



REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CRA NO.37 OF 2014

(Appeal arising from Hon. L. N. Wasige in Kilifi SRM Cr. No.1210 of 2010)

R N APPELLANT

VRS

REPUBLIC..... RESPONDENT

JUDGMENT

The appellant was charged with the offence of incest contrary to section 20 (1) of the Sexual Offences Act no.3 of 2006. The particulars of the offence were that the appellant on diverse dates in the month of July, 2011 in Kilifi County you caused your penis to penetrate the vagina of P M D a juvenile aged 7 years who who to your knowledge your niece.

Appellant was convicted and sentenced to life imprisonment. The grounds of appeal are that the trial court failed to properly consider the evidence on record, that the defence evidence did raise doubt on the prosecution, that the case was not proved beyond reasonable doubt and that other people adversely mentioned by the complainant were not summoned to testify as witnesses.

Parties agreed to determine the appeal by way of written submissions. Mr. Gekanana, counsel for the appellant maintains that the matter was heard by two different magistrates. The one who wrote the judgment complied with section 200 of the Criminal Procedure Code but did not have the advantage of seeing the prosecution witnesses. The magistrate did not warn herself on the dangers of convicting the appellant without having seen the witnesses. It is also submitted that the complainant allegedly confided to one R but she was not called to testify. It was also alleged that the complainant also confided to a househelp who did not testify. The complainant was allegedly taken to hospital for urinating blood but no treatment notes were produced. The trial magistrate simply concluded that since the complainant's hymen was broken, then it must have been broken through a sexual act yet the hymen can be broken through trauma or strenuous exercise. The exact date of the alleged offence is not indicated and that the P3 form was filled six months after the incident.

Ms Mathangani, prosecution counsel, opposed the appeal. Counsel submitted that the trial magistrate believed the complainant's evidence that was corroborated by the medical evidence. The appellant was married to the complainant's aunt and the case was proved beyond reasonable doubt.

I have read the record of the trial court, four witnesses testified for the prosecution. PW1, P M was the complainant. She testified that she was 8 years old in July 2011. Her mother went to Mombasa and together with her other siblings they were taken to stay at their aunt's place. While sleeping, she saw a shadow creeping into the room. Then the shadow put his "tuputupu" into my "tuputupu". She was not dreaming and she screamed. Her aunt went to the room and switched on the lights. There was nobody

and they were asked to continue sleeping. In the morning the appellant called her into his room and he defiled her after spitting saliva on his penis. He held her mouth with his hand and she was unable to scream. The appellant warned her not to tell anybody otherwise she will be killed. The following day, their mother picked them and they went home. She later confided to her friend R who later informed her mother PW2. Her mother inquired from her and she revealed what had happened to her. The matter was reported to Kilifi Police Station and she was taken to hospital. It is her evidence that her aunt is a sister to her mother.

PW2 F M is a teacher and the mother to PW1. She testified that on 28/11/2011, PW1's playmate informed her that PW1 had confided to her to the effect that she had been defiled by the appellant. It is her evidence that in July 2011 she took her children to her sister and she was attending an interview in Mombasa. When she collected her children the following morning, she found PW1 was passing blood in her urine. She immediately took her to hospital where she was treated as an outpatient. She did not know that PW1 had been defiled as PW1 is sickly. When she was informed about the incident, she went to notify her sister who is the appellant's wife. The matter was then reported to the police. The P3 form took some time to be filled as the doctors were on strike.

PW3 Dr. Rashida Zuberi, produced the P3 form for PW1. The medical examination showed that PW1's hymen was broken. The P3 form was filled on 5/1/2012 by her workmate, Dr. Maliki. PW4, corporal Cosmas Kanyi was based at the Kilifi Police Station. The incident was reported at the station on 28/11/2011 at about 4.00 p.m. He investigated the case and charged the appellant with the offence.

In his defence, the appellant denied committing the offence. He testified that he is a teacher in Kilifi and PW1 is his niece. He was not aware of the alleged defilement as PW1 lied to the court. PW1 and her siblings were not taken to his house. He further submitted that there was no hospital records that PW1 was taken to hospital as a result of the defilement. He had no disagreement with PW2. He only learnt of the alleged offence in December 2011 when he was arrested.

The main issue for the court to determine is whether the prosecution proved its case beyond reasonable doubt. The evidence shows that PW1's auntie is the appellant's wife. The appellant's wife is an elder sister to PW2. The appellant testified that PW1 is his niece. Section 20 (1) of the Sexual Offences Act includes the relations of a niece under the offence of incest.

The evidence of PW1 is that she initially thought that she had seen a shadow putting its "tuputupu" into her "tuputupu." She screamed and her aunt went to the room she was sleeping. The following morning, her aunt went to work and the appellant defiled her after spitting saliva on his "tuputupu". The trial magistrate concluded that PW1 positively identified the appellant as the person who defiled her. The trial court also dealt with the issue of lack of specific date of the offence and held that since the month was known, PW1 could not have been expected to know the exact date.

The record of the trial court shows that Mr. E. M. kagoni (RM) heard the four prosecution witnesses. Madam L. N. Wasige (SRM) took over the matter and recorded the defence evidence. Section 200 (3) was complied with and this is admitted by the appellant's counsel. There is no requirement under section 200 that a succeeding magistrate must warn himself/herself of the danger of convicting an accused on the evidence recorded before another magistrate. The record of the trial court was quite clear. There is no indication that PW1 was lying to the court. The appellant testified that he had no grudge with his sister in law (PW2). This clearly shows that PW1 had not been coached to implicate the appellant. The trial magistrate in her judgment noted that PW1 testified about one (1) year after the incident yet she clearly recalled what happened between her and the appellant. There was no prejudice on the appellant in the manner in which the trial was conducted.

It is also contended that R and a househelp to who PW1 confided were crucial witnesses but were not called. It is the evidence of PW1 that she talked to her friend R. R in turn informed PW2. It is R who talked to their househelp about what PW1 had told her. There was no need to call the house help. R also informed PW2 about what PW1 had told her. According to PW2, PW1 had seen the appellant passing by when she confided to R that he had defiled her. The fact that R was not called to testify does

not amount to concealment of evidence. The crucial evidence is whether PW1 was defiled. R's connection to the case is the link between PW1 and PW2. Already PW2 had noticed in July that her daughter was passing blood in her urine but did not suspect anything. The fact that no treatment notes were produced for the blood urine does not disprove PW2's evidence.

It is clear from the evidence that PW1 opened up in November 2011. PW2 testified that she came to know about the incident on 28/11/2011. It is the evidence of PW1 that the appellant had warned her of death. It took about four months for PW1 to reveal as to what happened to her. The matter was immediately reported to the police the same day of 28/11/2011 when PW2 came to know about it. PW2 explained that the doctors went on strike and that delayed the filling in of the P3 form. That explanation is acceptable. The post rape care form (PRC) was filled on 29/11/2011. This was a day after the incident had been reported to the police. From 28/11/2011 to 5/1/2012 is a difference of about one month and one week. There is no indication that this case was a frame up one against the appellant. Since PW1 took time to open up as she was also considering the death warning, I do find that the lapse of time is inconsequential in this matter. There is no time limit to prove sexual offences cases. That is why section 124 of the Evidence Act permits trial court to convict accused persons on the evidence of the complainant if the court is convinced that the complainant is telling the truth.

The appellant submitted that hymen can be lost due to trauma or strenuous exercise. In this case, PW1 testified that she was defiled. The incident occurred in July and the Doctors noted in November that her hymen was missing. I have indicated the date of November as the post rape care form was filled on 29/11/2011. The only explanation was that PW1 was penetrated. The absence of hymen is not the only evidence on record. There is the evidence of PW1 that she was defiled. That evidence is corroborated by the absence of the hymen. The only logical conclusion is that the hymen was lost during penetration.

It is the evidence of PW2 that PW1 was born on 8th February 2004. She produced her clinic card. By 2011, she was seven (7) years as per the charge sheet, there is no evidence that PW1 was above 18 years old. Given the evidence on record, it is clear to me that the appellant defiled PW1. The appellant is educated and knew very well that PW1 is his niece. The defence evidence does not raise any doubt on the prosecution case. The sentence of life imprisonment is provided for under section 20 of the Sexual Offences Act. I do find that the case was proved beyond reasonable doubt. The appeal lacks merit and is disallowed.

Dated, signed and delivered at Malindi this 22nd day of July, 2015.

SAID J. CHITEMBWE

JUDGE