



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
CRIMINAL APPEAL NO. 18 OF 2008
BETWEEN

P. N.....APPLICANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the decision of the Senior Resident Magistrate Hon. N. Shiundu dated 10th April, 2008 in Iten Senior Resident Magistrate's Court Criminal Case No. 116 of 2007)

JUDGMENT

The appellant, **P.N**, has filed this appeal to contest his conviction and sentence by the Learned Senior Resident Magistrate (**N. Shiundu**) sitting at Iten Senior Resident Magistrate's Court. He was arraigned in court on 7th February, 2007 and charged with incest contrary to section 20(1) of the Sexual Offences Act No. 3 of 2006. It was alleged that on the 2nd day of February, 2007 in Keiyo District of the Rift Valley Province, being a male person he had carnal knowledge of **L.C** a female person aged 13 years who was to his knowledge his daughter.

The appellant denied the charge and his trial commenced on 2nd July, 2007 at which the prosecution led by Inspector Chitira called six (6) witnesses in support of its case. The brief facts of the case were that on 2nd February, 2007 at around 7:00pm, the complainant was at home alone when the appellant arrived. He pulled her into the house removed her pants and his trousers and defiled her. She felt pain but could not scream because he threatened to assault her. When she was released she reported to the village elder **Josephat Kipsang** (PW2) who was their neighbour. In the company of PW2 she returned home and the appellant was arrested and taken to the police station. She recorded her statement and was issued with a P3 form which was eventually filled by **Wilson Talam** (PW5) of Iten District Hospital. On examination PW5 observed that the complainant had a torn under pant and had tenderness of the hip joint. He however noted nothing abnormal with the complainant's genitalia. Laboratory tests however disclosed a sexually transmitted infection and that made him conclude that the complainant had been defiled.

Josephat Kipsang (PW2) supported the complainant's testimony. He acknowledged receiving the complainant's report but gave the date as 3rd February, 2007. He was however not the village elder because, on receipt of the report, he went to inform **Paul Kipkoech Katam** (PW3) the village elder. They then went to the appellants home, arrested him and took him to Kapchelal Police Post where he was re-arrested by **APC Mathew Amutete** (PW4) and later charged.

At the close of the prosecution case, the appellant was found to have a case to answer. He gave an unsworn defence in which he stated that he had been arrested for an offence he did not know.

On 10th April, 2008 the Learned senior Resident Magistrate delivered his judgment in which he convicted the appellant and thereafter sentenced him to thirty (30) years imprisonment. Being aggrieved, the appellant filed this appeal. **Mr. Marube**, Learned Counsel, appeared for the appellant and argued the appeal on his behalf while **Mr. Chirchir**, Learned Senior State Counsel who represented the Respondent state, conceded the appeal on the ground that PW5 the clinical officer on examining the complainant found nothing abnormal with her genitalia and that even though he detected an infection on the complainant the same could not be attributed to the appellant because he was not examined.

I have carefully perused the grounds of appeal and find that the same challenge the judgment of the Learned Senior Resident Magistrate on the basis that the evidence did not support the charge; that there were contradictions in the evidence; that the conviction was founded on the testimony of a single witness and that the testimony of the clinical officer was not reliable.

Substantiating the above grounds of appeal, counsel submitted that the charge sheet as framed did not disclose an offence under section 20(1) of the Act. Counsel further pointed out various contradictions in the testimonies of the witnesses which contradictions, according to him, were not appreciated by the Learned Senior Resident Magistrate.

On my own independent re-consideration and re-evaluation of the evidence the following findings have emerged. The appellant was charged with incest which was alleged to have occurred on 2nd February, 2007, in Keiyo District of the Rift Valley. The charge as framed must have been on the basis of the complainant's statement. At the trial she testified that on the said date at around 7p.m., her father defiled her in their house when she was alone, she stated that as a result, she bled and felt a lot of pain. She immediately reported to a village elder called **Josephat** who lives nearby. **Josephat** testified as PW2. According to the complainant, after making the report PW2 accompanied her to her home where the appellant was arrested. She was then taken to hospital where a P3 was filled.

When PW2 took the witness stand, he did not say he was a village elder but a neighbour of the appellant. He also stated that the complainant reported to him on 3rd February, 2007 and not 2nd as the complainant had stated. It is PW2 who reported to the village elder **Paul Kipkoech Katam** (PW3) and they both arrested the appellant. The village elder supported the testimony of PW2. He specified the date the complainant was taken to the police as 4th February, 2007.

APC Mathew Amutete (PW4) on his part testified that members of the public took the appellant to him at Kapchelal AP Post at 8:00p.m. on 3rd February, 2007. According to him, the complainant was with members of the public. **Wilson Talam** (PW5) was the clinical officer who filled the P3 form in respect of the complainant. He testified that the complainant first visited the hospital on 2nd February, 2007 but he completed the P3 on 5th February, 2007. PW5 further testified that on examination of the complainant, he observed that she had a torn under-pant with tenderness on the hip-joint. He was however, categorical that there were no blood stains. When he examined the complainant's genitalia, there was nothing abnormal which he detected. He however concluded that the complainant had been defiled because laboratory tests showed that she was infected with gonorrhoea.

The testimony of PW5 was significant in several respects. It was relied upon in convicting the appellant. But what was the quality of that evidence? If the complainant went to hospital on 2nd February, 2007, as she alleged and as PW5 testified, how come no blood was detected from her genitalia? She testified that she bled and felt a lot of pain-which would have been obviously the case for any 13 year old girl not used to sex. Yet PW5 found nothing abnormal with the complainant's genitalia. He also saw no blood or blood stains. The laboratory test may have indicated that the complainant had a gonorrhoea infection which in itself was evidence the complainant had had sexual intercourse. The appellant however was never examined to determine, whether he too had the infection. The infection was therefore not conclusive proof that the appellant had committed the incest with the complainant.

Given the serious conflict of evidence of the complainant and the clinical officer (PW5), it could not be concluded that the complainant was truthful. A conviction could not therefore be based on the testimony of the complainant alone. Indeed the Learned Senior Resident Magistrate did not suggest that he was applying the proviso to section 124 of the Evidence Act. If he had intended to apply the said proviso, he would have given reasons for believing the complainant as required by the proviso. He did not.

In all those premises, I have come to the conclusion that the appellant was not convicted on sound evidence. I am not therefore surprised that the Learned Senior State Counsel conceded this appeal.

I allow the appellant's appeal and quash his conviction by the learned Senior Resident Magistrate. Without conviction the sentence has no basis and cannot stand. The same is hereby set aside. The appellant is set free forthwith unless he is otherwise lawfully held.

DATED AND DELIVERED AT ELDORET

THIS 16TH DAY OF FEBRUARY, 2012

F. AZANGALALA
JUDGE

Read in the presence of:-

Mr. Marube for the appellant and

Mr. Chirchir for the State.

F. AZANGALALA
JUDGE

16TH FEBRUARY, 2012