REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MARSABIT

CRIMINAL APPEAL NO. 12 OF 2016

M L .....APPELLANT

VERSUS

REPUBLIC ……. RESPONDENT

(From the original conviction and sentence in Criminal Case No. 506 of 2015 of the Principal Magistrate's Court at Marsabit by BOAZ M OMBEWA– Senior Resident Magistrate)

JUDGMENT

The appellant, **M L**, was convicted on the charge of incest contrary to section 20 (1) of the Sexual Offences Act **.** He was sentenced to serve ten years imprisonment. He now appeals against both conviction and sentence.

The particulars of the offence were that on 31st July 2015 at Marsabit County, intentionally and unlawfully caused his penis to penetrate the vagina of **M L** a female person who was to his knowledge his niece.

The appellant was in person. He raised five grounds that can be summarized as follows:

1. That the trial was illegal, null and void for he was detained at Laisamis police station for more than 24 hours,

2. That he was not supplied with a charge sheet in spite of several requests he made,

3.That the learned trial magistrate erred in law and in fact by failing to observe that he was not examined by a clinical officer; and

4.That the learned trial magistrate erred in law and in fact by failing to make a finding that the case was not proved against him.

The state opposed the appeal through Mr. Motende, the learned counsel.

The facts at the trial court were briefly as follows:

On the 31.7.2015 at about 1.00 A.M, **M L** was asleep in her grandmother's house. Due to the prevailing heat, she had slept naked. She woke up and found the appellant having sex with her. She screamed and some people rushed and removed the appellant from her. She said he is her uncle. The appellant escaped for people wanted to beat him up. He was later arrested and charged.

The appellant in his defence contended that he had been framed up.

This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated Case of **OKENO Vs. REPUBLIC [1972] EA 32** where the Court of Appeal set out the duties of a 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. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; 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] E.A 424."

The appellant has contended that he was detained at the police station for more than 24 hours. Article **49.** (1) (f) of the Constitution of Kenya provides as follows:

An arrested person has the right—

.....

.....

.....

(*f*) to be brought before a court as soon as reasonably possible,

but not later than—

(i) twenty-four hours after being arrested; or

(ii) if the twenty-four hours ends outside ordinary court

hours, or on a day that is not an ordinary court day, the

end of the next court day;

The appellant was arrested on 31st July 2015 which was on a Friday and was taken to court on 3rd August 2015, a Monday. This was the court's next sitting day after his arrest. He cannot therefore be heard to complain that he was remanded more than what the law requires. Even if he had been remanded more than what the law stipulates, his appeal would not be allowed on this ground. It is now settled law that where an accused alleges that his right has been breached by being held more than the law permits, the remedy lies in a civil court for damages and not in an acquittal. This was decided in the case of **Julius Kamau Mbugua v Republic [2010] eKLR.** The court of appeal was interpreting section 72 of the former Constitution which provided for the protection of the rights of an accused person as envisaged in article 49 of the present Constitution. The Court delivered itself as follows:

"The alleged unlawful detention does not exonerate the appellant from the serious crime he is alleged to have committed. The breach could logically give rise to a civil remedy – money compensation as stipulated in Section 72 (6). That is the appropriate remedy which the appellant should have sought in a different forum."

When the plea was taken on 4th August 2015, the court on its own motion ordered the appellant to be

supplied with witnesses' statements. On 21st August 2015 when the matter came up for hearing , the appellant did not complain that he had not been supplied with the charge sheet. He also never complained on the subsequent hearing dates. I therefore find this ground as an afterthought and dismiss it.

It is not mandatory to have an accused person in sexual offences to be medically examined. There are instances however, where the failure to examine such an accused may be fatal to the prosecution case. In the circumstances of this case, I find such a failure to have no effect to the case. Such evidence if availed would only have been in addition to the evidence on record. In the case of **JOHN OTIENO MUMBO v REPUBLIC [2011] eKLR** Nambuye J (as she then was) observed as follows:

Complaint was also raised about failure to medically examine the appellant in order to confirm his involvement in the commission of the offence. Indeed medical examination of an accused person is vital in proceedings where offences such as the one appellant faced in the lower court and is still facing an appeal are involved, but where such a procedural step has not been undertaken, it is not to be taken as being fatal to the entire prosecution's case, because if it had been undertaken then the resultant medical evidence would have been additional to any other evidence adduced and relied upon by the prosecution as either incriminating or exonerating the appellant in relation to the commission of the crime. In the absence of such evidence, the court has no alternative but to go by the evidence on the record.

I fully agree with the finding by the learned judge.

Was there sufficient evidence on which to found a conviction of the appellant on? The evidence of **M L (PW1)** the complainant is that she was roused from sleep by the act of sexual intercourse. After she had raised an alarm, her rescuers found the appellant in the act. She testified that the appellant was her uncle whom she had known since her childhood. This was confirmed by the evidence of **Joshua Lereo PW2** who testified that he was assisted by a young man called Lengedan to pull the appellant from the complainant. He testified that the appellant was naked on top of the complainant. He found the complainant screaming and was struggling at the same time.

The medical evidence was adduced by **Mark Diba PW4**, a clinical officer. He said he found bruises on the genitalia of the complainant. He also testified that she appeared confused when she went for examination on 31.7.2015.

When the prosecution witnesses testified, the appellant did not raise the issue of being framed up with them. He raised it for the first time in his defence.

The evidence against the appellant was watertight and the learned trial magistrate was right in dismissing his defence.

Section 20 (1) of the Sexual Offences Act provides as follows:

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

The appellant was therefore sentenced to the minimum sentence provided by the law. Interfering with the sentence would amount to an illegality**.**

The upshot of the foregoing analysis of evidence is that the appeal on conviction and sentence must fail. The same is therefore dismissed.

DATED at Marsabit this 21st day of September 2016

KIARIE WAWERU KIARIE

JUDGE