REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CRIMINAL APPEAL NO.149 OF 2017

(Appeal Originating from Nyahururu CM's Court Cr.No.2694 of 2015 by: Hon. V. Ochanda – R.M.)

A K K.....APPELLANT

-V E R S U S –

REPUBLIC.....RESPONDENT

J U D G M E N T

A K, the appellant herein, was convicted of ***incest contrary to Section 20(1) of the Sexual Offences Act.*** The particulars of the offence are that on diverse dates between 1st June, 2013 and 28th September, 2015 at [particulars withheld] in Nyandarua, unlawfully and intentionally caused his penis to penetrate the vagina of **L.W.K**. a child aged 10 years who to his knowledge, was his daughter.

In the alternative, the appellant faced the charge of ***committing an indecent act contrary Section 11(1) of the Sexual Offences Act*** in that on diverse dates between 1st June, 2013 and 28/9/2015 at [particulars withheld], unlawfully and intentionally caused his penis to come into contact with the vagina of **L.W.K**. a child aged 10 years.

He was sentenced to serve life imprisonment.

Being aggrieved by the conviction and sentence, the appellant lodged this appeal based on the following grounds:

(1) That there was no medical evidence or DNA to connect him to the offence;

(2) That the court failed to find that PW2 framed him;

(3) That the charge on which the conviction was based was defective;

(4) That the prosecution evidence was full of contradictions;

(5) That there was unexplained delay in complaining to the police this case;

(6) That the defence was not considered;

(7) That the conviction went against the weight of the evidence.

The appellant therefore prays that the conviction be quashed, sentence set aside and that he be set at liberty.

This is the first appeal and this court has a duty to examine all the evidence tendered in the trial court afresh, draw its own conclusions and make its own findings (*See* ***Okeno v Republic (1972) EA 52***).

The prosecution called a total of 4 witnesses. **PW1, L.W.K**. a child who was said to be 12 years, underwent a *voire dire* examination and the court directed that she be affirmed. She identified the appellant as her father; that her mother had left home after the appellant beat her; that on two occasions, which dates she could not recall, the appellant carried her from the bed in which she used to sleep in the night when her small brother was asleep, took her to his bed removed her clothes, removed his, made her lie on her back and lay on her and did bad manners to her. She said that on another occasion, he sent her for milk and followed her and as she returned, he took her into the bush, removed her clothes and did bad manners to her and later they went home together; that after the act, she had problems walking because she had pains in her vagina. That when she refused to go for milk her father beat her and she went to tell her mother and informed her of what the appellant had done to her.

PW2 L W is the mother of PW1. She produced the complainant's birth certificate which shows that PW1 was born on 28/4/2005 and was 10 years in 2015; that the appellant assaulted her and threw her out of the matrimonial home where he remained with their 3 children; that the complainant who was the oldest was told to care for the younger ones aged 3 and 2 ½ years; that on 28/9/2015, the complainant went where she lived and complained that the father had beaten her; PW2 took PW1 to her father for 7 days and later went to get her; that PW1 complained of stomachache and on that night, she started dreaming and saying that her neck and clothes should not be touched. PW2 became suspicious and decided to take her to hospital. She went to report at the police station, was issued with a P3 form and was sent to the doctor at Nyahururu. On the way back from hospital, PW2 questioned PW1 about what she heard her dream, and she told her that the father had defiled her. PW2 went back to report at the police station. Thereafter, the doctor filled the P3 form upon examining PW1.

PW3 CPL Paul Sereni then of Ndaragwa Police Station, recalled 6/10/2015 when PW1 and 2 went to the office and complained that the father of PW1 had defiled her on diverse dates between 1/6/2013 and 28/9/2015. He issued them with a P3 form and recorded their statements. PW3 arrested the appellant on 13/10/2015 after PW2 identified him in his house.

PW4 Doctor Karimi Kimani examined the complainant on 6/5/2015 and found her to be withdrawn, a bruised right wrist, had no bruises to the genitalia but the hymen was missing and had left an old scar; they found that urinalysis had bacteria and vaginal swab had significant pus cells; but there was no spermatozoa and he put PW1 on treatment of STI and trauma counseling. He was also guided by the treatment notes in filling the form. Treatment notes were produced as Ex.3 and 4.

Upon the close of the prosecution case, the accused opted to make an unsworn statement in his defence. He recalled August, 2012 when he had gone to visit his father at [particulars withheld] but was called back home and informed that his wife had carried away the pump. On coming back home, the wife denied knowing where the pump was and he sent her away; that she left with one child Caroline and left him with the three claiming she had not come with them. He did not press charges even after the pump was found; that he learnt that his wife used to come home. One day, he came back home and did not find the complainant, reported to the sub chief and was told that the complainant had been taken to PW2's father's home. That it is PW2 who told the child to frame him after she heard the child dreaming and he was arrested while at his home on 13/10/2015.

The appellant adopted his written submissions in support of the appeal which can be summarized as follows; that the charge was defective because it reads that the complainant was 10 years whereas she told the court she was 12 years old; that the charge is defective because the date of offence is unknown; that there was no forensic evidence to support the charge; that the case was a frame up because if he had defiled PW1, the neighbours, teachers and classmates would have noticed.

Mr. Mutembei, learned State Counsel opposed the appeal by submitting that the prosecution established that the complainant was about 8 years in 2015, that there was proof of penetration and that the appellant is the biological father of the complainant.

To prove an offence of incest, the prosecution must establish the following:

> ***(1) The relationship between the victim and perpetrator must fall within the category under Section 20(1) of the Sexual Offences Act i.e. mother, sister, niece e.t.c.***
>
> ***(2) Proof of penetration or an indecent act;***
>
> ***(3) Age of the complainant;***
>
> ***(4) Identity of the perpetrator.***

The relationship between PW1 and the appellant is not in dispute. The appellant does admit that PW1 is his biological daughter.

In a case of incest, the age of the victim is relevant only as regards sentence. PW1 told the court that she was 12 years old. A birth notification was produced as an exhibit (P.Ex.No.1) which indicates that the complainant was born on 28/4/2005. As at the time she testified on 24/3/2016, she was about 11 years old. The offence is said to have been committed between 1st June, 2013 to September, 2015 and the charge indicates the complainant was between 9 – 10 years old. A discrepancy in the age cannot be fatal to the charge. The 10 – 12 years is still within the same bracket- under 18 years.

The appellant complained that the charge sheet was defective because of the discrepancy in the age and the fact that the dates of the offence were not specific. PW1 is a child of tender age. According to her testimony, she had been abused over a period of time. Her mother seems to have left the matrimonial home in 2012. The incidents had happened over a period of time between 2013 to 2015 when it was discovered. The fact that she could not recall the dates is not fatal to the charge. Such a defect is curable under Section 382 of the Criminal Procedure Code.

Whether there was penetration; penetration is defined under Section 2 of Sexual Offences Act as:

> "***penetration***" means "***the partial or complete insertion of the genital organs of a person into the genital organs of another person***".

According to PW2, the complainant went to her home on 28/9/2015 claiming to have been assaulted by the appellant. PW2 sent PW1 to her father for a week and it is after that she discovered that the complainant had been defiled. The complainant was examined by the Doctor PW4 on 6/10/2018, about 2 weeks after she had left the appellant's home. The doctor found the hymen had been broken earlier and left an old scar. Because of the time lapse, fresh evidence of penetration was not available. However, PW1 was found to have a sexually transmitted infection which is evidence of penetration. PW1 narrated how her father would carry her from her bed (in the night) into his bed,

remove her clothes and do bad manners to her, while lying on her. She also narrated how he had also done that to her in the bush as she brought milk back home. Though PW1 was not explicit as to the actual act, she told the court of having had pain in the vagina. The medical evidence corroborated the complainant's evidence that she was indeed defiled and was infected with an STI which confirmed the act of penetration.

PW1 identified the father as the perpetrator of the offence. She narrated that the appellant used to carry her to his bed and would warn her not to tell anybody. It did not happen once. On the day she was allegedly defiled in the bush, she said it was about 7.00 p.m. and the appellant talked to her and that they walked back home together as he carried the milk. The appellant denies commission of the offence but claims to have been framed by PW2 because of the disagreements they had. The trial court considered that defence but found no evidence that PW2 framed the appellant; that on PW1 going to PW2, PW2 for fear even took the child to her father until she heard PW1 having a nightmare that she took up this issue . The trial court had the opportunity to see the demeanor of the two witnesses and having believed them, this court cannot take a contrary view. To add to the above, from PW1's narration of the avents and what happened to her at the hands of the appellant I have no doubt that she told the court the truth and her testimony was corroborated by the doctor's findings.

It is the appellant's complaint that there was no forensic evidence or DNA. PW1 was found to be suffering from STI and it would have been useful if the appellant had been tested to corroborate PW1's testimony. However, such a long time having passed there would have been no guarantee that the appellant would be infected because he may have sought treatment. The law is that defilement or rape can be proved by other evidence, other than medical evidence. In this case DNA would not be necessary as the complainant was not pregnant. In the case of ***Denis Osoro Obiero v Republic 2014 KLR, (the Court of Appeal (NRB)*** stated as follows:

> ***"Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed under the proviso to section 124 of the Evidence Act, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone; if the court believes the victim and records the reasons for such belief."***

See also ***Kassim Ali v Republic***. **CRA 84 of 2005 (Msa)**

The court of Appeal said,

> **" 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 in circumstantial evidence."**

Guided by the above authorities, it was not mandatory for the trial court to call for medical evidence.

Lastly, the appellant complained that his defence was not considered. I have alluded to the judgment of the trial court when it dismissed the appellant's contention that he was framed and instead believed the testimony of PW1 and 2.

Having considered all the grounds raised by the appellant, I find no merit in any. The conviction is well founded. Under Section 20(1) of the Sexual Offences Act, the only sentence provided is life imprisonment. The sentence is lawful. In the end, I find the appeal to be without merit and it is hereby dismissed.

Dated, Signed and Delivered at *NYAHURURU* this *21st* day of *March*, 2018.

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R.P.V. Wendoh

JUDGE

Present:

Mr. Rugut - for Prosecution

Soi - Court Assistant

Appellant - in person