REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

HCCRA NO. 40 OF 2014

(FORMERLY NAKURU CRIMINAL APPEAL NO. 100 OF 13)

(Being an appeal against conviction and sentence in Naivasha Chief Magistrate's Criminal Case No. 3016 of 2011 – E. Boke P.M.)

MKN…….APPELLANT

VERSUS

REPUBLIC……RESPONDENT

J U D G M E N T

1. The Appellant herein was charged with the offence of Incest by a male person Contrary to Section 207 (1) of the Sexual Offences Act. In that on 27th September, 2011 and 2nd October, 2011 Mai Mahiu he caused his penis to penetrate the vagina of G.W.K. who to his knowledge is his daughter aged 9 years. In the alternative he was charged on the same facts for the offence of Indecent Act with a child contrary to section 11 (1) of the Sexual Offences Act.
2. He denied the charges and following a trial was convicted and sentenced to serve life imprisonment. He filed an appeal to this court citing four grounds of appeal as follows:

1.The conviction is not supported by firm evidence.

3. **The evidence consisted of unfounded allegations made by the victim through the influence of her mother with whom the Appellant had differences.**

3. The trial magistrate did not evaluate the evidence tendered carefully with a view to determining its credibility.

4. The trial court incorrectly dismissed the Appellant's defence.

3. At the hearing of the appeal, the Appellant tendered his home-made written submissions opting to rely thereon entirely. The State through the DPP opposed the appeal. The prosecution case at the trial was as follows. The victim (G. W. K.) was aged 9 years in 2011. She lived at [Particular Withheld] area in the material period. The mother was working in Narok on weekdays hence the victim and her siblings were under the care of the father, the Appellant.
4. On two occasions prior to the 6th October, 2011, while the victim's mother was away, the Appellant sexually assaulted the minor on a sofa seat in the home. After the second assault the victim determined to run away to her sister's home, but fortunately, a good Samaritan **Phylis Muthoni (PW2)** met her stranded on the road. She reported that her father had beaten her on the

previous day and that she had not had a meal.

PW2 bought the victim a meal before escorting her to Mai Mahiu Police station. She was interviewed by **PC Susan Mutua (PW4)** and it emerged that she had been defiled twice by her father and escaped when a third attempt was made. She was treated and examined. Later the Appellant was arrested and charged.

5. The Appellant gave a sworn statement and called his wife, and mother to the victim, M.M.M. as DW2. The accused's defence is that he went to report the disappearance of the victim to police on 7/10/11 and was arrested for neglecting his children. He denied committing the offence.
6. In the case of **Okeno -vs- Republic 1972 E.A. 322,** the Court of Appeal set out the duty of the first Appellate court as follows:

> **"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya –Vs- R [1957] EA 336) 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 (Shantilal M. Ruwala – Vs- R [1957] EA 570. It is not the function of the first appellate court merely to scrutinize the evidence to see there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters –Vs- Sunday Post [1958] EA 424."**

7. Not having had the advantage of seeing and hearing witnesses testify, the Appellate Court will only interfere with findings of fact by the trial court based on credibility of witnesses where they are plainly wrong or that no reasonable tribunal could have made them (**See Republic -vs- Oyier (1983) KLR 353)**
8. The Appellant's challenge in this appeal primarily targets the evidence tendered by the prosecution. His submissions revolved around the key ingredients of the offence. However, there was no dispute in the trial or on this appeal as to the relationship between the Appellant and the victim; the latter was the Appellant's daughter. Regarding her age, the age assessment was done at Naivasha District Hospital and the report tendered as Exhibit 3. It clearly indicates that the victim was ten years old as at 7th October 2011. The victim testified in late November that she was 11 years old at the date of the trial.
9. The age assessment form being a medical document is the more reliable compared to the evidence of the minor. The trial magistrate did not explicitly deal with the question of the age of the victim as stated in the charge sheet but on my own assessment of the evidence I am satisfied that she was proved to have been around ten years of age at the time of the offence. No prejudice was occasioned by this minor discrepancy.
10. Regarding penetration, the testimony of the minor was that in the absence of the mother, on two occasions, the Appellant "**did bad manners**" to her while drunk. That another attempt was made on 6.10.11 which led her to escape from home.Towards the close of her evidence in chief, which had to be paused severally due to her distraught state, the minor victim stated:

> "**At the hospital I was examined at my vagina. I was injured in my vagina. It is father who injured me there. He inserted his organ which he uses to urinate inside my vagina. A P3 form was filled for me"(sic)**

11. During the fairly lengthy cross-examination the witness remained firm on details, including minor ones, regarding the two assaults and the third attempt. These included the fact that the assault occurred on a seat while the Appellant was drunk and that the Appellant deprived her of food.
12. She stated in answer during cross-examination:

> **"I am not framing you. You defiled me. You did it when you were drunk. I could tell from your eyes and also because you had a bottle of liquid resembling tea without**

milk. You could do it at the time you came home from work. The first time, it was around that time, same as the 2nd time but on the 3rd occasion I escaped and found a lady who bought me food. It (assault) was on a sofa set. The biggest sofa set. It is a wooden sofa set, the size of this table (about 2 meters long) with wooden arms and has loose cushion…….It is not that I slept with you on the seat. It is you who lay on me on the seat. You lay facing me that is with your stomach facing me and not the back (demonstrates)".

13. The witness freely admitted that one **Peter Kang'ethe** a former landlord of the family had also defiled her prior to this. The Appellant through questions attempted to cast the minor as a wayward child and emphasized the use of force, issues which in my opinion do not count in a case of this nature. It seemed however that the victim and the other children were not well cared for and were left to fend for themselves on occasions.
14. The fact that the complainant had been abused by another man previously did not exclude a further defilement. However, it means that the absence of a hymen alone could not be blamed on sexual activity with the Appellant, more so as no swabs were taken for DNA testing. However **Dr. Wamalwa Denis (PW3)** stated upon examining the Complainant said she named her father as the assailant, and after reviewing the case concluded that sexual penetration could not be ruled out.
15. While this may not be a conclusive finding of recent penetration the doctor further stated: "**Epithelial cells were also detected on urine test, an indication of trauma**". This piece of evidence clearly indicates that the said trauma was recent, and excludes the possibility that the same was caused through alleged sexual assault by the stated **Kang'ethe**, which according to PW1 had happened earlier in the plot where the family lived before.
16. During the evidence of the **PC Mutua (PW4)** who received the Complainant from **PW2**, **PW4** was shown the statement of the Complainant which referred to the defilement by **Kang'ethe.** The officer stated in cross-examination:

> **"What you are showing me is part of the statement of the Complainant, where she said that one Peter Kang'ethe also used to abuse her a year before. When she was in class one. If you found him in the cells, I did not see him. I do not even know Peter Kang'ethe".**

17. From the *voire dire* examination of PW1, she was in Class Two at the time of the alleged assault regarding the present case. This evidence tends to support the Complainant's evidence that the person who defiled her during the material period is her own father and not the alleged **Kang'ethe.** The evidence by the good Samaritan **PW2** clearly shows that the child was distraught when she found her, hungry and alone by the road side. The child had decided to run away from home. Her explanation to **PW2** being that she had been assaulted by the father, and later opening up told **PW4** on the sexual abuse. That she did not rush to complain about the sexual assault to PW2 is not evidence of lack of credibility for a child, given her circumstances.
18. **PW2** said that the complainant appeared terrified, and "**was trembling in fear**". The question is why a child of that age would suddenly decide to run away from home. The two parents of the complainant the Appellant and DW2 merely stated that she did not come home on the night of 6/10/10 and yet it was not until the next day that they supposedly decided to report to the police about her disappearance. There is no evidence that they searched for her in the night in the neighbourhood. Indeed from the defence evidence, it is hard to tell what happened in their home on 6/10/11 or what may have led to the victim leaving home.
19. From the sketchy defence evidence by DW2, it is likely as PW1 stated that she ran away from home on 6/10/11 for the reasons she gave. I do agree with the finding of the trial magistrate, that, as a mother the evidence of DW2 did not add anything of value to the case. The Magistrate questioned, correctly in my view, the lack of a plausible explanation for a child escaping from home and staying hungry. She found the explanation in the evidence of PW1 which she believed and described as **"convincing to an extent that the court was convinced that it was not a story she was cooking up regarding the threats, mistreatments and defilement"(sic)**
20. On her demeanour the court observed:

"The victim gave a long evidence especially during cross-examination and she was categorical that her father slept with her twice on the sofa set, threatened her with an axe and would even deprive her (of) food. She appeared like a child who had been suffering in silence without anyone to listen to her. It came out during cross-examination…….that someone else called Kang'ethe at some period was said to have defiled the victim but that does not matter, as long as it is proved that the accused person also did it even if he is not the one who broke her hymen since was a possibility that the victim had been earlier abused by someone else….." (sic).

21. I agree with this line of reasoning although in my view the court should have applied its mind to the explanation of the doctor regarding the presence of epithelial cells being indicative of trauma and therefore bringing the assault closer to the date of the examination. She seemed to have taken the medical evidence generally as corroboration of the evidence of the complainant.

Such scrutiny was necessary to exclude the suggestion that one **Kang'ethe**, not the Appellant was responsible for the recent attack on the complainant.

22. Be that as it may, the court was perfectly entitled, to rely on the evidence of PW1 in proof of the assault without seeking corroboration by virtue of the *proviso* to Section 124 of the Evidence Act. In her Judgment the trial magistrate gave reasons for accepting the evidence of the complainant as truthful, that cannot be faulted.
23. This court too cannot find any reason for the complainant at her age to make up such a grave accusation against her own father, and persist during thorough cross-examination. Had she been coached or made up her evidence, cracks would certainly have appeared in her testimony during the intensive session of cross examination. That did not happen even though the child did break down in tears during her testimony. Whether indeed the Appellant threatened the Complainant with the small axe tendered as evidence at the trial does not matter in this case.
24. Equally neither **PW2** nor **PW4** had any reason to prop up the complainant's story, if at all, by inventing events that did not happen. As it is their evidence was consistent with that of the Complainant on material particulars. On the basis of the oral evidence of **PW1** as supported by **PW2 & PW4** as well as the medical evidence the trial court was entitled to find with regard to the material dates that it was the Appellant who sexually assaulted the Complainant, and not **Peter Kang'ethe** who had assaulted her in an earlier incident. The parents however took no action.
25. On my own evaluation of the evidence, I am satisfied that the Appellant was properly convicted for the offence charged. The appeal has no merit and is accordingly dismissed.
26. On a small but related issue, the minor victim testified that she was accommodated in a safe house in the material period of trial. The court did not consider whether or not to make any order under Section 114 of the Children Act. The mother who testified in the case on behalf of the Appellant seemed indifferent to the welfare of the minor and was at the time living away from home on most occasions. The children seem to have been poorly cared for.
27. It is essential that trial courts when confronted with such situations endeavour to make relevant orders under Section 114 of the Children Act for the welfare of the minor victims. It is quite unfortunate that this appeal was concluded almost five years since the trial and it may be impossible to rectify the failure of the trial court in this regard.

Delivered and Signed at Naivasha this **13TH day of May 2016.**

For the Appellant. Present in person

For the DPP Mr. Koima

Court Clerk Mr. Barasa

C MEOLI

JUDGE