



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT EMBU**

**CRIMINAL APPEAL NO. 25 OF 2017**

**HNN.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The appellant was charged with offence of incest c/s 20 (1) of the sexual offence act no 3 of 2006. The particulars of the offence are that the appellant on the 30<sup>th</sup> Day of September 2015 within Embu County being a male person caused his genital organ 'penis' to penetrate the genital organ 'vagina' of RWN aged 14 years who was to his knowledge his niece.

The trial court convicted the appellant and sentenced him to serve life imprisonment. The grounds of appeal are:-

- 1) That the learned trial magistrate erred in both points of laws and facts when he failed to consider that the appellant wasn't arrested and booked with alleged charges before the court in to PW5 the investigation officer here in leaving the case to be a frame- up case.**
- 2) That the learned trial magistrate erred in both points of laws and facts when he failed to put in consideration on multiple contradictions based on prosecution witnesses PW1, PW2 and PW5 based on date of alleged offence thus contravening in section 163 (I) of Evidence ACT CAP & Law of Kenya.**
- 3) That there was persisting grudge based on family land issue the factor of which lead PW2 to use Pw1 her daughter to frame the appellant with this case.**
- 4) That ritual witness were not summoned to give evidence as stipulated by provision of section 150 (i) of C.P.C.**
- 5) That there was delay in report together with the arrest of accused of more than 8 months without the appellant having been arrested thus still proving out that case was a frame up case.**
- 6) That my defense wasn't at all considered by the trials magistrate of which was highly supported by six defense witnesses.**

The appellant submit that the evidence of pw4 show that the appellant was arrested in respect of an offence of threatening to kill. That contention was collaborated by the evidence of PW5.

The prosecution case had material contradictions which prove that the case was framed against the appellant. Whereas PW1 alleged that the incident occurred on the 28<sup>th</sup> of September 2015. PW2 her mother, stated that it occurred on 30<sup>th</sup> of September 2015. The doctor alleged that she was told by the complainant that the incident took place on 29<sup>th</sup> September 2015. In her sworn testimony PW1 testified that it took place on 30<sup>th</sup> September 2015 but during cross examination she changed to 28<sup>th</sup> September 2015. That evidence clearly proofs that the case was surrounded by multiple contradictions between the prosecution witnesses. The appellant lies on the case of **JOHN BARASA VS REP. KITALE CRM APPELA NUMBER 22 OF 2005** where Justice D.K MARAGA (as he then was) stated as follows.

**“It is trite law that where evidence is contradicted or inconsistent the court should never rely on the same”.**

The appellant further submits that pw3 examined the complainant but did not find any spermatozoa. Pw3 saw the complainant on 30<sup>th</sup> of September 2015 and this was before 24hrs had elapsed. It is the appellant's contention that sperms can stay for 72 hrs before they disappears therefore failure by pw3 to notice the presence of spermatozoa leaves no doubt that the incident did not occur. The post rape care form

indicates that the complainant had not taken bath and it was expected that spermatozoa could be noted. The PRC form also indicates that no condom was used. The allegation of pw3 that the complainant's private part had blood is not supported. Pw3 did not examine the complainant to find out whether the blood as a result of monthly period or not. The complainant was more than 14 years old and she could have been experiencing monthly periods. Although pw3 pointed out that the hymen was broken, that was not proof that there was defilement since the hymen can be broken due to other reasons.

The appellant also contend that no DNA was conducted on both the complainant and the appellant as required under section 36 of sexual offences act. There was a family dispute as their father wanted to sale land. His brother wanted him to be the one responsible of the selling of the land. There was a disagreement and his brother and his wife used their daughter to frame him with the offence. It took more than 8 months without the appellant being arrested. The offence occurred on 30<sup>th</sup> September 2015 but the case was reported on 10<sup>th</sup> of June 2016 which is the date of the arrest. It is clear therefore that the case was reported on the date of the arrest. The appellant's defense was not considered.

Miss Nandwa, prosecution counsel opposed the appeal. Pw2 testified that the appellant was his brother in law a d a brother to her husband. The age of pw1 was established by a birth cert. She was born on 23<sup>rd</sup> November 2000. The appellant was an uncle to the complainant. Pw1 testified how the appellant grabbed her, took her into coffee bushes and defiled her. That evidence is supported by the evidence of pw4 who heard the appellant calling pw1. The identification of the appellant has no problem since he was known to pw1. Pw1 had blood stains on her external genitalia and her hymen was perforated. Therefore the ingredients of defilement were established by the prosecution. It is submitted that the mere fact that no spermatozoa was noted upon examination of pw1 does not disprove the case. All what the prosecution was required to proof was where there was penetration or not and whether a spermatozoon was present. Counsel relies on the case of MARK OIRURI MOSE VRS REP (2013) eKLR. In that case the court of appeal at Kisumu stated as follows:-

***“In any event the offence is against penetration of a minor and penetration does not necessarily end in release of sperms into victim. Many times the attacker does not fully complete sexual act during commission of the offence. That is the main reason why the Law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ.”***

Counsel further submits that the charge sheet was proper and the appellant knew the offence he was facing. All the relevant witnesses testified.

This court has to examine the evidence adduced before the trial court and make its own determinations. Pw1 who was the complainant. She gave sworn evidence. On 30<sup>th</sup> of September 2015 she was at home with her sister. The appellant went there and asked her to give him his shoes which he had given her to clean in the morning. It was about 8.00pm and the appellant also asked for a torch. There was no torch and they gave him their lamp. She followed him to his house and the appellant lit his lamp and gave back the other lamp. The appellant then told her that he was from MUTHIGA and members of the public were baying for their blood. He told pw1 to go and call her mother and tell her not to go home because it was dangerous. The appellant asked her to follow him to his place of work so that he could borrow a phone and call her mother. The appellant went to where he worked but went back to where he had left pw1 and informed her that he did not get the phone. They went back to the road and she saw her mother alighting from a motorcycle 60 meters away. She told the appellant that she had seen her mother but the appellant told her that it was not possible. As they were walking along a route with coffee bushes the appellant pulled her and made her to face the ground and defiled her. He told her to remove her pant otherwise he would kill her. She complied. The appellant inserted his penis in her vagina. He had a knife and a hammer which he used to threaten her.

It was painful and she bled. They went together home after the defilement as they live in the same compound. She could not tell her mother since the appellant was causing chaos regarding the sale of land. The appellant told her mother to call her husband and inform him that he would kill everyone. The appellant, her mother and herself went out and borrowed a battery and called her father. The appellant insulted his brother over the phone. She went to bed at around 2.00am. In the morning at about 6am she informed her mother. She was taken to Embu provincial general hospital where she was treated. She had cobia relations with the appellant. A P3 form a post rape care form was filled. When she went home that night her mother prevented the appellant from killing her grandmother with a metal bar. At that time the appellant's father was selling the land.

PW2 LKN is pw1's mother. On 30<sup>th</sup> Day of September 2015. She reached home at 10.00pm but did not find pw1. She asked PW1's sister (D) where pw1 was. D told her that the appellant had called pw1 outside the house. The appellant is her husband's brother and has known him since 1989. They proceeded to look for pw1 but could not trace her. They went back home and found pw1 and the appellant outside their appellant's mother's house. The appellant was shouting saying would kill his mother because he did not benefit from the sale of land. The appellant asked her to call her husband as he was about to kill their mother. Her phone battery was off and they all went to acquire an extra battery. The appellant made the calls and they went to sleep. The following morning at about 5am pw1 narrated to her what the appellant had done. Pw1 showed her the pant she had worn that night. She reported the matter to the police and pw1 was referred to Embu provincial general hospital. A p3 form was filled. It is her evidence that pw1 was born on 23<sup>rd</sup> November 2000.

PW3 DOCTOR PHYLISI MUHONJA was based at Embu level five hospitals. She produced a post rape care form that had been prepared by her colleague Dr Faith who was away on a seminar. Pw1 was examined on 30<sup>th</sup> September 2015. The panties were blood stained. Her outer genitalia were normal. There were no spermatozoa. A p3 form was also filled. Her genitalia had blood stains on outer sides and her hymen was torn. The doctor opined that there was defilement.

PW4 D.N.N is a sister to pw1 and was a form three student. Is an elder sister to PW1. On 30<sup>th</sup> September 2016 at around 8pm she was in the house with pw1. The appellant went there and asked for her but she was asleep. The appellant left with pw1. Their mother arrived from the market at about 9pm and found her alone in the house. They started looking for pw1 and when they returned home they found the appellant and pw1. The appellant told them that they had come from Muthigi and there were people who were coming to murder them so they should be on the alert. The appellant started causing commotion shouting that he would kill LR. The following morning pw1 informed their mother that the appellant had defiled her.

PW5 PC TIMOTHY NDIWA took over the investigations of the case. He was based at Manyatta police station. The appellant was arrested and charged with the offence. It is his evidence that the appellant and his father had sold a land and moved out of the place the appellant threaten to kill his father and was arrested. The complainant reported to the police station on 30<sup>th</sup> September 2015. She was taken to hospital on 1<sup>st</sup> of October 2015. The appellant was arrested on 10<sup>th</sup> of June 2016.

In his unsworn defence the appellant testified that he was arrested on 9<sup>th</sup> of June 2016. He was working with his younger brother at Itabua. His brother told him that their father intended to sell land to a teacher. His elder brother is the one who wanted to sale the land. He wanted to have them charged for failing to sell the property. His younger brother told him to sleep elsewhere because he would be arrested. He was arrested the same day at 10pm. The officers told him that it was a family matter. He was informed of the incest case at Itabua. He was then transferred to Manyatta police station.

DW2 SIN is the appellant's father. He was with the appellant making ballast. It is his evidence that the offence is fake. He came to know of the case when out was in October. pw1's father was alive. He denied that there was a case of incest at their home. DW3 MM testified that the appellant was brought to court because of a land dispute with his father. Dw4 MW also told the court that the appellant was brought to court because of a land dispute with his father. DW5 ROSE JACKSON MUSYOKA also informed the court that the appellant was charged because of a land dispute. DW6 LRN is the appellant's mother. She told the court that she knew nothing about the incest case. The appellant was brought to court because of a land dispute. The dispute was settled.

The issue for determination is whether the appellant defiled pw1. According to pw1 they went out that night with the appellant. The appellant had alleged that there were people who were out to kill them. The purposes of going out were to go and call her mother so that she could not go home that night. On their way back they passed through a route where there were coffee bushes and she was defiled. The incident occurred on 29<sup>th</sup> September 2015 and the p3 form indicates that pw1 was referred to hospital the following day on 30<sup>th</sup> September 2015. The Doctor who filled the p3 form did not indicate when she filled the p3. However, it indicates that the p3 form was filled after 22 hrs.

The appeal raised the following issues:-

1. Whether PW1 was defied, if so who defiled her.
2. Whether the appellant was framed in relation to this case.
3. Whether the prosecution proved its case beyond reasonable doubt.

PW1 testified that she was defiled at a place with coffee bushes. It was painful and she bled. PW3 examined PW1. She observed blood stains on the outer sides of PW1's genitalia and PW1's hymen was perforated. She opined that PW1 had been defiled. It is therefore established that PW1 was defiled.

PW1's evidence is that she was at home that evening with her sister, PW4. The appellant went there asking for his shoes which she had cleaned for him. The appellant was living in the same compound and is known to her. According to PW4, the appellant left with PW1. According to PW1 she went with the appellant upto where the appellant was working. The intention was to get a phone and call PW2 to inform her that there was insecurity and she should not have gone home.

PW1 testified that they didn't make the phone call. On their way back home she was defiled by the appellant. PW2 whom PW1 had seen being dropped by a motorbike arrived home but did not find PW1. They went out with PW4 to look for PW1 but did not get her. It is clear that the tow used a different route to the one used by PW1.

The appellant's defence is that heir father was selling land. It was his younger brother who wanted to sell the land and wanted to have him arrested for failing to sell the land. He was arrested and was told it was a family matter. It later turned out to be a case of incest. He was arrested by Police officers from Itabua Police station but was transferred to Manyatta Police station, the appellant called five other witnesses. Their line of evidence is that the appellant was arrested due to the land dispute. DW2 testified that he was with the appellant making ballast. He denied that here was a case of incest.

The appellant contends that here is contradiction as to the date of the offence. It is not clear whether it was 28<sup>th</sup>, 29<sup>th</sup> or 30<sup>th</sup> of September 2015. The trial court dealt with that issue. The evidence shows that the case was reported at Manyatta Police station on 30.9.2015 under occurrence book number 11 of that date. The P3 form was filled by PW3 on the same date of 30.9.2015 PW1 and PW2 testified that pW1 informed PW2 that she had been defiled by the appellant. That was on the morning of 30.9.2015. The incident must have taken place on 29<sup>th</sup> September, 2015. PW1 testified that she was givoen the shoes to clean on 28.9.205. The appellant went for the shoes in the evening. PW1 was taken to hospital the following morning. The P3 form indicate that the date of the alledged incident was 29<sup>th</sup> September, 2015 at 8.00pm.

I do find that the alleged contradiction do not affect the core issue which is whether pW1 was defiled or not. The P3 form properly gives the date of the incident as 29.9.2015. This corresponds with the chain of events as the case was reported on 30.9.2015. There was no miscarriage of justice.

The appellant and his witnesses maintained that he was arrested because of a land dispute. The record of the trial court gives two witnesses as having been number 4 in testifying. The first PW4 is PW1's sister. While the other one is PC John Gitahi. This is a minor issue of improper numbering of the witnesses. It does not affect the proceedings as the appellant was able to cross examine all the witnesses. It is PC John Gitahi who testified that the appellant was charged with the offence of threatening to kill. That offence involved the land dispute. PW5 P.C Timothy Ndimba testified that the appellant had threatened to kill his father. Upon arrest the appellant was taken to Itabua Police station. It was realized that the appellant had a case of incest which had been reported at the Manyatta Police station. It is PW5's evidence that it was

the appellant's father who reminded the Itabua Police that the appellant had a case of incest which had been reported at Manyatta Police station.

It is therefore true that the appellant was arrested for threatening to kill. That is not in dispute. The evidence of PW5 is that after the defilement incident, the appellant and his father sold their land and moved out of the compound. The appellant was arrested on 10<sup>th</sup> June, 2016 as he had moved out of the premises. This explains the delay in having the appellant arrested. Had he not threatened to kill his father, the case of incest could not have been prosecuted.

I am satisfied that the case of incest is not a framed up one. The P3 form indicate that the case was duly reported on 30.9.2015. The appellant was no longer living in the premises and was arrested in June 2016. The medical evidence had already been obtained in September 2015.

The Prosecution evidence does establish that PW1 was defiled. PW1 testified that the appellant was armed with a knife and a hammer. The appellant threatened to kill her and she complied. PW1 the appellant as her uncle. There is no evidence that pW1 was used by her parents to implicate the appellant. All the vital witnesses testified. There was no delay to report the incident. The incident was reported on time but there was delay in arresting the appellant.

I do find that PW1 was defiled. I do further find that it is the appellant who defiled the complainant. The appellant is an uncle to PW1. Their relationship falls within the prohibited sexual intercourse under section 209(1) of the Sexual Offences act. The charge of incest is therefore proper. Under section 20(1), if the victim is below 18 years, the accused shall be liable to imprisonment for life. The trial court intimated that the law imposes a minimum sentence. It appears that the trial court considered the life imprisonment to be the minimum sentence. I do find that the life imprisonment sentence is excessive. I do set it aside and replace it with twenty years imprisonment which is the minimum sentence for defilement of a victim who is between 12-16 years old. PW1 was 14 years old.

In the end, the appeal on conviction is disallowed. The life imprisonment sentence is set aside and is replaced by a twenty (20) years imprisonment sentence from the date of conviction.

**Dated and Signed at Marsabit this .....day of July 2018**

**S. CHITEMBWE**

**JUDGE**

**Dated, Signed and delivered at Embu this 25<sup>th</sup> day of July, 2018**

**F. MUCHEMI**

**JUDG**