



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIVASHA
CRIMINAL APPEAL NO. 13 OF 2015

*(Being an appeal from original Conviction and Sentence in the Chief Magistrate's Court at Naivasha
Criminal Case No. 3042 of 2013, S. Muchungi - SRM)*

J M I.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

J U D G M E N T

1. The Appellant herein was arraigned before the Chief Magistrate's Court Naivasha for the offence of Incest by a male person contrary to Section 20 (1) of the Sexual Offences Act. The particulars stated that in the month of July 2013 at an unknown date and time in Maai-Mahiu Township within Nakuru County, he willfully and unlawfully did cause his penis to penetrate the vagina of **B. W.** who to his knowledge is his daughter, aged about 13 years.

2. In the alternative, he was charged with Indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act. In that in the month of July 2013 at unknown date and time in Maai Mahiu Township within Nakuru County he committed an indecent act by touching with his hand the vagina of **B.W.** a girl aged about 13 years.

3. The Appellant denied the charges but following a full trial, he was found guilty and convicted on the main charge. He was sentenced to life imprisonment.

4. Aggrieved by the conviction and sentence, the Appellant lodged this appeal on the following grounds:-

“1.THAT the learned erred in law and fact by relying on unstable evidence to convict and sentence me.

2.THAT the learned trial magistrate erred in law and fact by convicting me on the hinge of the evidence of the complainant whose evidence was actually not credible.

3.THAT the learned trial magistrate erred in law and facts by convicting and sentencing me on the basis of false and in corroborant evidence of PW2.

4.THAT the learned trail magistrate erred in law and facts by convicting me the Appellant/Accused without considering the grudge element in the entire case.

5.THAT the learned trial magistrate erred in law and facts by relying on medical evidence which did not pinpoint to me.

6.THAT the learned trial magistrate erred in law and facts by convicting me the accused without considering my unshakable defence.”(sic)

5. The Appellant also filed written submissions in support of his grounds. The submissions impugn the evidence of his wife and two daughters as false and motivated by a soured relationship with his wife. In this regard he points out his estrangement to his wife and the fact that he was not subjected to a medical examination. He argues that the medical evidence tendered in the trial was inconclusive.

6. The appeal was opposed by the Director of Public Prosecutions through Mr. Koima. Mr. Koima dismissed the Appellant’s assertion that the prosecution evidence was motivated by a grudge between the Appellant and the prosecution witnesses. He reiterated their evidence, pointing out that penetration was confirmed through medical evidence.

7. The duty of the first appellate court was set out succinctly in **Okeno -Vs- Republic [1973] EA 32**, 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- R [1957] EA 336) and to the Appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala –Vs- R [1957] EA 570. It is not the function of the first appellate court merely to scrutinize the evidence to see there was some evidence to support the lower court’s findings and conclusions; 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] EA 424.”

8. The prosecution case was as follows. The Appellant lived at Maai-Mahiu with his family, that included his wife **BWM** (PW4) and their two daughters, **B.W.** (PW1) and **T.N.** (PW2). In 2013 **PW1** was aged 13 while **PW2** was 11 years old. In July 2013, **PW4** left home and went to her parents in Nyahururu. The children were left with the Appellant, sharing one room, with two beds.

9. One Sunday morning in July, 2013 the Appellant devised a trick to keep **PW1** at home while **PW2** went to church. The Appellant then persuaded **PW1** to wear her mother’s clothes and to have sex with him purportedly to deflect attempts by **PW4** to bewitch him. He forced **PW1** on the bed and undressed her before himself undressing. He penetrated her. The same thing happened in the night. It seems that the girls’ mother eventually returned a date on prior to 24th December 2013 when, the two girls decided to escape from home and go to their maternal grandmother’s home in Nyahururu.

10. They did not succeed and ended up in Maai Mahiu. A good Samaritan found them stranded and took them in for the night. Her son **S M T** (PW6) was called to escort them to the police station where **PC Mwema** (PW5) received the defilement report. The complainant was examined at Naivasha District Hospital. Her hymen was broken and she had a foul smelling discharge indicative of infection. The Appellant was arrested and charged.

11. In his defence the Appellant gave an unsworn statement, to the effect that the complainant was his 4th child aged 15 years in 2015. That in the material period he was cohabiting with **PW4** who was the ex-wife to **PW6**. That **PW4** had three children out of wedlock. In a period when the couple was separated in 2008, he lived with **PW1** and another child - John - all under 3 years of age. That in the hiatus **PW4** conceived a fourth child with another man.

12. When cohabitation resumed, **PW4** had **PW2** with her and the family stayed together until 2013 and did not separate as the minors stated in evidence. That **PW4** coerced **PW1** to make false allegations while the chief had pressured the police; that **PW1** framed him because she had been forced to accompany **PW6** who held himself out as a chief.

13. The age of the complainant and her relationship with the Appellant in the material period was not in dispute. Equally, that the Appellant had a rocky marriage to **PW4** characterised by periods of estrangement was not disputed. The trial court correctly addressed itself to the two issues in contention, namely, penetration and the identity of the assailant.

14. In his submissions on this appeal, as in his evidence in the trial, the Appellant attempted to discredit the evidence of the witnesses principally by besmirching them. He gave unflattering evidence as to the moral turpitude of **PW4** and also attacked **PW6** as **PW4**'s paramour. These two, the police officer **PW5** and an unnamed chief were in his view behind the nefarious plot to bring a false charge against him. Thus the evidence by **PW1** and **2** was a fabrication.

15. On my own, I have evaluated the evidence by **PW1** and **PW2**. **PW1** testified that the Appellant prevented her from going to church one Sunday in July 2013 while the mother was away in Nyahururu. She said the Appellant claimed that if she lay with him the act would deflect witchcraft activities by the mother (**PW4**) against him. That the Appellant had sex with her in the day and later on in the night. She said that some "whitish things" oozed out of her genitalia after the said encounter.

16. The complainant was cross-examined at same length by the Appellant. The witness did not waver. The Appellant sought reasons why the complainant did not go to her aunts living in Maai Mahiu after the offence, or leave home on 24th December, 2013 without telling the parents. In addition to denying that she was coached, **PW1** had said in her evidence-in-chief that after the first assault she confided in **PW2** and suggested they leave the home. Her reason was that she feared a similar attack on **PW2**.

17. Although **PW1** was the older child, both **PW2** and her mother **PW4** described her as the quiet or retiring one. While testifying in the trial the proceedings were halted because **PW1** involuntarily passed urine while in the witness box. She however did not concede that she was procured by the police, chief or her mother to give a false account. **PW1**'s account was corroborated by **PW2** who on returning home after the first assault learned of the incident from **PW1**.

18. **PW2** also shared a bed with **PW1** and noted her absence later in the night when the second assault occurred. She said she saw **PW1** "**being raped on bed**" but out of fear did not speak. The witness, unlike **PW1** was not reticent in her testimony. She stated inter alia in her evidence -in-chief:-

"He (chief) took us to Maai Mahiu police station. We reported and then went back home and had dad arrested. Dad said it was a lie..... Mum came the next day and brought us tea. The next day we were brought to court. Dad told Beth (PW1) to say it is a lie. Beth is generally a quiet and polite girl and so she went to tell another officer it is a lie but I told her it is true. We did not tell mum (earlier) because we feared if we told her she would ask dad and dad could kill us."

19. During cross-examination **PW2** explained that the two girls did not go to their relatives at Maai Mahiu because the Appellant used to call the mother's relatives "witches", and that if anyone went there their legs would break or lose any future children. Regarding what she said she observed on the material night no question was put to **PW2** by the Appellant. The evidence of opportunity for the initial and second assault in **PW1** is corroborated by **PW2** and **PW4**: that the latter was away in Nyahururu at the time while **PW1** was in church on the occasion of the first assault.

20. Although it was admitted that the children escaped from home after their mother's return from Nyahururu, which was about five months after the assault, **PW2**'s explanation makes sense, coming from a child that age. Not only did **PW1** fear a similar attack on **PW2** but the latter feared there would be violence if their mother raised the matter of defilement with the Appellant. And **PW4** confirmed in her evidence the Appellant's propensity for violence narrating a previous attack on her by the Appellant (by pricking feet with needles), threats to her life and general instability of the relationship. She denied that their problems had also come between the Appellant and the children.

21. To **PW2** the Appellant did not raise any allegation of giving false evidence at the behest of the

mother. **PW4** was not home during the alleged attack but while the Appellant appeared to claim otherwise in his defence, he did not canvass the matter with **PW4** or the children. Equally, as the trial court accurately observed, he did not suggest to **PW6** while he testified that he was a lover or ex-husband of **PW4**. **PW6** was a stranger to **PW1** and **2** and only stepped in because his mother asked him to take the strange girls who had sought refuge for the night, to the police station.

22. **PW5** said that when **PW6** took the children to the station she questioned the children at the station and later in the presence of their parents at home. They reiterated that they had run away because the Appellant had defiled **PW1**. **PW4** also confirmed this narrative. **PW4** said that the children disappeared on the evening of 24/12/2013 after she and the Appellant arrived home from work.

23. The Appellant in his defence also confirmed the disappearance of the girls from home. It is his position that **PW1** and **2** gave false evidence at the urging of third parties including their mother **PW4**. That does not explain their disappearance prior to the Appellant's arrest. And the Appellant did not expressly state to **PW4** in cross-examination that she organized the disappearance and the alleged false testimony of the minors. The Appellant it seems thrived on manipulating his family where violence did not work.

24. The medical evidence tendered by **PW3**, itself independent, confirms penetration of the complainant. It is the evidence of **PW5** that the complainant could not go to hospital on the day after the report, being Christmas day. The complainant was therefore seen at Naivasha District Hospital on 27/12/2013. The **PRC** forms completed on this date (Exhibit 2) documents a foul-smelling vaginal discharge and torn hymen. The complainant's high vaginal swab indicated pus and yeast cells.

25. This was also indicated in the P3 form (Exhibit 1) completed by Dorcas Osoro **PW3** a clinical officer at Naivasha District Hospital. Upon examining **PW1**, **PW3** confirmed that they hymen was torn and there was evidence of a discharge. **PW3** admitted that the Appellant was not presented for examination. Her view is that due to the lapse of time it may not have been useful as no spermatozoa was detected in **PW1**'s specimens. Whether or not the Appellant was examined does not take away the unchallenged medical evidence that supports the penetration of **PW1**.

26. I agree with the trial court's finding that the evidence of **PW1** and **PW2** was credible and not a fabrication, there being no cause for such fabrication. Besides, persons who were otherwise strangers such as **PW6** and the police had no axe to grind with the Appellant. As for **PW4** her evidence indicates that until police came to her on 24/12/2013 she was unaware of the events of July 2013.

27. The Accused's defence was displaced by the prosecution evidence and was properly rejected by the trial court. His conspiracy theory was evidently a figment of his own imagination. I am satisfied, upon re-evaluating the evidence that the Appellant's conviction was based on solid evidence and was therefore proper. His appeal is therefore dismissed.

Delivered and signed at Naivasha, this 17th day of **November, 2016**.

In the presence of:-

For the DPP:Mr. Koima

C/C: Barasa

Appellant :Present

C. MEOLI

JUDGE