REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

HIGH COURT CRIMINAL APPEAL NUMBER 42 OF 2014

DKW.....APPELLANT

=VERSUS=

REPUBLIC.....RESPONDENT

(Being an Appeal against both the conviction and the sentence of Senior Resident Magistrate Hon. J. N. Nthuku delivered on 3rd February, 2014 in NAKURU CM Criminal Case Number 216 OF 2012 Republic v David Kariuki Wahihenya)

J U D G M E N T

The appellant DKW was charged with **incest contrary to Section 20(1) of the Sexual Offences Act No. 3 of 2006.**

CHARGE

"INCEST BY MALE PERSON CONTRARY TO SECTION 20(1) OF THE SEXUAL OFFENCES ACT NO. 3 OF 2006(.)

DKW: On the 9th day of September, 2012, at [Particulars Withheld] area in Njoro District of the Rift Valley Province, unlawfully and intentionally caused his male reproductive organ namely penis to penetrate into the female reproductive organ namely vagina of FW a child aged 14 years knowing her to be his daughter(.)"

In the alternative he was charged with **Indecent Act with a child contrary to Section 11(1)** of the same Act.

ALTERNATIVE CHARGE

"INDECENT ACT WITH A CHILD CONTRARY TO SECTION 11(1) OF THE SEXUAL OFFENCES ACT NO. 3 OF 2006(.)

PARTICULARS

DKW: On the 9th day of September, 2012, at [Particulars Withheld] Area in Njoro District of the Rift Valley Province, intentionally and unlawfully did commit an indecent act with FW a child aged 14 years by touching her private parts namely vagina with your male genitalia namely penis."

At the end of the trial, on 3rd February, 2014 he was found guilty of the main charge and sentenced to serve forty (40) years imprisonment. Consequently he filed this appeal on 11th February, 2014. However in arguing his appeal he relied on the amended grounds of appeal filed on 17th October, 2008 by his counsel Achieng Owuor & Company Advocates:-

1. THAT the Learned Trial Magistrate erred in law and in fact in shifting the burden of proof from the prosecution to the accused and hence arrived at an erroneous decision.

2. THAT the Learned Trial Magistrate erred in law in basing the conviction on evidence of the victim alone which was not corroborated with any other independent witness and therefore arrived at a wrong decision.

3. THAT the Learned Trial Magistrate erred in law and in fact by convicting the appellant but failed to note that PENETRATION was not proved against the appellant.

4. THAT the Learned Trial Magistrate erred in law and in fact by convicting the appellant without any medical evidence to corroborate the evidence of the complainant."

He sought that the conviction be quashed and sentence be set aside on the grounds that the trial magistrate had not only shifted the burden of proof on him but had based the conviction on the uncorroborated evidence of the complainant, on evidence that did not prove penetration, that the medical evidence did not prove the charge.

THE EVIDENCE

After considering *voire dire* the trial magistrate formed the opinion that the complainant aged fourteen (14) years at the material time one FW understood the importance of telling the truth and nature of the oath. The case for the prosecution was that the appellant married the complainant's mother when she was already in standard two (2) (2008) and they had two (2) other children.

On 9th September, 2012, the appellant was informed that his father was unwell. His blood pressure had shot up. He arranged to visit him the following day, 10th September, 2012 with his wife, the complainant's mother.

However the complainant's mother fell ill that night. It was then decided that complainant would accompany her father so that she could return with the sister one SN who was at her grandmothers.

According to the complainant they left when it was still dark as it was a 10 hour journey At [Particulars Withheld] , there was maize on both sides of the footpath and it is these that he took advantage of by grabbing her and laying her against a tree. He removed her clothes, unzipped his trousers, lay on her, inserted his penis into her vagina and did tabia mbaya to her. When he finished she saw white things coming out of the vagina.

They proceeded with the journey. Upon arrival at her grandmother's she did not tell the appellant's his sister or his mother, her grandmother saying that she was afraid he would harm her on their way back. It is when they returned back home that she told her auntie JW. Her auntie sent her to call her mother. It is her auntie who now told her mother what had happened. The following day her mother went and told the Pastor Edward because she, complainant now wanted to run away from home because the appellant was not her biological father.

Her mother came back with Pastor Edward because her mother told him she wanted to escape. The matter was reported to Mau Narok Police station and she was taken for treatment. The police went and arrested her father while she was at her aunt's place. , He was later arrested and charged. She identified him in court. She added that in June 2010 he had defiled her but his parents had asked her to forgive him which she did. That her father used to assault her and her mother. She also did not tell her mother because she knew her mother would ask him and he would have beaten her (her mother) that is why she went and told her auntie.

Her mother MN was PW2. She testified that her daughter was aged 14 years old Date of Birth eighteenth November 1997. Her other child F was staying with the accused's parents. On 7th September, her father in law called the accused. PW2 was unwell. The accused and the complainant left at 5:00am to go get the child. They came back in the evening. When they returned in the evening the complainant was sent to buy food, instead she went and came back to call her. Her aunt W wanted to see her. When she went to W's she told her that complainant had told her that the appellant had defiled her. She went and reported to the pastor, one Edward. The complainant was threatening to kill herself. The appellant was arrested. She said she did not talk to appellant about the issue because she was afraid of him. She was not aware that he had defiled her daughter before. That they had been married since 1995 and that he was a drunkard.

On cross examination she said she had not noticed anything wrong, that her son had fought with the accused in self defence.

PW3 Simon Kipngetich Langat was a clinical officer at Mau Narok Health Centre. He testified that he examined the complainant on 9th September, 2012. She had changed her clothes and told him it was an ongoing activity. Her genitalia was normal but had an old broken hymen. There was no discharge, no bruises because it was not her first time to engage in sex. All the tests were negative but he found evidence of penetration. He produced both P3s. He said he examined the complainant a day after the last time she was defiled.

He also examined the accused. He found no bruises on his genitalia.

PW4 No. 91845 PC David Njaramba was the investigation officer. He received the report on 10th September, 2012 from the complainant who was accompanied by her mother and pastor. The report was that on that day she was going to Kianjoya with her father. He diverted her from the main road into a bushy place where he defiled her. He booked the report, took her to Mau Narok dispensary where she was treated and the P3 completed. He gave her his contact in case of need fo help to arrest the accused. The following day he was rang by the complainant's mother. He went and arrested the accused at Nyakinyua, took him to hospital for examination and filling of P3. The complainant also took him to the scene where he s aw the bended tree *'but due to the rainy weather there were no indicators'*. He said the accused was step father of the complainant and it was common in the area for men to defile their foster daughters. On cross examination, he told the court that the accused person's family had neighbours. That he had threatened to kill the girl but she told the pastor. That she first told the pastor then told her aunt. That she reported to the police after one day because she feared the accused. That she told him in the officer's presence that she had forgiven him for the 'other time'. That the evidence of the pastor was not necessary but on re exam said the Pastor was from Prophet Owuor's Church and was not easy to find. In his defence the appellant gave an unsworn statement. He said that on 11th his wife asked for Ksh. 500/= because her brother was sick. He told her he had no money. It is then that she got angry and he went to the shamba. When he came home at 2.00 p.m. there was no one at home. His wife arrived soon thereafter accompanied by a man who handcuffed him. He was taken to hospital and later to court and charged with this offence. He said they had differences where by his wife had brought her brother who had assaulted him.

In her judgment delivered on 3rd February, 2014, the trial magistrate set out the issues for determination.

1. Has the complainant's age been proved

2. Has penetration been proved , if yes

3. Has it been proved it is the accused who caused it

4. Has it been proved that accused was PW1's father

The appellant is entitled to a fresh look at the evidence on record, and for this court to arrive at its own conclusions.

The prosecution had sufficient time to respond to the appellant's submissions filed on 17th October, 2018 but they did not do so as at the time a date for judgment was given.

APPELLANT'S SUBMISSIONS

He argued that the complainant testified it was dark when she alleges to have been defiled and it was not possible for her to see white stuff coming from her vagina after the alleged defilement. The complainant also alleged that the accused had defiled her before and she was made to forgive him, something her mother said she was not aware of. That if this was the case could the complainant's mother have allowed her child to travel with the accused alone at 5.00 a.m. in the morning? How could that happen? When did this all happen? The appellant submitted that the complainant and her mother gave conflicting evidence.

According to the complainant the father was informed of his father's illness on 9th September, 2012. He was to go see him on 10th September, 2012 however her mother fell ill and they left on 10th September, 2012 and returned the same day. Her own mother said they left on 7th September, 2012 at 5.30 a.m. so which was which? In addition the Clinical Officer said he examined complainant on 9th September 2012.

The appellant also attacked the case for prosecution for failing to call the crucial witness. The aunt to the complainant who was the first person to whom the complainant reported the defilement was not called. He submitted that the medical evidence did not in any way support the charge. No evidence of spermatozoa, penetration. The broken hymen could not be proof of the defilement. The Clinical officer's testimony that the defilement was ongoing was not supported by that of the complainant. The trial magistrate did not warn himself before relying on evidence of the child.

ANALYSIS

The offence of incest is defilement by a relative within the degrees of consanguinity defined by the **Sexual Offences Act.** The ingredients are the same;-

- **Age of victim**
- **Penetration**
- **Identity of offender**
- **Relationship with victim**

In this case it is not denied that the accused was the step father of the victim. The age of the complainant was also not in issue. What is in issue in this case is whether defilement took place. According to the trial magistrate she believed the complainant as provided for under **Section 124** of the **Evidence Act, Cap 80** which states:

> ***"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him: Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.***

The questions here are.

1. Does this case fit the description that, the only evidence is that of the alleged victim of the offence?

2. Are there reasons recorded in the proceedings to support the courts satisfaction that the victim was indeed telling the truth?

On the first issue evidence is defined in the **Act,**

> ***"denotes the means by which an alleged matter of fact the truth of which is submitted to investigation, is proved or disproved,***

and, without prejudice to the foregoing generality, includes statements by accused persons, admissions, and observations by the court in its judicial capacity".

In this case the prosecution called three other witnesses who gave evidence in support of the charge; the mother said she was informed of the defilement by the aunt to her daughter; the police officer visited the scene; the clinical officer examined both the complainant and the victim, all this evidence was intended to support the charge of incest and by calling these witnesses the prosecution intended that their evidence form a cohesive body of the means:-

> *"from which in inference would logically be drawn of the existence of the face of defilement. "to paraphrase* ***, Blacks Dictionary Law Page 638***
>
> *Evidence – "is that which makes plain [it] is a demonstration of a fact; it signifies that which demonstrates, makes clear or ascertains the truth of the very fact or point in issue, either on the one side or on the other" Page 635.*

The complainant testified that she accompanied her father to her grandmother's on the material date that is denied, what evidence was placed before court to prove this crucial fact, as this was the background to the offence?

It was upon the prosecution to establish this fact, as it is the fact that would take us to the scene of crime. It was alleged the offence took place on a footpath into a maize plantation where there was a bended tree where the appellant allegedly forced the complainant to lie and forced himself on her. The investigating officer alleged to have visited the scene, without the scenes of crime officer, and "saw the bended tree" if indeed that was a fact, why did he not avail a scenes of crime officer to visit the scene and capture this unique evidence for the benefit of the court?

The dates of the alleged offence are three, 7th, 9th and 10th September 2012 or 2011? This is important. It is not just any of those things that happen and the date may not be necessary.

The medical evidence cannot be wished away because it is on record and the prosecution brought it to prove that a sexual offence had been committed against the complainant. The date of examination in the clinical officer's testimony is not the same as that in the P3. His testimony that there was evidence of penetration is not supported by the record of the P3. I found it necessary to reproduce its contents here. The P3 indicated that the report was made on 10/9/2012 at 1530hours. The date of the alleged offence was 9/9 2012 at 6:00am. The P3 was completed on 10/9/2012.

In it the Clinical officer at part A:

> *No blood stains, she had changed clothing and taken a bath.*

On general medical history he recorded

> *Having been defiled by her father several times O/E. No recent sexual contact…*

On approximate age of injuries he wrote: *Weeks*

In part C he noted the nature of offence as '***harm'*** and upon examination of the complainant's genitalia where he was required describe in detail any injuries he stated;

> *Labia – none*
>
> *Majora-none*
>
> *Minora- none*
>
> *Vagina –no hymen*
>
> *Cervix- intact*
>
> *No discharge, no blood, no venereal infection.*

A plain reading of the P3 gives a completely different scenario from that given by the complainant, and her mother. She told the clinical officer on 10th September 2012 that there had be NO RECENT SEXUAL CONTACT with the accused but it had been going on over a period of time. This is in complete contradiction to her testimony that she had been defiled the day before the examination; that her father had defiled her once before in 2010.

The complainant told the court she wanted to run away because the accused was not her biological father. The mother said she wanted to commit suicide and that is why she brought the pastor. To the police, the complainant reported that she reported to the pastor first then to her aunt. Neither of them recorded a statement neither were they called to testify. The presumption would be that what they would have said would not have supported the case for the prosecution.

Hence it cannot be correct that the only evidence on record available was that of the complainant. The other evidence availed ought to walk hand in hand with the evidence given by the complainant to prove the charge against the appellant.

Granted, the prosecution has all the discretion to decide to call any witness they wish to support their case, however if the evidence of a missing witness had a direct link to proof of the offence, then the inference is that perhaps that evidence would not support the charge falls into place.

This aunt was the first person the complainant allegedly went to report the defilement to because she was afraid if she told her mother, her mother would confront her father, and her father would beat her mother. That is evidence that points the accused as an abusive, a person who did whatever he wanted and got away with it by use of brute force. The prosecution however made no effort to bring this into consistency with the first alleged defilement, in 2010, where, again it is alleged, to the contrary that the accused's parents asked her to **forgive him.** There is no evidence that the accused person was violent when confronted with the alleged defilement, it is also not consistent with the reason why the complainant did not report to the grandmother, the fear that that accused would harm her on the way back All this casts long shadows of doubt on the truthfulness of the case from the prosecution.

This allegation of an earlier defilement in 2010, or continuing defilement is a very serious one as it was expected to feed into the current one. It was alleged that the complainant had forgiven the accused through the intervention of his parents. The key question is how would it be possible that this fact not be known to the mother of the complainant? Granted, there have been situations where spouses hide the truth about sexual offences committed against their children to 'protect' their marriages. But why would the police not investigate the same, and if they missed it why would the prosecution no have it investigated to establish the truth or otherwise of the matter? They owed this to the complainant and the fact that it remains an allegation without any supporting evidence creates the impression of exaggerated evidence. That is the nature of our criminal justice system. He who alleges must prove and in this case, beyond a reasonable doubt. I am wont to say this: The amount of laxity in the investigations of sexual offences is bewildering. Sexual offences are very serious offences for both the victim, for the gross violations to their rights and bodily integrity they undergo and the accused for the liability to serve long sentences in prison, and enter the books of the damned. It is necessary that the Directorate of Criminal Investigations takes them as seriously as it does other felonies. The violation of the rights of a person, the integrity of their person, through sexual violence is no less political than the violation of that persons rights through an act of corruption. The Office of the Director of Public Prosecution must demand more than just witness statements and hurriedly completed P3 forms. The bar for investigations must be set high enough to ensure that victims are not dragged through the Criminal justice system as a matter of course. The application of the proviso to s. 124 of the Evidence Act should come as a matter of last resort not a matter of course so that investigators can first demonstrate every effort was made to avail evidence, so that the court can arrive at the conclusion that the that the only evidence available is that of the victim.. This thing of presenting shoddily investigated cases to court must stop.

The provisions of this **Section 124** of the **Evidence Act** were not intended to make investigating officers lazy or make the system lax. The basis of the trail magistrate's belief must be demonstrated.

What is the basis of 'belief?'

Black's Law Dictionary 9th Edition Page 175 defines **belief** as:-

> *"A state of mind that regards the existence of something as likely or relatively certain."*
>
> ***Believe: -*** *"to feel certain about the truth of: to accept as true*
>
> ***Reasonably believe: -*** *"(1) To believe (a given fact or combination of facts) under circumstances in which a reasonable person would believe. (2) To think or suppose."*

Hence when the proviso says there must be reasons for this belief to be recorded in the proceedings, it must have been expected that it would be more than just a phrase 'I believed the complainant'. A trial court in a **Sexual Offences Act** matter must be alive from the word go that it may have to rely on the proceedings to support its belief in the evidence of victim. Hence the proceedings must contain, sign posts which the trial court will come back to should there be no other evidence available to support the charge.

Adopting the issues set down by the trial court;

> *1. Has the complainant's age been proved?*
>
> *2. Has penetration been proved, if yes*
>
> *3. Has it been proved it is the accused who caused it?*
>
> *4. Has it been proved that accused was PW1's father?*

It is evident that the age of the complainant was not in dispute or her relationship with the appellant. I have shown from the evidence on record that there was no evidence of penetration, or recent sexual intercourse, or intercourse with the appellant. In addition there was also no basis to rely on the proviso to s. 124 of the Evidence Act.

In the end I find that the conviction was unsafe. The same is quashed. The sentence is set aside and the appellant is to be set at liberty unless otherwise legally held.

Dated, delivered and signed at Nakuru this 20th day of January, 2020.

Mumbua T. Matheka

Judge

In the presence of

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