



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIVASHA
CRIMINAL APPEAL NO. 10 OF 2015

(Being an Appeal from Original Conviction and Sentence in

Criminal Case No. 505 of 2014 of the Chief Magistrate's Court at Naivasha – P. Gesora, CM)

T N M.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

J U D G M E N T

1. The Appellant herein was charged with Incest contrary to Section 20 (1) of the Sexual Offences Act and was convicted upon a full trial. He was sentenced to life imprisonment. Although the Director of Public Prosecutions conceded the appeal, the court found it prudent to review the evidence in light of the serious nature of the offence.
2. The nine grounds of appeal were argued on behalf of the Appellant through submissions made by Mr. Gichuki who represented him at the hearing.
3. The main complaints in grounds 6, 7, 8 and 9 are that there was insufficient evidence to prove penetration and that the complainant's mother (**PW2**), the complainant (**PW1**) absolved the Appellant by their testimony, while **PW1's** teachers, **PW3** and **PW5** asserted otherwise. Further that medical evidence tendered was unsatisfactory. The defence took issue with comments in the trial court's judgment which they viewed as drawing of conclusions not supported by evidence. The Appellant emphasized the importance of corroboration through medical evidence in a case of this nature.
4. Regarding grounds 2, 4 and 5 Mr. Gichuki highlighted failure by the doctor to physically examine the victim before preparing the medical report. And he challenged the contents of the medical report in particular in relation to the presence of pus and inflammation of the genitals, which, in his view may have been occasioned by the victim's HIV condition. He submitted that evidence of breaching of the complainant's hymen does not necessarily prove sexual intercourse.
5. Regarding ground 3, a further challenge was raised in respect of the P3 form which, was described as hearsay evidence in light of the failure by the prosecution to call its maker. It was further submitted that the age of the minor was not proved, and that the trial magistrate shifted the burden of proof on the Appellant to prove his innocence.
6. The reasons given by the Director of Public Prosecutions through Mr. Mutinda for not supporting the appeal are mainly, that the medical evidence adduced was insufficient while the complainant and the mother in their testimonies absolved the Appellant from blame. He also lamented the poor investigations

carried out by the police.

7. This court is not bound by the decision of the Director of Public Prosecutions in conceding the appeal, but has a duty to consider the evidence tendered in the trial in order to arrive at its own decision. This is in fulfilment of its obligations as the first appellate court, as set out in **Pandya -Vs- Republic [1957] EA 336** is that:-

“On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court’s own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen.”

8. The particulars of the charge for which the Appellant was convicted stated that:

“On the night of 5th March 2014 at Ngondi Trading Centre in Naivasha Municipality within Nakuru County, he intentionally and unlawfully caused his penis to penetrate the vagina of R.N.N a girl aged 7 years who to the knowledge was his daughter.”

9. The police were alerted concerning this matter by teachers of the school where the complainant studied after noting her unusual gait. She was subsequently treated and PRC forms completed. However, the forms, which were apparently the basis of the findings in the P3 form were not produced in court. The P3 forms indicate that the examining doctor did not physically examine the complainant who was not available. The contents of the P3 form if substantiated, indicates that the victim had been involved in sexual activity, which her teachers had suspected.

10. The fact that the Appellant spent the material night in the same bed as the minor victim suggests opportunity for perpetrating the offence. However both the complainant and her mother denied that the offence in question occurred on the material night. Indeed, it seemed that the mother was uncooperative, as according to notes on the P3 form, the teachers took the initiative to obtain the P3 form because the mother refused to attend the doctor.

11. Thus, the trial magistrate cannot be blamed for suspecting that, as is often the case with incest, a cloak of secrecy was thrown around the matter by the concerned family to suppress the offence. The alleged fall by **PW1** on a base on the material night per **PW1** and **PW2** could not possibly have caused the injuries in her genitalia, in particular the breached hymen. The trial magistrate having agonized over the matter decided to declare **PW1** and **PW2** as hostile witnesses and to ignore their evidence. With respect, such a declaration should have been done through an application by the Director of Public Prosecutions at the trial.

12. The learned trial magistrate also failed to note that the victim was not physically examined by the doctor who completed the P3 form and that the corresponding PRC forms were never produced at the trial. In this case the PRC forms could have been used as primary medical evidence, if produced.

13. This is an unfortunate case. The victim’s teachers rose to the occasion in the protection of the minor and her welfare but were let down by the police who seemingly conducted routine investigations in the matter. The most unfortunate and heart breaking fact is the uncooperative stance by **PW2**, considering the age of the victim and her health condition.

14. In the clear absence of proper medical or other evidence in proof of the offence, however, the court ought not to have anchored a conviction on mere suspicion. For these reasons, I do find that the conviction in this case cannot stand and agree with the decision of the Director of Public Prosecutions to concede the appeal. The conviction is quashed and the Appellant is set at liberty unless otherwise lawfully held.

15. That notwithstanding, this court is obligated under Article 53 (2) of the Constitution to give paramountcy to the best interest of a child in every matter concerning the child. In the circumstances, I would direct that the Children Officer, Naivasha Sub-County, prepares a comprehensive report in respect of the complainant's current circumstances, and in particular, her health condition. Such report to be placed before the Deputy Registrar on 22nd May 2017 for necessary orders as regards the minor's welfare, pursuant to the Children Act.

Delivered and signed at Naivasha, this **28th** day of **April, 2017**.

In the presence of:-

Mr. Mutinda for the DPP

Mr. Gichuki for the Appellant :

Appellant – present

C/C – Quinter Ogutu

C. MEOLI

JUDGE