



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYAHURURU**

**CRIMINAL APPEAL NO.23 OF 2018**

**(Appeal Originating from Nyahururu CM's Court Cr.No.768 of 2018**

**by: Hon. A.W. Mukenga – S.R.M.)**

**PKM.....APPELLANT**

**- VERSUS -**

**REPUBLIC.....RESPONDENT**

**J U D G M E N T**

PKM, the appellant has appealed, against the decision of Hon. Mukenga R.M., dated 23/8/2016 where he was convicted of the offence of attempted incest contrary to Section 20(2) of the Sexual Offences Act.

The particulars of the charge are that on 12/3/2014 at about 8.00 a.m. within [particulars withheld] Village of Nyandarua County being a male person attempted to cause his penis to penetrate the vagina of D.N.N. who was to his knowledge, his daughter who was aged 6 years.

In the alternative, he was charged with the offence of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act in that on 12/3/2014 at [particulars withheld] Village in Nyandarua County, intentionally caused his penis to come into contact with the vagina of DNN a girl aged 6 years. No finding was made on the alternative charge.

Upon conviction on the main charge, he was sentenced to serve 20 years imprisonment. The appellant is aggrieved by both the conviction and sentence and preferred this appeal based on the following grounds:

- 1. The learned trial magistrate erred in law and in fact in convicting the appellant of attempted incest without considering that the evidence that was presented before court did not meet the threshold;*
- 2. The learned trial magistrate erred in law and in fact in failing to warn himself while convicting on the evidence of the minor solely;*
- 3. The learned trial magistrate erred in law and in fact in convicting the appellant on inconsistent evidence;*
- 4. The learned trial magistrate erred in law and in fact in failing to consider that the issue of a possibility of setup by the mother to the minor that came out during cross-examination of the PW1, the mother to the minor;*
- 5. The learned trial magistrate erred in law and in fact in failing to find that the credibility of the PW1 was questionable based on exaggerated evidence;*
- 6. The learned trial magistrate erred in law and in fact in failing to find that there was no proof of attempted incest;*
- 7. The learned trial magistrate erred law and in fact in failure by the prosecution to call a witness who featured in cross examination of PW1 could have otherwise been an attempt by the prosecution not to want to prejudice the then case;*
- 8. The learned trial magistrate erred law and in fact in finding that the minor understood the meaning of an oath on an uncondusive voire dire.*

The appellant therefore prays that the conviction be quashed and sentence set aside.

This is a first appeal and it is the duty of this court to re-examine all the evidence that was tendered in the trial court afresh, analyze it and arrive at its own conclusions and determinations. The court however continues itself that it did not have the supportively to assess the demeanor of the witnesses. I am guided by the decision in the case of Okeno v Republic (1973) EA 32.

The prosecution called a total of five witnesses. The complainant, PW2, DNN aged 6 years testified on oath after the court took her through *voire dire* examination and established that she understands the meaning of the oath and was intelligent enough to understand the proceedings. PW2 recalled that on 13/3/2014 about 8.00 a.m., while on her way to school at Mama Mwangi's shop, she met her father who asked her to go with him to his house and she accepted. He made her enter the house through the window while he used the door. While in the house, he covered her mouth with cellotape, told her to remove her trouser which she did. He removed his trouser and they slept on the bed where he used his penis to do bad manners to her private parts to which she pointed to and she felt pain in her stomach. He warned her not to tell anybody or he would kill her. After he finished, he told her to go to school. She told her teacher that she had a stomachache and he allowed her to go home. Her mother later took her to hospital.

PW1, LNM, PW2's mother recalled that PW2 left for school at 8.00 a.m. She later found the child crying and PW2 reported to her that the father had sex with her. PW1 took PW2 to hospital after examining and finding that the child's private parts were damaged. PW1 identified the appellant as the complainant's father and they had separated at that time. She also had the complainant's clinic card which was later produced in evidence by PW4 P.C. Erick Oduk (P.Ex.5.).

PW3 Dr. Kimani produced the P3 form which had been filled by Dr. Wagura who examined the complainant on 17/3/2014. The doctor did not find any physical injuries on complainant's genitalia. The doctor also produced the PRC forms that were filled at Baari Dispensary where the complainant was examined on 14/3/2014.

PW4 received a report of alleged defilement from PW1 and both PW1 and PW2, recorded their statements.

When placed on his defence, the appellant in his unsworn statement denied committing the offence.

Mr. Muhoho, counsel for the appellant submitted on grounds 2 and 8 that relate to the admissibility of *voire dire* evidence and urged that the court erred by failing to warn itself of relying on the sole evidence of a minor. He submitted that even though Section 124 of the Evidence Act does not require corroboration of evidence of a minor in a sexual offence, the court should have made a determination that it was convinced by the said evidence to have been true. Counsel further urged that the court should have examined evidence of PW2 *visa vis* that of PW1 and 4 – whereas PW4 said that the child reported later that the father gave her a ride on a motor cycle, PW1 said he promised to go buy PW2 a sweet and yet, PW1 never said anything about the motor cycle or being bought something.

He said that the minor was not truthful because, whereas she claimed that the appellant sealed her mouth with cello-tape, she never told the mother about it.

As to the grounds 4 & 5 on the possibility of a set up or grudge; counsel submitted that the appellant and PW1 were estranged and PW1 had taken the appellant to FIDA; that PW1's evidence was exaggerated when she alleged that the child's private parts were damaged.

On grounds 1 & 6, Mr. Muhoho submitted that the offence was not proved because it was not enough for the child to merely state that the appellant did bad manners to her and counsel relied on the decision of Lodwar H.Cr.A.60/2016 Michael Lokomen v Republic and that the attempt was not shown.

As to failure to call witnesses, the counsel urged that the teacher who was alleged to have seen PW2 crawl on the grass should have been called as a witness; that

Counsel further submitted that the age of the minor was not proved though a card was shown to court and marked for identification as MFI.1.

Lastly, it was the appellant's submission that the sentence of 20 years was excessive in the circumstances.

In opposing the appeal, Ms. Rugut, Learned Counsel for the State argued that the age of the complainant was proved by production of the vaccination card; that the offence of incest was committed because under Section 20(1) of the Sexual Offences Act, penetration had not occurred; that the offence was proved as there was a relationship between the appellant and complainant; that the court warned itself that it was relying on evidence of a single witness and it had an opportunity to observe the witness.

As for allegation of grudge, Ms. Rugut argued that it never arose even in the appellant's defence; that there is no evidence of grudge.

As regards the allegation that PW1 tended to exaggerate what she saw, counsel argued that the appellant had an opportunity to cross examine the complainant on her evidence but never challenged it.

I have considered all the evidence tendered in the trial court, grounds of appeal and submissions by counsel.

PW1 was a child of tender age. She underwent a *voire dire* examination and impressed the court as one who understood the meaning of an oath and was intelligent enough to understand the proceedings. The court recorded the questions and answers given by PW2 and it was very impressive that a 6 year old would give such answers. It is the court that asked the questions and so PW2 could not have been coached by anybody. Even if the questions had not been recorded, the court also recognizes the procedure where only answers are recorded. See

PW1 gave to the court PW2's immunization card which was initially marked as MFI '1'. DW1 said that the complainant was sixteen years old. PW4 produced the said card as P.Ex.No.5.

It indicated that PW2 was born on 19/12/2005 which meant that as of 12/3/2005 when the offences was committed, she was 9 years old, not 6 years.

It is surprising that even the PCR form and P3 form indicated that PW2 was 6 years as of that time. The bottom line is, however, that PW2 was a child of tender age, in standard 1 at the time. Her age was proved. I must point out that the age brackets are not necessary in an offence of incest. It is only a requirement in a case of defilement for purposes of sentencing. It is sufficient to prove that the complainant was a child.

The offence of incest is provided under section 20(1) of the Sexual Offences Act. The section provides as follows "*any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter.....*"

No doubt the complainant was the appellant's daughter. PW1 said so and PW2 confirmed by identifying the appellant as her father who had left them sometime back. The appellant did not deny that fact.

PW1 in her testimony was very clear. At first, she stated that bad manners were done to her by the appellant which she went ahead to explain, that he put his penis in her private parts. She even demonstrated it to the court by pointing out what the appellant did to her.

PW2 was first examined at Baari Dispensary where the PCR forms were filled on 14/3/2014. The findings of the clinical officer were that the outer private parts were painful and outer genitalia were inflamed. Although the hymen was still intact Dr. Wagura later examined PW2 on 17/3/2014, 4 days after the alleged offence. It is understandable why the doctor may not have seen the inflammation of the outer genitalia – because 4 days had passed. The findings of the clinic where PW2 was first examined go to confirm that indeed there was some interference with PW2's genitalia though there was no penetration. PW1's evidence that damage was done to the complainant's genitalia was therefore not an exaggeration.

Section 20(2) of the Sexual offences Act provides for attempted incest. The essential element of the offence of incest is an intentional indecent act, with knowledge, that the person is a relative of the perpetrator.

In the instant case, the magistrate properly considered whether the appellant had attempted to commit an indecent act or attempted to commit an act that would cause penetration or either of the above.

After considering the evidence, the trial court stated "*I believe the evidence of the complainant having warned myself sufficiently on the dangers of convicting on one single eye witness. I do not see any reason why a child of her age would have made up such serious allegations against the accused person.*"

Section 143 of the Evidence Act provides that a fact can be proved by the evidence of a single witness unless a particular law or statute provides otherwise.

The proviso to Section 124 of the Evidence Act allows a court to convict on the uncorroborated evidence of a Sexual Offence victim if the court is convinced by the truthfulness and credibility of the complainant's evidence. In this case, the court believed the complainant's evidence. When the complainant undertook a *voire dire* examination, she was impressive as an intelligent child, was very consistent and her testimony was not shaken at all.

Contrary to what the defence counsel alleged that the case may have been based on a grudge, firstly, the said grudge was never raised during cross examination of the witnesses nor was it raised in the defence. PW1 & 2 did not conceal anything from the court but were forthright, that PW1 and the appellant were indeed estranged. The medical evidence supported the fact that PW2's genitalia was inflamed. There is totally no evidence to support the contention that the charge against the appellant was a frame up.

The defence counsel also challenged the conviction for reasons that there were inconsistencies in the prosecution evidence for example, when PW4 said that the complainant reported that the appellant pretended to be giving PW2 a ride on his motor cycle, but that the complainant never told the court about the said ride. Secondly, he alleged that PW2 talked of the appellant putting cellotape on her mouth but never told anybody else.

I have given due consideration to the alleged inconsistencies. It is not uncommon for different witnesses to give different views of what they have seen even if it is the same incident. The court will ordinarily not reject such evidence unless the inconsistencies are so grave as to go to the root of the case. In Philip Nzaka Watu v Republic [2016] eKLR the court expressed itself as follows in regard to inconsistencies in evidence:

*"However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question.*

*In Dickson Elia Nsamba Shapwata & Another v The Republic, Cr. APP. NO. 92 OF 2007 the Court of Appeal of Tanzania addressed the issue of discrepancies in evidence and concluded as follows, a view we respectfully adopt:*

*“In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The Court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter.”*

*The main contradiction that the appellant complains about relates to the time when the offence was committed. The prosecution witnesses were clear that they were not testifying to the exact time. They were approximating, to the best of their abilities as common rural folk. The witnesses mentioned various times, ranging from 6.30 pm, 7.00 pm, 7.30 pm and 8 pm. The only exception was the evidence of PW1 where the time is recorded as 6.30 a.m. Granted the consistency of the estimates of the other witnesses, we cannot rule out the possibility that the reference to 6.30 a.m. was in fact a typographical error in the record. The trial court was satisfied that the offence was committed between 6.30 pm and 7.00 pm and we have no basis for concluding that there was material contradiction in the prosecution evidence to warrant interference with the conclusion of the trial court. In any case, the time when the offence was committed is a question of fact, which the two courts below determined.”*

In the holding in Uganda Court of Appeal in **Twehangane Alfred v. Uganda, Crim. App. No 139 of 2001, [2003] UGCA, 6** quoted with approval by the Court of Appeal of Kenya in **Erick Onyango Ondeng’ v. Republic [2014] eKLR**. The Uganda Court of Appeal held:

*“With regard to contradictions in the prosecution’s case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution’s case.”*

The inconsistencies referred to were very minor and did not go to the root of the charge.

*Whether crucial witnesses were not called:*

Generally, it is the discretion of the prosecution to call witnesses who are relevant to their case. The prosecution can only be faulted if failure to call a witness is prompted by an oblique motive. In the case of **Mwangi v Republic (1984) eKLR 595**, the court said:

*“Whether a witness should be called by the prosecution is a matter within the discretion of the prosecution and the court will not interfere with that discretion unless it may be shown that the prosecution was influenced by some oblique motive.”*

The prosecution is therefore not duty bound to call all persons involved in the transaction and its failure to call him is not necessarily fatal to its case unless the evidence adduced by the prosecution is insufficient to sustain a charge.

In **Keter v Republic 2007 1 EA 135** the court stated that:

*“The prosecution is not obligated to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt.”*

In this case, the complainant’s teacher could only testify to having seen the complainant at school and the reason for releasing her to go home. Lack of the teacher’s evidence is not fatal to the prosecution case because he did not witness the incident of incest nor did PW1 reveal to him what had happened to PW2.

After a careful analysis of all the evidence on record, I am satisfied beyond doubt that the prosecution proved that the appellant attempted to defile his own daughter and therefore committed the offence of attempted incest contrary to Section 20(2) of the Sexual Offences Act.

The conviction was well founded. I affirm it.

The appellant pleaded that the sentence of 20 years imprisonment is excessive. The appellant was treated as a first offender. There were no previous criminal records. He was not remorseful. The minimum sentence under section 20(2) Sexual Offences Act is 10 years imprisonment. In exercise of my discretion, I therefore set aside the sentence of 20 years imprisonment. Instead, I sentence the appellant to 10 years imprisonment. The prison sentence will run from the date the appellant was sentenced on 23/8/2016. The appeal succeeds to that extent.

**Dated, Signed and Delivered at NYAHURURU this 2nd day of March, 2020.**

.....

**R.P.V. Wendoh**

**JUDGE**

**PRESENT:**

**Ms. Rugut for the State**

**Mr. Maina Kairu holding brief for Mr. Muhoho for appellant**

**Eric - Court Assistant**