



IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 314 OF 2010^{•B}

(From original conviction and sentence in Criminal Case No.237 of 2009 of the Chief Magistrate's Court at Nakuru – H.O. Baraza, RM)

W.M.N.....APPELLANT
VERSUS
REPUBLIC.....RESPONDENT

JUDGMENT

W.M.N (the appellant) was charged with the offence of attempted incest contrary to **Section 20(2)** as read with **subsection 2(1)** of the **Sexual Offences Act 2006**. The particulars of the charge are that on diverse dates between March 2008 and 28/10/2009 in Nakuru North District of the Rift Valley Province, the appellant attempted to commit an act which would have caused penetration of his genital organ, penis into the female genital organ of R.M, a child aged 17 years, whom he knew to be his niece. In the alternative, the appellant was charged with the offence of having committed an indecent act with a child contrary to **Section 11(1)** of the **Sexual Offences Act 2006** in that between March 2008 and 28/10/2009 in Nakuru District, intentionally and unlawfully committed an indecent act by touching the female genital organ of R.M.M, a girl aged 17 years. After a full trial, H.O. Baraza, Resident Magistrate Nakuru, found the appellant guilty of the alternative charge and the appellant was sentenced to 10 years imprisonment. The appellant is aggrieved by both the conviction and sentence and filed this appeal citing 11 grounds of appeal in the supplementary grounds of appeal. Mr. Njuguna counsel for the appellant summarized them into six grounds.

The prosecution called a total of 9 witnesses whilst the defence called 3 witnesses including the appellant.

The complainant is R.M.M (PW1) who was aged 17 years old at the time of the trial and was a student at K [...] Secondary School. She recalled that sometime in March 2008, she was going to school when her uncle, W.M, the appellant herein, found her waiting for the school bus and called her. She went to his house, he pulled her in, removed her clothes, threw her on the bed and covered her mouth and had sex with her. The incident lasted from 7.00 a.m. to 10.00 a.m. The appellant warned her not to tell anybody. She went to school late. On 28/10/09 when she was going to school with her brother, E.M (PW2), the appellant asked her to go for a pen from his shop, she did. He then removed her clothes and had sex with her and gave her Kshs.5/-. She was released at 9.30a.m. but did not tell anybody. Her father learnt that she had gone to school late and demanded to know where she had been. Her father sensed there was a problem and they started to investigate and took her to the Police Station where she opened up to the Police Officer (PW9) as to what happened, she was taken for examination at Kabazi Hospital and was issued with a P3 form.

PW2, E.M.M, a child who was 6 years old was affirmed. He recalled one day when he was going to school with his sister, (PW1) when she said that she was going for a biro from their uncle M's shop. She left him on the road and he went to school alone. His father (PW4) found him alone on the road and PW2 informed him that R had gone for a biro.

PW3, E.K.N, the mother of PW1, had observed changes in PW1's behaviour from early 2009, that she came home late, had money and had become rude. She recalled that on 28/10/09, her husband informed her that PW1 had not gone to school that day because he had found PW2 on the road alone. Upon PW1's return in the evening, she could not disclose to anyone where she had been unless she was taken to Police Station. At Police Station, she disclosed to the police that she had been defiled by the appellant.

PW4, J.M.N, is the father of PW1 and an older brother to the appellant. He recalled that on 28/10/09, at about 7.30 a.m. he was on his way back home when he found PW2 on the road alone whereas he should have been with PW1 and PW2 informed him that PW1 had gone to get a pen. In the evening when PW1 returned home, she lied that she went to school with PW2. When confronted she refused to talk unless she was taken to the Police Station. At the Police Station, she opened up to the Police Officer (PW9) on what had happened.

PW5, Isaac Gitonga, the Clinical Officer at Kabazi Health Centre examined PW1 but found nothing abnormal on the complainant but the hymen was broken and that she had been sexually active. He found no sign of forced penetration or recent sexual activity.

PW6, PC Mark Chacha received a report of defilement from PW3 and later with PW9, they went to pick up the appellant from his kiosk. Both PW1 and the appellant were taken to Kabazi Health Centre for examination.

PW7, a child of 14 years old, M.M recalled that on 28/10/09 at about 7.00 a.m. when on his way to school, he saw PW1, who was his classmate walk to the appellant's shop. He went home and told his mother to call PW1's father, PW4 to go to the shop and confirm. On that day, PW1 arrived at school at 9.00 a.m. with a torch, ball gum and Kshs.30/-.

PW8, Lydia Wangui Macharia testified that on 28/10/09, at about 7.00 a.m. she went to buy milk near the appellant's shop and she saw PW1 enter the appellant's shop. She informed PW4 what she had seen and he told her what had been happening between the appellant and PW1.

PW9, PC Naomi Onyoni of Kirengero Police Station recalled that on 28/10/09, a defilement report was made to her; she interviewed PW1 who informed her that she had been defiled by the appellant since 2008. They arrested the appellant, took both appellant and PW1 for examination.

The appellant in his sworn defence said that on 28/10/09, he went to deliver milk and later went to his shop, which he operated till 7.30 p.m. He said that in 2009, his brother, PW4, had alleged that he poisoned his cows and had once released the appellant's cows into the employer's field and the employer had the appellant arrested. He recalled that two police officers came to his kiosk and he was arrested. He denied meeting PW1 on that day or committing the offence alleged.

DW2, K.M.N, the appellant's brother testified that on 28/10/09, he was at home and saw the appellant about 8.00 a.m. DW2 was mending the fence. He saw both the appellant and PW4 deliver milk. He repaired the fence with PW4 and PW4 escorted him to the stage but never informed him of the alleged defilement incident. At 8.00 p.m. PW4 called him to inform him that the appellant defiled his daughter. He doubted that the girl was defiled as there had been disagreement between the appellant and PW4 over the appellant's cows trespassing into PW4's employer's land.

DW3, R.M, the appellant's mother recalled that on 28/10/09, PW4 was at home doing some work for her. The appellant milked her cows till 7.00 a.m. and went back to the shop; That PW4 escorted DW2 at 4.00 p.m. and she saw the complainant at 5.00 p.m. She was later informed that the appellant defiled PW1. She said that PW4 and the appellant used to quarrel daily over the appellant's chicken trespassing

on PW4's property. PW1 did not tell her about what had happened.

The grounds upon which the appeal is premised were condensed into the following 6 grounds:-

1. **That the evidence adduced by the prosecution was contradictory and inconsistent;**
2. **That the amendment of the charge sheet 4 times was to cure the defects in the prosecution case;**
3. **That no weight was given to the defence case;**
4. **That the prosecution exhibits were forged and tampered with;**
5. **That the case was not proved beyond reasonable doubt;**
6. **That the charges as drawn are fatally defective.**

Mr. Nyakundi, learned Counsel for the State conceded the appeal on grounds that the charge sheet was amended 4 times to suit the evidence; that the prosecution witnesses were not credible; that sufficient weight was not given on the allegation that there was bad blood between PW4 and the appellant and the complainant had to be locked up in order to implicate the appellant.

As is required of this court as the first appellate court, I need to re-evaluate the evidence afresh and arrive at my own findings taking into account the fact that this court had no opportunity to assess the demeanor of the witnesses.

On the first ground that there were glaring contradictions in the prosecution's evidence, Mr. Njuguna raised several issues. Counsel submitted that the only direct evidence was adduced by PW1, PW2 and PW5. He submitted that whereas PW2 said that PW1 told him that she was going to get a pen from the appellant, PW1 said that the appellant called her to go and get a pen yet the appellant never met PW1 and PW2 on the road. I do agree that there was indeed contradiction in PW1 and PW2's evidence as to why the two parted on the said date. Infact PW4 added that PW2 informed him that PW1 had gone back home for a pen and PW4 did not find PW1 at home. Further, although PW3 and PW4, the complainant's parents testified as if they had not known about what was happening to their daughter, from the evidence of PW7, M and PW8, M's mother, it seems PW4 had sent people to spy on the complainant to confirm whether she used to go to the appellant's shop. PW7, a classmate of the complainant told the court that he spotted the complainant going to the appellant's house at 7.00 a.m. on 28/10/09. He went to tell his mother to inform the complainant's father. He specifically said that PW4 had told him that the complainant had an affair with the appellant. PW8, who is PW7's mother already, knew of the affair between the appellant and the complainant having been told by PW4. It would therefore seem that as of 28/10/09, PW1's parents already knew what was happening to their daughter but had taken no steps. Despite the fact that PW7 and PW8 informed the complainant's father that she had been seen going to the appellant's shop, it seems PW4 took no steps and waited for pw1 to go back home in the evening. The evidence of PW3 and PW4 on one hand and that of PW7 and PW8 on the other, as to the events of 28/10/09 does not add up.

PW3, PW4 and the arresting officers testified that the appellant was arrested on the same date of the incident that is 28/10/09. PW9, the Investigating Officer recalled that PW1 was examined on 29/10/09, which is a day after arrest. To the contrary, the P3 filled by PW5 indicates that she was examined on 10/12/09 that is over 10 days after she was held. The lapse of 10 days was not explained yet PW1 was held at the Police Station. It is then no wonder that no valuable evidence would have been found, if indeed there had been any. What was clear was that PW1 was sexually active.

Under the **Sexual Offences Act**, the age of the complainant is of essence because the age of the victim determines the sentence to be meted upon conviction. **Section 20** states:-

“20(1) 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 and is liable to imprisonment for a term of not less than ten years.

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 and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person.

(2) If any male person attempts to commit the offence specified in subsection (1), he is guilty of an offence of attempted incest and is liable upon conviction to a term of imprisonment of not less than ten years.

(3) Upon conviction in any court of any male person for an offence under this section, or of an attempt to commit such an offence, it shall be within the power of the court to issue orders referred to as “section 114 orders” under the Children’s Act and in addition divest the offender of all authority over such female, remove the offender from such guardianship and in such case to appoint any person or persons to be the guardian or guardians of any such female during her minority or less period.”

If the victim is over 18 years of age, upon conviction, the sentence is life imprisonment. It was therefore important that the complainant’s age be ascertained. In this case, the witnesses gave contradictory evidence on the age of PW1. PW5 assessed her to be 17 years; PW4 testified that she was born on 26/1/1993. PW1’s mother, PW3, said she was born on 22/10/1992 and produced the clinic card. The father said she was born on 21/10/1992. It is Mr. Njuguna’s contention that the birth notification is not genuine because the names are tampered with. I have had a look at the said notification and it is evident that there was overwriting on the names of the holder of the said clinic card. That card was not produced to the police immediately after the alleged offence but later. That alternation does raise doubt in that court’s mind as to its authenticity and the trial court should have taken that into account. It seems the age of the complainant was not established.

It is also the appellant’s contention that the charges as drawn were defective. The complainant’s evidence was that she was actually defiled and that it had been going on for a while. The charge indicates that the appellant only touched PW1’s private parts. I do think that such material contradiction would render the charge defective.

The appellant denied committing the offence alleged nor did that PW1 ever go to his shop on 28/10/09. He attributed these proceedings on some differences they have had with PW1’s father. DW2 said that the appellant had quarreled with PW4 over cows. However the appellant’s mother talked of her sons quarreling over chicken trespassing onto PW4’s land. Just like the trial court observed, I doubt that PW1, PW3 and PW4 would sink so low as to frame the appellant with such a charge and expose PW1 to such shameful proceedings. I believe that there was more to it than what the court knows. It is just because of the contradictions in the prosecution case that this court found that there was sufficient doubt raised in the prosecution case. There is strong suspicion that the appellant has been taking advantage of his niece. Although it is alleged that PW1 framed the appellant, it could be the reverse and might it be that the appellant may have been getting to his brother through defiling his niece? The fact that there are contradictions and inconsistencies in the prosecution case does not at all mean that the appellant is innocent? In my view, the appellant is a person who may be preying on children and should be watched.

Having said all the above, I find that the prosecution case was full of too many inconsistencies that the conviction is unsafe. It is hereby quashed and sentence set aside and the appellant is released forthwith unless otherwise lawfully held.

DATED and DELIVERED this 18th day of November, 2011.

R.P.V. WENDOH

JUDGE

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PRESENT:

Mr. Njuguna for the appellant.

Mr. Nyakundi for the State.

Kennedy – Court Clerk.