



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
CRIMINAL APPEAL 137 OF 2002

ABDULAHI GUYO MALICHA APPELLANT

AND

THE REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence in criminal case No. 1705 of 2000 of the Senior Resident Magistrate's Court at Isiolo dated 7.6.2002 (PM NDUNGU, Esq))

JUDGMENT OF THE COURT

The appellant herein, ABDULAHI GUYO MALICHA was the accused before the Isiolo Senior Resident Magistrate's court in criminal case No. 1705 of 2000 in which he was charged with one count of incest contrary to section 166(1) of the Penal Code, Cap 63 Laws of Kenya. The particulars of the charge being that,

“On divers dates between 1998 and November 1999, at Isiolo County Council estate, Isiolo District within Eastern Province, being a male person had carnal knowledge of NASIBO ABDULAHI a female person aged 13 years who was to his knowledge, his daughter.”

The appellant pleaded not guilty, was tried and convicted. He was sentenced to serve the mandatory life imprisonment.

The appellant appealed against both conviction and sentence. His home made Petition of Appeal filed in court on 17.2.2002 has five grounds of appeal:-

1. That the learned trial magistrate erred in both law and fact by failing to note that there was a family separation and long existing grudge and therefore a possibility of a frame up and implication.
2. That the learned trial magistrate erred in law and fact by relying on inconsistent, insufficient, incredible and discredited evidence to convict the appellant.
3. That the learned trial magistrate erred in both law and fact by misdirecting himself not only on the burden of proof but also on the evidence on record.
4. That the learned trial magistrate erred in both law and fact by failing to consider the appellant's defence or at all and putting the burden of proof upon the appellant which is a very serious

misdirection.

5. That the sentence is manifestly harsh and excessive.

Briefly, the facts of this case are that the appellant is the father of the complainant, NASIBO ABDULAH I who testified as PWI. The mother of PWI who was also the wife of the appellant died while PWI was still an infant. The appellant and PWI were staying in the same house at the Isiolo County Council estate. Another daughter of the appellant was staying with an uncle. At the time of the alleged commission of this offence by the appellant, PWI was aged below 14 years. It was alleged by PWI that on many occasions between 1998 and the month of November 1999, the appellant beat her and slept with her on a daily basis as if she were his wife.

When PWI tried to seek help from various quarters, the help was not forthcoming. PWI became so distressed that she had to drop out of school. When eventually PWI's complaints landed in the ear of the area District Officer, the appellant was arrested and taken to the police station where a report was made and necessary arrangements made for his prosecution. On 5.4.2001, the Attorney General gave consent for the appellant's prosecution. The appellant was arrested by the area chief DAUDI ABDI JILLO, who testified as PW4. Both the appellant and PWI were issued with P3 forms and referred to the hospital for examination. The two were examined by one LAWRENCE MARIENE, a clinical officer stationed at Isiolo District Hospital who testified as PW7. PW7 produced the P3 forms on both PWI and the appellant as P exhibits 1 and 2 respectively.

The prosecution called seven (7) witnesses who adduced evidence in support of the charge against the appellant. PWI was the complainant, NASIBO ABDULAH I. She testified that her mother was dead and was then staying with her uncle. She stated that in the month of September 1998, she was staying with her father, the appellant in their house at Isiolo County Council Estate. That at about 3.00am on one morning, the appellant called her to where he was and asked her to remove her clothes, including her pants. After she did so, under threats from the appellant, the appellant put her on a bed and had sexual intercourse with her. By then, she was in class three and aged about 12 years. The appellant did the same thing the following day after he beat PWI. The second day after this second assault, the appellant repeated the assault on PWI. That sexual assault upon PWI by the appellant became a habit and many a time he removed PWI's clothes by force and that he always beat her before he slept with her.

One day PWI tried to seek help from various people in the vicinity but all they did was to laugh at her. One good Samaritan gave PWI shelter for nine days but after that the appellant took PWI back home and forcibly slept with her again and slept with her every night while telling PWI that what he was doing to her was normal in other homes as well: fathers sleeping with their daughters!

Finally, PWI managed to report the matter to the police who arrested the appellant. PWI even ran away from home and contemplated suicide. PWI also reported the matter to the elders before whom the appellant admitted he was sexually assaulting PWI, and asked to be forgiven of his misdeeds. PWI also reported the matter to the area chief, one DAUD ABDI JILLO, who testified as PW4. PW4 reported the matter to the area DO and it was after that the appellant was arrested and charged. PWI was then issued with a P3 from which was later filled and produced in court as P exhibit 1 by PW7.

In her further evidence, PWI told the court that when the appellant appeared before the elders, he told them that he deserved to die for what he had done to her. She also stated that though none of the other witnesses saw the appellant in the act of sleeping with her, she complained to many enough people about her tribulations at the appellant's hands. PWI denied that she failed to go to school due to lack of school fees.

PW2 was MOHAMED JILLO, a neighbour to the appellant. He testified that on many nights in the year 1999, he used to hear PWI crying while the appellant ordered her to remove her clothes. It was PW2's evidence that on most of those occasions he would shout at the appellant to stop sleeping with his daughter but every time the appellant retorted by saying that he could do what he wanted with his own daughter. PW2 reported the matter to the elders and when appellant appeared before the elders, he asked for forgiveness but never stopped his habit of sexually assaulting PWI. He also testified that at one point,

things got so bad that PWI disappeared from home for some two weeks. When PWI was finally brought back home by the appellant, the appellant continued with the same habit.

After sometime, PW2 reported the matter to the chief but the chief did not take any action. This led PWI to contemplate suicide. When the appellant was summoned before the elders a second time, he confessed about his misdeeds and admitted that he deserved to die. Later on, PW2 learnt that the appellant had been arrested.

In his further evidence while under cross-examination, PW2 stated that the appellant had admitted before the elders that he used to sleep with his daughter, PWI. That because of what the appellant used to do to PWI, she used to run away from home many times and that he used to hear the appellant ordering his daughter to remove her clothes in the night.

PW3 was Simon Mwiraria the sub-area of Kiwanja Ndege. He testified that one day in the year 1999 PWI went to his home in the company of a certain man and woman. He took PWI to the chief, one MUHIDIN YUSUF and later to the children's officer. He also testified that PWI informed him that the appellant used to beat her and to sleep with her as if she were his wife. PWI also showed PW3's wife scars she (PWI) had on her body. After some days, PW3 took PWI to the D.O.'s place. PWI stayed at PW3's home for some two weeks before the appellant was arrested and taken to the AP's camp. The appellant had no questions for this witness.

PW4 was DAUDI ABDI JILLO, chief of Central Location Isiolo. He testified that one day in the year 1999, while he was at the home of his cousin HASSAN WAKU, PWI was taken to Waku's place by PW2 and other people with a report that PWI had been sexually assaulted by her father, the appellant. PW4 summoned the appellant who on being questioned admitted that he had sexually assaulted PWI and asked for forgiveness while promising that he would not do such a thing again. The appellant was forgiven and went his way. Again on 9.9.2000, PWI was taken to PW4's office by her uncle. Acting on the instructions of the DO, PW4 arrested the appellant and took him to the police station. The appellant put no questions to PW4.

PW5 was Police Constable Wilson Njiru of Isiolo Police Station. While he was on duty at the station on 9.11.2000, the appellant was taken to the station by PW4 on allegations that the appellant had sexually assaulted PWI. He booked the report and also informed the O.C. crime one Inspector Margaret, PW6. While PWI was taken to hospital, the appellant was re-arrested by PW5 and placed in cells. When PW5 was cross-examined by the appellant, he told the court that he was not the investigating officer for the case.

PW6 was Inspector MARGRET KATHUNGUCI, the then OC crime branch Isiolo police station. She recalled that on 9.11.2000 while she was at the police station PWI was taken to the station. On instructions from the OCS, she commenced investigations into PWI's complaints against the appellant. After the appellant was arrested and placed in cells, she visited the scene and later compiled her report after recording statements. According to PW6, PWI had visible injuries on her thighs near her private parts and also on the cheeks. She issued PWI with a P3 form.

The last prosecution witness was PW7, one LAWRENCE MARIANE, a clinical officer at Isiolo District Hospital. His testimony was that during the month of November 2000, he examined PWI who was alleged to have been defiled by her father the appellant. According to his findings, PWI had healed scars on her thighs which appeared to have been inflicted some four weeks before the date of the examination. As regards age, PW7 testified that PWI was about 13 years old. That her genital area had no evidence of injury and no evidence of a sexually transmitted disease.

PW7 also examined the appellant who was alleged to have defiled PWI. He said he found nothing abnormal about his genital area and with no discharge of any type. He also testified that there was no evidence suggesting rape. He then filled P3 forms in respect of PWI and the appellant. These were produced as p exhibits 1 and 2 respectively.

When put on his defence, the appellant gave sworn testimony and called two witnesses. He told the court that he had been taking care of PW1, but that PW1 had refused to go to school and gave him many problems. He admitted that he used to beat PW1 because first she refused to go to school and second because she used to sleep at other peoples' homes. That all the neighbours knew about PW1's refusal to go to school and the habit she had of sleeping away from home. The appellant also stated that there was a grudge between him and PW2, yet during cross-examination of PW2, the appellant did not suggest that there was such a grudge.

DWI was JARSO GODANA JILO who stated that he was the appellant's neighbour. His testimony was that PW1's allegations that the appellant had beaten her and defiled her were not true. Later, he stated that though the appellant beat PW1, he did not defile her. DWI could however not say what was happening inside the appellant's house during the night, nor could he say for sure whether the appellant defiled PW1.

DW2 was MOHAMED ABDI ABKIRA. His testimony was that he did not believe that the appellant whom he knew so well was capable of defiling PW1. When put under cross-examination, DW2 confessed he did not know anything that may have transpired between the appellant and PW1 in the years 1998 and 1999.

In his judgment, the learned trial magistrate found that PW1's testimony against the complaint was given in a manner that clearly brought out the trauma she suffered at the appellant's hands. The learned trial magistrate also found that it was not possible that such a detailed account of what the appellant allegedly did to PW1 could have been a fabrication by her. He therefore found the appellant guilty, convicted him and sentenced him to life imprisonment as by law provided.

My task as the first appellate court is to reconsider and re-evaluate the evidence with a view to reaching my own conclusions on the issue before me – namely whether on the strength of that evidence, the learned trial magistrate should have convicted the appellant on this very serious charge, (see **OKENO – V – R. (1972) E.A. 32**).

I have carefully reconsidered and re-evaluated the evidence on record, both for the prosecution and the defence. I have also considered the judgment by the learned trial magistrate which judgment sets out details of the two competing positions in this case. My own finding is that there was overwhelming evidence upon which the learned trial magistrate could base a conviction. I shall consider this finding of mine in detail by looking at the grounds of appeal one by one.

In ground 1, the appellant has complained that the learned trial magistrate failed to consider the fact that there was a possibility of implication because of an existing family grudge. Throughout the whole record, the appellant did not lay a basis for this ground. What there is that the appellant lived alone with his daughter after the latter's mother died, and according to PW1, the appellant turned her into his wife from around the year 1998 and went on doing so until PW1 took refuge at the home of PW3. The appellant did not suggest that the other witnesses were his relatives, nor did he show that a grudge existed between him and them except when he suggested that he (appellant) had a grudge with his neighbour, PW2. Even if it were to be assumed for a moment that such a grudge existed, it was not a family grudge. When the appellant testified, he did not refer to the existence of such a grudge, nor did he put any questions to PW2 on the alleged grudge.

My own reading of this complaint by the appellant is that it was an afterthought. This inference is even stronger when the appellant failed to put any questions to PW4 who testified that he summoned the appellant before a panel of elders and questioned him as to his relationship with PW1. The appellant admitted that he had done what PW1 was alleging he was doing and he was sorry. The prosecution's case thus remained unshaken all through that the appellant committed this beastly act against his own daughter and that he admitted as much before the elders who were summoned by PW4. Both PW2 and PW1 testified to the same fact. That first ground of the appeal therefore fails.

The appellant's second complaint is that the learned trial magistrate based his conviction on inconsistent, insufficient, incredible and discredited evidence. A look at the evidence on record reveals that nothing

could be further from the truth. PWI gave a detailed account of how the appellant started molesting her sexually from the year 1998 and how thereafter he made it a habit, even going to the extent of telling PWI that all fathers slept with their daughters like he did. PWI made a report to PW3 and PW4 came to learn about the appellants behaviour from PW2 who stated that he not only heard the appellant beating PWI and ordering her to remove her clothes, but that he even used to hear the sound of the appellant's bed as he sexually assaulted PWI. What PWI reported to those from whom she sought help was consistent with what she alleged the appellant was doing to her. Even the injuries which PWI suffered – being on her thighs and next to her genital parts were not inconsistent with the evidence that the appellant did indeed assault her. PWI's testimony is thus fully corroborated by the evidence given by all the other witnesses, namely PW2, 3, 4 and 7. This second ground of the appellant's appeal must therefore fail.

In his third ground of appeal, the appellant complains that the learned trial magistrate shifted the burden of proof from the prosecution to the appellant. Relying on the judgment of the Court of appeal in **REPUBLIC – VS – OYIER (1985) KLR 353** (although the offence therein was one of rape), I am satisfied that at no time during the hearing before the learned trial magistrate or during judgment did the burden of proof shift from the prosecution to the appellant. PWI stated quite categorically that each time the appellant ordered her to remove her clothes, she would refuse but every time the appellant would remove the clothes by force and sleep with her. Would it make a difference if PWI had consented to the appellant's overtures? Not at all. That ground of the appeal must also fail.

The appellant complained in ground four of the appeal that the learned trial magistrate failed to consider the appellant's defence and thereby shifted the burden of proof from the prosecution on to the appellant. This complaint has no merit because at page 2 of the judgment, the last portion thereof, the learned trial magistrate considered the appellant's defence and that of his witnesses and found that the said evidence was of no consequence. I have myself carefully considered the appellant's defence and that of his two witnesses. The sum total of that evidence is that PWI fabricated a story against her father, the appellant. Yet on cross-examination of both DW1 and DW2, none of them could say what was happening between the appellant and PWI when the two were alone in the house at night. I do, like the learned trial magistrate did, find that the appellant's evidence did not in any way dislodge the prosecution's evidence adduced against him. For the reasons I have given, this ground of the appeal must also fail.

The last complaint by the appellant is that the sentence meted out against him by the learned trial magistrate was excessive in the circumstances. Once it was established that PWI was under the age of 13 years when the appellant committed the offence against her, the learned trial magistrate had no option but to impose the only sentence provided by law. That ground of the appeal also fails.

Before I conclude this judgment there is just one point that I must comment about. Though it is clear from both the charge and the evidence, that PWI was a child of tender years it is not apparent from the record that the learned trial magistrate complied with the provisions of section 19 of the Oaths and Statutory Declarations Act. That fact notwithstanding, I am satisfied that PWI was possessed of sufficient intelligence to justify the reception by the trial court of the evidence that she gave. From the questions put to her in cross-examination and from the answers that she gave, I am myself satisfied that she understood the duty of speaking the truth. In the future, however, trial courts should clearly indicate in the case of child witnesses that the provisions of the section are complied with.

In the result, I find that the appellant's appeal lacks merit. The same is dismissed in its entirety.

Orders accordingly.

Dated and delivered at Meru this 29th day of June, 2006.

RUTH N. SITATI

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