



REPUBLIC OF KENYA

High Court at Nakuru

Criminal Appeal 179 of 2011

D S M.....APPELLANT

V

REPUBLIC.....RESPONDENT

JUDGMENT

This is an appeal arising from the decision of E. Boke, the Senior Resident Magistrate, Naivasha in Criminal Case No. 906 of 2011, where the appellant, D S M alias M, was charged with the offence of incest by a male contrary to **Section 20(1)** of the **Sexual Offences Act No. 3 of 2006**. It was alleged that on 29/3/2011, at *[particulars withheld]* Estate in Naivasha, caused penetration of his genital organ into that of RKM, who was his niece. In the alternative, the appellant faced a charge of indecent act with a child contrary to **Section 11(1)(a)** of the **Sexual Offences Act**. He denied the offence and the case proceeded to full trial with the prosecution calling a total of 6 witnesses. After the close of the prosecution case, the appellant was called upon to enter his defence and he made an unsworn statement. The trial magistrate convicted the appellant of the offence of defilement contrary to **Section 8(1)** as read with **Section 8(4)** of the **Sexual Offences Act**. He was handed 15 years imprisonment. The appellant being aggrieved by both the conviction and sentence, has preferred this appeal in which he relied on the following grounds:-

- 1. The court failed to consider that the complainant exonerated him from blame;**
- 2. The court failed to consider the grudge that existed between him and the complainant's mother. It was a frame up;**
- 3. The evidence upon which the court founded the conviction fell below the required standard;**

4. The court failed to consider the appellant's defence.

The appellant therefore prays that the court do allow his appeal, quash the conviction and set aside the sentence.

Mr. Rugut, the learned State Counsel conceded the appeal on the grounds that the trial court based the conviction on the evidence of PW2 who was declared a hostile witness. Counsel urged the court to quash the conviction and set aside the sentence for those reasons.

This being the first appellate court, it behoves me to evaluate the evidence afresh and arrive at my own conclusions. As I do so, I bear in mind that this court did not have an opportunity to see the witnesses who testified before the trial court to determine their credibility.

The complainant, RK, testified as PW2 but was declared a hostile witness and her evidence was therefore worthless and the trial court should not have made any reliance on it.

The victim's mother, NBM testified as PW3. She recalled that she came back from work at about 10.00 a.m. on 29/3/2011, when she found the daughter's uniform on the bed. The daughter was RK. She called out the daughter's name severally but she did not respond. The appellant lived next door in the same plot. PW3 enquired about the daughter from the appellant and he said that she had gone to look for firewood which was unusual because they were not using firewood to cook. The appellant kept going in and out of his house. Later he claimed to have a stomachache and asked PW3 to give him some water from the rain water. It is then PW3 saw the complainant come out of the appellant's house and went to the toilet. PW3 waited for her to come out and questioned her, she informed her that the appellant asked her to wash his utensils and when she was doing so, he defiled her. PW3 took the complainant and the appellant to the Naivasha Police Station then to Naivasha District Hospital.

PW4, Cpl. Johnstone Mudakani escorted both appellant and complainant to the hospital. PW5, PC Irene Wamuyu received the report from the complainant and she is the one who interrogated the complainant as PC Munene recorded the statement. PW5 said that she did inform her that she was defiled. She looked at the PRCI Form and P3 form filled by the Doctor which confirmed that she was defiled.

PW1, Doctor Njoki Ngumi of Naivasha District Hospital produced the P3 form prepared by Dr. Njiiri

who was said to be on leave. PW1 also produced the PRCI form which were filled when the complainant was first seen at the District Hospital – PEx.1 & 3.

In absence of the complainant's evidence, we only have the evidence of PW3, the police officer PW5 and the Doctor PW1. PW3 told the court that she found the complainant had come home under unknown circumstances and that is why she started looking for her only for her to emerge from the appellant's house. It is on interrogation that the child told PW3 that she had been defiled by the appellant. It seems PW3 did not examine the child herself. When the child was taken to the police station, she was again interrogated by PW5 and alleged to have been defiled and PW5 confirmed from the PRCI form and P3 form that she had indeed been defiled. PW5 said that then the complainant spoke freely and voluntarily. Although there were no bruises found on the complainant's genitalia, the first observations made on the PRCI form were that the complainant's hymen was broken. The Doctor did not, however, tell the court whether the hymen had been recently broken recently or it had happened earlier on. The doctor also found that the complainant had a white discharge. However, the discharge was not tested for spermatozoa. The doctor did not make any finding as to whether or not the child had been involved in a sexual activity. In absence of any injuries to the complaint's genitalia and without evidence of when the hymen was broken, the court can only be left guessing as to the trial magistrate did, that maybe that was not the first time that the appellant had had intercourse with the child. But without the child's evidence, what is left against the appellant is strong suspicion. I think that the doctor's evidence was very casual and she could have been to the point as to her findings on the complaint.

Although I do not doubt that the appellant may have been to no good with the child and especially taking into account the child's conduct in court, yet it is only the child who would have shed light on what truly happened to her in the appellant's house. What the child's parents should do is keep that girl far from the appellant.

There being only suspicion against the appellant I think that the conviction was unsafe and I hereby quash the conviction, set aside the sentence and set the appellant at liberty forthwith unless otherwise lawfully held.

DATED and DELIVERED this 31st day of May, 2013.

R.P.V. WENDOH

JUDGE

PRESENT:

The appellant present in person

Mr. Chirchir for the State

