REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 24 OF 2017

PM.....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Being an appeal arising from conviction and sentence in Nyeri Chief Magistrate's Court Criminal Case No.48 of 2015 delivered by J.N. Wambilyanga Principal Magistrate on 21st April 2017

JUDGEMENT

1. **PM** the Appellant was charged with the offence of incest contrary to section 20(1) of the Sexual Offence Act No 3 of 2006. The particulars being that the Appellant on the 23rd day of August, 2015 within Nyeri County in the Republic of Kenya, being a male person, caused his penis to penetrate the vagina of CWM a female child who was to his knowledge his daughter.

2. He faced an alternative count of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act on 3 of 2006. The particulars being that the Appellant on 23rd day of August 2015 within Nyeri County in the Republic of Kenya, he intentionally touched the vagina of CWM a child aged eight (8) years with his penis.

3. The matter proceeded to full hearing and he was convicted on the alternative count and sentenced to ten (10) years imprisonment. Being dissatisfied with the judgment he filed this appeal raising the following grounds:

(i) That the learned trial magistrate erred in fact and in law in passing judgment convicting him when the prosecution had not proved the case by discharging the required burden of proof.

(ii) That the learned trial magistrate erred in fact and in law in relying on the evidence of the prosecution witnesses which was insufficient and contradictory.

(iii) That the learned trial magistrate erred in fact and in law in reaching an erroneous finding from the defence and the evidence of the Appellant as well as his submissions.

(iv) That the learned trial magistrate erred in fact and in law in failing to acknowledge that the complaints attending the charges and the criminal prosecution in the matter was as a result of the animosity that exists in a matrimonial dispute involving the Appellant and his wife.

(v) That the learned magistrate erred in law and in fact in failing to find and rule that the evidence adduced by the prosecution was insufficient to sustain the conviction and sentence of the Appellant and in convicting him against the weight of the evidence adduced.

(vi) That the learned magistrate erred in law and in fact in failing to find and rule that there was no cogent, substantial, credible and direct evidence connecting the Appellant to the offence of committing an indecent act with a minor.

(vii) That the learned magistrate erred in law and in fact in convicting him on highly contradictory, misleading, inconsistent and unreliable evidence presented by the prosecution.

(viii) That the learned magistrate erred in law and in fact in convicting the Appellant on the uncorroborated and or insufficiently corroborated evidence of a minor.

(ix) That the learned magistrate erred in law in placing reliance on the credible evidence of the prosecution and in failing to accord due weight to the evidence of the Appellant.

(x) That in any event the learned magistrate erred in fact in meting out sentence that was grave and excessive in the circumstances.

4. The evidence that was presented to the court is that the Appellant and PW1 GR are husband and wife but separated. They are blessed with three children who testified herein as PW2, PW3 and PW4. The prosecution case is that on 22nd May 2015 the children without their mother (PW1) went to visit their father who is the Appellant. Their house is a 3 bedroomed wooden house.

5. The boys (PW3 & PW4) shared one room while the girl (PW2) who is the youngest of the three shared a room with the Appellant. She was aged 8 years then. The evidence is that there were two beds in the room of the Appellant.

6. On the material night as stated by PW2 the Appellant was sharing his bed with her. He removed her skirt and touched her genitals. He then poured something on her which burnt her. She did not know what it was and where it came from. The next morning she reported to PW3 & PW4 and lastly to their mother (PW1) when they returned home. PW1 took her to hospital and a report was made to the police.

7. PW7 **Francis Maina Kiragu** who has specialized in public health filled and produced the P3 form in respect to PW2. He said she had bruises on her genitals with a white discharge. He said the bruises were at the edge of the vagina. The white discharge was not taken for examination. The child was seen in hospital on 25th August 2015. He said fingers could cause such injuries.

8. PW6 **No 65639 PC Benedict Mwiroli** was the investigating officer. He explained that the Appellant was arrested on 2nd September 2015, and that's when he visited the scene. He confirmed that there had been a domestic issue between PW1 and Appellant which had been reported to the Post by the latter.

9. The Appellant gave a sworn statement of defence. He confirmed that his children PW2-PW4 came to visit him minus their mother on 22nd August 2015 and left on 24th August 2015. He took care of them and released them on 24th August 2015. He also confirmed that he shared his room with PW2 during that time. He did not hear of anything until 2nd September 2015 when police officers came to arrest him. He denied the charges and dismissed the evidence of PW1 as lies.

10. His brother (DW2) **LMW** explained to the court that indeed the children came home on 22nd August 2015 evening and they went to greet him on 23rd August 2015. He said the children are free with him and if they have any issue they share with him. They never told him anything concerning this allegation.

11. When the Appeal came for hearing Mr. Kiboi for the Appellant condensed the ten(10) grounds of Appeal and argued them as three (3) grounds. He submitted that the evidence was inconsistent and contradictory. He referred to the evidence of PW1, PW2 and PW7 where the witnesses talked of the hands and fingers as the offending organ while the charge sheet was specific that it was the penis.

12. He also referred to the contradictions in the evidence relating to the date of occurrence of the offence. He cited the evidence of PW1, PW4 & PW7. PW7 who examined the minor (PW2) said he examined her on 25th August 2015 six hours after the incident. He thus submitted that this incident must have occurred on 25th August 2015 if PW1 was correct. Counsel submitted that though PW2 claimed to have reported this incident to PW3 and PW4, the former denied having been given any such report.

13. He argued that if indeed PW2 cried the brothers could have heard, as they were in the same house. That it was not clear where PW3 & PW4 slept as the evidence is contradictory. He also submitted that the learned trial magistrate took two opposite positions on the issue of corroboration in respect to PW2's evidence.

14. The second ground was on the animosity between PW1 and the Appellant which he said was disregarded by the trial court. He submitted that the evidence of PW6 was crucial in this regard.

15. It was counsel's submission that the learned trial magistrate disregarded the sworn defence of the Appellant and his witness. That the court did not analyse the defence nor make a conclusion on it.

16. The Appeal was opposed by the State which was represented by Mr. Njue. He submitted that section 2 of the Sexual Offences Act (S.O.A) talks of contact with any part of the body with the genital organ. That failure to mention the body part is not prejudicial in view of the definition. On the contradiction in the dates, he argued that the bottom line was that it was on a Saturday as the next day was a Sunday.

17. He submitted that it was a fact that PW2 spent the night in the father's bedroom and this created an opportunity for commission of the offence. He argued that PW2 explained the happening well even in cross examination. On the P3 form he said the injuries were 6 hours to the examination and was quick to add that the injuries were there all the same. To him the 6 hours was an estimate and it is covered under section 214(2) Criminal Procedure Code which did not require any amendment.

18. On the Appellant's defence, counsel submitted that DW2 only confirmed the visitation by the children and nothing more. On the cries by PW2 he said the other children did not hear them. Further that the issue between PW1 and the Appellant was just a separation and nothing about animosity. Placing aside PW4's evidence he said there was nothing to show that PW2 was coached by the mother (PW1).

19. Mr Kiboi in a rejoinder emphasized that the particulars in the charge sheet had not been proved, and it was not clear when the incident had occurred.

20. This being a first appeal the court has a duty to re evaluate and reconsider the evidence on record and come to its own conclusion. It has to remember that it did not see nor hear the witnesses and give an allowance for that. In the case of **Patrick & Anor v R [2005] 2KLR 162** the Court of appeal stated thus:

"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. It is not the function of first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions.

Also see **Okeno V r 1972 ea 32: mwangi V r [2004] 2klr 28**

21. i have considered the evidence on record, the grounds of appeal and submissions by both counsel. I find the issues for determination to be

(i) Whether the minor (PW2) was sexually assaulted.

(ii) If the answer to issue (i) is in the affirmative whether the Appellant is the one who committed the offence.

There is no dispute that PW2 is the appellant's daughter.

Issue No(i)

Whether the minor (PW2) was sexually assaulted

22. The Appellant was charged with offence of incest under section 20(1) Sexual Offences act. The said section provides:

"Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years:

Provided that, if it is alleged in the information or charge and proved that the female person 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."

For an offence of incest to be said to have been committed there must be proof of an indecent act or an act which causes penetration. Under section 2 of the Sexual Offences Act penetration could be partial or complete insertion of the genital organs of a person into the genital organs of another person.

23. PW2 in her evidence stated she was only touched on her genitals and a liquid poured on her vagina. There was no evidence of penetration or even an attempt to penetrate. I agree with the learned trial magistrate's finding that penetration was not proved.

24. I now move to the alternative count on which the Appellant was convicted i.e committing an indecent act by touching C.W's vagina with his penis. CW(PW2) was a minor aged eight (8) years then. The evidence by PW1, PW3, PW4, Appellant and DW2 is that these children visited the Appellant on 22nd August 2015 and they left on 24th August 2015, later in the day. They even went to church as 24th was a Sunday.

25. PW1 in her evidence stated that on the first night she slept in her bed but on the second night the Appellant told her to sleep on his bed. It is therefore clear that the second night was 23rd August 2015, the children having visited on 22nd August 2015. The particulars show that the incident occurred on 23rd August 2015.

26. PW1 testified that the children arrived at her place on 24th August 2015 at about 4pm, and PW2 immediately reported the incident to her. She confirmed the report and took the child to a private hospital but she was not treated since the matter had not been reported. She went to report and was given an O.B number. She then took her to Mathari hospital where she was treated and put on medication. A P3 form was later filled and produced by PW7.

27. Mr Kiboi has raised issues with the date of incident based on the medical report. First and foremost it is a common and known practice that P3 forms are filled by Medical Doctors or Clinical Officers. This is how PW7 introduced himself:

" I am Francis Maina Kiragu working at Consolata Hospital Mathari in Nyeri. I have a Masters in Public health and have worked at Consolata for 14 years."

This is a court of record and the record does not show PW7 as having introduced himself as a Medical Doctor or Clinical Officer. This is evidence he gave on oath. The P3 (EXB1) where he signed as Dr F. Maina may save him.

28. Again another practice is to fill the P3 form. The PRC is not the original

treatment sheet. PW7 said he used the PRC (EXB3) to fill the P3 form (EXB1). The PRC form (EXB3) is shown as having been filled by one Faith RCO. Is she a Medical Doctor or Clinical Officer? Did she examine the complainant or she too just lifted up notes from another document?

29. According to PW1 the minor was treated at the Mathari Hospital which I believe is the same as Consolata Mathari Hospital on the early morning of 25th August. The P3 form shows that the injury which PW2 had was 6 hrs old. If indeed the minor was sexually assaulted on the night of 23rd August 2015, would the injuries be 6 hours old on 25th August 2015 2.00am? That would be more than 24 hours of age.

30. PW2 said a burning liquid had been poured into her vagina. The medical examination did not reveal anything to that effect. In fact what was alleged was that there was a whitish discharge from her genitals and they never attempted to find out what it was. The PRC form also shows a finding by Faith RCO showing that:

> **"the outer genitalia was smelling with whitish discharge"**

Could the hospital ignore such a factor and not find out what it was? Was the smell really there in the first place?

31. Assuming it is true that PW2 had these serious injuries from 23rd August 2015 night how was she able to continue staying at the father's place until late afternoon when they returned to the mother? She never told anyone including the grandparents.

32. PW3 was categorical that PW2 (CWM) never told him anything about 23rd August 20o5 night. PW4 who had said he had been notified by PW2 of the same came back to court and recanted that evidence saying it is their mother (PW1) who had told him to come and say what he had told the court when he first testified. This is what he told the court upon being recalled.

> **"Cross Examination by Mr. Kibui**
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> **My sister did not tell me that the accused did what he did. I did not wash the complainant. My father was not drunk on the mentioned night. I was told to say what I said in court by my mother. It is me who recorded the statement.**
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> **J. Wambilyanga**
>
> **SRM**
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> **Re Examination by State Counsel**
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> **The complainant washed herself. Yes it is my mother who told me to say what I said in court. I feared my mother. My mother did not threaten me to say lies. I was not staying with my father. I was staying with my mother. I had earlier said that my father was drunk but it was not true. My father was at home and the complainant was at home. I recorded my statement on the 24th together with the complainant and my mother.**
>
> **J. Wambilyanga**
>
> **SRM**

33. It is clear from the evidence that PW4 had a phone and could have easily communicated with PW1 if anything bad had happened to PW2. PW1 herself was so quick to tell the court that PW4 did not have a phone at that time which was a total lie. I also note that the home of the Appellant was not far from where PW1 was staying with these kids. They would still have travelled back the next morning since they were not locked up.

34. Just when was this case reported? PW1 said she reported on 24th August 2015. The P3 form (EXB1) shows the report was made on 28th August 2015 under OB 5/28/8/2015. The truth of the matter is that no report was made to the police on 24th August 2015 and neither was PW2 treated on 24th August 2015.

35. The PRC form (EXB3) which was used by PW7 to fill the P3 Form (EXB1) is shown as having been filled on 25th August 2015. The treatment notes which most likely may have shown a different date were never produced before the court as evidence.

36 It is true that the proviso to section 124 of the Evidence Act allows the court to convict on the basis of the evidence of

the victim if the court believes she is telling the truth. The evidence must of cause be supported by medical evidence in cases of a main charge of rape, defilement or incest.

37. However, when there is evidence negating the victim's evidence then the court must be extremely careful in wholly relying on such evidence to found a conviction. In the present case there is the main background to the relationship between the Appellant and PW1 to be watched. PW4 who had initially given evidence in support of PW2 came and recanted that entire evidence putting blame on the mother (PW1). PW3 denied that he was aware of any complaint against the father by the sister (PW2).

38. At the time of testifying PW4 was aged 17 years. If the mother (PW1) could influence him to come and lie against his father how about PW2 who was only eight (8) years old? PW3 refused to get into that brawl and told the court what he knew about the allegations. If indeed this child had the bruises and white discharge mentioned this court would have expected PW7 and his team to have the substance examined for whatever it was and also examine the Appellant, yet they took no action.

39. The family house was wooden and if PW 2 cried loudly as she said she did then the brothers who were in the same house would have definitely heard.

40. On the totality of the evidence adduced by the prosecution witnesses I have found a number of question marks on the evidence of PW1, PW2 and the medical evidence and even the investigations. The evidence does not clearly come out to incriminate the Appellant beyond reasonable doubt.

41. The broken relationship between the Appellant and PW1 appears to have played a central role in this matter. The doubt the evidence has created in my mind will go to the benefit of the Appellant.

42. In conclusion I find that the Appeal has merit and I allow it. The conviction is quashed and sentence set aside.

Orders accordingly.

Dated, signed and dated this 29th day of November 2018 in open court at Nyeri.

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HEDWIG I ONG'UDI

JUDGE