No. 135/2013

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 294 OF 2010

K M .....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Makueni Principal Magistrate's Court Criminal Case No. 90 of 2010 by Hon. F.M. Nyakundi, PM on 22/7/2010)

JUDGMENT

1. **K M** was charged with the offence of incest by male person contrary to Section 20(1) of the Sexual Offences Act No. 3 of 2006. Particulars thereof being that on the 10th day of February, 2010 at ***[particulars withheld]*** village, Thavu Location in Makueni District within Eastern Province being a male person, caused penetration on his male genitals with a female person namely **F M K** who is to his knowledge his daughter. In the alternative he faced the offence of indecent assault on a female contrary to Section 11(1) of the Sexual offences Act No. 3 of 2006. Particulars of the offence being that on the 10th day of February, 2010 at ***[particulars withheld]*** village, Thavu Location in Makueni District within Eastern Province committed an indecent act with a child namely **F M K** a girl aged 5 years by touching her private parts.
2. He was tried convicted and sentenced to 40 years imprisonment. Being aggrieved by the conviction and sentence he now appeals on grounds that the trial magistrate erred in law and fact by admitting evidence of PW5 which was inadmissible; by accepting PW1's evidence which was not corroborated and failing to take into account the defence tendered by the appellant.
3. To prove the case the prosecution called 5 witnesses. **PW2, M M** a child aged eleven years was subjected to *voire dire* examination and found to possess sufficient knowledge to understand the duty of telling the truth. She was affirmed. In her evidence she stated that the appellant her father would have carnal knowledge of her and her younger sister whenever he came home drunk. At the time of commission of the offence their mother had left home. The appellant would make them sleep naked. He would then have carnal knowledge of them. They would scream but since their home was far away from other homes nobody would go to their rescue. The pain she felt made her confide in some women at her church who reported to the local chief then the police.
4. PW3, **V N M** a member of Redeemed Gospel Church ***[particulars withheld]*** and six (6) other ladies at the church were told by PW2 that she had ran away from home because the appellant was defiling her and her younger sister. They reported the matter to the chief and she took her into her custody. She reported the matter to the District Commissioner who in turn reported to the children's officer. The matter was reported to the police who arrested the appellant.

5. The complainant was examined by PW1, **Onesmus Katua** clinical officer based at Makueni Hospital. Her hymen was torn/broken. There were pus cells in her urine. From the history given, the laboratory results and physical examination , there was evidence of the child having been defiled
6. PW4, **No. 2003057690 APC Ali Dubat** arrested the appellant.
7. PW5, **No. 73107, Corporal (W) Agnes Ikira** investigated the case and charged the appellant.
8. When put on his defence the appellant denied having defiled his daughter he stated that he honoured summons by the Assistant Chief. The chief asked him to find a place to take his children. He took them to his sister's place and that is when he discovered that his wife had gone to his other sister's place. When taken to Wote Police Station there were some other two (2) men. They were taken to court. It was alleged that he was selling his children to the men who had gone to his home for traditional liquor. The two were charged with the offence of being drunk and disorderly.
9. In his written submissions the appellant stated that the offence was said to have been committed at 9.30pm and no evidence was led of any light inside the house that would have enabled her to see who was committing the offence. Further, he argued that the act of touching did not amount to penetration by a penis into her vagina. He also stated that the evidence of tears between the vagina and anus was not proved by an expert as PW5 was not a medical officer and his evidence could not corroborate that of the complainant. In dismissing the defence, he argued that the trial magistrate shifted the onus of proof to the appellant which was a misdirection.
10. **Mr. Mukofu,** the learned State Counsel opposed the appeal. He stated that the complainant had positively identified the father as the person who had slept with her. She clearly stated how the appellant would remove his organ for urinating and insert in hers an act that made her feel a lot of pain and she would cry. Her evidence was corroborated by that of the clinical officer who confirmed that indeed she was defiled and her hymen was torn/broken and she had been infected with a sexually transmitted disease. The court based its decision on those facts. He called upon the court to uphold the decision of the court.
11. This being the first appellate court, I am duty bound to analyse and re-evaluate the evidence which was adduced before the trial court and come up with my own conclusions bearing in mind the fact that I did not have an opportunity of hearing and seeing witnesses. (***see Okeno versus Republic [1972] E.A. 32.)***
12. It is not denied by the appellant that a consanguineous relationship existed between him and the complainant. She was his biological daughter. Evidence was given by PW5 the clinical officer that indeed the child had been penetrated as she sustained a perennial tear. The appellant challenged the evidence. His argument was that this kind of evidence was inadmissible as he was not a medical expert. A clinical officer is a licenced practitioner of medicine who is legally qualified to prepare, sign legal documents like P3 forms and to present them in courts of law. (**See the Clinical Officers** (**Training Registration and Licencing) Act Cap 290 (K);** ***Raphael Kavi Kiilu versus Republic (2010 KLR.*** It is therefore a misconception to allege that such evidence is inadmissible.
13. The appellant faulted the trial magistrate to have based her conviction on the evidence of the complainant which was not corroborated. In her evidence however the learned trial magistrate stated thus;-

> ***"In the circumstances however, I find that the evidence of PW2, Corroborated by the medical evidence of PW2 and other prosecution witnesses have proved the main charge of incest by male person...."***

14. Indeed the medical evidence presented by PW1 corroborated PW2's evidence that indeed she had been defiled. The question would be whether there was an error in acceptance of the evidence to prove that the person who sexually assaulted PW2 was the appellant.
15. According to the provisions of Section 124 of the Evidence Act, as long as the court believes that the child in such an offence is telling the truth, a conviction can result without corroboration. The court having listened to the account of the sequence of events by the complainant stated thus:-

> "***I am satisfied that indeed PW2 was molested by her father, the accused person***

in the manner she has described".

The court was satisfied that the child was telling the truth. Such evidence did not require corroboration.

16. The appellant questioned how the child was able to identify him when the offence was committed at night. The evidence adduced by the complainant was that the appellant would take her and her sister **K** to bed while they were naked. They slept in his bed with him. He would then take his male organ and insert it in her female organ and she would be in a lot of pain as he penetrated her. In his defence the appellant did not comment on that evidence, he gave an account of how he was arrested and how he found some two (2) men at the police station who were subsequently charged with the offence of being drunk and disorderly. These men, per his allegations – were said to be persons he was selling to his daughters. This was an allegation not raised during cross-examination to elicit an answer from the arresting and investigation officer.
17. In the case of ***Ongweya versus Republic [1964] E.A. 12*** it was held that the commission of a sexual offence can be properly corroborated with circumstantial evidence.

> "***circumstantial evidence is the proof of facts or circumstances which give rise to a reasonable inference of other facts which tend to establish the guilty of innocence of a defendant(see people versus Jones [1985] 105 111.2d 342".***

No evidence was adduced to suggest that there was an intruder in the house. Therefore even if the prosecution did not lead evidence to establish that there was some light, evidence adduced pointed to only the appellant, a male person who was in that bed as the one who penetrated the complainant's organ using his male organ. She sustained an infection which could only be acquired following sexual intercourse. The learned trial magistrate did not make an error in reaching her decision.

18. In the premises, I find the appeal against conviction lacking merit. It is dismissed.
19. With regard to the sentence imposed. The Act provides for life imprisonment. However, the appellant having been a first offender the court should have been considerate. I therefore set aside the sentence of **40 years imprisonment** and substitute it with **30 years.**
20. Orders accordingly.

DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **21ST** day of **NOVEMBER, 2013.**

L.N. MUTENDE

JUDGE