



## HIGH COURT OF KENYA AT NAIROBI

### CRIMINAL DIVISION

### CRIMINAL APPEAL NO.113 OF 2012

*(An Appeal arising out of the conviction and sentence of Mrs. Nyakundi - PM*

*delivered on 28<sup>th</sup> February 2012 in Makadara CM.C. CR. Case No.4545 of 2007)*

S M K.....APPELLANT

**VERSUS**

REPUBLIC.....RESPONDENT

### JUDGMENT

The Appellant, S M K was charged with **incest** contrary to **Section 20(1)** of the **Sexual Offences Act**. The particulars of the offence were that on diverse dates between February 2010 and February 2011 at [particulars withheld] Village within the County of Nairobi, the Appellant committed an indecent act by causing his penis to penetrate the vagina of N W (hereinafter referred to as the complainant), a girl under the age of 10 years, and who to his knowledge was his daughter. He was alternatively charged with **committing an indecent act with a child** contrary to **Section 11(1)** of the **Sexual Offences Act**. The particulars of the offence were that between the same period and at the same place, the Appellant intentionally and unlawfully committed an indecent act by touching the female genital organ of N W, a child aged 10 years. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was convicted on the main count of incest. He was sentenced to life imprisonment. The Appellant was aggrieved by his conviction and sentence. He filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted on the evidence that did not establish conclusively that there was penetration. He took issue with the fact that the trial court relied on evidence of a child to convict him without corroboration. He faulted the trial magistrate for failing to take into consideration that crucial witnesses were not called to prove or disprove the evidence that the complainant had adduced in support of her allegation that she had been sexually assaulted. He took issue with the fact that the trial court failed to take into account the fact that the medical evidence adduced in court was contradictory and did not support the allegation by the complainant that she had been sexually assaulted. The Appellant was irked that the trial court failed to take into consideration the fact that there existed a grudge between himself and his wife which motivated her to concoct the complaint against him. He was aggrieved that the trial court had failed to take into consideration his defence and the totality and the weight of the evidence adduced which in his view exonerated him from the crime. In the premises therefore, he urged the court to allow the appeal, quash the conviction and set aside the sentence that was imposed upon him.

During the hearing of the appeal, the Appellant presented to court written submission in support of his appeal. He submitted that the evidence adduced by the prosecution witnesses did not support the charge

brought against him. In particular, he stated that the evidence adduced was contradictory, inconsistent and was tainted with malice on the part of his wife and therefore could not form a basis for his conviction. He stated that the medical evidence adduced did not support the allegation by the complainant that there was penetration. In the premises therefore, the Appellant urged the court to allow the appeal. On her part, Ms. Akunja for the State opposed the appeal. She submitted that the prosecution had adduced evidence which supported the complainant's claim that she had been repeatedly sexually assaulted by the Appellant, who is her father. Learned State Counsel submitted that taking into consideration the entire circumstance of the case, it was clear that the Appellant sexually preyed on his daughter for a long period of time after securing her silence by threatening to strangle her if she revealed what was going on to another person. She submitted that there was no evidence to support the contention by the Appellant that he was framed by his wife. She urged the court to dismiss the Appellant's defence as an afterthought and thereafter dismiss the appeal.

Before giving reasons for its decision, this court will set out the facts of this case, albeit briefly. The Appellant at the material time was married to PW4 S W. They were blessed with three children, the complainant who was then aged 10 years, a boy called B aged 5 years and a younger child then aged 1?2 years. The family lived in a two-roomed house in Kinoo. The Appellant and his wife slept in the other room while the children slept in a double decker bed in the sitting room. The complainant testified that between February 2010 and February 2011, the Appellant sexually assaulted her. She narrated that the Appellant usually watched the television after her mother had gone to sleep. The Appellant would then go to her bed and remove her clothes and then had sex with her. The complainant testified that she could not tell her mother what the Appellant did to her because the Appellant threatened to strangle her if she disclosed the fact to anyone. The Appellant testified that she was repeatedly sexually assaulted for a period of about a year until she decided to inform her school teacher.

PW3 Loise Wanjiru Mukiru, the Headteacher of [particulars withheld] Primary School testified that on 10<sup>th</sup> February 2011 she was informed by the class teacher of the complainant, a Mrs. Muthama that the complainant had told her that she had been defiled by her father. She called the complainant to her office and requested her to write down what she had told the teacher. The complainant wrote that she had been repeatedly defiled by her father. PW3 sought advice from the District Education Office and was directed to the Children's Office, Limuru. At the Children's Office, she was referred to PW2 Esther Wairimu Mbugua, a volunteer Children's Officer at Kikuyu. PW2 went to the school and interviewed the complainant. She took the complainant to a private place and examined her vagina. She confirmed that her vagina appeared abnormal for a girl of her age. She was emitting a foul smell. PW3 testified that she had earlier summoned the complainant's parents to go to school because the pupils in her class had complained that she used to smell. The mother went to school and explained that the complainant sometimes urinated in bed and therefore she smelled of urine when she went to school. She promised to ensure that the complainant took bath in the morning before going to school.

PW2 testified that after establishing that indeed the complainant appeared to have been sexually assaulted, she took the complainant to Kikuyu Police Station where she booked a report. She was given a letter and directed to go to Nairobi Women's Hospital. At the hospital, the complainant was examined by PW5 Dr. David Thuo. He noted that the complainant's genitalia was inflamed and red. The hymen was absent. Her urine had bacteria. She was put on treatment. He established that indeed the complainant had been sexually assaulted. He recommended that the complainant be counselled. The medical report prepared by PW5 was produced into evidence. After being seen by the doctor, PW2 reported back to the police. A decision was made to remove the custody of the complainant from her parents. The complainant's custody was handed to Destined Children's Centre at Kikuyu during the pendency of the case. The complainant was on 14<sup>th</sup> February 2011 referred for further medical examination at the Police Surgery. She was examined by PW7 Dr. Zephania Kamau. In his opinion, the vulva, vagina and perineum were normal. He testified that there were no injuries consistent with sexual assault because the complainant's hymen was intact.

PW4 the mother of the complainant testified that when she was informed by the teachers what the complainant had told them, she was shocked. She recalled that during the times the complainant said that the Appellant sexually assaulted her, indeed she used to go to bed early while the Appellant remained in

the sittingroom watching TV. The Appellant would later come to bed when she was already asleep. She confirmed that during the period that she cohabited with the Appellant, she noted that the Appellant had affairs with other people's wives. She explained that during the entire period, she never suspected that the Appellant was defiling their daughter. She however noted that due to the fact that the Appellant had threatened the child was the reason why the child did not tell her anything. She recalled that she was called to school on 10<sup>th</sup> February 2011, where after getting the information, she escorted the complainant to Nairobi Women Hospital where she was examined and confirmed that she had been indeed sexually assaulted.

The case was investigated by Sgt Emily Salamba. After conclusion of her investigations, she formed the opinion that indeed a case had been made for the Appellant to be charged with the offence for which he was convicted. When the Appellant was put on his defence, he denied committing the offence. He attributed his travails to the differences that he had with his wife. He denied the allegations made by the complainant that he had defiled her.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced before the trial court so as to arrive at its own independent determination whether or not to uphold the conviction of the Appellant. In doing so, this court is required to be mindful of the fact that it neither saw nor heard the witnesses as they testified and therefore cannot make any comment regarding their demeanor (See **Njoroge -vs- Republic (1987) KLR 19**). The issue for determination by this court is whether the prosecution established the charge of incest against the Appellant to the required standard of proof beyond any reasonable doubt.

In sexual offences, in order to establish the charge, the prosecution must establish three ingredients: whether there was penetration, in case where the victim is a child, the age of a child and finally the identity of the perpetrator. In the present appeal, the Appellant was charged with **incest**. Under **Section 20(1)** of the **Sexual Offences Act**, incest is committed when a male person commits an indecent act which causes penetration with a female person who to his knowledge is his daughter or close relative. In the present appeal, the complainant, who is the daughter of the Appellant, testified that for a period of one year prior to the Appellant's arrest, the Appellant severally sexually assaulted her. She explained that the Appellant used to remain behind in the sittingroom while watching TV after her mother had gone to sleep in another room. After watching TV, the Appellant would sexually assault her. He warned her not to report to anyone lest he strangles her. Because of this fear, the complainant did not tell anyone until when she decided to tell her class teacher what had been happening.

As regards the circumstances in which the sexual assault is said to have taken place, PW4 the complainant's mother, corroborated the complainant's testimony in so far as she stated that the Appellant used to go to bed long after she had already retired to bed. This court takes into consideration the fact that at the time the sexual assault is said to have taken place, the complainant was a child aged 10 years. Usually in sexual offences, it is difficult to get direct evidence corroborating the sexual act. The proviso to **Section 124** of the **Evidence Act** excludes corroboration in sexual offences where the court is satisfied that the victim is telling the truth. In the present appeal, it was clear to this court that the complainant was telling the truth when she said that her father, the Appellant sexually assaulted her on several occasions. The circumstances under which the sexual assault took place was such that there was no reason why the complainant made such allegations against her father if he did not do it. Indeed, the delay in reporting the sexual assault was attributed to the fact that the complainant was scared because she had been threatened with harm by the Appellant if she told anyone.

As regard whether there was evidence for penetration, this court notes that two pieces of medical evidence were produced in court. The first evidence was by PW5 Dr. Thuo who is a medical specialist working at the Nairobi Women's Hospital. He testified that upon examining the complainant, he formed the opinion that the complainant had indeed been sexually assaulted. On the other hand, when PW7 Dr. Kamau saw the complainant four days later, he noted that the complainant had not been sexually assaulted. To resolve the apparent contradiction in the evidence adduced by these two doctors, this court considered the details in which the medical examination was done. It was clear to this court that PW5 being a specialist doctor gave the correct finding because he also diagnosed the complainant's medical

condition that caused her urine to smell. He testified that upon examination, he noted that the complainant suffered from a bacterial infection. He treated the infection. This court is of the view that the testimony of PW5 is believable as compared to that PW7. In the premises therefore, this court holds that the prosecution established penetration to the required standard of proof beyond any reasonable doubt.

As regard the age of the complainant, the complainant testified that she was 10 years old at the time she gave her testimony to court. PW6, the investigating officer produced the ante-natal card of the complainant which indeed confirmed that she was born on 11<sup>th</sup> November 2000. She was therefore 10 years at the time of the sexual assault. The age of the complainant was therefore established to the required standard of the law.

In his defence, the Appellant testified that the charge was brought against him due to a grudge that existed between him and his wife. This court has carefully re-evaluated this evidence. From the facts of this case, it was clear that the complainant did not report the sexual assault to her mother because of the threats that she had received from the Appellant. She was scared. She reported the incident to the next person whom she trusted. This person happened to be her school teacher. The Appellant's wife was shocked when she was called to school and informed of what the complainant had told the teacher. If indeed it was true that the case was motivated by a grudge that existed between the Appellant and his wife, then, the natural course of events would have meant that it is the mother of the complainant that made the complaint of the sexual assault to the police. This court finds this defence to be without merit.

The upshot of the above reasons is that the appeal lodged by the Appellant lacks merit and is hereby dismissed. The Appellant's conviction is upheld. The sentence imposed on him is legal. It is similarly upheld. It is so ordered.

**DATED AT NAIROBI THIS 22<sup>ND</sup> DAY OF JUNE 2016**

**L. KIMARU**

**JUDGE**