



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**CRIMINAL APPEAL NO. 24 OF 2015**

**D K N ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**(From Original Conviction and Sentence in Sexual Offences Case No. 1 of**

**2013 of the Chief Magistrate's Court at Malindi – C.M. Nzibe, RM)**

**JUDGEMENT**

The appellant was charged with offence of incest contrary to section 20(1) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that the appellant between the period of 1<sup>st</sup> November, 2012 and 22<sup>nd</sup> February, 2013 at [particulars withheld] of Watamu Location within Kilifi County being a male person intentionally and unlawfully caused his penis to penetrate the vagina of H.J.N. a child aged 5 years who was to his knowledge his step-sister.

The trial court convicted the appellant and sentenced him to life imprisonment. The grounds of appeal are that the evidence of PW2 had no weight to warrant the conviction, that the prosecution case was made up and full of contradictions, that the investigations were shoddy and that the appellant's defence that was reliable was not considered.

The appellant relied on his written submissions. He contends that the alledged complainant was a minor of five years old. If she was defiled she ought to have cried during the first instance. She testified that she did not scream when the appellant was hurting her. It was not possible for her to be defiled without crying. The complainant alledged that she was bleeding after the defilement but her mother testified that she saw something like mucus (semen) but did not see the blood. That raises doubt on the prosecution evidence. The defilement occurred at night according to the complainant's mother. The complainant who was a minor could not have noticed that it was the appellant who was the defiler. The identification was not positive and it was just a mere assumption. No neighbor was called as a witness. The case was fabricated as the complainant's mother is a step mother to the appellant. There was allegations that the appellant admitted committing the offence at a family meeting but those who attended the meeting were not called to testify. The alledged admission by the appellant cannot be held to be a confession under section 25 of the Evidence Act.

It is further submitted that the prosecution evidence was full of contradictions. PW1 testified that the appellant has his own house. While at the same time testified that the appellant lives in the same house

with her but in a separate room. The medical officer testified that the victim told her that she had been defiled by her step father. That shows that it was a made up case.

Mr. Fedha, prosecution counsel opposed the appeal. Counsel submitted that the victim of the offence was a minor and the appellant was a step brother. The complainant's mother narrated the chain of events prior to the defilement. PW1 examined her child and noticed a mucus discharge. She saw the appellant running from the scene of crime. PW2 informed the court that it was the appellant who defiled her. The medical evidence confirmed that PW2 was defiled. The age of PW2 was assessed and found to be seven years. The appellant confirmed in his defence that he is a step brother to the complainant.

It is the duty of this court to evaluate the evidence adduced before the trial court and make its own conclusions. PW1 P Z S is the mother of PW2 (complainant) and a step mother to the appellant. She testified that the complainant was her daughter aged five years old and a nursery pupil. Sometimes in November, 2012 at about 10.00 pm she was coming from taking a bath when she noticed that the light she had left in the children's room was now in the living room. She was coming from behind the house. She opened the door and met the appellant who was leaving the house. She took the lamp and entered her children's bed room. She found PW2 naked. The other children were dressed. She had left PW2 sleeping with her clothes and lying on her stomach. She was now lying on her back. On checking her, she saw in her private parts some mucus looking discharge like semen. She informed her husband who went and checked the child. Her husband informed her that he would report the matter to the police. The following day she informed her sister in law B (PW5). B informed her that the appellant had repeated this act before. She confronted the appellant who denied committing the offence. On another day at about 11.00 pm she went out of the house for a call of nature and on coming back she found the appellant opening the door to her children's bed room. She informed her husband and the appellant ran away. The matter was reported to the police and the appellant was charged. She could not understand why the child did not cry when she was defiled. The matter was reported to the police in February, 2013.

PW2 was the complainant. She gave unsworn evidence and informed the court that she knew the appellant. She further testified that the appellant hurt her private part between her legs. He used to do bad manners to her at night. The appellant used his fingers and his stick to do the bad manners. She was bleeding when the appellant did the bad manners. She was later taken to hospital. She did not scream when the appellant was hurting her. Her other siblings were asleep when the appellant was doing the bad manners.

PW3 ROSELINE NABALA works with a non-governmental organization in Watamu which deals with child protection. She co-ordinates child abuse and exploitation matters. On 25<sup>th</sup> February, 2013 at about 2.00 pm she heard about the case. She was called by PW1 who informed her that her child had been defiled. She went to PW1's house at Dabaso. She saw the victim and was told that she had been defiled by her step brother. PW2 informed her that her husband had advised her not to take the child to hospital as it would become a police case. She escorted PW1 and PW2 to Watamu police station where the matter was reported. PW2 was referred to Gede dispensary where she was treated. Later on a P3 form was filled. She checked on PW2's private parts and observed that she was defiled. PW2 told her in Giriama that the appellant removed her panty and inserted his stick into her private part. She told him that she was feeling pain but he held her tightly and raped her. PW2 informed her that the appellant had done it several times.

PW4 C K W is the appellant's paternal grandfather. In December, 2012 his nephew J N who is the appellant's father went to his home at 5.00 pm. He told him to go to his house and talk to the appellant. He talked to the appellant who denied defiling PW2. He warned the appellant not to commit such an offence because he could get into trouble. The appellant's father, auntie and PW1 were present when he was talking to the appellant.

PW5 B N lives in Watamu and is an auntie to the appellant. Sometimes in November, 2012 PW1 informed her that the appellant was habitually defiling PW2. One day PW5 found the appellant leaving the room where PW2 was sleeping. The appellant saw her seated outside the house. He entered the house and then left wearing his clothes. She talked to PW2 who informed her that the appellant told her

that if she informed her father the appellant would beat her. On 23<sup>rd</sup> February, 2013 PW1 told her that she wanted her help as the appellant had raped PW2 again. PW2 had discharge from her private parts which appeared to be semen. She advised PW2 to report the matter to the police. They took PW2 to Gede hospital and was later referred to Malindi general hospital. She talked to the appellant who responded that she was defaming him and denied having defiled the child. The appellant's mother is co-wife to PW1. PW1 was taking care of the appellant just like her son. The appellant's father is a brother to PW5. She was present when PW4 was talking to the appellant.

PW6 IBRAHIM ABDULLAHI is a clinical officer who was working at Malindi hospital. He filled the P3 form for PW2 on 1<sup>st</sup> March, 2013. He saw treatment notes from Gede Health Centre. The girl's age was assessed and found to be seven years old in 2014. She was five years old in 2012. On virginal examination the hymen was broken. PW1 suffered grievous psychological harm.

PW7 Corporal NANCY AUMA was stationed at Watamu police station. She investigated the case. On 26<sup>th</sup> February 2013 at about 9.00 am PW1 and PW2 went to her office accompanied by PW3 together with PW5. She was informed about the incident. She referred them to hospital. PW3 told her that PW2's husband J Ng had prevented PW1 from taking the child to hospital. She arrested J N and charged him with child neglect. She took PW2 to a children's home. PW2's age was assessed and found to be seven years in 2014. She was defiled in 2012 when she was five years old. It is her evidence that PW2 was fearful and withdrawn. She seemed to be traumatized. While they were traveling from Watamu to Malindi they had to stop the vehicle several times for PW2 to go for a short call. PW2 was able to express herself very well and informed her that the appellant who is her brother was the one who repeatedly defiled her. The appellant was later arrested and charged with offence. PW2 informed her that the appellant started by carrying her and inserting his fingers into her private parts and later began taking her to bed and defiling her.

In his unsworn defence the appellant testified that on 29<sup>th</sup> February, 2013 he was at home at about 10.00 am. Police officers went to the home and arrested him. He was taken to watamu police station and placed in the cells. The following day 1<sup>st</sup> March 2013 he was arraigned in court and charged with offence.

The issues for consideration by the court are whether PW2 was defiled and if so, whether it was the appellant who defiled her. According to PW6, he found PW2's hymen broken. He concluded that PW2 was defiled. It is the evidence of PW1 that at one time he left PW2 sleeping on her stomach. When she returned to her house, she found PW2 sleeping on her back naked. PW1 observed some semen on PW2's private parts. She also saw the appellant leaving the house.

None of the witnesses saw the appellant defiling PW2. I have noted the P3 form and the proceedings of the trial court. The P3 form indicate at page 1 part II that the complainant had been defiled by a step father. The first part filled by the police indicate that the defiler was a step brother. When PW6 was testifying, the term step-father was used. The appellant contends that this is uncorroborated evidence.

It is PW2's evidence that she was defiled several times. The medical evidence does corroborate PW2's allegations. PW1 and PW3 also checked on PW2's private parts and observed that she was defiled. Given the evidence on record, I do find that indeed PW2 was defiled.

The next issue is whether it is the appellant who defiled PW2. As indicated hereinabove, none of the witnesses saw the appellant defiling PW2. However, there is the evidence of PW2 herself and the medical evidence of PW6. According to PW2, it was the appellant who used to defile her. PW2 considered to PW3 that the appellant started by carrying her and inserting his fingers before he turned to defiling her. The appellant contends that the alledged incident occurred at night and PW2 could not know who had defiled her. It is the evidence of PW1 that in one occasion, she had left a lamp in her children's bedroom. She later saw the lamp in the living room. She saw the appellant leaving the house. She saw the appellant again opening he children's door at about 11.00 pm. PW5 testified that on one occasion, he saw the appellant entering pw1's house and left. PW2 was sleeping in the house. PW2 informed PW5

that the appellant used to take his stick and insert it in her body. The appellant threatened to beat her if she reported to her father.

It is the appellant's contention that if PW2 was defiled, how comes she did not scream yet she was five years old. PW2 testified that she did not scream when the appellant was hurting her. It is PW2's evidence that the appellant started by inserting his fingers. He would then do bad manners to her at night. It is clear from the evidence that the defilement started by insertion of fingers first. Later on the complainant would be defiled. It is not unusual that PW2 did not scream at the first instance. When PW1 saw PW2 lying on her back, it appears that was not the first time PW2 was being defiled. By that time PW2 was already getting used to the ordeal.

Given the evidence on record, I do find that it is the appellant who used to defile his step sister. It is the evidence of the investigating officer that PW2 was capable of expressing herself very well. PW2 narrated to PW3, PW5 and PW7 that it was the appellant, her step brother who used to defile her. The reference to a step father is a simple error as there is no evidence that PW2 had a step father. The entire evidence relates to defilement by a step brother. There is no evidence that PW2 had a grudge with the appellant or his mother. It is PW5's evidence that PW1 used to take care of the appellant as her own child. The case was not fabricated as alleged by the appellant.

I am satisfied that the prosecution evidence against the appellant is direct. There is no contradiction in the prosecution evidence. The fact that no neighbours were called to testify cannot be a good ground of appeal as there was no involvement of neighbours in the entire case. It is clear to me that the appellant started by using his fingers and later engaged in full blown defilement. PW2 knew the appellant very well and this cannot be a case of mistaken identity. The defilement took place on several occasions. PW2 was threatened not to reveal the ordeal. The relationship between PW2 and the appellant is well established by the evidence. The appellant is a step brother to PW2. The appellant did confirm that PW1 is his step mother.

I do find that the appeal lacks merit and is hereby disallowed. The prosecution proved its case beyond reasonable doubt. The appeal is dismissed.

**Dated and delivered in Malindi this 22<sup>nd</sup> day of September, 2016.**

**S.J. CHITEMBWE**

**JUDGE**