



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL NO. 45 OF 2015

E W.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in the Criminal Case No. 405 of 2014 of the Principal Magistrate Court at Sirisia by K. Mukabi – Resident Magistrate)

JUDGMENT

1. The Appellant, **E W**, was charged with the offence of defilement contrary to **section 8(1)** as read with **section 8(2)** of the **Sexual Offences Act 3 of 2006**. The particulars of the charge were that on the 25th April, 2014 in Bungoma West District within Bungoma County he intentionally and unlawfully caused penetration by inserting his male genital organ namely penis into the female genital organ namely vagina of L.N. a girl aged 10 years. (initials substituted to protect identity of minor.)
2. In the alternative, the Appellant was charged with an indecent act with a child contrary to **section 11(1)** of the **Sexual Offences Act**. It was alleged that on the same day, the Appellant intentionally and unlawfully committed an indecent act by touching the female genitalia namely vagina of the said L.N.
3. A synopsis of the prosecution case was that on 25th April 2014 at about 4.00 p.m, the Complainant was at home herding cattle together with her sibling when the Appellant sent the sibling to fetch firewood leaving him solely with the Complainant. The Appellant, who is also the Complainant's step father, lured her into her mother's house where he instructed her to lie on the floor. He undressed her, asked her to hold her pant in her hand and had sexual intercourse with her. The Complainant's mother, PW1, walked in on them and found the Appellant on top of her. She immediately raised alarm, startling the Appellant in the process, who got up and put on his pants.
4. **PW1** alerted the Assistant Chief and the village elder who came to their rescue. The Complainant was examined at Sirisia Hospital on the 26th of April, 2014 and they recorded a statement at Sirisia Divisional Headquarters. The Appellant was consequently arrested and charged before the trial court.
5. In his unsworn defence, the Appellant denied any involvement in the offence and stated that he was not familiar with the charges levelled against him. He proceeded to narrate the events leading up to his arrest.
6. The learned trial magistrate considered all the evidence before him and found that the prosecution had proved their case against the Appellant to the required standard. He convicted the Appellant on the charge of defilement and sentenced him to life imprisonment.
7. On 20th March, 2015 the Appellant lodged a petition of appeal which he later amended on 19th June, 2018, advancing four (4) grounds of appeal. In the grounds, he claimed that: the charges leveled against him were defective and unable to sustain a conviction; the investigations carried out were shoddy and failed to comply with **section 2(1)** of the **Sexual Offences Act**; the trial magistrate failed to consider his defence which was truthful and capable of displacing the prosecution's case.
8. Learned State Counsel Mr. Oimbo opposed the appeal stating that it lacked merit and urged the court to dismiss it and uphold the conviction and sentence.
9. I have subjected the evidence adduced before the trial court to fresh analysis and re-evaluation bearing in mind that the duty of the first appellate court is not merely to scrutinize the evidence on record to see if there was some evidence to support the lower court's findings and conclusion. In **Kiilu and Anor vs. Republic [2005] 1 KLR pg 174**, the learned Judges of Appeal, Tunoi, Waki and Onyango Otieno JJA, held *inter alia* that:

“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. The first appellate court must itself weigh conflicting evidence and draw its own conclusions."

10. In the first ground, the Appellant complained that the charge sheet was defective for charging him under **section 8(1)** as read with **section 8(2)** of the **Sexual Offences Act** instead of **section 20(1)** of the **Sexual Offences Act**. He stated that the Complainant rightfully stated that he is her step-father and that **PW1**, the Complainant's mother, also testified that the Appellant was her second husband with whom she had cohabited for a period of over one year.

11. Learned state counsel Mr. Oimbo submitted that **section 8(1)** of the **Sexual Offences Act** defines the offence of defilement while **section 20(1)** of the **Sexual Offences Act** defines the offence of incest. Counsel submitted that the Director of Public Prosecution has the discretion to decide under which section to prefer charges because the ingredients in these circumstances fitted under both sections, and both sections attract the same sentence. He urged that as such, the charges under **section 8(1)** as read with **section 8(2)** of the **Sexual Offences Act** instead of **section 20(1)** of the **Sexual offences Act** did not render the charge defective.

12. **Section 20(1)** of the **Sexual Offences Act** provides thus:

"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."

13. The prescribed relationships are stipulated under **section 22** of the **Sexual Offences Act** which provides *inter alia* that:

"(1) In cases of the offence of incest, brother and sister includes half brother, half sister and adoptive brother and adoptive sister and a father includes a half father and an uncle of the first degree and a mother includes a half mother and an aunt of the first degree whether through lawful wedlock or not... "

14. From the definition in **section 22(1)** of the **Sexual Offences Act** as cited above, the Appellant rightfully falls within the prohibited relationships which are tested before one can be charged with the offence of incest. The Complainant being a minor, the sentence would be the same whichever section the Appellant was convicted under.

15. The Appellant's second ground was that he was not subjected to a DNA test under **section 36** of the **Sexual Offences Act**. Learned state counsel Mr. Oimbo submitted that this section is not mandatory. That failure to subject the Appellant to DNA testing did not therefore render the charge defective.

16. In the case of **AML vs. Republic Criminal Appeal 74 of 2011 [2012] eKLR** Odero J while deliberating on the requirement of DNA testing observed thus:

"The fact of rape or defilement is not proved by way of a DNA test but by way of evidence."

Further, in the case of **Robert Mutungi Muumbi vs. Republic Criminal Appeal No. 5 of 2013 [2015] eKLR**, the court of appeal (Makhandia, Ouko & M'noti JJ.A) sitting at Malindi opined thus:

"Section 36(1) of the Act empowers the Court to direct a person charged with an offence under the Act to provide samples for tests, including for DNA testing to establish linkage between the accused person and the offence. Clearly that provision is not couched in mandatory terms. Decisions of this court abound which affirm the principle that medical or DNA evidence is not the only evidence by which the commission of a sexual offence may be proved."

17. The record herein indicates that the Complainant was taken to Sirisia Sub-district Hospital for treatment. The Complainant was examined by Dr. Sivachi, the medical superintendent at the hospital. His observations were that the Complainant had bruises and blood on her labia majora and labia minora. Her urethra was swollen and tender to touch, and her hymen was missing. The Complainant was subjected to laboratory tests for urinalysis and STD testing. She was put on HIV Post-Exposure Prophylaxis (PEP) medication and given antibiotics to prevent the pain. Dr. Sivachi filled the P3 form based on his clinical notes. Both documents were produced before the court by **PW5**, a clinical officer at Sirisia Sub-district Hospital.

18. The medical evidence presented before the trial court demonstrates that the Complainant was defiled, and that the injuries she sustained could not be attributed to falling down as alluded to by the Appellant. The Complainant also described in detail that the Appellant removed his trousers, demanded that she remove her underpants after which he removed his male genitalia and inserted it into her female genitalia. That he forcefully had sexual intercourse with her for a while but she did not scream because she feared for her life.

19. **PW1**, the Complainant's mother, corroborated the Complainant's testimony and stated that she walked in on the Appellant having sexual intercourse with the Complainant. That the Appellant who was naked, lay atop the Complainant whose clothes had been pulled upwards. As such the medical evidence, and the testimony of the prosecution witnesses demonstrated that the Complainant had been defiled and satisfactorily proved the issue of penetration.

20. The Appellant further complained that the P3 form was produced by a person who was not the author. Learned state counsel Mr. Oimbo submitted that **section 77** of the **Evidence Act** provides conditions under which someone else can produce a document that he did not make. Counsel urged that **PW5** fulfilled these conditions, and that the author of the P3 form could not be found without occasioning undue delay.

21. The record indicates that the matter came up for hearing on 23rd July, 2014, and was adjourned until 15th January, 2015 owing to the unavailability of Dr. Sivachi who filled the P3 form. On 15th January, 2015 the prosecution made an application to have **PW5** testify on behalf of Dr. Sivachi. The trial court allowed the application stating that no prejudice would be suffered by the accused if **PW5** testified on behalf of Dr. Sivachi.

22. **Section 77** of the **Evidence Act** allows the court to presume the genuineness of a document or report presented before it by government analysts, medical practitioners, ballistic experts or document examiners. It does not however provide for who can produce such documents as claimed. This is provided under **section 72** of the **Evidence Act** which provides thus:

“Where evidence is required of a document which is required by law to be attested, and none of the attesting witnesses can be found, or where such witness is incapable of giving evidence or cannot be called as a witness without an amount of delay or expense which the court regards as unreasonable, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person.”

23. In the spirit of **section 72** cited above, trial courts often allow medical reports to be produced by persons familiar with the signatures of the author and who are professionally qualified to answer any questions that may arise in respect of the document to ensure that the trial is concluded without unreasonable delay.

24. The record indicates that **PW5**, who produced the clinical notes, P3 form and the age assessment report, on behalf of the author Dr. Sivachi, was a clinical officer at Sirisia Sub-district Hospital. He had worked in that capacity for four (4) years at the time, and with Dr. Sivachi for a period of two (2) years and was therefore familiar with his handwriting. Further he had interacted with the Complainant since it is he that issued her with the prescribed medication. As a clinical officer, he was also able to answer any questions that would have arisen in respect of the documents, and which the record shows he did.

25. On the third ground, the Appellant argued that the charges were not framed in accordance with **section 137** of the **Criminal Procedure Code**, since the prosecution failed to indicate the exact time when the offence took place. Mr. Oimbo submitted that the section was complied with and that the charges were clear and written in ordinary and unambiguous language.

26. **Section 137(a)(iii)** of the **Criminal Procedure Code** provides thus:

“after the statement of the offence, particulars of the offence shall be set out in ordinary language, in which the use of technical terms shall not be necessary:

Provided that where any rule of law or any Act limits the particulars of an offence which are required to be given in a charge or information, nothing in this paragraph shall require more particulars to be given than those so required;”

27. The particulars of the offence as indicated in the charge sheet were as follows:

“E W:- On the 25th April, 2014 in Bungoma West District within Bungoma County intentionally and unlawfully you caused penetration by inserting your male genital organ namely penis into the female genital organ namely vagina of L.N a girl aged 10 years.”

28. Further **section 134** of the **Criminal Procedure Code** requires that the offence is specified in the charge or information with the necessary particulars. The section provides thus:

“Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.”

29. The charge as framed and the particulars of the offence in the present case contain sufficient information as to disclose the offence with which the Appellant was charged and the prescribed punishment thereof in conformity with **section 137** of the **Criminal Procedure Code**. It also disclosed where and when the offence was committed and against whom the offence was alleged to have been committed.

30. Further, the particulars of the offence were set out in ordinary language. It is noteworthy that **section 137(a)(iii)** of the **Criminal Procedure Code** notes that it is not a requirement that more particulars than those required are to be given. Whereas the particulars herein failed to indicate the exact time when the alleged offence took place, this did not occasion any prejudice to the Appellant, and in any case, such an error is curable under **section 382** of the **Criminal Procedure Code**.

31. Lastly, the Appellant contended that his defence was not considered by the trial court. Learned state counsel Mr. Oimbo opposed this contention and submitted that the Appellant's defence was considered and found to be lacking in merit whereupon it was dismissed.

32. The record indicates that the Appellant gave unsworn testimony in his defence without calling any witness. He denied any knowledge of the Complainant or of the events that happened on 25th April, 2014. He however confirmed that **PW1**, the Complainant's mother, was his wife. He advanced an *alibi* defence, alleging that on the material day, he was at Sirisia Market from 6 a.m. upto 6 p.m. and proceeded to give

an account of the events surrounding his arrest.

33. The trial court found that the *alibi* defence advanced by the Accused had been dislodged by the evidence tendered by the prosecution. That the *alibi* defence was merely an afterthought, since it was never relied upon during the cross-examination of witnesses, so that it would have been tested by the prosecution on re-examination. The trial court dismissed the Appellant's defence and rightly so.

34. In the premise therefore, the Appellant cannot claim that the trial court failed to consider his defence. The record is clear that the trial court evaluated his defence against the evidence tendered by the prosecution and found it to be lacking in merit.

35. The ingredients required to prove defilement are the age of the complainant, proof of penetration and positive identification of the assailant. In the present case all three have been proved. An age assessment report prepared by Dr. Sivachi and presented before the trial court by **PW5**, the clinical officer at Sirisia Sub-district hospital indicated that the Complainant was aged 10 years. The medical evidence and witness testimonies proved the issue of penetration. The Appellant was also known to the Complainant so that it was merely a matter of recognition as opposed to identification.

36. Whereas the record indicates that the Appellant denied knowing the Complainant before the trial court, in his amended petition of appeal, he states that he is the Complainant's step-father. Further, it is impossible for him to state that **PW1**, the Complainant's mother, was his wife and then deny knowing her daughter, the Complainant herein, when both lived with him in the same house. As such he was positively identified as the assailant.

37. It is not in doubt that the Appellant herein was the Complainant's step-father. Whereas the Appellant could have been charged under **section 20(1)** of the **Sexual Offences Act**, there was nothing to preclude him from being charged under **section 8(1)** of the **Sexual Offences Act** as he was. The ingredients in both the offence of defilement and incest are similar save that in the offence of incest, an additional element of a relationship between the accused and the victim must be proved.

38. In the instant case, the fact that the Appellant was charged with defilement and not incest did not render the trial defective neither did it prejudice him or occasion any failure of justice, as both offences provide for a punishment of life imprisonment in view of the age of **PW3**, the Complainant herein.

39. After a careful analysis of the evidence on record, I have arrived at the same conclusion, as did the trial magistrate, that the prosecution did prove its case against the Appellant to the required standard and that the conviction entered against the Appellant was well founded. The appeal is therefore found to be lacking in merit and is dismissed accordingly.

DATED AND SIGNED AT NAIROBI THIS 31ST DAY OF OCTOBER 2018.

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L. A. ACHODE

HIGH COURT JUDGE

DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUNGOMA THIS 22ND DAY OF NOVEMBER 2018.

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S. N. RIECHI

HIGH COURT JUDGE