



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYERI**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO. 18 OF 2018**

**BETWEEN**

**MMK.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

***(Being an appeal from original conviction and sentence of life by Hon. E. Michieka, Principal Magistrate, dated 21<sup>st</sup> June, 2018 in Karatina (S.O) Criminal Case No. 8 of 2015)***

**JUDGMENT**

**Introduction**

1. MMK, the appellant herein was charged before the Karatina Principal Magistrate's Court with the offence of ***incest contrary to section 20(1) of the Sexual Offences Act, No. 3 of 2006***. The particulars of the offence are that on diverse dates between December, 2011 and 7<sup>th</sup> February 2015 in Mathira West District in Nyeri County, being a male person caused his penis to penetrate the vagina of SW, alias SKM, a female juvenile aged 7, a person who was to his knowledge his daughter.
2. The appellant faced an alternative charge of committing and ***indecent act with a child contrary to section 11(1) of the Sexual Offences Act number 3*** of 2006, the particulars being that on diverse dates between December, 2011 and 17<sup>th</sup> February 2015 in Mathira District within Nyeri County intentionally touched the buttocks of SW alias SKM a child aged 7 years.
3. The appellant pleaded not guilty to both the main and alternative counts, as a result of which the prosecution called 3 witnesses in support of their case. At the close of the prosecution case, the appellant was found with a case to answer and put on his defence. He gave sworn evidence but called no witnesses. The trial court considered the appellant's defence but found that it did not displace the prosecution's case against him.

**Judgment of the Learned Trial Court**

4. Upon careful analysis of the whole of the evidence on record, the learned trial court made a finding that the prosecution had proved its case against the appellant on the main count beyond any reasonable doubt. The appellant was therefore found guilty as charged, convicted and sentenced to imprisonment for life.

**The Appeal**

5. Being dissatisfied with the entire judgment the appellant came to this court on appeal, seeking to upset the judgment of the learned trial court on grounds:-

- 1. THAT the trial magistrate erred in both law and fact by convicting the appellant on the basis of the testimony of PW1, the complainant which evidence was admitted without following the provisions of section 19(1) of the Oaths and Statutory Declarations Act.**
- 2. THAT the trial magistrate erred in law and fact by convicting the appellant without considering that the provisions of section 200 of the CPC were not complied with during trial yet the same was mandatory.**

3. THAT the trial magistrate erred in law and fact by convicting the appellant of charges that were not proved beyond any reasonable doubt by the prosecution, knowing very well that the onus was on them to prove their case.

4. THAT the trial magistrate erred in law and fact by allowing the clinical officer to produce the P3 form which he had not authored and this was contrary to the provisions of section 33 of the Evidence Act since no evidence was tabled by prosecution to show that the original author could not be found, was dead or that his presence could not be procured.

5. THAT the trial magistrate erred in law and fact by convicting the appellant on the basis of evidence of P3 form that did not ascertain age of injuries and this did not connect the appellant with the alleged offence.

6. It is the appellant's prayer that his appeal be allowed, conviction quashed and sentence set aside so that he can regain his freedom.

7. This is a first appeal, and in the circumstances, the appellant herein expects this court to subject the whole of the evidence to a fresh and exhaustive examination with a view to reaching its own conclusions in the matter. Until this is done, there would be no basis for this court to either confirm or reject the trial court's findings. Generally see *Gabriel Njoroge versus Republic [1982-88]IKAR 1134* in which the Court of Appeal stated, *inter alia* that :-

*“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 on the question of fact as on the question of law, to demand a decision of the court of the first appeal and as the 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 nor heard from the witnesses and make due allowance in this respect. (see Pandya versus Rex [1957]EA 336, Ruwala versus Rex [1957]EA 570.”*

8. I shall now proceed to summarize the evidence that was laid before the trial court.

### The Prosecution Case

9. The complainant herein (PW1) testified and told the court that the appellant herein was her biological father and that when she was living with him, the appellant would remove his thing for susu and put it in her thing for susu and that whenever he did so, she would scream but he always blocked her screams with his hand. That each time the appellant completed the act, he would wash PW1 and would tell her not to say anything to anyone about what he was doing to her. PW1 reported the matter to one of her teachers by the name E who in turn informed madam Hope Mureithi (PW2), a sub-county children's officer in Mathira. PW2 took PW1 to Jambo Rescue Centre before taking her to Karatina District Hospital for examination and treatment. PW2 was present when PW1 was being examined and she also witnessed the filling of the P3 and the PRC forms.

10. PW2 confirmed that upon receipt of information that PW1 was being defiled by her father she made arrangements and took PW1 to Jambo Rescue Centre and also took the child for medical examination and treatment. PW2 also stated during cross examination that she got the information about PW1's plight from the area Probation Officer and PW1's head teacher.

11. Grace Nyawira Ndungu (PW3) testified that she worked at Jambo Rescue Centre and received PW1 at the home following the issuance of a court order. PW3 also accompanied PW2 and DW1 to Karatina District Hospital for examination and treatment.

12. Moses Thuo of Rititi sub-location testified as PW4. He testified how on 9<sup>th</sup> February 2015 he received a telephone call from PW1's head teacher informing him that the appellant had complained that PW1 had been defiled by a fellow pupil in school. When he went to the school and investigated the matter, PW4 established that no fellow student had defiled PW1. Instead, PW1 informed PW4 that it was the appellant who had defiled her during the night as PW1 and the appellant slept in the same bed. On 17<sup>th</sup> February 2015, PW4 accompanied PW2 to the school at about 6.00pm where they found the appellant and PW2. When the appellant was informed that PW1 was to be taken away, he ran off with her, but eventually PW1 was rescued and the appellant arrested and charged.

13. Dr Makori of Karatina District Hospital testified as PW5. He testified on behalf of Dr. Wahome who had since left the hospital. PW5 produced the P3, PRC forms in respect of PW1. According to the findings, PW1's hymen was not intact and she had minimal discharge. PW5 also testified that from Wahome's examination of PW1's genitalia, he had noted a creamish discharge from her private parts. The conclusion of the examination was that there had been penetration. From the PRC, Dr. Wahome recorded what PW1 told him in Kiswahili concerning what the appellant allegedly did to her. PW1 stated the following:-

**‘Amekuwa akinifanyia tabia mbaya. Nikilia ananifunga mdomo akimaliza ananiosha na kuniambia nisiambie mtu.’**

And when PW1 was asked to explain ‘**tabia mbaya**’ the child said ‘**anaweka kitu yake kwa kitu yangu.**’ The P3 and PRC Forms were produced as Pexhibits 2 and 3 respectively.

14. The last witness for the prosecution was number 95520 Police Constable (W) Norah Nyando (PW6) of Kiamachibi Police Station. She is the one who received the report on PW1. Her evidence was that PW1 informed her that the appellant would often defile her. PW6 took PW1 to Karatina District Hospital after issuing PW1 with a P3 form. PW6 confirmed that PW1 was 4 years old at the time of the defilement. The original birth certificate for PW1 was produced as Pexhibit 1. It showed PW1 was born on 31<sup>st</sup> July, 2008.

### The Defence case

15. The appellant gave sworn evidence. He testified that he had custody dispute with the mother of PW1. He denied defiling PW1 and

averred that the charge against him had been engineered by PW1's mother following a custody dispute. He produced a copy of the court proceedings in the custody dispute as D exhibit 1.

### Issues for Determination

16. After carefully reading through the evidence, the judgment of the learned trial magistrate, the grounds of appeal as well as the rival submissions during the hearing of this appeal, the following are the issues for determination:-

- a. Whether PW1, the complainant herein was defiled, namely whether penetration was proved.
- b. Whether the offence of incest was proved.

### Analysis and Determination

17. Regarding the first issue, counsel for the appellant submitted that because of non-compliance with **section 19(1) of the Oaths and Statutory Declarations Act, Cap 15 Laws of Kenya**, PW1's evidence ought not to have been relied upon because the trial court did not note on the record whether it was satisfied that PW1 understood the nature of an oath. Reliance was placed on **Samuel Warui Karimi versus Republic [2016]eKLR, being Nyeri Court of Appeal, Criminal Appeal No. 16 of 2014**.

18. Section 19(1) of the Oaths and Statutory Declarations Act which deals with receiving of evidence of a child by courts provides,

***“Where in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth.”***

19. After going through the definition of a child of tender years as provided by section 2 of the Children's Act, and after a detailed review of several High Court decisions as to who a child of tender years is, the Court of Appeal in the above cited authority took the position that any child who is 14 years and below should be taken through a *voir dire* examination by the trial court. As rightly stated by the Court of Appeal, a *voir dire* examination is a test of the competency of the witness to give evidence and secondly it is a means of testing whether the witness understands the solemnity of an oath. Where the trial court finds a child incompetent to comprehend the evidence, such a child will give unsworn evidence.

20. In response to the submissions by appellant's counsel Mr. Warutere, prosecution counsel, M/S Owuor submitted that **section 19(1) of the Oaths and Statutory Declarations Act** should be read alongside **section 125(1) of the Evidence Act** which provides:-

***“All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease (whether of body or mind) or any similar case.”***

21. I now return to the instant case. PW1 was taken through a *voir dire* examination. Though the same was brief, it came out clearly from the examination that PW1 understood the difference between truth and lies and she also appreciated the consequences of each. She stated in part, **“people who tell the truth go to heaven, I want to go to heaven. I always tell the truth.”** After this statement and other statements made before that in answer to questions put to PW1, the trial court said:-

***“Court: Though the child is of tender years, she possesses sufficient intelligence to give evidence on oath”*** PW1 was thereafter duly sworn.

22. In my considered view, and after observing her as she gave answers to the questions put to her, the trial court was satisfied that PW1 was possessed of sufficient intelligence to justify the reception of her evidence and to do so on oath. From what PW1 said there is no doubt that she understood the duty of speaking the truth. In the circumstances, I do not agree with appellant's counsel that the learned trial magistrate did not comply with the provisions of **section 19(1) of the Oaths and Statutory Declarations Act**. Further and by way of distinction, the two courts in the **Samuel Warui Karimi case (above)** do not appear to have taken the 12 year old girl through any form of *voir dire* examination. At paragraph 10 of the Court of Appeal judgment, the court noted in part,

***“.....the complainant was not subjected to voir dire examination, an aspect that seems to have eluded both courts below. Nonetheless, as it is apparent to us, we have to address it as a point of law in the instant appeal. Subjecting a witness of tender age to voir dire examination is founded under section 125(1) of the Evidence Act.....”***

23. Having settled the issue of the *voir dire* examination, the real issue now is whether PW1 was defiled. In my very considered view, there is no doubt in my mind that PW1 was defiled. Her own testimony, which I find no reason to doubt is clear that she was defiled. What PW1 explained to Dr. Wahome, as recorded in the PRC form leaves no doubt in the mind of this court that she was defiled. Even if hers is the case of a single witness, I am satisfied that the documentary evidence corroborated PW1's testimony. She reported the matter to her teacher Emily who in turn informed PW2 and PW3 and she was able to repeat the story even under intense cross examination. Dr. Wahome also certified that there was penetration and that PW1's hymen was not intact. PW1's evidence would also have been cushioned by the **proviso to section 124 of the Evidence Act**, even if no other evidence had been adduced to corroborate her story as long as the trial court would indicate it believed her.

24. The second issue is whether the offence of incest was committed. What this means is whether the prosecution proved the relationship between the appellant and PW1. Both parties are agreed on one fact, that PW1 is the appellant's daughter while the appellant is PW1's father. **Section 20(1) of the Sexual Offences** stipulates that a person commits the offence of incest if he has sexual intercourse with a **daughter, granddaughter, sister, mother, niece, aunt or grandmother**. The relationship between the appellant and PW1 not being in doubt and having found that indeed PW1 was defiled, and that she was defiled by the appellant who is her father, I am satisfied that it is the appellant who defiled PW1. The evidence also clearly shows that the appellant defiled PW1 over a considerably long period of time and in PW1's own words, he did so regularly after which he would bathe her and warn her against saying anything to anyone.

25. During cross examination and also during his defence, the appellant tried to implicate other people, including PW1's brother Ian, but PW1 remained steadfast in her testimony that it was the appellant and the appellant alone who defiled her. She stated that she had not seen the susu thing of any other person apart from the appellant's. I therefore find that the appellants defence did not challenge the prosecution's case in any material way; and I therefore find no merit in it.

26. Mr. Warutere also submitted that Dr. Makori should not have been allowed to testify because no reasons were advanced by the prosecution why Dr. Wahome could not be called to testify. The reason that was given by Dr. Makori was that, Dr. Wahome had left to work at Karen Hospital in Nairobi. Dr. Makori also explained that he had worked with Dr. Wahome for 2 years before the latter left and that he was conversant with both the handwriting and signature of Dr. Wahome. I have read the provisions of **section 33 of the Evidence Act** and I am satisfied that availing Dr. Wahome would not have been done without undue delay, and more so in a sexual offences case involving a child. Nothing much in my humble view, turns on the appellant's complaint in this regard.

### **Conclusion**

27. In light of all the findings above made, I am satisfied that the appellant's appeal lacks merit. The same be and is hereby dismissed in its entirety. Right of appeal to Court of Appeal within 14 days from the date of this judgment.

28. It is so ordered.

Judgment written and signed at Kapenguria

**RUTH. N. SITATI**

**JUDGE**

**Judgment delivered, dated and countersigned in open court at Nyeri on 20<sup>th</sup> day of December, 2018**

**HON. A. MSHILA**

**JUDGE.**

**In the Presence of**

N/A for state

None for respondent

Rahab – Court Assistant