



E I

L.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in criminal case Number 3941 of 2009

in the Chief Magistrate's Court at Makadara – A. Lorot (SRM) on 30th July 2010)

JUDGMENT

1. The appellant, **E I L** was tried for the offence of incest by male person contrary to **Section 20(1)** of the **Sexual Offences Act No. 3 of 2006**. It was briefly stated that on 16th September 2009 at around 9.00 p.m. at Reuben Slum Industrial Area in Nairobi, he caused his penis to penetrate the vagina of Z.A.E a female person who was to his knowledge his daughter aged 14 years. (The initials Z.A.E have been substituted for the complainant's name to protect her identity being a minor)
2. On 30th July 2010 the learned trial magistrate convicted him as charged and sentenced him to serve 25 years imprisonment.
3. The appellant immediately filed an appeal in which he raised four grounds summarised as follows:
 - 1) *The evidence of PWI was not tenable.*
 - 2) *The prosecution's evidence raised reasonable doubt.*
 - 3) *The case was not properly investigated to exhume the truth.*
 - 4) *The defence was plausible and should not have been rejected.*
4. The Learned state counsel Mr. Mulati opposing the appeal on behalf of the state submitted that, **PWI** the complainant gave a graphic account of the defilement, and that the evidence of the two doctors corroborated her assertions. The learned state counsel urged that the said inconsistencies in the prosecution evidence were minor and immaterial to the case.
5. As stated by the Honourable Judges of appeal in **Benjamin Mbugua Gitau vs. Republic Cr. App No. 257 of 2009 (unreported)** there is no set format or style for re-assessing the evidence on record as a court of first appeal. I have however, analysed and re-evaluated the evidence on record afresh keeping in mind what was held in **Odhiambo vs Republic Cr. App No. 280 of 2004 [2005] 1 KLR.** In the said case the court of Appeal held that:

“On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore

cannot tell their demeanour”.

6. On **grounds No. 1** and **No. 2** which the appellant urged together, he reiterated what he had stated in his defence statement. This evidence was in agreement with that of **PWI**, that **PWI** was his step daughter and that he had received a report from his neighbour that she was seen roaming about at night. That he had caned her to discipline her. Their evidence was also in agreement that they set off at 8.00 p.m. to take **PWI** to the Chief’s office to report that incident.

7. Their evidence parted ways when the appellant testified that on the way to the chief’s office the minor apologised and promised to change her ways, and that they turned back and went home. He denied sexually assaulting her. According to the appellant this case arose out of a grudge the minor harboured towards him because of the said caning. **PWI** a 14 year old class 8 pupil in primary school, on the other hand, testified that on the way to the chief’s office it was the appellant who said he had forgiven her and they should go back home. She accepted this because he was her father. According to the minor, when they turned to go back home the appellant chose a different route from that which they had used to get there. The route they now took went through a dark alley with no security lights.

8. The minor pointed out to the appellant the dangers of using such a route but he reminded her that he was the adult and therefore knew what was best for them. Presently they came to a bushy area that had tall grass and some thickets. It was her testimony that the appellant pulled her towards the thickets and that when she resisted, he lifted her and carried her deep into the thickets. The appellant covered her mouth with a piece of cloth, so that she could not scream.

9. I respectfully agree with the learned state counsel Mr. Mulati that the minors account of the defilement was graphic. She told the court that the appellant pinioned her hands at the back so that her weight rested on them, as she lay facing up when he put her on the ground. He lifted her skirt and tore the pair of bikers that she wore underneath it and threw it away. He then pulled her legs apart and lowered his own trousers and under pant, and inserted his penis into her vagina and had forceful sex with her.

10. I found it important to recapitulate the minor’s graphic account because the appellant posed certain questions in his written submissions to wit:

“My lord, how many hands had the appellant? Some were gagging her, holding her hands on her back (sic) lowering the trouser and pants and it is funny that a man could fuck his victim forcefully without touching her any other body (sic) while the victim is in a vigorous struggle. Could this have been possible?”

11. First of all **PWI** was a 14 year old girl against a male adult, even though there is nothing on record to tell us about their respective physiques nor that any of them had any infirmity. It shall be remembered that the appellant had raised **PWI** from the age of two years. Their respective strengths and control of one over the other was not comparable.

12. Secondly, he had put a piece of cloth in her mouth as he carried her so that she could not shout for help. Thirdly, once he put her on the ground with her hands pinioned underneath her and his weight over her she was practically helpless.

13. **PWI** was not certain of it, but she told the court that she may have passed out due to pain because when she came to, roused by the cool night wind, the appellant was standing some distance from her, and the lower half of her body was naked. She did not have her skirt, bikers or pant. The appellant took issue with the fact that **PWI** did not lead the police to the scene of the rape to recover her pair of bikers which she said he tore off her and threw away, nor did she tell her mother of her ordeal the next morning. I took note of the fact that she was a minor and was also not the person in charge of the investigations. It was upto the investigating officer to visit the scene of crime or not. From the evidence, the minor cared so much what effect the act would have on her mother, that she divulged it to her teacher only on condition that the teacher **“should not tell her mother because she can run into shock and die”.**

14. The appellant advanced a hypothesis that the minor was induced by someone to frame him because he was bitter and strict and was trying to stop her ill-advised movements. He however did not disclose who that person was nor is there any evidence on record to support such a hypothesis. Further that the spermatozoa recovered from the minor in the vaginal swabs could have come from some boys she was allegedly involving herself with. There is however no evidence on record that the minor was in distress before she set off with her father to go to the chief. To the contrary she appeared to be alright and had completed her evening chores.

15. The evidence of defilement was corroborated by the two medical witnesses Dr. Kamau who testified as **PW2** and Dr. Adan Ridhuan who testified as **PW5**. **PW5** produced a P3 on behalf of Dr. Muhombe who examined her on 17th September 2009 a day after the assault. Dr. Muhombe noted that she only had a thin ring of hymen left and it had small fresh tears in the 5 o'clock and 9 o'clock positions. She also had two lacerations at the pineal area (the area between the vagina and anus) and had a prurient (foul smelling) discharge. A vaginal swab revealed presence of spermatozoa and the Dr. Observed that she appeared emotionally distressed.

16. **PW2, Dr. Kamau**, saw her two weeks later and noted the absence of the hymen and an old tear.

17. On **grounds No. 3 and No. 4** the record reflects that the learned trial magistrate set out the appellant's evidence which he had tendered in his defence without oath and without calling witnesses. He analysed it alongside the testimonies of **PW2** Dr. Kamau, **PW4** the mother and **PW5** Dr. Adan Ridhuan.

18. I examined the demeanour of the appellant after the act, and respectfully agreed with the learned trial magistrate that the appellant's behaviour was strange. He told **PW4** that he had escorted the minor directly to the rented room which she used as a bedroom, without letting her come to take super from her mother's house. When the mother prepared to take some food to her, the appellant told her not to disturb the minor yet he knew she had gone to bed hungry. The next morning he told the mother to stay in bed as he would go and wake the minor up to go to school. He even offered to escort her upto the school gate. This points to a concerted effort on the appellant's part, to keep the minor from being alone with her mother until it was too late. The mother however noted that the minor too was acting strangely and did not look well, the following morning.

19. The proceedings therefore show, that the learned trial magistrate considered the appellant's defence at length and found it not plausible in light of the rest of the evidence on record. I too have anxiously scrutinised his defence alongside all the evidence on record to draw my own conclusions. I concur with the learned trial magistrate's findings.

20. There is no evidence on record upon which I could find that the minor conceived a malicious plot to frame the appellant just because he had chastised her as a father. There is no evidence either to support any claim that **PW4** the mother, bore the appellant any malice to spur her to frame him. Indeed as observed by the learned trial magistrate this is a woman who still visited him even in remand, and at the time of the incident had sought out his brother before confronting the appellant with the teachers report. To accept the appellant's allegations that **PW1** and **PW4** acted with malice aforethought, would render inexplicable the evidence of the teacher **PW3**.

21. The minor was alone when the defilement occurred. There would therefore be no witness to corroborate her evidence on identification. In reaching this conclusion I took into account the Court of Appeal decision in **Ogeto v Republic [2004] 2KLR**, in which the Hon. Judges of Appeal Omolo, Githinji and Onyango Otieno, JJA held, *inter alia*, that:

"It is trite law that a fact can be proved by the evidence of a single witness although there is need to test with the greatest care the identification evidence of such a witness especially when it is shown that conditions favouring identification were difficult. Further, the Court has to bear in mind that it is possible for a witness to be honest but to be mistaken".

22. In this case however, the issue of identification does not arise. The appellant is the minor's father and they were alone having come from home together. There was no intervening intrusion by any 3rd party.

23. **Section 124** of the **Evidence Act** provides that where in a criminal case involving sexual offence, the only evidence available is that of the alleged victim of the offence, the court shall receive the evidence of the victim and may proceed to convict the accused if it is satisfied that the complainant is telling the truth. The law only requires that the reasons for believing that the complainant is telling the truth be recorded in the proceedings.

24. The minor was subjected to **voire dire** examination before her testimony was received on oath. In the assessment of the learned trial magistrate he noted as follows:

“The child, evidently a minor, is intelligent and speaks confidently. She does appreciate the concept of truth and understands the substance of oath”

The record also shows that she withstood cross-examination from the appellant beautifully, and that the learned trial magistrate observed as follows concerning her evidence:

“The evidence of the girl was well rendered. It was detailed. She left nothing to chance. She reported to the nearest care giver at the earliest opportune moment. She found solace in her teacher.

The allegations she raised against her own father were of serious magnitude. They are not light and even as she told teacher Magdalene she still had her mother's best interest at heart. She was truthful forthright and above all candid. Her testimony was corroborated by that of her mother and Dr. Adan. The prosecution in this case was well conducted. The evidence was proved beyond an iota of doubt.”

I am satisfied therefore, that the learned trial magistrate recorded the reasons for believing the minor who was the lone witness to the act. Further the defence evidence did not manage to oust the otherwise overwhelming evidence tendered by the prosecution.

25. Having so far found, the **Sexual Offences Act No. 3 of 2006** provides that:

“any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother niece aunt or grandmother is guilty of an offence termed incest”.

In this case the appellant was the minor's father for all intents and purposes. He had assumed parental responsibility over her and raised her as his daughter from infancy. She did not even know that he was not her biological father until this case came up. In any case under **Section 22(1)** of the **Sexual Offences Act No. 3 of 2006**, in cases of incest a father includes a half father. The relationship between them was therefore incestuous.

26. For the foregoing reasons I find that the charge of incest was proved against the appellant beyond reasonable doubt. The conviction entered against the appellant was well founded.

27. On the sentence, the appellant was convicted under **Section 20(1)** of the **Sexual Offences Act** which has a proviso that states that:

“provided that, if it is alleged in the information or charge and proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life.....”.

The minor's mother produced a birth certificate in evidence, which confirmed that she was born on 23rd August 1995 and was therefore aged 14 years at the time of the assault. The sentence of 25 years imprisonment imposed by the trial court was therefore within the law.

For the foregoing reason I find that the appeal has no merit. I dismiss the appeal uphold the conviction and affirm the sentence imposed by the learned trial magistrate.

It is so ordered.

SIGNED DATED and **DELIVERED** in open court this **20th** day of **June 2012**.

L. A. ACHODE

JUDGE