REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 185 OF 2012

D W M .... APPELLANT

VERSUS

REPUBLIC ....RESPONDENT

(APPEAL ARISING FROM THE JUDGMENT OF THE RESIDENT MAGISTRATE'S COURT AT BARICHO (J.N. MWANIKI – S.R.M) IN CRIMINAL CASE NO. 841 OF 2010 DELIVERED ON 13TH JUNE 2011)

JUDGMENT

The appellant herein was convicted by J.N. Mwaniki (Senior Resident Magistrate) on 13th June 2011 and sentenced to life imprisonment for the offence of defiling H W a four year old child by penetrating her vagina using his penis.

He has now filed this appeal against sentence and conviction raising the following grounds:-

1. ***That he pleaded not guilty***
2. ***That the learned trial magistrate erred in law and fact when convicting him on the un-corroborated evidence of the complainant***
3. ***That the learned trial magistrate erred in law and in fact by not considering that the Medical officer who came to testify was not the one who treated the complainant and who could therefore not answer questions put to hi m***
4. ***That the learned trial magistrate erred in law and in fact by failing to consider that the exhibits recorded in the Police Station were not the ones produced during trial***
5. ***That the learned trial magistrate erred in law and in fact by failing to consider that there was a long time marital problem between him and PW2 who is the complainant's mother***
6. ***That the trial magistrate erred in law and in fact by failing to consider that despite the age of the minor, she did not cry nor report the incident to the mother and the allegation that he defiled her only emerged after he fought with complainant's mother***
7. ***That the trial magistrate erred in law and fact by not considering his defence and mitigation.***

This being a first appellate Court, I must consider and re-evaluate the evidence afresh and be satisfied that it was proper, to support a conviction on the charge facing the appellant. In doing so, however, I must remember that unlike the trial Court, I have not had the advantage of seeing or hearing the witnesses.

The complainant who was aged five (5) years at the time of the trial is actually the appellant's daughter and on the night of the incident i.e. 24th September 2010, she told the Court that

her mother had left her alone with her father (appellant) who went to her bed that night and did bad things to her after removing her pants. She reported the incident to her uncle and mother.

R M (PW2) is mother to complainant and wife to appellant. She testified that on 22nd September 2010, she left to attend to her bereaved sister and left complainant with appellant and when she returned on 24th September 2010, she did not find the complainant at home. She found her at the neighbour's home looking disturbed and afraid and she told her that the appellant had defiled her and upon inspecting her, she noticed that the complainant's vagina was wide open and very red. She took complainant to a neighbour JANE WAGUTHI who also inspected the complainant and narrated to them what had happened. The matter was reported to the Police and complainant was issued with P3 Form.

P.C. PHILIP KIGEN of Sagana Police Station told the Court that he received this report on 27th September 2010 so he arrested the appellant and issued a P3 Form.

NANCY KURIA (PW4) is a Clinical officer at Sagana Health Center and produced the P3 Form (Exhibit 2) on behalf of her colleague GLADYS MAUNGO who was away on study leave but whose handwriting and signature she was familiar with. she said complainant had given a history of having been defiled by her father on 23rd September 2010 and had scratch marks on her neck, a broken hymen and inflamed vagina. The findings of the examining officer was that complainant had had sexual intercourse.

JANE WAKUTHI (PW5) told the Court that on 26th September 2010, PW2 went to her house in company of the complainant and asked her to examined her and upon doing so, she noticed that the complainant had a swollen vagina and a tear. Complainant told her that her father had defiled her when her mother was away.

The appellant gave un-sworn statement in defence and confirmed that the complainant is her daughter and that on 23rd September 2010, he went to work and upon return, he had a quarrel with the wife. On 24th September 2010, the wife left home with a younger child but left the complainant behind. The complainant went to school the following morning and when he returned home, he found the complainant with his niece and prepared super for them after which the complainant left to sleep at the niece's place. On 25th September, he left home and instructed his brother to take care of the complainant and when he returned home in the evening, he found his wife had come back. She made super for them before leaving with the children to a homestead where there was a ceremony and returned at mid-night and threatened the appellant. On 26th September 2010, the wife again left and returned at 4 p.m. On the following day, an elder from the neighouring village came and questioned him about defiling his daughter and he was shocked and insisted that the complainant be taken to hospital and so him, his wife, the complainant and the elder all went to Sagana Police Station and he was arraigned in Court on 28th September 2010 where the police took his 3,000/= saying it would be used to have the complainant examined and a P3 Form prepared. He added that the complainant and other witnesses lied and he produced their statements as well as another statement by one JOSEPH MWANGI WACHIRA who was never called to testify, as defence exhibits – see Exhibits 1 to 4.

It is not in doubt that the appellant is the father of the complainant and therefore, he ought to have been charged with the offence of incest by male person contrary to ***Section 20 (1) of the Sexual Offences Act*** rather than the offence of defilement. However, the ingredients of both offences are similar save that in the offence of incest, the victim is a relative of the suspect. The fact that the appellant was charged with defilement and not incest does not render the trial defective neither did it prejudice his trial as he has himself admitted that the complainant is his daughter. It was an error to charge him with defilement and not incest. However, pursuant to the provisions of ***Section 382 Criminal Procedure Code,*** I find that that did not occasion any failure of justice nor is it sufficient on it's own, to warrant a reversal of the finding of the trial Court.

As to when exactly the offence took place, the charge sheet says it was on 24th September 2010 which is the same date given by complainant. The appellant says the Clinical officer gave the date as 23rd September 2010. the complainant's mother says she left home on 22nd September 2010 and upon return on 24th September 2010, the complainant told her that appellant had gone to her room at night and defiled her. That would only mean that the incident occurred on the night of 23rd September 2010 after the complainant's mother had left the home. Again that did not prejudice the appellant who himself stated in his defence that the incident complained of

" ***started on 23rd September 2010".***

The appellant states in his appeal that he was convicted on the un-corroborated evidence of the complainant. It is true that the complainant was the only eye witness to the event. The law allows a Court to convict on the un-corroborated evidence of a single witness if it is satisfied that the " ***victim is telling the truth***" - see ***Section 124 Evidence Act***. The trial magistrate having put some questions to the complainant allowed her to testify without being sworn. In the course of the judgment, the trial Court said the following about the complainant's testimony:-

" ***Complainant was a small child when she testified in Court (sic) 26th October 2010. She was aged five (5) years. However, the Court was alive to the provisions of Section 19 of the Oath and Statutory Declaration Act (Cap 15) which governs taking evidence of children of tender years. The Court did conduct a voire dire by putting several probing questions to the complainant and did form an opinion that though she did not understand the nature of an oath, she was possessed of sufficient intelligence to justify taking her evidence and understand (sic) the duty of speaking the truth. She gave un-sworn evidence. She remained candid even on cross- examination by the accused person. She never gave the Court any reason to doubt her recollection of the events of the material night"***

It is clear from the above that the trial magistrate was satisfied that the complainant, though aged five (5) years and the only eye witness to the event, was speaking the truth. There is no other interpretation that can be given to the above quote from the judgment. And since the trial magistrate saw and heard the complainant and other witnesses, his findings on their truthfulness or lack of it must be respected unless there is sufficient reason to depart from that finding and for myself, I see no reason to do so. The proceedings indicate that the appellant put questions to the complainant which she answered. Therefore, the trial magistrate having believed that the complainant was speaking the truth, he was entitled to base his conviction on her evidence notwithstanding lack of corroboration.

There was also medical evidence that indeed the complainant was defiled. The P3 (Exhibit 2) showed that her hymen was broken and vagina inflamed. Similarly, the complainant's mother examined her and saw her vagina was " ***wide open and very red***" and their neighbour Jane Wakuthii (PW5) also saw the complainant's vagina ***"swollen"*** and with ***"a tear".*** There was no evidence to suggest that there was any other male person in the house at the time of the incident other than the appellant in this case. Indeed he confirmed in his defence that his wife had left him at home with the complainant. The appellant therefore had the opportunity to commit the offence during the absence of his wife and although mere opportunity to commit an offence does not in itself amount to corroboration, the opportunity may be of such character that taken together with other circumstances, may in themselves amount to corroboration – ***MALONZA VS REPUBLIC 1986 K.L.R 426.*** Corroboration has also been defined as some independent evidence of some material fact which implicates the accused person and tends to confirm that he is guilty of the offence - ***CLYNES (1960) 44 Cr. App R 158***. In this case, the fact as admitted by the appellant in his defence is that he was the only male in that house and so he is the only person who had the opportunity to commit the offence and it has been established that on the morning after he had been left with the complainant, she was found to have been defiled and she has named him as the offender. Therefore, the ground of appeal that he was convicted on the un-corroborated evidence of the complainant cannot stand as the trial magistrate believed the complainant and his presence at the scene of the offence offered sufficient corroborative evidence.

The appellant has also taken issue with the fact that the P3 Form was not produced by the maker. The absence of the Clinical officer who examined the complainant was explained as she was said to be on study leave and there is nothing on record to indicate that the appellant insisted on her presence. NANCY KURIA (PW4) her colleague who was familiar with her handwriting and signature was within the law to produce the P3 Form and ***Section 77 of the Evidence Act*** justified it's reception by the trial Court. Nothing therefore turns on that ground of appeal and the record does not suggest that the witness was un-able to respond to appellant's questions. Nothing also turns on the ground that the exhibits produced were not the ones that were recorded at the Police Station.

The appellant also raises the issue that there was a long time marital dispute between him and his wife (PW2). However, nowhere in his cross-examination of this witness does the appellant raise the issue of long time material dispute with her. Indeed there is even no suggestion in his cross-examination of his wife that would suggest that the two had any prior difference. In his defence, he only mentions that he quarrelled with his wife on 23rd September 2010 and she left but there is nothing to suggest that her evidence was motivated by malice. She simply repeated what the complainant told her and what she observed. The trial Court also considered this and found that there was nothing to suggest that the complainant and her mother acted in concert to make up a case against the appellant. This line of defence was therefore considered and rejected and rightly so. The trial magistrate's notes before sentencing him clearly show that he considered the appellant's mitigation. That ground of appeal also fails.

Having considered the evidence as adduced in the trial Court together with the grounds of appeal and the submissions by appellant and the State Counsel, I am satisfied that the appellant's conviction was proper but I substitute the conviction to that of incest by male person contrary to ***Section***

20 (1) of the Sexual Offences Act.

With regard to sentence, the appellant was imprisoned for life. The complainant herein was aged five (5) years old and ***Section 20 (1) of the Sexual Offences Act*** provides that if the female is under eighteen (18) years, the accused " ***shall be liable to imprisonment for life***". Those words mean that the life sentence is the maximum penalty for that offence.

The Court of Appeal for Eastern Africa in the case of ***OPOYA VS UGANDA 1967 E.A 752*** held that the words " ***shall be liable to ------*** " provided for a maximum sentence. That means that the term ***"shall be liable to imprisonment for life"*** means that imprisonment for life is the maximum sentence for a offence under ***Section 20 (1) of the Sexual Offences Act*** and the trial Court can impose a lesser sentence. In this case, the appellant was a first offender but the trial Court noted that such offences against children are prevalent and further, that the appellant who was supposed to be the protector of the complainant turned against her. The offence is no doubt a serious one. I would substitute the sentence of life imprisonment with one of twenty (20) years imprisonment.

Further, ***Section 20 (3) of the Sexual Offences Act*** mandates the Court to make orders divesting the offender from all authority over the victim under ***Section 114 of the Children's Act***. There was evidence from the complainant's mother during cross-examination by appellant as follows:-

> " ***Complainant first said she would not want to reside at our home with you"***

It is clear that it would not be in the interest of complainant to continue residing with the appellant even after he serves his sentence. However, by that time, the complainant will not be a child and so it is not necessary to make the so called ***Section 114 orders.***

I would therefore dismiss the appeal on conviction but substitute it to one under ***Section 20 (1) of the Sexual Offences Act*** and reduce the sentence to one of twenty (20) years imprisonment.

It is so ordered.

B.N. OLAO

JUDGE

26TH NOVEMBER, 2013

26/11/2013

Coram

B.N Olao – Judge

CC - Muriithi

Appellant – present

Mr. Omayo State Counsel – present

COURT: Judgment delivered this 26th day of November 2013 in open Court.

Appellant present in person

Mr. Omayo State Counsel present

Mr. Muriithi Court clerk present

Right of appeal explained.

B.N. OLAO

JUDGE

26TH NOVEMBER, 2013