



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 117 OF 2017

CORAM: D.S. MAJANJA J.

BETWEEN

T K M.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. N.M. Idagwa, RM

dated 22nd November 2016 at the Principal Magistrate's Court

at Nkubi in Criminal Case No. 879 of 2014)

JUDGMENT

1. The appellant, **T K M**, was charged with the offence of incest contrary to **section 20(1)** of the **Sexual Offences Act**. It was alleged that on 4th February, 2014 within Imenti South District of Meru County, he intentionally and unlawfully caused his penis to penetrate the vagina of W K, a child aged 8 years, who to his knowledge was his daughter. He also faced, on the same facts, an alternative charge of committing an indecent act with a child contrary to **section 11(1)** of the **Sexual Offences Act**.

2. The appellant was convicted and sentenced to life imprisonment. He now appeals against conviction and sentence. He has filed his grounds of appeal, amended grounds of appeal and written submissions. He contends that the prosecution did not prove its case as the testimonies of the witness were inconsistent, that the medical evidence did not meet the threshold to prove penetration and that the age of the child was not proved. He also complained that his defence was not considered. Counsel for the State opposed the appeal and submitted that the prosecution proved all elements of the offence.

3. It is the duty of this court, being a first appellate court, to subject the evidence on record to a fresh review and scrutiny and come to its own conclusions all the time bearing in mind that it did not see the witnesses testify as to form its own opinion on their demeanour (see **Okeno v Republic [1972] EA 32**).

4. After a *voire dire*, the child (PW 1), was duly sworn. She testified that the appellant was her father and that he slept with her. She stated it took place as follows:

He came and removed my clothes and started to insert his thing inside my thing. It was inside the house. He removed me my clothes. He removed all his clothes the day he he inserted his urinating thing in my urinating thing.

5. After the ordeal, she screamed and this attracted other people including her aunt. PW 2 recalled that on 4th February 2014 at about 11.00pm, PW 1's brother was sitting by the roadside and since he used to be with PW 1, she asked where she was. He told her that PW 1 was with her father in the house. When the brother went to get her, she saw PW 1 walking with her legs a part. She also saw her private part bleeding. She decided to take PW 1 to the Egoji Police Post where PW 1 was issued with the P3 form and referred to hospital for examination and treatment.

6. The Clinical Officer, PW 3, who examined PW 1 noted that her clothes were blood stained and that her vagina was swollen and painful and her hymen was missing. Based on this evidence, she concluded that there was penetration.

7. The Investigating Officer (PW 4), testified that when she reported at work at Igoji Police Station, she found that the appellant had already been arrested and booked in the Occurrence Book at 6.00pm on 4th June 2016. She recalled that although the incident had been reported on 4th February 2016 and investigated, the appellant disappeared from the village until he was arrested. She produced PW 1's birth notification which showed that she was born on 1st August 2006.

8. The appellant, in his sworn testimony, denied the offence. He admitted that PW 1 was his daughter. He complained that the charges against him were fabricated because he was being accused of failing to take care of the children. He told the court that he left them when he was unable to fend for the children and his aunt agreed to take the children. When he was summoned by the chief on the issues of the children, he got scared and left the village.

9. I have reviewed the entire evidence and there is no dispute that PW 1 was the daughter of the appellant as confirmed by PW 1 and PW 2 and admitted by the appellant. The issue is whether penetration was proved. At this stage, I note that under **section 20** of the **Sexual Offences Act**, an indecent act is sufficient to sustain a charge of incest. Nevertheless, PW 1 gave clear evidence of how the appellant sexually assaulted her. Her testimony was sufficient and did not require corroboration in light of the proviso to **section 124** of the **Evidence Act (Chapter 80 of the Laws of Kenya)**. The trial magistrate in her judgment noted that, "[T]he complainant was steady in her evidence and her evidence was not shaken in cross-examination The complainant did not come out as a person harbouring any ill feeling towards the accused."

10. As such, the medical evidence was merely corroborative. The testimony of PW 3 and medical report showed the state of PW 1's genitalia; the tender vaginal orifice and perforated hymen which was consistent with an act of penetration. Further, PW 2 testified that she saw PW 1 in a state of distress after her order gives weight to the prosecution case. The totality of all this evidence displaces the appellant's testimony that he was framed.

11. The age of the child was proved by the notification of birth and the P3 form. She was 8 years and accordingly below the age of 11 years which would attract a life sentence under **section 8(2)** of the **Sexual Offences Act** had he been charged with defilement. The sentence of life imprisonment was therefore legal.

12. The conviction and sentence are affirmed. The appeal is dismissed.

DATED and DELIVERED at MERU this 29th day of May 2018.

D.S. MAJANJA

JUDGE

Appellant in person.

Mr Namiti, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.