



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 76 OF 2006

M M APPELLANT

VERSUS

REPUBLIC

(Being an appeal from the sentence of Hon. E.K. Makori (SRM) delivered on 15/06/2006 in Kitui Principal Magistrate's Court Criminal Case No. 2135 of 2004)

(Before Hon. B. Thurania Jaden J)

J U D G M E N T

1. The Appellant, **M M**, was charged with the offence of incest contrary to **section 166 (1)** of the **Penal Code**.

The particulars of the offence were that “on the 15th day of November 2004 at 9.00 p.m. in **Kitui District** of the **Eastern Province**, being a male person, had carnal knowledge of **E M** a female person who was to his knowledge his daughter”.

2. In the alternative, the Appellant was charged with the offence of indecent assault on female contrary to **section 144 (1)** of the **Penal Code**.

The particulars of the offence were that “on the 15th day of November 2004 at 9.00 p.m. in **Kitui District** of the **Eastern Province**, unlawfully and indecently assaulted **E M** a girl aged 8 years by touching her private parts namely vagina”.

3. When the Appellant was arraigned before the trial court, he pleaded not guilty. The case proceeded to a full trial.
4. The prosecution case was that at the material time, the complainant, PW3 **E W M**, a eight (8) year old standard four (4) pupil was sleeping at home with her younger siblings. Their mother PW4 **W K** had gone to **Nairobi**. The Appellant who is the complainant's father woke her up and asked for firewood to light cigarettes. The complainant did as instructed. The Appellant then held the complainant, stripped her naked and “raped” her. The complainant screamed but nobody went to her rescue. The complainant sustained injuries on her private parts and blood was oozing out and she felt pain when walking. The complainant informed her siblings what had befallen her. She also visited her grandmother and informed her of the matter. The mother and the clan were informed what had transpired. The mother checked the complainant's private parts and found the

- same were blood stained. The Appellant who had disappeared from home was arrested and taken to the police station. The complainant was issued with a P3 form and referred to **Kitui District Hospital** where she was treated and the P3 form filled in. The Clinical Officer confirmed that the complainant had been defiled. The Appellant was subsequently charged.
5. When called upon to give his defence case, the Appellant gave unsworn evidence. The Appellant stated that on the material day, he was at his place of work where he was employed at **Kiusyani area** as a domestic servant. That on Saturday he went home but did not find his wife and child in. People started assembling at his home and alleged he had committed the offence. He was then arrested and brought to court.
 6. The trial magistrate found prosecution case against the Appellant was proved beyond any reasonable doubts. The Appellant was convicted for the offence of incest and sentenced to twenty (20) years imprisonment. The Appellant was aggrieved by both the conviction and sentence and appealed to this court on the following grounds:-
 - **That the language used in the trial court was not indicated.**
 - **That the complainant's evidence lacked sufficient corroboration.**
 - **That the delay of four days before the complainant was taken to hospital was not explained.**
 - **That some crucial witnesses were not called.**
 - **That the prosecution case was not proved beyond reasonable doubts.**
 - **That the alibi defence was not shaken by the prosecution.**
 7. During the hearing of the appeal, the Appellant relied on written submissions which I have duly considered. The learned counsel for the State opposed the appeal and submitted that there was sufficient evidence to sustain the conviction.
 8. This being a first appeal, this court is duty bound to re-evaluate the evidence and the record afresh and come to its own conclusions and inferences – *See Okeno –vs- Republic (1972) EA 32.*
 9. The complainant gave evidence after the trial court carried out a *voire dire* and was satisfied that she understood the meaning of oath. The complainant's evidence was that it was the Appellant who defiled her. Although the complainant did not in her evidence indicate the source of light, it is observed that there was a conversation between her and the Appellant who she knew as her father. The complainant's mother (PW4) gave evidence that confirmed that she had left the children including the complainant with the Appellant who was their father. It is also noteworthy that the complainant's narrative to her mother soon after the offence is consistent with the complainant's evidence in court.
 10. The evidence of the Clinical Officers, PW1 **Charles Makau Muthini** and PW2 **Everlyne Makau** confirmed that the complainant had been defiled. Their evidence was that the complainant had bruises on the vaginal wall and the hymen was broken. The medical evidence was therefore not compromised by the delay in taking the complainant to hospital. The P3 form has indicated the age of the injuries as seven (7) days. The Clinical Officer assessed the complainant's age as eight (8) years.
 11. The evidence of the Investigating Officer confirmed that the report of defilement was made at **Kitui Police Station** and investigations carried out. PW5 **PC Veronica Kapoko** the Investigating Officer testified that the complainant could not walk properly and walked with her legs apart.
 12. The Appellant denied the offence and stated that he was away at his place of work at the material time. However, this alibi defence does not displace the prosecution evidence against him. There are no reasons why the Appellant would give false evidence against him. The trial magistrate who had the benefit of seeing the witnesses testify and observed their demeanour believed the complainant. I have no reasons to differ with the findings of the trial magistrate.
 13. On the question of corroboration of the complainant's evidence, the proviso to **section 124** of the **Evidence Act** states as follows:-

“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.”

The trial magistrate duly cautioned himself of the nature of the evidence on record and believed the complainant, hence the conviction.

14. The Appellant raised the issue of the failure to reflect the language used in the proceedings. It is the duty of the trial court to reflect the language used. However, the record reflects that there was a court clerk in court. As stated by the Court of Appeal in **Said Hassan Nuno v Republic (2010) eKLR:-**

“We take judicial notice that one of the core duties of a court clerk is to offer interpretation services to accused or even to the court where it does not understand the language of the accused; or a witness to the case.”

15. The complainant’s evidence reflects that nobody went to her rescue when she cried for help. There are therefore no crucial witnesses who were not called by the prosecution.

16. Having considered the evidence on record in its entirety, I am satisfied that the prosecution case was proved beyond reasonable doubts. The sentence is within the law. I find no merits in the appeal and dismiss the same. I uphold the conviction and sentence.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 31st day of July 2014.

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JUDGE