REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 108 OF 2007

F.N.K.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the Sentence and Conviction of D.O. ONYANGO Resident Magistrate Runyenjes in Criminal Case No. 189 of 2007 on 9th July 2007)

J U D G M E N T

F N K the appellant herein was charged with the offence of **Defilement of a girl Contrary to Section 8(1) as read with Sub-Section (2) of the Sexual Offences Act of 2006.**

The particulars as stated in the charge sheet were as follows:-

On diverse dates in between the months of 1st March 2006 and 12th day of April 2007, in, Embu District within Eastern Province had unlawful canal knowledge of C.K.N a girl under the age of eleven years.

The case proceeded to full hearing and the appellant was convicted and sentenced to Life imprisonment. He has appealed against the conviction and sentence and cites the following grounds.

1. ***The case lacked evidence from the prosecution witnesses where the trial magistrate erred in law and fact when convicting him.***
2. ***The evidence is inconsistent and lacked a support from the complainant who was coached and guided on what to say by a group of politic women.***
3. ***There occurred a manifest miscarriage of justice.***
4. ***No medical examination was done to him to proof that he was the one who committed the alleged offence.***
5. ***The trial magistrate failed to consider that there was a grudge between him and the complainant's mother who had departed from him some year ago and the possibility of framing him the case against him was possible as engineered by her.***
6. ***The trial magistrate erred in law and fact when he rejected his defence which was very true that that he was left with the children as the only parent and care for them after their mother left.***

The case of the prosecution was that the appellant and his wife had 4 children. They separated and

the appellant was left with the children. The complainant (PW2) aged 9 years in 2007 was the eldest of the four children. The appellant and the 4 children lived in a one roomed house and all slept in one bed. It was during the time they were in bed that the appellant would remove PW2's clothes and defile her.

A Community Health Worker (PW3) and others had visited the home in March 2007 after receiving reports about the deplorable conditions the children were living in. He was advised to make a separate bed for the children.

On 11/4/2007 PW3 and others made a follow up visit and they found PW2 walking with difficulty. When asked about it she started crying and it was then that she revealed to them that the appellant had defiled her thrice. They reported the matter and also took PW2 to Hospital. The doctor (PW1) who examined PW2 found her hymen to have been broken and she had bruises in her genitalia (EXB1). The appellant in his unsworn defence denied the charges. He admitted that his wife left him with the children. And that he was accused of defiling PW1 one month after some people visited his home. He would leave the children as he went to work and would sometimes return at 9 p.m.

When the appeal came for hearing the appellant presented the court with written submissions. He criticized the evidence of PW3 saying it was not free from error and mistake. He blames his former wife for his woes. To him the absence of spermatozoa and blood meant the girl was not defiled. The state opposed the appeal saying the evidence was consistent. And that the issue of a grudge with PW2's mother was no true as PW2's mother was not a witness.

This is a first appeal and this court has a duty to re-consider and re-evaluate the evidence and arrive at its won conclusion. I am alive to the fact that I did not see or hear the witnesses. In the case of ***KIILU & ANOTHER VS REPUBLIC [2005] 1 KLR 174*** the Court of Appeal held thus

1. ***An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions.***
2. ***It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower courts' findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.***

I have considered the submissions of both the appellant and the learned state counsel. I have equally subjected the entire evidence to on evaluation. I will condense all the grounds together and deal with three issues.

1. ***Whether there were inconsistencies in the evidence of the prosecution witnesses.***
2. ***Whether the appellant's defence was considered by the learned trial magistrate.***
3. ***Whether there was sufficient evidence to support the charge.***

The complainant in this case was a child said to be 9 years in 2007 when the case was heard. She stated that her parents were not staying together and she and her siblings lived with the father (the appellant). This was confirmed by PW3 and the appellant himself. PW2 further stated that they lived in a one roomed house with one bed which they all shared. This was confirmed by PW3 who is a Community Health Worker who had visited with others. PW3 even said they had advised that the appellant makes another bed for the children.

PW3 on a follow up visit on 11/4/2006 noticed that PW2 was walking with difficulty and she inquired from PW2. PW2 told her that the appellant had defiled her thrice. And she was crying. The element of the defilement was confirmed by the doctor who examined PW2. This evidence is very consistent. The evidence was well supported by PW3 who found the girl to be walking with difficulty. It was confirmed by the medical doctor. Therefore defilement was proved. PW2 knew the appellant well as her father and the man she and her younger siblings shared a bed with. The environment was so

conducive for the appellant to do what was complained of. His former wife had nothing to do with this as she was not a witness and there was independent evidence before the Court. PW2 even complemented him for cooking for them! PW3 and PW4 were told by the minor that it was the appellant who had been defiling her. Section 124 of the Evident Act under the proviso states:-

> ***" 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 learned trial magistrate in his judgment at page 10 lines 19-33

> ***"I have considered that the only direct evidence against the accused is that of the minor who is aged 9 years. I have considered the danger of relying on the sole evidence of the minor. I watched the minor testify. Though she appeared timid she had no difficulty pointing to her father the accused as the one who defiled her. I have considered that the person who the complainant named as the one who defiled her is the accused. The complainant mentioned the name of the accused to PW3 immediately she was asked about her problem in walking. I find no reason whatsoever why the complainant would want to frame her father for no apparent reason. I equally find no reason why PW3 would lie against the accused. Though the accused denied the charge his statement did not displace the evidence of the complainant which directly implicates him with the charge herein. I dismiss the statement of the accused as unconvincing."***

In the said judgment I do find that the learned trial magistrate was alive to the danger of relying on the sole evidence of a minor. He saw her testify. He believed her. He considered the appellant's defence and did not find it convincing. The absence of spermatozoa and blood is not evidence of non penetration of the minor. The reason for the absence of spermatozoa ad blood is that the offence had not occurred on the date of complaint. That is why the particulars state "diverse dates between 1st March 2006 and 12th April 2007". What PW3 came across was the effect of the defilement. (i.e. the walking with difficulty by PW2).

I therefore find the 1st and 2nd issues to be answered in the positive. For the 3rd issue, I do find that the evidence clearly shows that the appellant defiled a child who he knew to be his daughter. He ought to have been charged with the offence of incest contrary to Section 20(1) of the Sexual offences Act.

I therefore set aside the conviction for defilement and substitute it with a conviction of Incest contrary to Section 20(1) of the Sexual Offences Act. Though there was no documentary evidence to confirm the age of PW2, its all clear that she was a minor and below the age of 18 years. She was in standard 2 and PW1, PW3 and PW4 confirmed she was a minor. Under Section 20(1) of the Sexual Offences Act in the proviso, any one convicted of committing incest with a minor is sentenced to life imprisonment.

I therefore dismiss the appeal.

Orders accordingly.

Right of appeal explained.

DELIVERED, DATED AND SIGNED AT EMBU THIS 16TH OF JULY 2013.

H.I. ONG'UDI

JUDGE

In presence of:-

Ms. Ing'ahidzu for State

Appellant

Njue CC