REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 278 OF 2010

J W K ...…..... APPELLANT

VERSUS

REPUBLIC ….....….….... RESPONDENT

(B*eing an appeal from the original conviction and sentence in Kangundo Principal Magistrate's Court Criminal Case No. 4 of 2010 by*

Hon. C. Obulutsa – P.M. on 28/6/2010)

J U D G M E NT

1. The appellant was charged with the offence of incest contrary to Section 20(1) of the Sexual Offences Act, No. 3 of 2006. Particulars of the offence are that on the 10th May 2010 at 1.00 p.m. At Ngunguuni village, Kakuyoni Division in Kangundo District of the Eastern Province, willfully and unlawfully penetrated the vagina of **W W** *[Minor]* aged 9 years with his penis who was to his knowledge his daughter. In the alternative he was charged with the offence of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006. Particulars of the offence being that on the 10th May 2010 at 1.00 p.m. at Ngunguuni village, in Kangundo District of the Eastern Province, intentionally touched the vagina of **W W** *[minor]* a child aged 9 years with his penis.

2. The appellant was tried, convicted and sentenced to serve life imprisonment. Being aggrieved by the conviction and sentence he now appeals on grounds that: the learned trial magistrate erred in law and fact by convicting on evidence that was inconsistent; by relying on unsworn evidence of PW1 which was not credible; initial witnesses were not called; medical evidence adduced did not support the charges; and that the motive behind the appellant's wife's action was not considered, yet she had sold his maize.
3. The case as presented by the prosecution was that the complainant, **W W** *[minor]* a child aged 9 years is the appellant's biological child. On the 10th May 2010, she returned home from school with her siblings **M** and **F**. The appellant went home at about 1.00 p.m., sent her siblings somewhere and took her inside the house. He removed her pant, put her on the bed, undressed her and put his penis into her private part. He then sent her to fetch water. She returned to find him having left. She stated that it was not the first time her father, the appellant had sexual intercourse with her as he had done it previously. She notified her mother, PW2 **F M.** The matter was reported to the police.
4. PW3**, Dr. Muoki** examined the complainant and found no injury on the labia. The hymen was intact. There was whitish discharge that had a foul smell. A laboratory examination done showed many pus cells, yeast cell and spermatozoa. He formed an opinion that there was penetration but it was not beyond the hymen.

5. PW4, **No. 87889 Ruth Mugure** a police officer received the report from the complainant. She arrested the appellant, investigated the case and charged him.
6. When put on his defence, the appellant said on the material date he was at home. He sent the complainant with her two (2) siblings to fetch water. On their return, she claimed he had defiled her.
7. At the hearing the appellant relied on his written submissions.

   Mr. Mukofu learned state counsel for the state opposed the appeal arguing that identification was cogent. The act of penetration of the complainant was proved. The court noted the demeanor of the complainant. She had no reason to accuse her father falsely.

8. This being the first appeal, I am mandated to re-look at the evidence adduced before the trial court, re-evaluate and re-assess it to reach my own independent conclusion having in mind the fact that I neither saw nor heard witnesses who testified. **(See Okeno versus Republic (1972) EA 32; Njoroge versus Republic (1987) KLR 9).**
9. It is admitted by the appellant that the complainant herein is his daughter aged 9 years. Medical evidence adduced proves that the complainant was sexually assaulted. There was partial penetration, and she contracted some infection. Spermatozoa present was evidence of a male organ having penetrated her that spewed the same. It was contended by the appellant that there was no penetration since the hymen was not broken. Partial insertion of a genital organ of a person into another is penetration. There was partial penetration by virtue of spermatozoa having been found in the genital organ of the complainant. Therefore, there was penetration.
10. Did the learned trial magistrate, therefore, err in convicting on evidence that was inconsistent? In his submissions the appellant argued that the magistrate at the ruling stage ruled as follows:

"A prima facie case is established against the accused"

He stated further that it would have been expected of the prosecution to bring out sufficient evidence in support of its case which was not the case. A prima facie case denotes a case where evidence adduced is sufficient to prove a proposition of fact, unless that evidence is rebutted. The question of prima facie case was considered in the case of ***Ramanlal Trambaklal Bhatt versus (1957) E.A. 322*** where it was stated thus:

> ***"A prima facie case must mean one where a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence."***

The court has a duty of deciding whether evidence adduced so far is credible and weighty to prove the case conclusively. At the close of the prosecution case, the court is required to consider if the case against the accused is made out sufficiently to require him to make a defence, then it puts him on his defence. (***See Section 211 of the Criminal Procedure Code).*** By making the statement alluded to by the appellant, the court was satisfied of existence of sufficient evidence requiring the accused being put on his defence and so do I find.

11. It has been argued that evidence adduced by the complainant was of a single witness and having not understood the nature of oath the magistrate should not have based its conviction on such evidence. ***Section 19(1) of the Oaths and Statutory Declarations Act (K)*** stipulate as follows:

> ***"Where, in any proceeding before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court as such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understand the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into***

writing in accordance to Section 233 of the Criminal Procedure Code, shall be deemed to be a deposition within the meaning of that Section".

The trial magistrate conducted a preliminary examination of the child (voire dire) and formed an opinion that the complainant did not understand the nature of the oath but was seized of sufficient intelligence to justify her evidence being received by the court. He directed that she tenders unsworn evidence. The appellant was given an opportunity of cross examining her but had no question to put to her. Her evidence, therefore, stood uncontroverted.

12. The proviso to Section 124 of the Evidence Act provides:

"Provided that where in a criminal case involving a Sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings the court is satisfied that the alleged victim is telling the truth."

In reaching its finding the trial court stated:

"The court finds girls (sic) testimony credible … Having observed the demeanor of the girl and taking into account the medical finding, the court finds the evidence consistent"

The court having been satisfied of the credibility of the evidence adduced by the complainant did not misdirect itself in convicting. Corroboration was not a requirement.

13. There is a contention that critical witnesses were not called. The applicant submitted that F and M should have been called as witnesses. In her testimony PW1 said prior to the appellant committing the heinous act, "**he sent her siblings somewhere."** In his defence the appellant said he sent all the three(3) children to fetch water. He did not dispute what the complainant stated as he did not cross examine her. The complainant must, therefore, be believed when she says he sent her siblings to some place. The children having not been witnesses to what transpired, their evidence was not relevant.
14. The motive of the appellant's wife was questioned. Was the appellant framed up? The complainant stated that it was not the first time the appellant was committing an act of indecency as it happened previously. She reported to her mother (PW2) who failed to take action as she feared the appellant, whom she described as a violent person who used to beat her and the children. On cross examination she reiterated the fact that the complainant had told her about the sexual assault in the presence of the appellant previously. In his defence the appellant was silent on this aspect of evidence. He did not render any explanation. He did not even allude to it. His allegation that he was framed has no basis.

15. Having evaluated the evidence adduced in the lower court, I find the trial magistrate having analyzed the evidence on record correctly. The conviction in the circumstances was proper which I uphold.
16. On sentence meted out, the proviso to **Section 20(1) of the Sexual Offences Act** provides for life imprisonment where the victim of the sexual assault is below the age of 18 years. The sentence was lawful and I confirm it. The appeal is, therefore, dismissed.
17. It is so ordered.

DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **27TH** day of **JANUARY, 2014.**

L.N. MUTENDE

JUDGE