



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL DIVISION

CRIMINAL APPEAL NO.166 OF 2012

(An Appeal arising out of the conviction and sentence of Hon. B. MOSIRIA – (PM))

delivered on 29th September 2012 in Kapsabet SPM CR. Case No.1343 of 2012)

CL.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, CL was charged with the offence of **incest by male** contrary to **Section 20(1)** of the **Sexual Offences Act**. The particulars of the offence were that on 18th June 2012 at 7.00 p.m. in Nandi County, the Appellant caused his penis to penetrate the vagina of PE (hereinafter referred to as the complainant), a girl aged four (4) years who the Appellant knew to be his daughter. In the alternative, the Appellant was charged with **committing an indecent act with a child** contrary to **Section 11(1)** of the **Sexual Offences Act**. The particulars of the offence were that on the same day and in the same place, the Appellant intentionally and unlawfully caused his penis to come into contact with the vagina of the complainant. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charges. After full trial, he was convicted as charged on the main count. He was sentenced to serve life imprisonment. The Appellant was aggrieved by his conviction and sentence. He has filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that his right to fair trial had been denied to him because he was not availed the witnesses' statements prior to the commencement of the trial. The Appellant took issue with the fact that he was not warned of the consequences should he be convicted prior to taking plea. He was of the view that his conviction was based on mere suspicion and no tangible evidence since no probative evidence had been adduced to connect him with the offence. The Appellant faulted the trial magistrate for relying on contradictory evidence to convict him. He took issue that he was convicted when critical witnesses were not availed to testify before the court. He was finally aggrieved that he had been sentenced to serve a custodial sentence that was harsh and excessive in the circumstances. He urged the court to allow the appeal, quash his conviction and set aside the sentence that was imposed upon him.

During the hearing of the appeal, the Appellant presented to court written submission in support of his appeal. In summary, it is the Appellant's case that penetration had not been proved to the required standard of proof. He particularly questioned the evidence that was adduced by the complainant which did not add up nor suggest that he was the one that had defiled the complainant. He was of the view that the complainant had been coached to implicate him with the offence. He questioned why the trial court did not properly evaluate the medical evidence which did not support the complainant's evidence that she had been sexually assaulted.

The Appellant took issue with the manner in which the prosecution sought to amend the charge just before it closed its case. He submitted that he was denied the chance to cross-examine the complainant in regard to the age of the complainant which was the subject of the amended charge. He was aggrieved that the trial court had not told him of his right to have legal counsel provided to him during trial. He was of the view that if he had been provided with legal counsel, he would have better defended the case. He was finally aggrieved that the trial court had not taken into account the fact that the police had not properly investigated the case and thereby reached the wrong conclusion that it was him and him alone who could have committed the offence.

Ms. Oduor for the State opposed the appeal. She submitted that the five (5) prosecution witnesses who testified established to the required standard of proof that the Appellant indeed defiled the complainant, her daughter. She explained that the complainant, at the material time, lived with the Appellant. The complainant's mother left the home due to domestic violence that was meted on her by the Appellant. The Appellant defiled the complainant. On the following morning, a neighbour saw the complainant. She was not walking properly. On making

inquiry, she discovered that the complainant had been defiled. She made a report to the area Assistant Chief. The neighbour took the child to hospital. On examination, it was established that she had indeed been defiled. Mrs. Oduor submitted that all the elements in support of the charge, including the age of the complainant, were established to the required standard of proof. She urged the court to disallow the appeal.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced before the trial court so as to reach its own independent determination whether or not to uphold the conviction of the Appellant. As was held by the Court of Appeal in **Njoroge -Vs- Republic [1987] KLR 19 at P.22:**

“As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect (see Pandya v R [1957] EA 336, Ruwala v R [1957] EA 570)”.

In the present appeal, the issue for determination by this court is whether the prosecution established the case against the Appellant on the charge of **incest** contrary to **Section 20(1)** of the **Sexual Offences Act** to the required standard of proof beyond any reasonable doubt.

As appreciated by both the Appellant and the State, for the prosecution to establish the charge of incest with a child, it was required to establish that the perpetrator was related to the victim, that there was penetration and, finally the age of the victim. In the present appeal, the prosecution established to the required standard of proof that the Appellant is the father of the victim. Indeed, it was not an issue for debate that the Appellant was the father of the complainant. The complainant testified that on the material day of 18th June 2012, the Appellant, her father arrived home while drunk. He then sexually assaulted her before going to sleep. On the following day when the Appellant left for work, the complainant was seen by a neighbour, PW2 Viola Murei. The neighbour noticed that she was not walking properly. Upon inquiry, she discovered that the complainant had been sexually assaulted.

PW2 informed the landlord who advised her to report to the area Assistant Chief, PW4 Salina Kipnetich. She made a report to the area Assistant Chief. She was escorted with the child to Kapsabet District Hospital where the child was examined by PW3 Josephat Embeko, a Clinical Officer based at the said hospital. He noted that the complainant's hymen had been broken. This was proof that she had been penetrated. The duly filled P3 form and the treatment card were produced into evidence. PW3 was later called upon to assess the age of the complainant. In his assessment, the complainant was aged four (4) years at the time of the incident. Although the Appellant denied that he had sexually assaulted the complainant, upon re-evaluation of the evidence adduced before the trial magistrate's court, this court holds that the prosecution did indeed establish to the required standard of proof beyond any reasonable doubt that indeed the complainant was penetrated.

As regard the age of the complainant, the same was assessed by PW3. It was established that she was four (4) years at the time of the sexual assault. The age of the complainant was thus established to the required standard of proof. The identity of the perpetrator was also established. The complainant testified that she lived alone with the Appellant in their house. Her mother had run away after she could no longer stand being a victim of domestic violence. There was no other person, male or female living with the complainant and the Appellant at the time. The testimony that the complainant adduced vividly painted how she was sexually assaulted by her own father.

Her testimony was corroborated, as regards the identity of the perpetrator, by PW2 the neighbour who testified that the Appellant is the only person who lived with the complainant. The Appellant did not deny that he was the only one who lived with the complainant. He did not accuse anyone else other than claim that he was framed after the complainant had been coached to testify against him. This court is of the view that the complainant and PW2 were telling the truth because they had nothing to gain from reporting the incident to the police other than getting justice for the complainant. This court therefore holds that the prosecution did establish to the required standard of proof beyond any reasonable doubt that the Appellant was the perpetrator of the offence.

As regards the Appellant's claim to the effect that his constitutional right to fair trial had been infringed, upon perusal of the trial court's record, this court is not convinced by the allegations made by the Appellant. From the proceedings, it was clear that the Appellant was aware of the charge that he was facing, he asked relevant questions of all the witnesses that were produced by the prosecution witnesses. At no time did he complain to the trial court that he felt that his rights to fair trial were being infringed. He was accorded all the opportunity to prepare for his defence. In the premises therefore, this court holds that the Appellant was properly convicted in a trial that was properly conducted.

The upshot of the above reasons is that the appeal lodged by the Appellant lacks merit and is hereby dismissed. The sentence imposed on the Appellant is legal. The trial court properly considered the Appellant's mitigation before the sentence. The conviction and sentence of the trial court is hereby upheld. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 19TH DAY OF SEPTEMBER 2018

L. KIMARU

JUDGE

DATED, SIGNED AND DELIVERED AT ELDORET THIS 26TH DAY OF SEPTEMBER 2018

HELLEN OMONDI

JUDGE