



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL CASE NO. 182 OF 2007

M. R. N.....APPELLANT
VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the original conviction and sentence by E. J. OSORO, Senior Resident Magistrate, in Nyeri Chief Magistrate's Criminal Case No.1422 of 2006 delivered on 13th March 2007)

JUDGMENT

M. R. N, the appellant herein, was tried on a charge of incest by male contrary to *Section 166 (1)* of the Penal Code. He also faced the alternative count of indecent assault on female contrary to *Section 141 (1)* of the Penal Code. At the end of the trial, the Appellant was convicted on the main charge under *Section 20* of the Sexual Offences Act No. 3 of 2006. He was sentenced to serve 20 years imprisonment. Being aggrieved, he filed this appeal.

On appeal, the Appellant put forward the following grounds of appeal:

1. *That I pleaded not guilty to the charge.*
2. *That the learned trial magistrate erred in law and fact by failing to find that this was a keenly and arranged case between P.W.1 and her mother just to frame me because I had divorced her (P.W.1's mother) since 1999 till today.*
3. *That the learned trial magistrate erred in law and fact by failing to find that P.W.2 the chairperson of good shepherd orphans project got the first report the alleged offence on 3/3/06 and report this case on 14/3/06, the question was, why did she take that long to report.*
4. *That the learned trial magistrate erred in law and fact when she failed to consider that P.W. 1 claimed her father started defiling her since January 06 to March 06 the question was if this offence was being committed in the said month, how come didn't the complainant report to the neighbour or chairperson of the good shepherd orphans project.*
5. *That the trial magistrate erred in law and fact by relying on prosecution witnesses who did not prove their evidence of how I was defiling P.W.1.*
6. *That the learned trial magistrate erred in law and fact when she failed to consider that the clinical officer told the court he examined P.W.1 on 21/3/06 and while cross-examining by me P.W.5 told the same court that P.W.1 was examined on 16/3/06. The question was who was telling the truth?*
7. *That the trial court erred in law by failing to consider my defence adequately.*

The case before the trial court was to the effect that **E.W.R.** (P.W.1), the Complainant herein, lived with her father, the Appellant, when her mother deserted the matrimonial home. P.W. 1 claimed before the trial court that early 2006 the Appellant went to her bedroom while she was asleep. She alleged that the appellant undressed and proceeded to defile her on her bed. It is said the Appellant penetrated the Complainant causing her great pain. P.W.1 said she went and told her teacher, Mrs. **C. W. K.** (P.W.4) about the incident. Jane Nyaga (P.W.2) alleged that P.W.1's sister told her that she suspected the Complainant was being defiled by her father. P.W.2 said that upon receipt of that information, she visited the Complainant's school where she met P.W.4. P.W. 4 said that she introduced P.W.2 to P.W.1. The Complainant (P.W.1) is said to have revealed what the Appellant had done to the Complainant. P.W. 2 took P.W.1 to hospital for examination and treatment. The child was rescued and taken to Bellhope Children's home. Thereafter the Appellant was arrested and charged. **Joseph Njoroge** (P.W.3) examined the Complainant and formed the opinion that there was penetration. The Appellant was later arrested at Mukurweini Police Station where he went to make inquiries about a missing child.

The Appellant gave an unsworn testimony in his defence. He claimed he was framed up by the complainant's mother whom he had

divorced. He also blamed P.W. 2 and P.W. 3 for framing him up due to a land dispute. The learned trial Magistrate considered the evidence from both sides and came to the conclusion that the Complainant was sexually assaulted. The learned Senior Resident Magistrate formed the opinion that the demeanor of the complainant indicated that she was a truthful witness. The trial Magistrate proceeded to dismiss the Appellant's defence claiming it did not shake the Prosecution's case.

On appeal, the Appellant relied on written submissions. Miss Ngalyuka, learned Senior State Counsel, was of the view that there was sufficient evidence to sustain the conviction against the Appellant. Though the Appellant forwarded a total of seven (7) grounds in his Petition, in my view, those grounds may be summarized to two main grounds namely:

- (i) Whether or not there was cogent evidence to sustain a conviction.
- (ii) Whether or not the trial Magistrate properly considered the Appellant's defence.

Let me start by considering the second ground of appeal. In his defence, the Appellant claimed that P.W. 2 was not a truthful witness because if it is true he defiled the complainant, she would not have left the child under his care. The Appellant also alleged that P.W. 2 and P.W. 3 had a grudge against him over a plot they disputed with their church, the Seventh Day Adventist. He claimed the Church wanted to take away his land but he restrained it. The recorded evidence shows that the Appellant cross-examined P.W. 2 at length. Initially P.W. 2 had indicated that she did not know the appellant and that is why she did not bother to talk to him. Later P.W.2 admitted that she knew the appellant to be a brother of one M. and S. She denied that she was involved in the construction of the church in the appellant's land. P.W.2 went to give great details of the relationship between the Appellant and his sister S. P.W.2 claimed that Sabina had told her that they feared the Appellant hence they could not question him. I have re-considered the evidence of P.W.2 vis-à-vis the Appellant's defence. It is obvious from the evidence that P.W.2 had denied knowledge of the Appellant. There is clear evidence that she hid a lot of information from the Court. She initially denied knowledge of the Appellant only for her to change her story upon intense cross-examination. I think there is credence in the defence of the Appellant that he could have been framed up by P.W.2 due to a dispute over a church plot within the Appellant's land. This piece of evidence came out clearly from P.W.2's evidence in cross-examination and from the Appellant's defence. I think the Appellant's defence was dismissed without due consideration.

Let me now consider the first ground. The question is whether there was cogent evidence to sustain a conviction? To begin with, the medical evidence clearly shows that the Complainant was defiled. The difficult part is who defiled the child? The Appellant was not medically examined to create the link. Of course, the appellant had the opportunity to commit the offence but that is not enough in a serious case like this. It is possible that the Appellant may have committed the offence. It is also possible that the Appellant may have been framed up by P.W. 2 because of a land dispute. The law enjoins the Court to give the Appellant the benefit of doubt.

In the end I allow the appeal by quashing the conviction and by setting aside the sentence. The Appellant is set free forthwith unless lawfully held.

Dated and delivered at Nyeri this 6th day of October 2011.

J. K. SERGON

JUDGE

The Appellant present in person. Maundu for the State present.