



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CRIMINAL APPEAL NO.313 OF 2010

EDWARD SHIVANJI MAKANGA..... APPELLANT

VERSUS

REPUBLIC OF KENYA RESPONDENT

(Appeal from the Conviction and Sentence by Hon. E. Tanui, Resident Magistrate at Nakuru in
C.M.CR.C.NO.66 of 2010 dated 15th October, 2010)

JUDGMENT

FACTS

The appellant was charged with the offence of incest contrary to **Section 20 (1)** of the **Sexual Offences Act, No.3 of 2006** and upon conviction, sentenced to life imprisonment. The appellant also faced an alternative charge of committing an indecent act with a child contrary to **Section 11(1)** of the **Sexual Offences Act, No.3 of 2006**.

The particulars of the offences were that on diverse dates between 1st January, 2002 to 16th May 2010 at Mwaura Farm Njoro in Nakuru district within the Rift Valley province, he unlawfully and intentionally committed an unlawful act by inserting his male genital organ (penis) into the genital organ (vagina) of **LWN** a child aged 14 years knowing her to be his granddaughter.

Aggrieved by both the conviction and sentence the appellant appealed on the grounds inter alia; that his conviction was based on single evidence that had no corroboration; that the trial magistrate failed to consider the evidence of the medical officer which exonerated him from the offence and that his weighty defence was disregarded.

Through his amended grounds of appeal, the appellant sought to argue his appeal on the grounds that the prosecution case was not proved beyond reasonable doubt, that crucial witnesses were not called to testify, that investigations carried out in the case were shoddy and did not expose the naked truth concerning the matter, that the prosecution evidence was contradictory and that his defence was not adequately considered.

APPELLANT'S SUBMISSIONS

When the matter came up for hearing the appellant informed the court that he was relying on his filed

written submissions. In those submissions the appellant contends that the trial magistrate relied on unproved allegations to convict him. He accuses the trial magistrate of having failed to carry out proper evaluation of the evidence on record before making her decision. In this regard, he submits that there was evidence that the complainant was not believed by the police when she went to report the alleged offence and that she was beaten by police. Wondering how the police would have beaten the complainant if she was speaking the truth and why the alleged beating was not investigated, the appellant maintained that the prosecution's case was not believable.

The appellant also took issue with the allegation that the complainant confided in her aunt, Rahab, who did not believe her, and in her grandmother who, also failed to believe her. Arguing that crucial evidence was withheld, the appellant termed the complainant's allegation that he began defiling her in 2002 as being exceptional, he submitted that the prosecution ought to have called the complainant's aunt and the police officers who are said to have refused to believe the complainant's allegations to explain why they did not believe the complainant. The appellant also took issue with the fact that the complainant took over eight (8) years to report the alleged incidences of defilement. In this regard, the appellant contended that the complainant all along had responsible people to whom she could have confided in, for example, her teachers, aunts and/or grandmother, yet she did not do so.

Terming the complainant a hostile witness, the appellant submitted that she was induced and/or out to mislead the court in her effort to abscond from school.

Concerning the complainant's age, the appellant submitted that the complainant lied to the court that she was 14 years in 2010, yet she was 17. He maintained that the evidence concerning the appellant's age was contradictory and urged the court to impeach it under **Section 163 (1) (c) of the Evidence Act, Chapter 80, Laws of Kenya.**

The appellant also faulted the trial magistrate for having relied on the testimony of **PW.1**, a clinical officer, whom he contends was not qualified to fill the P3 form produced in evidence. Citing **Section 48 of the Evidence Act**, the appellant submitted that reliance on the testimony of the clinical officer was unsafe.

With regard to his defence, the appellant states that the complainant started making the allegations against him in May 2010, after she began refusing to go to school. He also blames **PW.3** for his woes claiming that she once vowed she would ensure that he lost all he had because he was so proud. In that regard, he contends that had the trial magistrate observed **PW.3**, he would have noted that she had her own interests in the case.

The appellant prayed that his appeal be allowed and the conviction be quashed and sentence set aside and the appellant be set free.

RESPONDENT'S SUBMISSIONS

On her part, counsel for the State, Ms Rugut, opposed the appeal and submitted that the testimony of prosecution witness sufficed to prove the offence beyond reasonable doubt. In this regard, she submitted that according to the testimony of **PW.2**, the appellant used to defile her from 2002. **PW.2** is said to have identified the appellant as her grandfather and that the investigating officer (**PW.5**) produced a letter from the complainant which showed that the complainant was 14 years old as at 2010.

Concerning the allegation that the complainant took long to report the offence that began in 2002, counsel pointed out that **PW.2** reported the offence to her aunt, Rahab, who did not believe her. In view of the foregoing, counsel submitted that the appellant's defence was rightly rejected by the trial magistrate as it was mere denial.

Counsel prayed that the appeal be dismissed and the conviction and sentence be upheld.

The evidence that was presented before the lower court and which formed the basis of the appellant's

conviction was to the effect that the complainant, **LWN (P.W.2)** a girl aged 14 years was at the material time staying with the appellant (her grandfather) and her grandmother (LW). Her mother had died when she was young and left her in the custody of her grandparents.

Concerning the case herein, she informed the court that the appellant began defiling her from the time she was in standard one aged six (6) years old and that he used to do so when her grandmother was away. After committing this heinous act, the appellant would give her money and if she refused to take it, he would beat her up.

The trial magistrate heard that because of the appellant's alleged unlawful activities, the complainant would sometimes go and sleep at the neighbours and the appellant would fetch her in the following day and return her home.

After putting up with the appellant's conduct for a long period of time, she at long last made a report to her aunt, R, and to her grandmother, both of whom did not believe her. The complainant informed Mama Nyambura, a neighbour, about her woes. Mama Nyambura took her to the Administration Police post near their home whereat she was interviewed.

Because the police officers did not believe her, they thoroughly beat her demanding that she tells them the truth. After she chose to stand with her allegations, the administration officers took her to Njoro Police Station where she recorded her statement. Thereafter, she was taken to hospital for treatment and examination.

In her testimony, the complainant maintained that she had never had sex with anybody else and that the appellant is the one who broke her virginity.

Concerning her birth certificate, she informed the court that the documents were left with her grandmother by her late mother. The court also heard that the complainant ran away from home because the appellant had become too much (he had raped her severally) and concerning the assault by police officers, she explained that the appellant was the cause of the same.

Reiterating that the appellant had defiled her, the complainant accused the appellant of abusing her instead of raising her up properly as her late mother would have wished him to do.

On her part, **PW.3, Florence Wairimu**, recalled that on 10/6/2010 at about lunch hour, the complainant came to her house and upon inquiring from her why she was not in school, she informed her that her grandfather had raped her while at home. She informed her that she had made a report at Administration Police office to the Corporal in charge and that she had been referred to the Anti-Stock theft unit offices (**ASTU**) to get a letter of referral from them. She advised her to let them investigate the matter first instead of defaming her grandfather. However, on the following day, she took the complainant to the Administration Police office. There, the complainant narrated the ordeals she encountered since 2002 when the appellant allegedly stated defiling her.

Since the police did not believe her, they beat her up and demanded that she speaks the truth. The complainant stood with her allegations and demanded that she be escorted to hospital for examination. It was at that time when the police called the appellant who said he would come to the station with his daughters to resolve the issue. In the meantime **PW.3** went home to prepare lunch. When she returned to the station at 4p.m., she met the appellant and his wife who told him that the complainant had run away.

When the complainant was found on 11/5/2010, she accompanied her to Njoro Police Station and recorded her statement. Thereafter the complainant was referred to hospital.

PW.4, Amos Kanyari, informed the trial magistrate that he got information that a child had run away from home and was living with a neighbour, Mama Nyambura. Upon visiting Mama Nyambura's place he learnt that after being beaten by the police the complainant went to live in another village. With the help of friends he traced the complainant and brought her back to her village. On interviewing her, the

complainant informed him that she had left home because the appellant had been sexually abusing her. He informed the children's officer who referred them to Njoro Health Centre where the complainant was examined. Later on, he recorded his statement.

On being cross-examined by the appellant, **PW.4** admitted that he did not interview the complainants "**parents**" because they were the suspects.

PW.1, Mary Njogu, a clinical officer at Njoro Health Centre examined the complainant then aged 16 years. She did so on 17th May, 2010, after the complainant was taken to the health center. The complainant claimed to have been defiled by her grandfather (the appellant) severally. Upon examining her, she found that her hymen was missing. However, she did not see any injuries. Laboratory tests were also negative.

PW.1 informed the court that the appellant was also examined. Although laboratory tests in respect of the appellant were negative, he was found to have an infection in his urine for which he was treated. She filled a P3 form for the complainant which she produced as **PExb.1(a)**. She also produced the complainant's treatment card as **PExb.1(b)**. She concluded that the complainant had been defiled.

PW.5, Nelius Nyambura, recalled that on 16/5/2010 at 3p.m she was at the report office when a defilement report against the appellant was made. She informed the court that the complainant alleged that the appellant had been defiling her since 2001. Being the investigating officer, she took the complainant to hospital for examination. Later on she visited the crime scene and obtained a letter from the complainant's head teacher concerning the complainant's age. Later on, in the company of her fellow officers and the complainant they visited the appellant's place work, St. Thomas Aquinas Primary School, arrested the appellant and later charged him with the offences herein.

ISSUES FOR DETERMINATION

From the grounds of appeal herein and the submissions made by the respective parties in respect thereof, the issues for the court's determination are:-

1. Whether the prosecution failed to avail essential witnesses?
2. Whether the complainant's age was adequately proved?
3. Whether the prosecution's case against the appellant was proved beyond reasonable doubt?

ANALYSIS

As the first appellate court, it is my duty to consider and re-evaluate the evidence presented in the lower court in order to arrive at my own independent conclusion, bearing in mind that I neither heard nor saw the witnesses testify. See **Okeno V. Republic**, (1972) E.A 32.

Whether the prosecution failed to avail crucial witnesses:

1. The Appellant argued that the failure by the prosecution to call crucial witnesses was fatal to its case as it cast doubt to the credibility of the complainant's evidence. The complainant testified that she informed her grandmother, aunt and Police Officers that the appellant used to defile her but they did not believe her allegations. The appellant argued that these were material witnesses who should have been called to give their reasons for not believing the complaint. That the prosecution withheld this evidence because it was not favourable to their case.
2. I am alive to the holding of the former East Africa Court of Appeal in **Bukenya & Others V. Uganda**, [1972] E.A. 549, that the prosecution has a duty to call all the witnesses necessary to establish the truth even though their evidence may be inconsistent; that the court itself had the duty to call any person whose evidence appears essential to the just decision of the case.
3. However, **Section 153** of the **Evidence Act, Cap.80** provides that, in the absence of any requirement by provision of law, no particular number of witnesses shall be required for the proof of any fact. In addition, the proviso to **Section 124** of the **Evidence Act** allows the court to

- convict on the sole evidence of a victim of a sexual offence if it is satisfied that the victim is being truthful.
4. Accordingly, the prosecution need not call all witnesses who may have information on a fact. Failure to call a witness will only be fatal if the evidence presented by the prosecution is insufficient to sustain a conviction and contains gaps which could have been filled by a witness who was not available.
 5. On conducting a *voire dire* examination, the court found that the complainant was competent to give sworn testimony. She told the court that her grandparents took her in upon the death of her mother. The appellant, her grandfather, started defiling her as from the year 2002 when she was in class one. He would do this when her grandmother was away.
 6. She explained that the appellant used to take his penis out and put it in her vagina. After defiling her, he would give her money and beat her if she refused to accept it. She informed her grandmother and aunt who did not believe her. The appellant continued to defile her up until the year 2010 when she ran away to **P.W.3's** house.
 7. The trial court, which had the opportunity to observe the complainant's demeanor found that she was truthful and believed her. This being a finding of fact, it is one which this court will not interfere with unless just cause is shown. Having carefully analysed the complainant's testimony, I have found no reason to depart from the trial court's finding.
 8. The complainant's sole evidence was sufficient to sustain a conviction in terms of the proviso to **Section 124 of the Evidence Act**. However, it was corroborated by the entire prosecution evidence.
 9. **P.W.3** confirmed that the complainant informed her of the incident. When they went to report to the Administration Police Camp, the complainant was beaten by the police who accused her of defaming her grandfather. They only agreed to investigate the matter after the complainant refused to recant her allegation that she had been defiled by the appellant.
 10. In addition, the medical examination established that the complainant's hymen had been broken, which according to **P.W.1**, was evidence that she had been defiled.
 11. There was no gap in the prosecution case that the additional witnesses' testimony would have filled. The complainant's credibility was not in doubt and she maintained her stand even after being unfairly chastised. In this case therefore, failure to call the additional witnesses was not crucial and had no bearing to the prosecution case.
 12. The appellant also objected to **P.W.1**, a clinical officer, filled in and produced the P3 Form as evidence in court. To answer this assertion, I refer to the Court of Appeal in **Erick Onyango Ondeng' V. Republic**, [2004] eKLR, that:

“We do not think much turns on the appellant's complaint that P.W.5 was not competent to fill in a P3 form under Section 48 of the Evidence Act. P.W.5 is a clinical officer who testified on behalf of his colleague, Alfred Toronke who examined and treated P.W.2 at Matuu District Hospital. In our opinion a clinical officer is qualified to fill in a P3 form. This is an area of his competence. (See Raphael Kavoi Kiilu V. Republic, Criminal Appeal No.198/2008; Section 2 of the Clinical Officer Act (Training, Registration and Licensing) Act, Cap 260 (LOK)”

13. In my view the prosecution established a strong case that the appellant defiled the complainant while in contrast, the appellant's defence that the complainant concocted the allegations to avoid going to school was very unlikely and unbelievable.
14. I am satisfied that the prosecution proved its case beyond reasonable doubt

Whether the age of the complainant was proved

1. In offences under the **Sexual Offence Act**, the age of the complainant must be proved as it is the determinant of the sentence that will be meted out to the accused person.
2. **Section 210 of the Sexual Act**, provides for the offence of incest as follows:

“20.(1) Any male person who commits an indecent act or an act which cause 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, it is 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.”

3. There was no documentary evidence to prove the complainant's age as according to the complainant, these documents were not given to her by her mother before her death. Nonetheless, she testified on oath that she was born in the year 1996 and at the time of the hearing she was 14 years old. This was corroborated by **P.W.5** who referred to a letter written by the head teacher of the complainant's school regarding her situation. However, **P.W.1** testified that the complainant was 16 years old at the time of the hearing.
4. Notwithstanding this contradiction, it was proved that the complainant was the appellant's granddaughter and that she was under the age of 18 years at the time when she was defiled by the appellant. The appellant was aware at the material time that he was related to the complainant. Accordingly, I am satisfied the particulars under **Section 20** were established.

FINDINGS

For the reasons set out above this court makes the following findings;

- a. This court finds that failure to call the so called crucial witness was not fatal or adverse to the prosecution's case as there was sufficient evidence to sustain a conviction.
- b. This court finds that the complainant was under the age of eighteen (18) years at the time of the commission of the offence of incest.
- c. This court finds that the prosecution proved beyond reasonable doubt that the appellant was the grandfather of the complainant and that the offence of incest was also proved beyond reasonable doubt.

DETERMINATION

The appeal is found lacking in merit and it is hereby dismissed.

The conviction and sentence are both upheld.

Orders accordingly.

Dated, Signed and Delivered at Nakuru this 19th day of March, 2015.

A. MSHILA

JUDGE