



IN THE HIGH COURT OF KENYA

AT NAKURU

Criminal Appeal No. 203 Of 2011

I M N.....Appellant

Versus

Republic.....Respondent

(From original conviction and sentence in Criminal Case No.197 of 2011 of the Senior Principal Magistrate's court at Naivasha – T.W.C. WAMAE (MRS)

JUDGMENT

I M N, the appellant herein, was charged with the offence of incest by a male contrary to **Section 20(1)** of the **Sexual Offences Act No. 3 of 2006**. The allegation against the appellant was that on 17/1/2011 at S R Village in N, Nyandarua County caused his penis to penetrate the private parts of S N M, a girl aged 12 years whom he knew to be his daughter. In the alterantive, the appellant faced a charge of indecent act contrary to **Section 11(1)** of the **Sexual Offences Act**. The appellant was tried and convicted by Mrs Wamae, Senior Principal Magistrate, Naivasha and was sentenced to life imprisonment. The appellant appeals against the said conviction and sentence. The grounds of appeal are contained in the petition of appeal and further grounds were adduced in the written submissions filed by the appellant. The grounds can be summarized as follows:-

- 1. That the trial court erred by relying o the evidence of a single witness;**
- 2. That the court erred by relying on the contradictory evidence of PW2 and PW3;**
- 3. That the court failed to consider that relevant/material witnesses were not called;**
- 4. That the court did not consider the defence of the appellant that he was framed;**
- 5. That the charge was not proved to the required standard.**

As a result, the appellant prays that the court do allow his appeal, quash the conviction, set aside the sentence and set him at liberty.

The appeal was opposed. Mr. Chirchir, the learned State Counsel appearing on behalf of the Republic submitted that the doctor's evidence confirmed that the complainant was defiled; that the complainant narrated how the appellant, her father defiled her and that it was not the first time he had done so; that the court believed PW2's evidence; that the trial court considered the defence but dismissed it as untrue. As regards the appellant's allegation that he is HIV positive and therefore the complainant should also be if

she was defiled, there is no medical evidence on record on his condition.

A brief summary of the case before the trial court is as follows:- The complainant, S N M testified as PW2. She gave sworn evidence after a voire dire examination was conducted by the court. She told the court that she was 13 years old having been born in 1998 and was in class 5 at the time. She recalled that on 17/1/2011 at 7.30p.m., while at home with her younger siblings aged 11 years, 6 years and 2½ years, she cooked, the children ate and went to sleep. Her mother was away. She slept in the same room with the others. Her father came home at 11.00 p.m., she opened the door for him, she served him with ugali, he gave her some fish he came with. Later he held her by the neck, held her breasts and caused her to his bed, asked her to relieve herself, pushed her and took her back to his bed, removed her clothes and then removed his, lay on her, put his penis in her vagina. He finished, went out, came back later, she opened for him, he again took her to the bedroom and defiled her again. The next morning, she made breakfast for her siblings, her mother called her to inform the father to go to N, to meet her. PW2 went to see her grandmother and found the mother there and informed them about what the father had done to her. The mother took her to N Police Station, the police referred her to Naivasha Hospital where she was examined.

The complaint's mother, PW3, L W M, recalled that she had gone to visit her mother on 17/1/2011, leaving the complainant with the other children. Next day, she called the complainant on a neighbour's phone to tell the father to go to N to meet PW3 there and it is then the complainant informed her that she was sick. The complainant went and met PW3 at N and informed her what the father had done to her. She reported to N Police Station and then they went to hospital. She was issued with a P3 Form – PEx.1. She denied having quarreled with the appellant before she left home on 17/1/2011.

It is PW1, Dr. Margaret Mboga who produced the P3 Form in respect of the complainant. The complainant had been examined by Dr. Njiri on 20/1/2011. The doctor observed that the complainant was examined after 3 days, had bruises on her outer genitalia, hymen was broken, and had a whitish discharge but no infection and the doctor found there to have been penetration of the complainant. She produced the PRCI Form as PEx.1a and b. She also produced the P3 in respect of the appellant who was examined by Dr. Etole (PEx.2).

The Investigation Officer in the case, PW4, PC Michael Muindu of N Police Station recalled that he received a report from the complainant and the mother on 18/1/2011, that the complainant had been defiled by her father and both appellant and complainant were referred to the Naivasha District Hospital.

The appellant gave an unsworn evidence in his defence. He said that his wife had been involved in a relationship with one Baba W and he sent her away on 24/12/2010. He said that Baba W wife had died of Aids and PW3 had infected him. That PW3 went to rent a house at the N Market with the children. He went for PW3 and the children on 14/1/11. On 17/1/2011, PW3 left to go and check on her goods left at N but did not come back till 5.00 p.m. When he called her on phone PW3 claimed to be going to visit the mother. He went to check with his mother-in-law but she denied seeing PW3. On the next day he went to the shamba with the children. PW3 called PW2 on phone and PW2 went to N. The appellant followed them to N and found PW2, PW3 and Baba W together. They called police and it was alleged he had defiled the child.

This being the first appellate court, it is required of me to assess and evaluate the evidence a fresh and arrive at my own independent conclusions and findings. As I do so I do bear in mind that I did not have the opportunity to see the witnesses testify in order to assess their demeanor. See **Okeno v Republic (1972) EA 32**.

The card issued by N Health Centre at the complainant's birth was produced in court. It indicates that she was born on 9/12/1998. She was only 12 years old when she was defiled

The complainant narrated in detail how she was defiled on the night of 17/1/2011, when her mother was away. Infact the appellant does confirm that PW3 was away from home on the night of alleged incident. PW2 gave evidence on oath after the court was satisfied that she understood the meaning of the oath. She

was cross-examined by the appellant and she maintained that she was defiled by him. When she was recalled by the appellant for further cross examination, her testimony was not shaken. Her evidence was corroborated by the evidence of the Doctor and the treatment documents from N Health Centre – PEx.3. They were issued on 18/1/2011. It was observed that the hymen was absent, she had a whitish discharge, the genitalia were bruised. The P3 Form was also issued on the same day (18/1/2011) but the doctor examined her on 20/1/2011 and confirmed that she had a whitish discharge, broken hymen and bruises in the perineum. The appellant was, however, examined on 27/1/2011. There is overwhelming evidence confirming that the complainant was defiled. The next question is who did it.

As observed above, the appellant was left alone with the children on the night of 17/1/2011. PW2 insists that it is her father who defiled her not once but twice on that same night. The trial court believed her. Even though she is a single witness, there is no requirement that a fact has to be proved by more than one witness. (See **Section 143** of the **Evidence Act**)

PW2 gave evidence on oath. Even if it was unsworn, **Section 124** of the **Evidence Act** allows the court to rely on evidence of a minor in a sexual offence, if the court believes the said evidence and gives reasons for the belief. I am satisfied that the complainant was a truthful witness and there is no evidence that she was influenced by the mother to frame her father.

The appellant complained that the trial court relied on contradictory evidence of PW2 and PW3. Although PW3 denied that they had ever had marital problems with the appellant, from PW2's testimony it seems there were. PW2 accepted that PW3 had been staying at the market in a rented house with the children and they had just returned home on 14/1/2011, 3 days before this incident occurred. The appellant did confirm that the family had just returned home on 14/1/2011. It seems PW3 was not exactly truthful. But in any event, PW3 did not witness the incident. PW2 was alone with her younger siblings and the appellant when the incident occurred.

The appellant also alleged that the prosecution failed to call relevant witnesses like the grandmother or uncles to the complainant as witnesses. Although the prosecution has a duty to call all material witnesses to its case, it has no duty to call a superfluity of witnesses. The uncles or grandmother of PW2 did not witness the incident and would not be relevant in this case. A fact can be proved by a single witness. It is common knowledge that most sexual offences are committed in secret and it is most unlikely that there will be a second witness to the act unless the culprit is caught red-handed.

The appellant alleges that it is the wife who framed him. He alleged that PW3 had left him and gone to cohabit with one Baba Wambui and that she had threatened to frame him. If indeed PW3 had left the appellant for another man, then it is not clear why she would frame him with such an offence using their own daughter. It is unbelievable that PW3 would have her daughter defiled in order to frame the appellant. When the appellant asked PW3 about Baba Wambui, she denied knowledge of such a person. The appellant was alleging that PW3 had extra marital affairs but in his defence he only mentioned Baba Wambui. At no time in cross examination of PW4, the Investigation Officer, did he mention Baba Wambui or that he had told the police about being framed by PW3 and Baba Wambui. There would have been no reason for the prosecution to call Baba Wambui without a basis being laid. It is only in his defence that the appellant alleged that Baba Wambui was part of those who caused his arrest and that the clinical Officer was Baba Wambui's cousin. PW2 was seen by Dr. Mboga and also at the Health Centre and both came up with the same result, that the complainant was defiled. In my view, even if one Baba Wambui existed, the appellant turned on his daughter and defiled her, may be because of their differences with PW3 which is unfortunate.

The trial court considered the appellant's defence and did not believe it in light of the unwavering evidence of the complainant.

The appellant also complained that he is HIV positive and if he had defiled the complainant, she could have been infected. There is no evidence that the appellant is HIV positive and this was raised as an afterthought so that the prosecution had no chance to have him examined for HIV. In any event, this court cannot tell whether it is mandatory that the complainant would be infected with HIV after the sexual

act. That needs to be proved by medical evidence.

In the end, I find that the trial court carefully considered the evidence on record and I am satisfied that the charge was proved beyond any doubt. PW2 identified the appellant as her father. PW3 confirmed that fact. The appellant did not deny that the complainant was his daughter. The complainant was only 12 years old. I am satisfied that the offence of incest was committed by the appellant contrary to **Section 20(1)** of the **Sexual Offences Act**. There is no reason to warrant this court interfering with the conviction and sentence meted by the trial court. The appeal is dismissed on both conviction and sentence. It is so ordered.

DATED and DELIVERED this 19th day of July, 2013.

R.P.V. WENDOH

JUDGE

PRESENT:

The appellant in person

Ms Idagwa for the State

Jared Okumu – Court Clerk