REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 45 OF 2014

J K N ……..…APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

J K N was charged and convicted of the offence of incest contrary to **Section 20 (1) of the Sexual Offences Act, 2006.** The particulars of the charge were that on 17/1/2014 about 7.00 p.m. at [particulars withheld] Sub Location, engaged in sexual activity with a child aged 10 years whom he knew to be his daughter. In the alternative, he had been charged with the offence of indecent act contrary to **Section 11 (1) of the Sexual Offences Act**, but no finding was made on that charge. The appellant was sentenced to serve life sentence in prison. He was aggrieved by both conviction and sentence based on the following grounds:

1. **That there was no medical evidence connecting the appellant with the offence;**

2. **That the court failed to consider his alibi defence;**

3. **The court failed to consider that this case was a frame up by his estranged wife.**

He therefore prays that the court do allow the appeal, quash the conviction and set aside the sentence. He filed submissions in support of the grounds.

The appeal was opposed by Mr. Mungai, Learned Counsel for the State who submitted that there was overwhelming evidence that implicated the appellant, who is a father of the complainant; that the complainant identified the appellant as the perpetrator of the offence; that the complainant's evidence was corroborated by other witnesses. On sentence, Counsel urged that the complainant was aged 10 years and the sentence is lawful.

As required of the first appellate court, I will examine all the evidence adduced in the trial court afresh and arrive at my own findings and conclusions, but always bearing in mind that this court did not have the opportunity to see the witnesses to determine their demeanor. For that proposition, the court will be guided by the decision of ***Okeno v Rep (1972) EA 32***.

After a *voire dire* examination, the court directed that the complainant, **PW1 F.K.** give unsworn evidence. She told the court that on a date she could not recall, she came back from school about 4.00 p.m. Later, her father removed her panty and did to her bad things while they were in his bed and he warned her not to tell anybody but she informed her aunt K. She was taken to Hospital.

L G, a sister-in-law to the appellant, recalled that on 17/1/2014 at 7.30 p.m., she was in her house when she heard a child screaming. She went out, found PW1 crying and the father was ordering her back into the house. She asked PW1 why she was crying but the father interjected and said that she had split food.

PW3 H K, a sister to the appellant said that on 18/1/2014 about 8.00 p.m., J K (PW4) informed her that her brother K (accused) was beating his children. She did not go to check immediately till Tuesday. She volunteered to take the appellant's children, called on the Sub Chief of the area and they went to Mujwa Police Station to seek assistance so that she could get the children – she was told to take them but the appellant insisted that the children could not leave. It is then she heard the complainant's mother allege that the appellant was defiling the children.

PW4 J K recalled that appellant's wife deserted the home in September and went with the children but after some time, the children went back to the appellant. In January 2014, she heard that the appellant was beating the children and she informed PW3 to go take the children. The Chief allowed PW3 to take the children and appellant started blaming the Chief that he was peddling rumours that he was defiling PW1. She was asked to take the child to the Dispensary but the police took over the matter from her.

PW5 Fabian Muriira an Assistant Chief, recalled that on 20/1/2014 the appellant's sister (PW3) reported to him that the appellant was defiling his children and he tasked her to get the mother of the complainant. On 22/1/2014, accompanied by appellant's sister L K and K, they went to appellant's house, found the three children. They sent the complainant to Hospital and arrested the appellant while the mother of the children took them in her custody; that PW1 was sent for further tests on the next day.

PW6 Sepharina Kaimathiri, a Clinical Officer at Kenyakine District Hospital examined the complainant, who was depressed. Her genitalia and vulva were inflamed, labias were edematous, hymen was absent and there was a foul smelling fluid from her vagina and there was presence of pus cells and spermatozoa. She formed the opinion that the complainant had taken part in penetrative sexual activity.

PW7 CPL Francis Njoroge of Mujwa Patrol Base recalled having received a report from the complainant's mother that the appellant had defiled their child and next day he accompanied the child to Kenyakine Hospital for examination where a P3 was filled.

In his sworn defence, the appellant recalled the day his wife and Assistant Chief went to his home where he lived with his children, arrested him and took the children away; that the case is fabricated. He denied committing the offence and that he was taking good care of his children while the wife was away.

The complainant gave unsworn testimony (PW1) after the trial court conducted a *voire dire* examination. She told the court that she was then 10 years old and in standard 2. After the examination, the court found as follows:

> ***"The minor is intelligent and does understand the meaning and nature of oath. To give unsworn testimony."***

The purpose of conducting a *voire dire* examination is to establish whether or not the child of tender age understands the meaning of the oath (importance of speaking the truth); and is intelligent enough to understand the seriousness of the proceedings. Having established these two ingredients, the court should have allowed the child to testify on oath. See ***Johnshon Muiruri v Rep (1983) KLR 447.***

The complainant could not recall the date her father allegedly did 'bad things to her' but PW2, a sister-in-law to the appellant heard her crying on 17/1/2014 about 7.30 p.m. and the appellant alleged that the complainant had spilt food. PW3 and 4 got the complainant that the appellant was defiling his children in January. According to PW6 the complainant was examined on22/1/2014 and found that there were injuries to the complainant's genitalia, hymen was absent, there were spermatozoa present confirming that the complainant had taken part in a sexual activity which she described as forceful penetrative sexual intercourse. I am satisfied that the offence was committed on 17th January, 2014. The only question is,

who committed the offence?

PW1 told the court that it is her father who 'did bad things to her' after removing her pants and she felt pain. It is common knowledge that children will refer to sexual acts as 'bad manners' or 'bad things' the actual word being taboo. The appellant was allowed to cross examine PW1 and she confirmed in cross examination that it is the appellant who did bad things to her. The appellant is complainant's father, the incident was at daytime and the issue of identity did not arise. PW1 said the act took place in the appellant's own bed. The trial court believed the complainant to have been truthful and this court has no reason to depart from that finding. I am satisfied that it is the appellant who defiled his own daughter. He admitted that the complainant is his own daughter.

Under **Section 124 of the Evidence Act**, though the testimony of the minor is unsworn, the court can rely on the minor's evidence provided the court record reasons for so doing without necessarily looking for corroborative evidence. There is also no requirement that there has to be medical evidence. PW1's evidence was consistent and clear. Besides, the appellant was the one living with the child at the time and had the opportunity to commit the offence. There was no known reason why PW1 would lie. The defence was a mere denial which the trial court properly rejected.

One of the grounds of appeal is that appellant's alibi defence was not considered. However, the appellant did not raise any alibi. He merely referred to the day of his arrest but not the date when the incident occurred on 17/1/2014. It is during cross-examination by the prosecutor that he said he was not home on 17/1/2014. That was an alibi defence.

After a careful evaluation of the evidence on record, the grounds of appeal, I am satisfied that the conviction was well founded. The grounds of appeal have no substance and I dismiss them. I confirm the conviction. On sentence, the appellant complained that the court failed to take into account his mitigation. However, under **Section 20 (1) of the Sexual Offences Act**, the sentence of life imprisonment is lawful and it is hereby upheld. In the end, the appeal is dismissed in its entirety.

DATED, SIGNED AND DELIVERED THIS 25TH DAY OF FEBBRUAY, 2016.

R.P.V. WENDOH

JUDGE

25/2/2015

PRESENT

Mr. Musyoka for State

In Person, Accused

Ibrahim/Peninah, Court Assistants