REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL NO.103 OF 2013

R N K.....APPELLANT

VERSUS

REPUBLIC.....RESPONENT

(Appeal from original conviction and sentence in Mukurweini Senior Principal Magistrates' Court

Criminal Case No. 536A of 2012 (Hon. W. Kagendo, Senior Principal Magistrate)

JUDGMENT

The appellant was charged with the offence of incest contrary to **section 20(1)** of the **Sexual Offences Act No. 3 of 2006.** It was stated in the particulars of the offence that on the 19th day of December, 2012 in Mukurweini district within the Nyeri County, the appellant touched with his penis the vagina of R W N who to his knowledge was his daughter.

He was convicted of the offence and sentenced to life imprisonment; he appealed against the conviction and sentence and raised the following as his grounds of appeal:

1. The learned magistrate erred both in law and in fact in convicting the appellant based on doubtful evidence of PW3 and PW5;

2. The learned magistrate erred both in law and in fact in convicting the appellant based on fabricated allegations by the appellant's wife; and,

3. The learned magistrate erred both in law and in fact in rejecting the appellant's defence which wasn't challenged by the prosecution.

The prosecution case was that the appellant was found in the act defiling his own daughter, the complainant herein. On 19th of December 2012 at about 6:30 PM, the complainant's mother, **J W N (PW4)** stepped out with her son **D (PW5)** to see off a friend; they did not leave anybody behind because the rest of the children were at a neighbor's home. However, when she returned she was shocked to find her husband, the appellant, defiling their daughter. He was equally shocked to see her and so he stopped and put on his trouser immediately.

She dressed the complainant and proceeded to a clinic nearby; however, she could not be attended to there and therefore she proceeded to Mukurweini hospital where the complainant was examined. She also

reported the matter to the police who retained the complainant's pant and issued her with a P3 form.

Apart from the complainant, the complainant's mother testified that she had five other children with the appellant. One of them **D K (PW5)** testified that indeed he accompanied his mother to see off a visitor on the material date at about 7 PM. He corroborated his mother's evidence that they left the complainant at a neighbour's place and also that when they went back they found the appellant and the complainant in bed.

The complainant herself **(PW3)** gave unsworn testimony that on the material evening her mother left her in the house when she escorted a visitor; her father came and found her in the house and it is then that he defiled her. Her mother caught him in the act when she returned.

The complainant, her brother **D (PW5)** and her mother testified that the latter had prior differences with the appellant; according to the complainant, the two used to fight. It was D's evidence that at one time their mother went back to her parent's home because of the differences with the appellant.

The complainant was examined at the hospital on 9th December, 2012; the **clinical officer (PW2)** who examined her did not find any physical injury on any part of her body but found sperm deposits on her external genitalia and on her pant.

According to the investigations officer, police constable **Eric Nyang'au (PW6)** the clinical officer also undertook a vaginal swab on the complainant. He forwarded the swab and the complainant's pant together with a sample of the appellant's blood to the government laboratory for analysis. The purpose of the analysis according to the government chemist, **Paul Waweru Kangethe** (**PW1),** was to determine the presence and source of semen or spermatozoa.

He established that there was semen in the vaginal swab but no similar tissue was found on the pant. An attempt to generate DNA profile did not yield any results since such a profile could only have been generated from spermatozoa; however, there were no traces of spermatozoa either on the complainant's pant or in the vaginal swab. Thus though traces of semen were traced in the swab, they could not be linked to the appellant through a DNA analysis.

The appellant himself denied having committed the offence; in his unsworn statement, he said that he had spent the previous two days at his brother's home and on the material date he came back to his house and slept at around 9:30 PM. He did not find his wife in the house but she later came with the policeman who arrested him and took him to Mukurweini police station. His brother's wife testified and confirmed that indeed the appellant had been at their home; he left at around 2 PM but later she saw him going to his home at about 9 PM on the material night. The appellant's son also testified on his behalf and said that he had picked his father on the way home at about 9:30 PM. According to his evidence, the appellant was too drunk to walk and so he supported him and took him to his house.

In order to appreciate whether this evidence was sufficient to support the charge, it is necessary to consider what the charge itself says; **section 20 (1) of the Sexual Offences Act** on which it's based reads as follows:

> ***20. (1) 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:***
>
> ***Provided that, if it is alleged in the information or charge and proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person.***

In order to establish an offence under this provision of the law, the prosecution must prove beyond reasonable doubt that the accused person committed either an indecent act or an act that causes

penetration of a female person who is either his daughter, granddaughter, sister, mother, niece, aunt or grandmother.

Looking at the judgment of the trial court, the learned magistrate proceeded on the assumption that the appellant had committed an act which causes penetration; I say so because the learned magistrate firmly held that the appellant had been caught having *"sex with his daughter with impunity"* and that this was only one of the several sexual encounters he had had with his daughter.

The available evidence suggests that the learned magistrate might have misdirected herself on evidence. The P3 form which is supposed to provide the medical proof of any sort of sexual assault on complainant did not reveal any injury on her genital organs. In fact, that part of the form where details of the injury, the approximate age of the injury if any, the probable type of weapon causing the injury and the classification of the degree of the injury was left blank. It is only in its last part where it was clearly stated that no physical injuries on genital organs of the complainant were noted.

It is quite improbable that an adult of the appellant's age would be engaged in sexual intercourse with a minor of eight years old and leave no mark of any sort of injury on her genital organs. At the very least, there was no conclusive medical evidence that there was partial or complete insertion of the appellant's genital organs into the genital organs of the complainant; in a layman's language, there was no evidence that the complainant was engaged in any sexual activity on the material night or had been so engaged at any other time.

I am minded, however, that the prosecution need not always prove penetration in order to establish an offence under this provision of the law. If it can prove that there was an indecent act by a male person with any category of persons prescribed in **section 20 (1)** of the **Act**, that would suffice.

What amounts to an indecent act has been defined in **section 2** of the Sexual Offences Act to mean:

> ***"any unlawful intentional act which causes-***
>
> ***(a) any contact between the genital organs of a person, his or her breasts and buttocks with that of another person;***
>
> ***(b) exposure or display of any pornographic material to any person against his or her will, but does not include an act which causes penetration."***

Thus, if it was proved that there was intentional contact between the genital organs of the appellant, in this case his penis, with the genital organs of the complainant, as she seemed to suggest in her evidence, then the offence would be complete and it would not be necessary for the prosecution to prove any sexual activity between the appellant and the complainant.

The question that then follows is whether it was proved beyond reasonable doubt that there was such intentional contact between the appellant's and the complainant's material organs. According to the complainant's mother, she caught the appellant in the act. The complainant herself testified that the appellant did "bad manners" to her. In order to appreciate the evidence of these two witnesses and whether it carried any weight, it is necessary to look at the evidence of the pre-existing circumstances.

The complainant's mother was categorical that soon before this incident happened she had left with her son D to see off a visitor; it was also her evidence that she did not leave anybody behind as all her children were at a neighbour's home or house. The complainant, however, contradicted this evidence and testified that her mother left her at home.

The contradiction between the evidence of the complainant and that of her mother is, in my view, material; it is material because if the complainant was at a neighbour's house or home as her mother suggested, it would mean that the complainant was not truthful. If the prosecution case was that she might have come to house in her mother's absence, it was necessary to shed light on the circumstances under

which she may have left the neighbour's house alone. No evidence was led to fill this gap.

Conversely, if, on the other hand, the complainant was left in the house as she testified, then the contradiction is also material because it shows that her mother was the doubtful witness and therefore her evidence was not creditworthy.

Either way, it is not for the court to speculate on who between them was telling the truth; the burden was on the prosecution to bring forth consistent and credible evidence and in the absence of these aspects of consistency and credibility, the court was bound to find that such evidence was doubtful and, at any rate, was not sufficient to support a particular fact.

I also note that that at one point during her testimony, the complainant told the court that she had been told what to say in her statement by her own mother. The implication of such a kind of testimony is that she was coached on what to say or tell the court. If this is true, the evidence of both the complainant and her mother lost any credibility.

The appellant's own son testified that he literally rescued his father from himself when he found him drunk on the road on the material night; according to his evidence his father was so drunk that he could not walk. He had to assist him to his house where he left him at around 9:30 PM. The appellant's sister-in-law also testified that he had seen the appellant at around 9 PM when he passed by her house on his way to his own house.

I have not found any reason why the evidence of the appellant's son and that of his sister-in-law was not accepted as truthful and credible; the learned magistrate did not offer any in her judgment and thus there is some force in the appellant's argument that the learned magistrate did give his defence the attention it deserved.

If the earliest time the appellant reached his house was 9:30 PM on the material night, then it is not possible that he could have committed some crime in his house at 7 PM. I note from the evidence of the complainant that at one time during her testimony she testified that her father left, apparently on the material day, but did not come back; it is only later in her testimony that she changed her story to say that he came back while her mother was away.

It must also be remembered that the appellant was charged against the backdrop of standing differences between him and his wife; they not only quarreled but they also used to fight and at some stage in their marriage the appellant's wife left to go back to her parents. This evidence came out from the prosecution evidence and in my humble, considering the contradiction between the complainant and her mother, it was reasonable to conclude that there was a possibility that the charges against the appellant were malice driven or ill-motivated.

Going back to the evidence of the government chemist, I appreciate that it established that elements of semen were traced in the vaginal swab. However, the doctor admitted that there were no spermatozoa from which a DNA analysis could establish whether the semen found on the complainant was that of the appellant. In short, the government chemist's evidence was not conclusive that the semen was that of the appellant; it follows that this evidence left it open to the possibility that the semen could probably have emanated from anybody else and not necessarily from the appellant. Such a possibility should have created a reasonable doubt in the mind of the trial court that the appellant's genital organs were in contact with those of the complainant.

The upshot of all this is that there was insufficient evidence to prove the fact that the appellant did an indecent act to his own daughter in circumstances that amounted to the offence of incest as prescribed under **section 20 (1)** of the **Sexual Offences Act.**

The second aspect of this offence is the sentence imposed upon conviction; the proviso to **section 20(1)** of the **Sexual Offences Act** is clear that it is only in cases where it is alleged in the information or charge and proved that the female person is under the age of eighteen years that that the accused person may be

imprisoned for life.

The charge or information in this case did not state the age of the complainant; all that was said in the particulars was:

> ***"R N K: - on the ninth day of December 2012 in Mukurweini district within the Nyeri County, intentionally touched the vagina of R W N with his penis, or to his knowledge was his daughter."***

Besides the omission to state the age in the charge or information, it was not proved in the trial against the appellant.

In the absence of the disclosure of the complainant's age in the charge or information and, more importantly, without proof of her age, the learned magistrate misdirected herself both in law and in fact in proceeding on the presumption that the complainant was under 18 years old. It follows that even if it was to be assumed that the appellant was guilty, the sentence meted out against him was unlawful.

For the reasons I have given I am of the humble view that the appellant's appeal is merited and I hereby allow it; his conviction is quashed and the sentence set aside. The appellant is set at liberty unless he is lawfully held.

Signed, dated and delivered in open court this 18th day of November, 2016

Ngaah Jairus

JUDGE