



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CRIMINAL APPEAL NO. 111 OF 2011

C M W.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against conviction and sentence in Nanyuki Senior Principal Magistrates' Court Criminal Case No. 329 of 2010 (Hon. E.N. Gichangi, RM) in a judgement delivered on 10th June, 2011)

JUDGMENT

The appellant was charged with the offence of incest contrary to **section 20(1)** of the **Sexual Offences Act, No 3 of 2006**. It was alleged in the particulars of the offence that on the 7th day of February, 2010 at [Particulars Withheld] village, Laikipia Central District within Rift Valley Province, the appellant unlawfully and intentionally committed an act which causes penetration with M N who was to his knowledge his daughter.

At the conclusion of his trial, the appellant was convicted as charged and sentenced to life imprisonment. Being dissatisfied with the conviction and sentence he has appealed to this court against the lower court's decision. His grounds of appeal are that he pleaded not guilty to the charge; that the trial magistrate erred in law and in fact in convicting him on uncorroborated evidence; and that the learned magistrate erred in law and in fact in failing to consider that there was no reasonable ground or evidence to suggest that it was the appellant who committed the offence.

The trial record shows that the prosecution called five witnesses who gave evidence on oath. The appellant also gave a sworn testimony when he was put on his defence though he did not call any witnesses.

As usual, it is necessary at this stage to evaluate the evidence of these witnesses afresh before this Court, exercising its appellate jurisdiction, can come to its own conclusion on whether or not the decision of the lower court can be sustained; in this regard, I am conscious that much as I am not bound by the factual findings of the magistrates' court, it is only that court that had the advantage of seeing and hearing the witnesses. **(See Okeno versus Republic (1972) EA 32 at page 36)**

The first of the prosecution witnesses was the complainant herself; she testified that she was 14 years old and in class seven at [Particulars Withheld] primary school. She identified the appellant as her father who, at the material time, was separated from her mother with whom she was living. On 7th February, 2010, at around 5.00 pm she went back home from Ngoro Theru centre where she had been selling mangoes for her mother. She realised that she had lost Kshs 100/= out of the proceeds of the day; her mother beat her

up and perhaps to avoid further punishment, she went looking for the money. Since she could not find it, she proceeded to the appellant's home in [Particulars Withheld] to borrow the money.

The complainant arrived at the appellant's house as darkness was setting in; the appellant told the complainant that he did not have the money she was looking for but because it was dark, he could not release her to go back home, to her mother. While in the house, which the complainant testified was three-roomed, the appellant undressed her and proceeded to defile her. He was still at it when, according to the complainant, someone called him from outside the house; the complainant was able to recognise the caller's voice as that of one Mwangi Gachure. The appellant is said to have put off the lamp and hid the complainant behind a cupboard before he went to open the door. Mwangi Gachure and some other persons entered the house and enquired whether the complainant was in the house. The complainant testified that despite their search they could not find her. As soon as these people left the appellant is alleged to have resumed having intercourse with the complainant till 5.00 am the following day when he released her.

Rather than return to her mother, the complainant went to her uncle's place but before going there she passed through the home of **M W (PW2)** who was her classmate; she asked W to inform their class teacher that she was unwell.

When she arrived at her uncle's place and informed him what the appellant had done, the uncle is said to have phoned the complainant's mother who then came and took her back home. She narrated to her mother what had transpired and they both went to report the matter to the police the following day and later went to hospital for treatment. The complainant added that the appellant had hit her mother with a stick at [Particulars Withheld] ; that she lived with her grandmother; and that she bled when the appellant had intercourse with her. She said in cross-examination that the appellant had threatened her with death if she dared say she was in his house. The complainant also testified that this was the second time the appellant had defiled her; when he defiled her previously she lodged her complaint to the same police station that she reported this second incident.

M W (PW2) testified that the complainant found her at her (M's) home on 8th February, 2010 at about 5 am preparing to go school; since they were classmates, the complainant asked her to seek permission on her behalf to be away from school on that day because, according to her, she was unwell; the permission was to be sought from their class teacher, identified as Mrs Thiba. This witness, however, did not inform the class teacher of the complainant's request because, according to her, everybody in her class was aware that the complainant had gone missing.

The complainant's mother, **M N M (PW3)** testified that indeed the complainant was her daughter and the appellant was her husband. She confirmed that she lived separately from her husband. It was her evidence that on 7th February, 2010 at around 6 pm she beat the complainant for losing Kshs 100/= which was part of the day's proceeds from the sale of mangoes. The complainant disappeared after being punished and this witness got four men to help her find the complainant; she named these men as Mwangi, Gachure, Ngatia and Githauri. They went straight to [Particulars Withheld] where the appellant lived because it is at his home that the complainant was found when she ran away from home on a previous occasion. On that occasion, the complainant is alleged to have been defiled by the appellant and that the case had even been reported at Matanya police station where they made they reported this second incident.

The witness said they arrived at the appellant's home at 10 pm; Mwangi, one of the men who accompanied her called out the appellant's name when they arrived; apparently everybody else entered the appellant's house to search for the complainant but this witness remained outside. They could not find the complainant in the appellant's house and therefore they went back home.

On the following day, one Githaura went and reported to school that the complainant had disappeared; in the course of the day, she got a report that the complainant had been seen going to Mwiyo and while the witness was trying to trace the complainant on that route she was told that the complainant had been seen at her uncle's place. She went there and true to the information she had been given, she found the complainant at her uncle's home. This uncle, whom the witness identified as K, told her that he had

brought the complainant to his home. On the following day, the complainant's mother reported the case to the chief who referred them to Matanya police post.

The witness testified that she examined the complainant's private parts and that she was in pains; however, she did not see any blood. The complainant was examined at Nguki District hospital a day after they went to the hospital.

The witness also testified that she could not enter the appellant's house, which according to her was two-roomed and not three-roomed as the complainant had testified. She admitted that the appellant and herself had a separate case pending at the Chief's office.

The police officer who received the complainant's complaint at Matanya police station was PC **Robert Omomba (PW4)**; apparently he is the same officer who investigated the complaint and arrested the appellant. In his evidence, he said that on the 10th February, 2010, the complainant was brought to the station by her mother (PW2). The latter told him how the complainant had escaped from home to her father's place. She also told him that the complainant had been defiled while at his father's house. He gave the mother a P3 form which was filled and returned to him. The officer arrested the appellant and also took him to the doctor for medical examination.

On whether a similar complaint had been raised against the appellant at same Matanya police post previously, the officer testified that he was not aware of such a case. The officer testified that it took some time for the complaint to be made at the police post because the complainant and her mother went and reported the matter to the chief first. As far as the complainant's uncle is concerned, the officer testified that he could not trace him and therefore was not a prosecution witness. It was also his evidence that he did not have any exhibit in the case because the complainant had cleaned herself and also washed her clothes.

A clinical officer who identified himself as **Kangogo (PW5)** from **Nanyuki District Hospital** produced the P3 forms in respect of the medical examination and findings with regard to the complainant and the appellant. He did not himself examine the two but his colleague whom he named as Stanley did. This witness produced the forms because, according to him, the maker thereof was sick; he testified, however, that he was familiar with his handwriting and signature and that he had worked with him for two years and hence he was competent to produce the forms.

As for the complainant, the clinical officer testified that she came to the hospital on 11th February, 2010 alleging that she had been defiled by the appellant since 2006 with the latest incident having taken place on 7th February, 2010. Upon examination she was found to be in a fair condition; the hymen was broken though not recently; she had gonorrhoea infection and discharge of pus cells and no spermatozoa were seen. The complainant, according to the officer had been defiled for a while.

The results of examination of the appellant were that he had no syphilis or HIV or any other disease he was examined for. The doctor opined that since it had taken sometime before he was examined he could possibly have been treated elsewhere.

The appellant, as earlier noted, gave a sworn testimony; he said that on 7th February, 2010 he was asleep in his house when at 9.30 pm some people called him; he opened the door to his house and found four people together with his wife. They asked for the complainant and searched for her in the appellant's house but they could not find her. They then left.

Being concerned about what could possibly have happened to his daughter, the appellant called his father to find out whether she was at his home. He searched for her the following day but could not find her; he later came to learn that the appellant was with her mother. On the 9th, apparently of February, 2010, the appellant had a different case at the chief's office with his wife; however, the case could not proceed because the complainant's mother alleged that the appellant had defiled the complainant.

On 15th February, 2010 he was arrested by the police and taken to hospital before he was even booked at the police station. He was later charged with the offence for which he was convicted. It was his evidence that the complainant's mother had a habit of alleging that he had defiled their daughter and in fact on 8th October, 2009 he had been arrested over a similar complaint.

The appellant also testified that though the complainant has said in her testimony that she had found the appellant at his home, she had, in her statement, said that she met the appellant on the road while she was looking for the money that is alleged to have been lost. It is then, according to her statement that they both went to his house. He produced the statements by all the prosecution witnesses as his exhibits. He also applied for the Occurrence Book of 8th February, 2010 to be produced; the Court issued the order for production of this book but there is nothing on record to indicate that it was produced or admitted in evidence.

Section 20 (1) of the Sexual Offences Act, No. 3 of 2006 under which the appellant was charged provides as follows:-

20. (1) 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.

The evidence of the complainant, her mother and that of the appellant is clear that the complainant was the appellant's daughter and therefore the relationship between the complainant and the appellant envisaged under **section 20(1)** is settled and for purposes of this appeal, it can be said that it is an issue that was proved beyond all reasonable doubt.

The main question which the trial court ought to have been concerned with and which this court will also try to resolve, is whether it was proved to the same standard that the appellant committed an indecent act or an act which causes penetration with his daughter and if so whether, for purposes of the proviso to **section 20(1)**, it was also proved, again to the required standard, that his daughter was below eighteen years old as to attract the life sentence meted out against him.

In determining the primary question, this Court will proceed on the premise that apart from the complainant, there was no other person who may have witnessed the commission of the alleged offence; the rest of the evidence, besides the complainant's testimony was, or was meant to be, corroborative evidence. It is necessary to interrogate the complainant's evidence alongside the evidence of the rest of the prosecution witnesses and that of the accused in order to find the solution to this question.

The complainant testified that when she could not find the money she was looking for, she proceeded to her father's home where she found him. In the statement she gave the police which the appellant produced in court as part of his evidence, she is recorded to have said that she met the father on the way and together they proceeded to the latter's house where she lodged for the night and where she was also defiled. That statement does not also show that the complainant visited the home of **M W (PW2)** on the morning of 8th February, 2010 contrary to what both the complainant and M W (PW2) told the court.

A further contradiction in this statement is the allegation that the appellant only threatened her with death if she ever revealed that he had defiled her when she was leaving his house on 8th February, 2010 yet it was her evidence in court that her father threatened her at the time he was hiding her behind the cupboard when the mother and a group of four men came looking for her on the night of 7th February, 2010.

The complainant also testified that she had bled when she was defiled but her own mother who testified that she examined her private parts said that she did not notice any blood.

It is also noted that when her mother and four other men came looking for her, the complainant was aware of at least one person of the four men who entered the house searching for her; she said that she could recognise his voice. If that was the case, is it not possible that she should either have sought help from him or escaped from her hideout when these people entered the house?

Still on the complainant's evidence, she said that the appellant hit her mother with a stick on the night she came at the appellant's home; he own mother testified that she remained outside the house when the four men she was accompanied with entered the appellant's house. She never complained of anybody having assaulted her. Again if the complainant was in the house, hidden, as she alleged, it is difficult to understand how she could have seen her father assault her mother.

These contradictions and inconsistencies in the complainant's evidence, in my view, bring into question, the credibility her evidence.

The other nagging question which I think the magistrates' court ought to have noted that it was not answered to its satisfaction was how four men could possibly fail to find a fourteen year old girl in a three or two-roomed house (the evidence of the complainant and her mother on the extent of the appellant's house was contradictory). Although the girl testified that she was hidden behind a cupboard none of the men who searched the house testified to shed some light on whether such cupboard existed and if it did, how possible it was for the complainant to hide behind it as to escape the attention of four men curious to know where she was. The investigations officer himself did not visit the appellant's house and had he done so, perhaps he would have recovered this piece of furniture and demonstrated in court how it could have possibly been used as the complainant's hideout.

The complainant testified that she went to her uncle's place on the morning of 8th February, 2016 and that her uncle then phoned her mother to tell her that she was at his home. The mother, on the other hand, testified that she set to look for her daughter on the material day and only came to learn from some other children that the complainant had gone to her uncle's place. Out of these contradictions in the evidence of the complainant and her mother, it is not clear when and how the complainant went to her uncle's place. The said uncle who probably would have provided some evidence on this question did not testify.

The other evidence that casts doubt on the prosecution's case is the medical evidence. While the complainant is alleged to have been defiled on or about the 7th and 8th February, 2010, it was not until the 11th February, 2010 that she was examined. According to the P3 form in respect of the complainant's examination, if the complainant sustained any injuries on her genitals, those injuries were approximately four years old; the rapture of her hymen was just as old and in the doctor's opinion, the complainant was a person who had been involved in sexual activity long before the alleged defilement.

More critically, the complainant was diagnosed with gonorrhoea; her father, the appellant, who was examined almost at the same time, was found to be free from any sexually transmitted diseases. The doctor opined that the appellant could have probably been treated of any such diseases before he was examined; however, if there was no evidence at all that the appellant had a history of sexually transmitted diseases, the clinical officer was in my view stretching his opinion too far to suggest that the appellant could have been treated of any of this kind of diseases.

It is not so clear from the appellant's P3 form or the evidence of the clinical officer when the appellant was examined; however, the appellant himself testified that he was arrested and immediately taken to hospital. If he was arrested on 15th February, 2010 as the appellant testified, it means he was examined a week after the alleged offence. How is it possible then, that if the appellant was suffering from any sexually transmitted disease, which presumably, he infected the complainant with, he could have been treated of the disease within a period of less than seven days to the extent no trace of such disease or its treatment could be found?

If the medical evidence established that the complainant's sexual activity began four years before the alleged defilement, and any injuries associated with such activity were equally old and that the sexually transmitted disease the complainant was suffering from could not be associated with the appellant, then I cannot see how it can be said with any certainty that this piece of evidence provided the necessary link between the appellant and the alleged defilement of the complainant. The complainant could have been defiled and indeed it was proved that she had been engaged in sexual activity for several years but it was not proved, at least to the required standard, that the appellant had anything to do with the complainant's sexual engagements; if anything the medical evidence produced by the prosecution exonerated him.

It is also important to note that although the complainant's mother testified that she had previously reported to the police previous incidences of the appellant defiling the complainant, the investigations officer from the station where these reports are said to have been made testified that he was not aware of any such report having been made against the appellant.

In the face of these contradictions, I must hold that the learned magistrate misdirected himself on facts to find that the prosecution evidence was credible and consistent. My own assessment and appreciation of the evidence that was proffered at the trial does not show this credibility or consistency. The prosecution did not discharge the burden of proof beyond all reasonable doubt that the appellant defiled his daughter and therefore committed the offence of incest.

There is also doubt that the age of the complainant was sufficiently proved; however, having found that there was no sufficient evidence to prove the offence of incest against the appellant, I need not interrogate this question any further; were it that the conviction was to be upheld, it would have been necessary to consider this question more extensively for the sole reason that it is central to the sentence meted out against a person convicted of the offence of incest.

In the ultimate I find that the appeal is merited and I am persuaded that it should be allowed; it is hereby allowed and the appellant is set at liberty unless he is lawfully held.

Signed, dated and delivered in open court this 18th day of March, 2016

Ngaah Jairus

JUDGE