REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 680 OF 2010

D S B .....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(From original conviction and sentence in Criminal Case Number 3562 of 2009 in the Chief Magistrate's Court at Makadara – T. Ngugi (SRM)

JUDGMENT

Introduction

1. This appeal arises out of the conviction of the appellant for the offence of attempted incest contrary to **Section 20(2)** of the **Sexual Offences Act No. 3 of 2006**, in **CM Cr. Case No. 3562 of 2009 Makadara.** He was sentenced to serve 15 (fifteen) years imprisonment.

Particulars

2. It had been alleged that on 17th August 2009 at Eastleigh Section 3 in Nairobi, being a male person, he attempted to cause his penis to penetrate the vagina of H.S. (identity concealed on account of her being a minor) who was to his knowledge his daughter a child of 14 years.

Summary of the Case

3. The gist of the prosecution case was that on the morning of 17th August 2009, the complainant who was a 14 year old minor was sleeping with her younger sister on the floor of the one roomed house she called home, when she felt her father tugging at her trousers. He fondled her genitals but stopped when the door was opened by someone else. The minor testified that this was not the first time her father had sexually assaulted her. That in an earlier instance, she had woken up from sleep to find herself without clothes and with a wet substance on her thighs. Her father was fondling her breasts and her genitals.

4. The appellant was arrested when his wife (PW3) returned from the clinic where she had taken the baby and the minor reported the second incident to her. She in turn reported the matter to the police who arrested the appellant.

5. The appellant denied the offence in his unsworn testimony and called one witness. He told the

court that the case stemmed from domestic differences between him and his wife. That she was in the habit of publicly embarrassing him and that she had once made allegations that he was a robber, which resulted in his dismissal from the police force. He also blamed his wife's friend for the breakup of his family.

Grounds of Appeal

6. The learned trial magistrate considered all the evidence before her and found that the prosecution had proved their case against the appellant to the required standard. She convicted the appellant and sentenced him to 15 years imprisonment whereupon he filed this appeal. In his amended grounds of appeal he raised five grounds.

7. In the **first ground** the appellant argued that the conviction was based on a charge sheet that was fundamentally flawed and incurably defective. This he said was because the evidence of **PW1** and **PW3** was in regard to incidents which occurred on other dates other than the 17th August 2009 on which he was alleged to have committed the offence. The appellant cited the cases of **Yongo v Republic [1983] KLR 5** and **Joel Kirunga and anor. v Republic H.C. Cr App. No. 348 of 89 NRB**, in which the court held that a charge is defective when it does not agree with the evidence adduced .

8. In response learned state counsel Mr. Mutua submitted that the charge sheet complied with the law since it described the offence as incest and gave proper particulars consistent with the provisions of the law.

9. From the charge sheet the appellant was charged with the offence of attempted incest contrary to **Section 20(2)** of the **Sexual Offences Act No. 3 of 2006.** The charge sheet clearly gave particulars which would enable the appellant to know the time and place of the offence; the act which constituted the offence and the relationship between the appellant and the complainant. I therefore find no basis upon which the court can hold that the charge sheet was fundamentally flawed or defective. I will however, assess the evidence on record to make a finding as to whether or not it supports the charge.

10. In the **second ground** the appellant urged the court to find that the proceedings were a mistrial since the court had not been properly constituted at all times during the trial. An example was given of the day the plea was taken when it was said the presence or rank of the prosecutor was not indicated, and on 16th June 2010 when the record reads "later Coram as before". He cited the case of **Benard Elirema Ekimat v Republic C.A. 151 of 2004 Eld** and **Abusiro Hussain Kadir v Republic Cr. App 1232 of 2002 Nairobi**. In Eliremas case the court observed that it was difficult to appreciate what the phrase "Coram as before" means.

11. In rebuttal Mr. Mutua stated that the trial was conducted in a fair manner. That five witnesses testified for the prosecution and that the coram was complete. He submitted that the prosecution was conducted by a chief Inspector of Police Mr. Mukui, on the date that the plea was taken.

12. I have scoured the record and humbly agree with Mr. Mutua that on 3rd September 2009 when the plea was taken, it reflects that CIP Mukui was the prosecutor. On 16th June 2010 the prosecution was led by CIP Ngure who informed the court that he was expecting Dr. Adan in court later that day. When Dr. Adan arrived the record indicated "later coram as before". This indeed is a lazy way of capturing proceedings but in the context of this case it does not amount to a mistrial, as the coram was complete on all other days. On this particular day it is evident that CIP Ngure was still in court.

13. This case is distinguished from the two cases above, relied upon by the appellant. In those cases the appellants appeared in court severally, while the coram continued to indicate that it was as before. In **Busiro's cases** (supra), during the delivery of the judgment the record noted only the appearance of the trial magistrate without indicating the whole coram.

14. I therefore find that in the case before me the coram was complete as it was evident who was presiding over the case, who was prosecuting it and who was the attending clerk on any given day of the trial.

15. In the **third ground** the appellant contended that the trial court failed to give due consideration to the existing grudge and the frosty relationship between him and his child, **PW1** and wife, **PW3**. The appellant submitted that **PW3** was out to settle scores and gain her freedom from him, due to his perceived harsh dispositions. Further that **PW1** was merely used as a means to an end in this saga.

16. The appellant fell back on the case of **Maina v Republic [1970] EACA**, in which the court observed that it was dangerous to convict on the evidence of a woman or a girl alone because human experience had shown that girls and women sometimes tell an entirely false story which is easy to fabricate and extremely difficult to unravel. Mr. Mutua did not address the court on this particular issue.

17. I cannot correct the appellant's misconception demonstrated above any more forcefully than the Court of Appeal did in the case of **FUAD DUMILA MOHAMED VS REPUBLIC CR. APP 210/2003 (MOMBASA UNREPORTED)**. In the said case the Court of Appeal corrected the invariable practice followed by the courts in requiring corroboration in all cases of sexual assault despite the absence of express legal provision for it. Their lordships said:

> **"The requirement for corroboration in sexual offences affecting adult women and girls is unconstitutional to the extent that the requirement is against them qua women or girls and is an infringement of section 82 of the Constitution of Kenya."**

Sexual offences are by nature secretive and will rarely be committed in the presence of witnesses. There is however no legal requirement for independent evidence to corroborate the evidence of a victim.

18. **Section 124** of the **Evidence Act** requires that where in a criminal case involving sexual offence, the only evidence available is that of the alleged victim of the offence, the court shall receive the evidence of the victim and may proceed to convict the accused if it is satisfied that the complainant is telling the truth. The law only requires that the reason for believing that the complainant is telling the truth be recorded in the proceedings.

19. In the **fourth** and **fifth grounds** which the appellant urged together, he submitted that the evidence of **PW5**, Dr. Adan Lerman was irregularly admitted. That the Dr. did not testify that he was conversant with the handwriting of the maker of the document he produced in evidence nor that the maker was unavailable. The appellant further argued that the evidence on record was full of contradictions. In his opinion the evidence was "skimpy, flimsy, insufficient, full of conjectures and speculations which were riddled with suspicions" and was therefore inconclusive.

20. On the first limb of the two pronged grounds, Mr. Mutua countered that the law allows a person other than the maker of a document to produce it in evidence if they knew the maker of the document and were familiar with the maker's handwriting. That in this case Dr. Adan knew Dr. Muhombe and was familiar with his handwriting.

21. Indeed the proceedings reflect that Dr. Adan came to court to testify on behalf of Dr. Muhombe whom he said was ailing. He also confirmed that they worked together and that he was conversant with her handwriting. **Section 33(b)** of the **Evidence Act Cap 80 Laws of Kenya** allows the court to admit in evidence statements, written or oral, of admissible facts made by persons in certain circumstances set out in the section. Among other circumstances, these include persons who have become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which in the circumstances of the case, appears to the court to be unreasonable.

22. Such statements may be produced if they were made in the ordinary course of business. It is safe to state that for Dr. Muhombe being a medical doctor, the making of the report such as was produced in this case after examining the complainant would be in the ordinary course of her business. I therefore find that the court was properly entitled to admit the medical evidence tendered by Dr. Adan on her behalf in this case.

23. On the second limb of the two grounds, Mr. Mutua averred that the witness gave credible evidence which was corroborated by **PW3** her mother and the medical witnesses. In particular that **PW2** Dr. Kamau noted the torn hymen.

24. From the evidence this case split a family right in the middle. On one side was a father who was the accused and **DW1** his step son, who gave evidence in his support. On the other side of the divide was the minor daughter who was the complainant, and **PW3** the mother who gave evidence in her support.

25. The appellant told the court that the complainant was intimidated and only confessed because she was under duress from **PW3** and that **PW3** brought this case to settle scores with him. **DW1** on the other hand, appeared to harbour some deep seated resentment towards his mother as was evinced by the disparaging words he used to refer to her, such as being "loose" and volunteering that she had refused to show him his biological father.

26. It is evident that the parties in this marriage did not enjoy wedded bliss. Instead they had a problematic and unstable marriage plagued by accusations and perhaps harsh treatment from the appellant. Because of these undercurrents I have scrutinised and reassessed the evidence to ensure that if the appellant was wrongly accused he does not continue to suffer as a result, and if he was the perpetrator he should also not go unpunished. In other words he should get his just deserts.

27. The record indicates that there had been previous incidents of molestation of the complainant by the appellant but because of the appellant's harsh disposition and the complainant's fear of him she did not report them. **PW3** also feared to confront him when she first suspected that all was not well between him and the complainant. This explains the reference by both witnesses to incidents which occurred prior to the date in issue. The important evidence however is that which pertains to what occurred on the 17th August 2009.

28. The view advanced by the defence that this case was **PW3**'s way of eliminating the appellant so that she could be free to live a permissive life style because she was of loose morals and the complainant went along with it because she too wanted her freedom to do as she pleased is not credible. After all the appellant and **PW3** had accommodated each other, the appellant's harsh disposition and **PW3**'s permissiveness if at all, for 22 years as reflected in the evidence.

29. In any case I find it difficult to believe that a 14 year old child would go to such extreme lengths to help **PW3** fix her father just because she wanted to live without parental control.

30. As is usual in cases of this nature the complainant was alone with the appellant and neither **PW3** nor **DW1** was present in the house when the assault occurred. From her evidence she had endured her father's molestations before because first, she feared her father and second, she feared that if word got out it would be the talk of the neighbours. In the end she started looking for accommodation elsewhere whenever the night fell because she feared her father's sexual advances.

31. The learned trial magistrate observed, and the record bears her out that the complainant was candid and was able to withstand cross-examination very well. A fit she would not have accomplished from coached testimony. The court observed in part that:

"The above narration does not appear to me to have been coached. The complainant's mother had been suspicious before but had not taken action. I find her action that of a brave

mother whose only intention was to protect her child. Accused person's unsworn defence is evasive which he does not say why his 14 years old would implicate him. I find it a mere denial notwithstanding the marital differences with the wife. I have no reason to doubt the testimony of the complainant. She struck me as a person speaking the truth. A traumatized child who had nowhere to hide until the mother went to her rescue. I believe her evidence as corroborated by that of her mother PW3 and the medical records."

The learned trial magistrate who had the advantage of observing the witnesses as they testified expressed her confidence in the truthfulness of the testimonies of the **PW1** and **PW3** despite the prevailing difficult circumstances in their domestic setting.

32. I have anxiously considered the evidence before me and the manner in which the learned trial magistrate evaluated it and find no reason to depart from her findings.

33. In the circumstance, I am satisfied that the Appellant's appeal is without merit and I accordingly dismiss it.

SIGNED DATED and **DELIVERED** in open court this **2nd day** of **April 2014.**

L. A. ACHODE

JUDGE