REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL CASE NO. 20 OF 2019

(From original conviction and sentence in Sexual Offence No. 10 of 2018 of Chief Magistrate's Court at Kitale delivered by Hon. C.M. Kesse (SRM)

YAFO...APPELLANT

VERSUS

REPUBLIC ....RESPONDENT

JUDGMENT

The Appellant, **YAFO**, was charged with **Incest** contrary to **Section 20(1)** of the **Sexual Offences Act**. The Particulars of the offence were that on **12th January 2018** at **[Particulars Withheld] Estate** in **Trans Nzoia County,** the Appellant, being a male person, caused his penis to penetrate the vagina of **MN**, a child aged 10 years, who was to his knowledge his daughter. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was convicted as charged and sentenced to serve twenty (20) years imprisonment. Aggrieved by his conviction and sentence, the Appellant has filed this appeal before this court.

In his Petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He faulted the trial court for convicting him on the basis of a defective charge sheet. He faulted the trial court for relying on medical evidence which was a product of examinations done beyond 72 hours after the alleged sexual assault, and contrary to **Section 7** of the **Clinical Officers Act.** The Appellant was aggrieved that the trial court had not taken into account the fact that the laying of the charge against him was as a result of a family feud that resulted from the existence of bad blood between him and his former wife.

The Appellant faulted the trial court for failing to properly analyse the medical evidence which, in his view, could have led to an alternative finding that the hymen could have been torn through another activity other than though penetration. He pointed out that it was unlikely that the hymen could have been torn in the circumstances of sexual assault without laceration. He was of the view that the prosecution had failed to establish the charge against him to the required standard of proof. He urged the court to allow his appeal, quash the conviction and set aside the sentence that was imposed on him.

During the hearing of the appeal, both the Appellant (who was acting in person) and the prosecution presented to court their respective written submission. This court has carefully considered the said submission. Before commenting on the same, it is imperative that the facts of the case, as put forward by the prosecution be set out, albeit briefly.

The Complainant**, PW1 MN** testified that she was fourteen years of age at the time she testified before the trial court. At the material time, she lived with the Appellant, her father, with her stepmother. She recalled that on 12th January 2018 at lunchtime, she was at home with her three step sisters. Her step mother was not at home at the time. The Appellant called her inside a bedroom. He appear angry. This court would do no better that to reproduce the complainant's own words:

"He tied my hands together and the legs apart. The legs were tied apart and fastened to the bed. I was lying on the bed facing up. I tried to rescue myself. He stated that if I screamed he would stab me. He then removed my clothes. He then lay on me. He took his "urinating thing" and inserted it into my "urinating thing". He then inserted in and I felt pain. I felt pain and I couldn't scream. He threatened me. I persevered. He did this to me once. After he was done, he left me on the bed. He did not untie me. He dressed himself up. He dressed me up and left me tied. My big sister M came and untied me. I did not tell anyone".

On 16th January 2018, four days later, the complainant went to school. **PW2 Jane Manoti,** a teacher at [Particulars Withheld] Primary school, was told by other pupils that the complainant had urinated on herself. She appeared dull. When she inquired what the problem was, the complainant told her that she had accidentally cut herself on the private part (vagina) with a jembe handle as she was lighting fire. PW2 was not convinced by her explanation. She referred her to the Deputy head teacher who referred her to Counselor. It was then that she disclosed that she had been defiled by her father. She was taken to hospital where medical examination confirmed the same.

At the hospital, the complainant was examined by Dr. Sophia. She filled the P3 form and also wrote the treatment notes. The two documents

were produced on behalf of Dr. Sophia into evidence by **PW3 Dr. Timothy Nyikuri** based at Cherangani Sub County Hospital, Kachibora. Dr. Nyikuri explained that Dr. Sophia was absent from court on that day due to the fact that she was attending a seminar at Nakuru. The doctor noted that the complainant complained of urinary incontinence and inflammation passing urine. On examination, it was established that she had tears in her vagina. The vaginal area was bruised. She was producing a foul smelling odour which was as a result of an infection. The hymen was broken. It was fresh. The doctor formed the opinion that from the nature of injuries sustained by the complainant, it was proof of forceful penetration. The complainant was treated and discharged.

PW4 Corporal Daniel Misita of Cherangani Police Station, the investigating officer, testified that the case was initially investigated by Corporal Sheila before he took it over after her transfer to Busia. He told the court that the investigations had indeed established that the Appellant, the complainant's father, took advantage of her stepmother's absence to defile the complainant. Medical evidence established that the complainant had indeed been defiled. An age assessment was done which established the complainant age to be fourteen (14) years. The discovery of the defilement was made by the complainant's teacher at the school where she is a pupil.

When the Appellant was put on his defence, he denied committing the offence. He told the court that the complainant had stayed with him for only a period of 19 days prior to the complaint. She was sick and was on medication. He stated that he could not have committed the offence as it went against his Islamic faith. In regard to the allegation that the complainant was sick at the time, the Appellant's testimony was corroborated by **DW2 Lucy Atieno**, a neighbour and **DW3** one **Damaris Nekesa** who claimed to be a neighbour but it was doubted by the prosecution who thought she was the Appellant's wife. DW3 testified that the complainant had urinated on herself when she was taken to hospital, treated and discharged. What was however peculiar, was that the Appellant's wife did not come to court to testify on the issue because it was claimed she could not get fare to come to court.

As the first appellate court, it is the duty of this court to reconsider and to re-evaluate the evidence adduced before the trial court, before reaching its own independent determination whether or not to uphold the conviction. In doing so, this court is required to take into consideration that it did not see nor hear the witnesses as they testified. **(See Okeno Vs Republic [1972] EA 32).** In the present appeal, the issue for determination is whether the prosecution established the charge brought against the appellant to the required standard of proof.

In cases such as the present one, the prosecution is required to establish, to the required standard of proof, the three elements that establish the offence; the age of the complainant, penetration and the identity of the perpetrator of the offence. In addition, the prosecution was required to establish that the appellant was the blood relative of the complainant to establish the element of incest. As regards the issue of age, although the charge sheet indicates that the complainant was at the material time aged ten (10) years, the complainant herself testified in her testimony that she was fourteen (14) years of age at the time of the incident. It should be noted that the complainant testified in the same year that the prosecution alleges the offence was committed. As further proof, PW4, the investigating officer testified that the complainant age was assessed and an age assessment report filed in court. It was confirmed that the complainant's age at the time was fourteen (14) years. The Appellant did not seriously contest the age of the Complainant both before the trial court and before this court on appeal. This court therefore holds that the prosecution did establish to the required standard of proof that the complainant was fourteen (14) years of age at the time of the alleged offence. The complainant is therefore a child within the meaning ascribed to the term under **Section 2** of the **Children Act.**

As regards whether there was penetration, the Appellant hotly disputes this fact. In the first place, the Appellant urged the court to reject the medical reports since, in his view, the maker was not called to testify before court. The prosecution on its part, insisted that the said medical reports were properly produced by PW3 who was a colleague of Dr. Sophia at Cherangani Sub-county Hospital. PW3 was familiar with Dr. Sophia's handwriting and signature. At the time, Dr. Sophia could not attend court because she was attending a seminar in Nakuru. Upon re-evaluation of this objection to the production of the medical reports by PW3, the court observed that the Appellant did not oppose the production of the said medical reports during the trial. In any event, even if the Appellant raised such objection, PW3 would still have been allowed to testify on behalf of Dr. Sophia since the same is permitted under **Section 33(b)** of the **Evidence Act.** This Section allows a written statement prepared by a witness who cannot be procured to attend court without considerable expenses to be produced by another witness who is familiar with the handwriting of the absent witness. This court therefore finds no merit with the ground of appeal and proceed to dismiss it.

In respect to the substance of the medical reports, it is the Appellant's contention that the same did not meet the legal threshold of satisfying the criteria that the medical evidence supported the prosecution's case that there was penetration. In particular, it was the Appellant's contention that the medical examinations having been done beyond a period of twenty four (24) hours, the same could not establish penetration. He further submitted that he and his witnesses had adduced evidence which established that the complainant was sick at the time and was even suffering from urinary incontinence. That being the case, it was the Appellant's submissions that the injury observed by the doctor could not be said, in the circumstances, to have arisen from the penetration. The prosecution on its part insisted that the medical report did indeed establish penetration to the required standard of proof.

On re-evaluation of the evidence, this court formed the firm opinion that indeed the medical evidence adduced by PW3 established penetration to the required standard of proof beyond any reasonable doubt. Why so? It is clear that the injury caused to the complainant's vagina was consistent with an injury caused by forceful penetration. PW3 confirmed that indeed such injury could only have been caused by forceful sexual assault. In addition to this evidence, there was the evidence of the complainant herself who narrated the circumstances in which the sexual assault took place. The evidence of the complainant was consistent, cogent and credible in that it gave a blow to blow account of what transpired on the on the material day. This court formed the view that the complainant's testimony had a ring of truth in it. The Appellant's contestation of the veracity or the truth of the complainant's testimony in self-serving. This court discerned no reason why the complainant could falsely accuse her father if the incident did not actually occur. In any event, due to threats made to the complainant by the Appellant, she was reluctant to tell anyone until she was persuaded to do so by her teachers. She had no malice against the Appellant, neither did she have form a plan to frame the father. There is no obvious advantage that she would have gained by "fixing" her father. This court therefore holds that the prosecution proved penetration to the required standard of proof beyond any reasonable doubt.

The issues that remains for determination is the identity of the perpetrator and whether the perpetrator is related to the complainant. From the evidence adduced, which was not challenged by the appellant both on this appeal and before the trial court, there is no doubt that this appellant is the complainant's biological father. The complainant was at the material time living with the appellant and her step mother. This

court having found that the prosecution had established penetration and that the penetration was perpetrated by the Appellant, this court holds that the prosecution established the identity of the perpetrator to the required standard of proof beyond any reasonable doubt.

The appeal against conviction lacks merit and is hereby dismissed. On sentence, the appellant is on firm ground **Section 20 (1)** of the **Sexual Offences Act, any male person convicted of incest shall be sentenced to serve a term of imprisonment of not less than ten (10) years.** The Appellant was sentenced to serve twenty (20) years imprisonment on 7th March 2019. This court discerned no aggravating circumstances that would have made the trial court sentence the appellant to serve a term of imprisonment other than the minimum provided by the law. It was also evident that the trial court did not consider the Appellant's mitigation which included the fact that he is a father of eleven (11) children. In the premises therefore, this court will allow the Appellant's appeal on sentence and reduce the Appellant's custodial sentence from twenty (20) years imprisonment to ten (10) years imprisonment. The sentence shall take effect from 18th January, 2018 when the Appellant was arraigned before the trial court since he was not released on bond. It is so ordered.

DATED AT KITALE THIS 9TH DAY OF DECEMBER 2021.

L. KIMARU

JUDGE