REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

CRIMINAL APPEAL NO. 69 OF 2015

(From original conviction and sentence in Criminal Case No. 88 of 2014

of the Principal Magistrate's Court at Mwingi – Kibet Sambu P.M)

K M.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant K M was charged in the magistrate's court at Mwingi with incest contrary to section 20(1) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on the 15th August 2014 in Migwani District within Kitui County being a male person committed an act that caused his penis to penetrate into the vagina of MM1 a child aged 13 years 24 days who was to his knowledge his niece.

He denied the charge. After a full trial, he was convicted of the offence and sentenced to serve life imprisonment.

Aggrieved by the decision of the trial court, the appellant has come to this court through counsel Mbaluka & Co Advocates, on appeal against both conviction and sentence. Counsel also filed written submissions and relied on several case authorities.

Mr. Munyoki who held brief for Mr. Mbaluka for the appellant also highlighted the written submissions in court.

Mr. Okemwa for the Director Public Prosecutions, opposed the appeal. Counsel stated that it was clear that the appellant and the complainant were an uncle and a niece. He submitted that the case authorities cited by the appellant's counsel were merely of persuasive authority and not binding on this court.

In brief the prosecution evidence is that on 15th of August 2014 the complainant MM1 also called ZM was at home sleeping with FK a brother, MM2 and SM. The parents were not in the house that night. In the course of the night, the appellant who was her Uncle knocked at the door and asked them to open. FK took a torch and flashed at the appellant, who then came into the house, removed his clothes and raped MM1while her brothers were hiding under the bed.

The next day, a report was made to her mother JM PW2, who reported the incident to the police. The complainant PWI was then taken to hospital on the 16th May 2014, examined and a P3 form filled. The

appellant was late arrested and charged in court.

In his defence, the appellant gave sworn testimony. He stated that on the day in question he was at his home. However on the 27th September 2014, he was woken up by the police and arrested for incest which he knew nothing about. He stated that his sister in law PW2 had a grudge against him and that must have been the reason for his arrest. He was cross examined.

This is a first appeal. As a first appellate court, I am required to re-evaluate all the evidence on record and come to my own conclusions and inferences. I have to bear in mind that I did not have the opportunity of seeing witnesses testify to determine their demeanor and give due allowance for that fact – see the case of ***Okeno -vs- Republic (1972) EA 32.***

I have evaluated the evidence on record. Indeed, the evidence on record is that the appellant and the complainant were an uncle and a niece. Such evidence was not disputed or challenged. It was also, in my view, established by evidence that the complainant PWI was defiled through a sexual act. The doctor produced the P3 form. He also explained that he examined and treated the complainant and also filled the P3 form. The entries in the P3 form show evidence of that there was recent sexual intercourse between the complainant and a male person.

The appellant gave a long sworn defence. He was cross examined at length. He stated that he was not at the scene on the date alleged. He alleged that there was an existing grudge between him and his sister in law PW2, the mother of the complainant.

An accused person does not have a burden of proving his defence of alibi. It still remains the prosecution burden to prove that an accused was at the scene of the incident when the alleged crime was committed.

It is of note that the incident occurred on 15th of August 2014 but the appellant was arrested on 27th September 2014. If indeed the appellant was the culprit, one may ask why it took more than a month to arrest him. Except for the arresting officer PW4 who said in cross examination that the appellant went into hiding, there is no evidence to explain why there was such a long delay of more than a month from the time the offence was alleged to have been committed to the time the appellant was arrested. Though the arresting officer said that the appellant had disappeared, PW2 stated that the appellant was called by her husband but was not ready to face him. The evidence of the arresting officer therefore on the disappearance of the appellant was hearsay evidence as it was not supported by PW2.

There was also another major weakness in the prosecution case. PWI the complainant said that her brother FK shone a torch at the appellant and identified him. The said FK was not called by the prosecution to testify and no explanation was given for such failure to call a critical witness by the prosecution. In addition the person who informed PW2 about the incident, one Kivinya, to whom the complainant first reported the incident was not called to testify by the prosecution. Again, no explanation was given for the failure of the prosecution to call this witness. This is the witness who would have confirmed the consistency of the evidence between PW1 the complainant and PW2 the mother of the complainant on identity of the culprit.

In the case of ***Bukenya -vs Uganda***, ***(1972) EA 547*** the Court of Appeal for East Africa held that failure of the prosecution to call crucial witnesses to testify in court, could lead the court to an inference that those witnesses would contradict the other evidence of the prosecution. In the circumstance of the present case, I am of the view that such inference is well grounded and applies to the circumstances herein.

Indeed the complainant was sexually assaulted. She was a young girl. She was related to the appellant as his uncle. It is however possible, with family relations that there could exist a grudge between the appellant and his Sister Inlaw JM PW2. JM said that the appellant had the habit of going to their house at about midnight.

In my view, it is quite probable that the appellant was mentioned as the culprit because of his bad conduct of going to the house of PW2 at night. It is possible that it was assumed that he was the one who visited

and sexually assaulted the complainant that night. In my view the identification of the appellant was far from positive. The appellant is entitled to the benefit of that doubt, and I give him that benefit.

Consequently I find merits in the appeal. The conviction is not safe. The sentence has to be set aside. I allow the appeal, quash the conviction and set aside the sentence. I order that the appellant be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Garissa this 27th September 2016.

GEORGE DULU

JUDGE