



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT
MACHAKOS
APPELLATE SIDE**

Criminal Appeal 123 of 2003

(From Original Conviction(s) and Sentence(s) in Criminal Case No 615 of 2002 of the Senior Resident Magistrate's Court at Kajiado H.N. Ndungu (Esq.) on 4/3/03)

M M APPELLANT

VERSUS

REPUBLIC RESPONDENT

J U D G E M E N T

The appellant M M was charged with the offence of incest by a male Contrary to Section 166 (1) of the Penal Code in the Senior Resident Magistrate's Court Kajiado in Cr. Case 615 of 2002. He is alleged to have had carnal knowledge of his daughter, NM. He was convicted of the offence and sentenced to 14 years in prison. He is aggrieved by both conviction and sentence.

Briefly stated, the case before the lower court was that the appellant had separated with his wife. The wife went away with the children but later PW 3 the appellant's mother and grand mother to the children who include the complainant, went to collect the children from where the mother had left them to get married elsewhere. PW 3 lived with the children for a while and the appellant decided to take back his children. He has no house and so he lived under a tree with the children. On the material night while they were asleep the appellant went to the complainant, removed her under pant and started to have carnal knowledge of her. She screamed, which attracted PW 2, the complainant's aunt and sister in law to the appellant, and the complainant's grand mother PW 3. Upon enquiry why the complainant was crying, the appellant gave them an explanation and they went back to sleep. PW 1 said that on returning to sleep, the appellant again took off her pants and defiled her. The next day PW 2 enquired what had really happened and the complainant narrated to her the ordeal. The accused was arrested. PW 1 was examined by PW 5 who found that she was sexually assaulted and her hymen was torn; had a discharge of blood mixed with pus; dead spermatozoa and bruised majora. She was put on treatment.

The appellant's Memorandum of appeal contains three grounds. He contends that the trial magistrate erred in law and fact by: not testing the evidence of PW 1 who was a minor; believing the contradictory evidence of PW 2 and 3 and by rejecting the appellant's defence. Though the appellant indicated that he would adduce more grounds at the hearing of the appeal he only added that he was never examined by a doctor and that his son Mutiso should have been called as a witness. In opposing the appeal the learned state counsel submitted that the evidence on record speaks for itself, that it was overwhelming. That the witnesses who are appellant's own daughter, mother and sister in law had no reason to frame him as he alleges and that the defence was not plausible.

There was no doubt and there was ample evidence before the trial magistrate to prove that the

complainant was sexually assaulted. She was injured, her hymen was torn and the vaginal swab had evidence of spermatozoa and pus. The question is who did it.

PW 1, though a girl of 12, was examined by the court and found to understand the meaning and seriousness of talking the truth and she was sworn and gave evidence on oath. Her evidence was tested by the appellant on cross-examination. There was no need to test the evidence any further. The evidence was clear, cogent and sufficiently corroborated by that of PW 2 and 3 as to what transpired on the night. PW 1 had actually raised an alarm but the appellant outsmarted her by giving a false explanation to PW 2 and 3. In fact, PW 3 recalled that the complainant had been sleeping with her in the house but the appellant had insisted on having her sleep with him outside under the tree. The events that followed point to his intent. The appellant has raised a defence that he was framed. He never gave any plausible explanation as to why his daughter, mother and PW 2 would frame him. He hardly challenged their evidence on cross-examination. His defence is not plausible and the trial magistrate correctly rejected it.

It is true that the appellant was not examined by a doctor. No reason was given to why but it is not a mandatory requirement that he should be examined if there is ample www.kenyalaw.org M M v Republic [2005] eKLR 4 evidence on record. The court can still find a conviction without medical evidence. (*see case of FRED WANJALA versus REPUBLIC Criminal Appeal 51/1984.*)

As to why Mutiso appellant's son was not called, the appellant never raised that issue in the lower court. The prosecution does not need to call all witnesses but those are able to prove the case. Had he raised it in the lower court, this court would have presumed that Mutiso's evidence might have been adverse to the prosecution evidence and that is why he was left out but that cannot be done at this state. Failure to call Mutiso as a witness is not prejudicial to the appellant's case.

The appellant had the opportunity to defile the complainant as he had ordered her to be removed from PW3's house. PW 1 raised alarm at the night when this incident happened. There is medical evidence in support of the offence and I find that the magistrate correctly found that the appellant committed the offence. The lower court's judgement cannot be faulted and the conviction is sound and hereby confirmed. The appellant was sentenced to 14 years imprisonment. He raised no complaint about the sentence. The offence attracts a life sentence. The appellant was the father of the complainant to whom the complainant looked for protection and yet the appellant went ahead to abuse the same. He did not do it once but repeated it.

The sentence is fair in the circumstances and the court finds no good reason to interfere with it.

The appeal on both conviction and sentence is dismissed.

Dated at Machakos this 26th day of January 2005

Read and delivered in the presence of

R.V. WENDOH

JUDGE