



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 32 OF 2012

(An appeal from the Judgment of the Resident Magistrate, Embu in CMCR. Case No. 926 of 2011 dated 17/2/2012)

F K N..... APPELLANT

VERSUS

PROSECUTION.....RESPONDENT

J U D G M E N T

This is an appeal against the judgment of Embu Resident Magistrate delivered on 17/2/2012. The appellant was convicted of the offence of incest contrary to Section 20(1) of the Sexual Offences Act with an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the same Act. He was sentenced to serve life imprisonment.

In his petition of appeal and in the grounds of submissions the appellant raises the following grounds:-

- i. *That the magistrate erred in convicting him relying on evidence that was uncorroborated and inconsistent.*
- ii. *That the magistrate failed to consider that no DNA was conducted to connect the appellant with the offence.*
- iii. *That the magistrate erred in failing to consider that the wife and the brothers of the appellant conspired to frame him up so that they would dispose of his parcel of land.*
- iv. *That the magistrate erred in failing to consider that the medical evidence was defective since it could not prove the offence.*
- v. *That the age of the complainant was not proved.*
- vi. *That no medical examination was conducted on the appellant to connect him with the infection that was found in the complainant.*
- vii. *That important witnesses were not called to testify.*
- viii. *That no explanation was given for arresting the appellant 5 days after the incident.*
- ix. *That the incident was reported late despite the knowledge that the suspect was the complainant's biological father.*

In his written submissions the appellant argued that his case was not proved beyond any reasonable doubt due to the numerous gaps and contradictions. He submitted that the charge shows that the offence was committed on the 11/6/2011 and that it was reported on the 15/6/2011. PW1 and PW4 gave contradictory evidence concerning where the first report was made. PW1 said that it was at Gathangari police post while PW4 said that she received the matter at Manyatta police Station on 15/6/2012. He states that the grandmother and the teacher were not called to testify although they were important witnesses. The members of public who allegedly arrest the appellant did not testify. There was no evidence that the

complainant was first treated at Kianjokoma. The medical evidence was defective in that the appellant was not examined for the infection found in the complainant.

The respondent opposed the appeal. It was argued by Ms. Matere that the evidence of the complainant was consistent and was corroborated by PW1 and PW3. The doctor confirmed that penetration had taken place. There was no requirement that a DNA be conducted. The allegation that the case was framed up against the appellant is not true and was an afterthought.

The grandmother and the teacher of the complaint were not vital witnesses for they did not witness the incident. There was sufficient evidence for prove of age and to connect the appellant with the offence.

The duty of the 1st appellate court was explained in the case of **OKENO VS REPUBLIC [1972] EA 32** where it was held:-

“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 Vrs. 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 Vrs. 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 Vrs Sunday Post [1958] E.A 424).”

The evidence of PW1 the mother of the complainant was that she was married to the appellant and that they had 4 children. On the 12/6/2011 she went with the complainant to the river to wash clothes. The complainant aged 11 years informed her that she was feeling pain in the genitals. PW1 examined the child and found that her vagina was gaping open. Upon making inquiries as to what had happened, the complainant said that her father had defiled her the previous day.

PW1 took the complainant to Kianjokoma Dispensary where she was examined and referred to Embu Provincial General Hospital. She was examined and put on medication. The matter was later reported at Manyatta police station where a P3 form was issued.

PW2 gave an unsworn statement. She testified that on the 11/6/2011 at around 2.00 p.m. she was at home playing alone. The appellant who is her father came and held her by the hand. He took her to the house and put her on the bed. He asked her to undress but she refused. He then undressed her and lay on top of her after removing his clothes. He put his penis inside her genitals several times causing her a lot of pain. After he finished he warned her not to tell anyone about it or else he would beat her. He showed her a cane which he would use to cane her. She reported the matter to her grandmother and later to her mother. Her mother was away when she was defiled. When she returned home, she took her to hospital and to Manyatta police station where the incident was reported. At Embu General Hospital she was examined by a doctor.

PW3 the doctor who examined the complainant assessed her age as 11 years using her dental formula. She examined the complainant and found a broken hymen and lacerations on her labia minora measuring ½ cm. Her genitalia was inflamed and she had a foul smell. The witness produced a post rape care form which showed the injuries on her genitalia and presence of pus cells upon laboratory examination.

The matter was reported at Manyatta police station on 15/6/2011. PW4 testified that she was on duty when the complainant’s mother made the report. The complainant said that she had been defiled by her father on 11/6/2011. She recorded their statements, issued the P3 form and escorted them to Embu Provincial Hospital for treatment. She further testified that on 20/6/2011, accompanied by other police officers, she went to the home of the appellant and arrested hm. At the time of arrest, the appellant had several injuries sustained from an assault by a mob.

At Embu Provincial Hospital, PW5 assessed the age of the complainant as 11 years. She produced the report in evidence.

The appellant in his sworn statement testified that on 11/6/2011 he left home and went to work. He denied committing the offence. He told the court he was HIV positive and could not have defiled his daughter and added that the case was framed against him.

He called one witness DW2. She testified that she was the mother of the appellant and that she was not aware that the complainant had been defiled. She recalled that the appellant's wife informed her that she had taken the child for treatment. Later the same day the appellant was assaulted by the mob.

The appellant faces the charge of incest contrary to Section 20(1) of the Sexual Offences Act which provides:-

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 offense 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.

The alternative charge of committing an indecent act with a child is covered by Section 11(1) of the Act which provides:-

Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years.

Although the appellant alleged that there were inconsistencies in the evidence of the prosecution, he did not point out the particulars. The only thing he mentioned was that PW1 and PW4 contradicted themselves on where the first report was made. PW1 testified that she went to Gathangari police post and she was referred to Manyatta police station where she made the report. PW4 testified that the report of the incident was made at Manyatta police station by the complainant and her mother. No contradiction exists in the evidence of PW1 and PW4 since both of them made it clear that the report was made at Manyatta police station.

In regard to corroboration, PW2 explained how she was defiled by the appellant. Her mother had gone to pick tea away from home. The appellant threatened her not to tell anyone or else he would beat her up. The evidence of the complainant was corroborated by that of the doctor who confirmed that her hymen was broken and her labia minora inflamed and lacerated. She reached a conclusion that there was a penetration.

The appellant challenged the medical evidence as being insufficient in that it did not indicate the injury sustained, the probable type of weapon, the treatment given and the degree of injury. On perusal of the P3 form, the injuries sustained were given as broken hymen and lacerations on the labia minora. It is true that the other details mentioned by the appellant were not indicated. In a case of defilement, it is not a requirement that the age and degree of injury be indicated. As regards the weapon used, the evidence of the complainant and that of the doctor was sufficient.

Section 124 of the Evidence Act provides that the evidence of a minor in a defilement case does not require corroboration. The victim's evidence is sufficiently corroborated by the medical evidence. It has been held in several Court of Appeal cases that such evidence is sufficient to sustain a conviction. Bearing in mind the provisions of Section 124 of the Evidence Act, I reach the conclusion that the

evidence of the complainant was sufficiently corroborated.

The appellant said that he was not taken for medical examination to confirm whether he is the one who infected the complainant. It is trite law that such examination was not necessary. In the case of **DENNIS OSORO OBIRI VS REPUBLIC [2014] eKLR** the appellant had contended that there was no medical evidence linking him to the defilement. The court held that:-

“Such evidence was not necessary the moment the trial court found that there was sufficient medical evidence to prove that the complainant was defiled and that her evidence was trustworthy as to the identity of the person who defiled her”.

In regard to the failure to conduct a DNA test, it is trite law that such a test is not necessary provided there was sufficient medical and other evidences to support the charge. In the case of **FAPPYTON MUTUKU NGUI VS REPUBLIC [2014] eKLR**, the Court of Appeal held that:-

“In our view, such evidence was not necessary and in any event, the trial court found that there was sufficient medical evidence in support of PW2’s testimony which was trustworthy as to the person who had defiled her”.

The appellant alleged that he was framed by his wife in corroboration with his brothers so that they could sell his land. It is surprising to note that the appellant did not raise the issue of such conspiracy during cross examination and in his defence. The issue of his land or the involvement of his brothers did not feature during the trial. This is an afterthought which cannot prevail given the overwhelming evidence of the prosecution on how the incident occurred.

The appellant claimed that important witnesses were not called to testify. These are the grandmother and the teacher of the complainant. It is noted that none of these witnesses witnessed the incident. The prosecutions are at liberty to call the witnesses whom it finds relevant to their case. The appellant called his mother who is also the grandmother of the complainant as a defence witness.

The age of the complainant was assessed at Embu Provincial Hospital by Dr. Daniel Kimeu and the report produced in evidence. He testified in court as PW5 and produced the report. It is not in dispute that the complainant’s age was established.

The appellant said he was arrested five days after the incident and no explanation was given for the delay. PW4 confirmed that she arrested the appellant on 20/6/2011. The report was made at Manyatta police station on 15/6/2011. No explanation was given for the delay in arresting the appellant. However, the delay does not affect the case against the appellant.

The defence of the appellant was a mere denial and did not challenge the overwhelming evidence of the prosecution. He claimed that he was HIV positive and he could therefore not defile his own daughter. This was dislodged by the evidence of the prosecution which proved that the appellant defiled his daughter and threatened her not to disclose what had happened. DW2 could not account the whereabouts of the appellant on the material day. Neither did she shed any light on the events of the date of offence.

The evidence of the complainant and her mother was sufficient to establish the relationship between the appellant and the victim. It was proved that the appellant was the biological father of the complainant. The prosecution proved the offence of incest against the appellant beyond any reasonable doubt. It is my considered opinion that the conviction was safe.

The sentence provided under Section 20(1) of the Act is imprisonment not less than 10 years. The section has a proviso that enhances the sentence where the female person is under the age of 18 years to imprisonment for life. The complainant was aged 11 years which fall within the age bracket provided in the proviso. The sentence imposed by the trial magistrate of life imprisonment was within the law.

The conviction and the sentence are hereby upheld. The appeal is unmerited and it is dismissed.

DELIVERED, DATED AND SIGNED AT EMBU THIS 25TH DAY OF JUNE, 2015.

F. MUCHEMI

JUDGE

In the presence of:-

Ms. Matere for the respondent

The Appellant