REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS

Criminal Appeal 97 of 2007

A H

VERSUS

REPUBLIC

(Appeal from original Conviction and Sentence in Mwingi Senior Resident Magistrate's Court Criminal Case No. 396/2004 by Richard Ondenyo,S.R.M on 28.5.2007)

JUDGMENT

1. A H, the Appellant herein was the accused person in Mwingi Senior Resident Magistrate's Court Criminal case No.396 of 2005 where he faced the charge of incest contrary to section 166(1) of the Penal Code and the alternative charge of indecent assault of a female contrary to section 144(1) of the Penal Code. The Particulars of offence were that in the main count, he had carnal knowledge of his daughter, **K. A.** on 9.5.2004 at [*particulars withheld pursuant to section 76 (5) of the Children Act, 2001*]. The alternative was that on the same day and place he touched her private part, namely her vagina. He was acquitted of the main charge but sentenced to serve 10 years imprisonment on account of the alternative charge.

2.The present appeal is preferred against both conviction and sentence and before turning to my appreciation of the evidence, I should first set out that evidence which was as follow:-

3.PW1, **D. D**, wife of the Appellant stated that the alleged victim of the incident in question was her daughter sired by the Appellant in 1987 before they got married. That she was the first of 5 children and on 9.5.2004, **K. A.** disappeared from home and returned at 4p.m. PW1 caned her because she had delayed in returning which had become her habit whenever she left home. The child left and did not return. The next day, PW1 was asked by the Appellant to go to her mother's home and check for **K. A**. When she went there, her mother told her that the Appellant had indecently assaulted their daughter and the matter had been reported to Mwingi Police Station. PW1 did not believe the allegation and so together with the Appellant, they proceeded to Mwingi Police Station and the Appellant was locked up. After 3 days, her daughter returned home and denied making the complaint against her father.

4.PW1 in cross examination said that the area Assistant Chief and her mother were the ones who made the report about the Appellant and that the Assistant Chief had tried to seduce her to customarily marry his mother who had no children and that may have been the reason why the charges were framed against her husband.

5.PW2, **K. D**, said that on 9.5.2004, she went to church and returned at 4.p.m. That her mother caned her and told her to return whence she had come from and so she went to her grandmother's home, 1 ½ kms

away. She spent the night there and the next day together with her grandmother they went to the home of one **Mwendwa** and then to the home of the area assistant chief. Her grandmother spoke to the latter and then with an Administration Police Officer called **Stephen**, they returned to her home. That her father was not at home and so she was taken to Mwingi Police Station. At this point in her evidence, the Prosecutor applied for her to be placed in custody because she was not following her statement to the police. She was locked up for 3 days and released on bond of Kshs. 20,000/= with one surety.

6.When PW2 resumed her testimony, she said that after coming from church, her father met her on the way and led her to a place near river Katitika and while fully dressed, he had sex with her and ejaculated 3 times. She clarified that the Appellant did not penetrate her because she had her pants on. She nonetheless bled from the alleged assault. When she went home, her mother caned her and chased her away. She instead reported the incident to her grandmother who took her to hospital. Her father was arrested later and charged.

7. When she was cross-examined, PW2 stated that after the assault, her grandmother checked her private parts and then PW2 had a bath and washed her pants.

8. PW3, **K. K.,** grandmother of PW2 received her complaint at 5pm on 9.5.2004 and she said that PW2 told her what happened while she was crying. PW2 told her that the incident was the third time she was being sexually assaulted by her father. PW3 examined her granddaughter, saw blood and sperms and then she took her to the village headman who advised them to sleep and come the next day. She did so and later the Appellant was arrested after a report was mode to the Assistant Chief and the Police.

9. On 10.5.2004, PW2 was taken to hospital but she was only treated on 11.5.2004. It was her evidence that PW2 took a bath the same day she was allegedly assaulted and also washed her underwear. PW3 helped her by washing her injured private parts with cotton wool.

10.PW4, **Patrick Mulonzya**, Assistant Chief, Kyethani sub-location recalled that at 7.30 am on 10.5.2004, he received the report of the alleged sexual assault of PW2, and with AP **Stephen Bogoka**, he arrested the Appellant and took him to Mwingi Police Station.

11 PW5, PC **Salim Bakari** was at Mwingi Police Station on 10.5.2004 at 3.20 p.m when he received the report from the complainant and together with PC **Susan Ikubo**, they escorted PW2 to Mwingi District Hospital and when she was checked, she had a venereal disease. Later, he charged the Appellant in court.

12.PW6, **Fredrick Mutua** examined PW2 on 11.5.2004 and he found that she had a torn hymen with minor bleeding and she had minor vaginal discharge and pus cells were detected in her vagina. No spermatozoa was seen.

13 When the Appellant was asked to defend himself, he said that on 9.5.2004, he was at home working with one **Dominic Nzoka**, **Ngui Kavindu** and one "**Ero"** and they all did so until about 3pm. That all his children had gone to church and returned without PW2 who came at 2.30 pm. That PW1 caned PW2 but was restrained by **Dominic** and the Appellant's mother. The Appellant came home at 3pm and was informed by PW1 of the incident and then together with his other children, **K**, **H** and **M**, the Appellant took his goats for grazing and returned later and at 7.30 p.m. parted ways with the people who had been helping him but not before he gave them a goat to eat. PW2 only returned home the next day by which time, the Appellant had reunited with his friends aforesaid and he was having tea with them. Together with **Dominic, Ngui** and "**Ero"** aforesaid they were confronted by PW4 who then hit him on the face after he had been handcuffed. PW4 took Kshs. 9,700/= and demanded more money from the Appellant. The Police Officer who accompanied PW4 restrained him and led the Appellant to his home and thence to Mwingi Police Station and later he was charged in court. He blamed his predicament on the Assistant Chief (PW4) whom he had a grudge with partly because PW4 wanted to marry PW1 and also because he had been paid some money to recover a donkey on behalf of the Appellant from a certain man in Kiambere but PW4 did nothing. That PW4 was also jealous because the Appellant had opened a shop in the neighbourhood and PW4 had promised to have him jailed for that reason.

14.The Appellant denied the offence and said that his mother-in-law was behind the evidence given by PW2.

15.DW2, **Dominic Maluki** was working with the Appellant on 9.5.2004 and at 1pm he saw PW1 caning PW2 for coming home late. He restrained PW1 and went back to work until 3pm when they went to the Appellant's house. At 7.30 pm, DW2 said that he left and returned to the Appellant's home the next day and he was present when PW1 arrested the Appellant and hit him on the face. When DW2 and others intervened, PW4 threatened them and later the Appellant was led away and then he was charged in court.

16.DW3, **Ngui Kavindu** was with DW2 and the Appellant on 9.5.2004 while working with him and also on 10.5.2004 when the Appellant was arrested. He gave evidence similar to that of DW2 as regards the conduct of PW4.

17.In his judgment, learned trial magistrate found that the main charge of incest had not been proved because of "***lack of medical evidence.***" The reason for this finding was that in Geoffrey Muriu Kamau vs Republic Cr. Appeal No. 129/2002, Ang'awa, J. dismissed the evidence of a clinical officer because he was not a medical doctor. In any event, learned trial magistrate found that the alternative charge had been proved and he convicted and sentenced the Appellant accordingly.

18.For my part, I should begin by setting out the law as regards the offence of indecent assault, since I cannot now address the offence of incest for which the Appellant was acquitted much as I am tempted to. Assault becomes indecent when there is more than just utterances of sexual intercourse as was held in Hamisi vs Republic [1972]E.A. 367 but also where there is an intention to assault the female that is evidenced by the assault itself for example by touching her private parts, as was held in Gitatu **vs** Republic [1983] KLR 222. In Thumi vs Republic [1984]KLR 660, it was further held that medical evidence is not necessary to convict on a charge of indecent assault contrary to section 144(1) of the Penal Code I am therefore appropriately guided.

19.With the above background in mind, the evidence before me is that PW2 was grabbed by her father at 4pm on 9.5.2004, led to a bush near river Katitika where he proceeded without removing her pants to have sex with her and accordingly to PW2 ejaculated three times. She had injuries to her vagina, was found to have pus cells two days later and her hymen was broken. PW2 said that the Appellant never penetrated her but she was still injured. There was no other witness to the offence and the question is, can PW2 be believed in the circumstances of this case?

20.It will be noted that PW1, wife of the Appellant and mother of the complainant said that PW2 came home late and she caned her and then PW2 ran away. The Appellant came later and asked about her. PW2 added that she was assaulted before reaching home and after her ordeal, reported to PW3 who confirmed her injuries and then reported to PW4 and PW5 who the next day arrested the Appellant. Can that evidence be faulted? Reluctantly, I cannot do so because there is no reason whatsoever to say that because PW3 and PW5 had a grudge with the Appellant, they used his own daughter who was at the time about 17 years of age to frame him up. Further, the Appellant at 4 pm was not at home with PW2 when PW1 caned her and there is no evidence that by PW1 caning PW2, then the daughter (PW2) would react against her father and not her mother who caned her. To my mind, the evidence of PW2 together with the report she made and the examination by PW3 clearly shows that it was the Appellant who indecently assaulted her and no one else. Otherwise how else would one explain the fact that she was indeed bruised even without penetration? I am unable to give the benefit of doubt to the Appellant.

21.Regarding the defence tendered by the Appellant and the witnesses that he called, I have no doubt that DW2 and DW3 on 9.5.2004 were with the Appellant but it is instructive that DW2 said that at some point, he returned to the Appellant's home, and left the Appellant in the bush. It is unclear where exactly in the bush the Appellant was but since they were cutting trees to make a fence, it is quite likely that he met PW2 during that period, at (4p.m) and alone assaulted her. PW2 did not scream and it was likely that the witnesses to the beastly offence were just the two of them. I am not convinced that the defence is of any help to the Appellant.

22.On the whole therefore, having seen the grounds of appeal, the written submissions by the Appellant and the record of evidence, I am not convinced that the Appellant's conviction was unsafe.

23.As regards sentence, an offence of the kind is serious and I do not see anything wrong or outrageous about the 10 year sentence meted out to the Appellant.

24.The upshot of all I have said is that the Appeal herein fails and is dismissed.

25.Orders accordingly.

Dated and delivered at Machakos this **3rd** day of June 2008

ISSAC LENAOLA

JUDGE

In the presence of : Appellant in person

Mr. Wang'ondu for Republic

ISAAC LENAOLA

JUDGE