appellant's biological daughter. The offence was committed in broad daylight. I am satisfied that the offence of incest was proved beyond reasonable doubt. The conviction of the appellant court is sound and will not be disturbed.

Section 20(1) of the Sexual Offences Act provides a mandatory life sentence where the victim of incest is under 18 years. The complainant was a child aged about 7 years. The sentence meted by the trial court is lawful and this court has no discretion to interfere.

Consequently, the appeal is dismissed in its entirety.

Right of appeal 14 days.

Dated, Signed and Delivered at *NYAHURURU* this *19th* day of *January*, 2018.

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R.P.V. Wendoh

JUDGE

Present:

Mr. Mutembei – for prosecution

Counsel for appellant - absent

Mr. Soi - court assistant

Present – appellant