



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MARSABIT**

**CRIMINAL APPEAL NO.15 OF 2018**

**ELI.....APPELLANT**

**VERSUS**

**REPUBLIC..... RESPONDENT**

*(Being an appeal from the original conviction and sentence in criminal case no.612 of 2017 of the Principal Magistrate court at Marsabit)*

**JUDGMENT**

The appellant was charged with the offence of incest Contrary to Section 20(1) of the Sexual Offences Act No.3 of 2006. The particulars of the offence are that the appellant on diverse dates between 26<sup>th</sup> and 28<sup>th</sup> of March 2017 in Marsabit central sub county within Marsabit County, being a male person, unlawfully and intentionally caused his penis to penetrate the vagina of SS.L a juvenile aged 13 years who was to his knowledge his daughter.

The appellant was also charged with an alternative count of indecent act with a child Contrary to Section 11 (1) of the Sexual Offences Act No.3 of 2006. The particulars of the offence are that the appellant on diverse dates between 26<sup>th</sup> and 28<sup>th</sup> of March 2017 in Marsabit central sub county within Marsabit County, being a male person unlawfully and intentionally touched the vagina of SSL a child aged 13 years with his penis.

The trial Court found the appellant guilty of the main count of incest and sentenced him to serve 20 years imprisonment. The grounds of appeal are:

- 1. That the trial court erred in law and fact by admitting the evidence of an intermediary without considering that the same was bad in law.***
- 2. That the charge of incest was made up and the medical evidence is doubtful.***
- 3. That the learned trial magistrate erred in law and facts by taking into consideration contradicting evidence by the prosecution witnesses thereby leading to a miscarriage of justice.***
- 4. That the prosecution did not prove its case beyond reasonable doubt.***
- 5. That the trial magistrate erred in law and in fact by failing to consider the defence by the appellant.***

Mr. Nyenyire appeared for the appellant. Counsel submit that the prosecution evidence is not concrete. The alleged offence occurred between 26<sup>th</sup> and 28<sup>th</sup> March 2017. It was reported after a period of nine (9) months. There is doubt as to the weight of the evidence. The complainant never gave evidence to the investigating officer to the effect that she had been defiled. The Investigating officer testified that he did not talk to the complainant. Being the investigating officer he was expected to have taken the evidence of the complainant. The complainant's statement was recorded in Nairobi at Gertrude hospital. The medical evidence indicates that the complainant herself was not cooperative. A report by Dr. Carolyn Odula Obonyo indicate that she tried to examine the complainant's vagina but it was difficult as she was uncooperative. Counsel further submitted that there was recommendation for further examination of the complainant but that was not done. It is submitted that the prosecution case did not prove that there was penetration. The prosecution evidence is inconsistent. The trial court did not

consider the appellant's defence.

The state opposed the appeal. Mr. Ochieng submit that the evidence is overwhelming. All the fundamental ingredients of the offence were brought out. The relationship between the appellant and the victim was established. PW1's evidence was corroborated by that PW2 as well as the medical evidence. The reason why the report was made to the Police after nine (9) months is explained in the evidence. PW1 was traumatized. The medical report confirm that she was penetrated. The complainant was undergoing treatment in Nairobi and that is where her statement was recorded. The medical report indicate that the child was uncooperative because the area that was being examined was tender. The appellant's defence is a sham.

Before the trial Court seven witnesses testified for the prosecution. **PW1** was the complainant. She was 14 years old. The trial Court conducted *voire dire* and took sworn evidence from the complainant. She stated that she was a class six pupil. She is the first born of the appellant and PW3. On 26<sup>th</sup> March, 2017 she was watching TV with PW2. PW2 went to sleep. The appellant went there and asked to be shown where she was feeling pain. She showed him her stomach. He started touching her breasts and private parts. He then raped her. She tried to push him but he pressed his mouth on her mouth. The following day her mother was on a safari and he raped her. She did not scream. On the 3<sup>rd</sup> day she was mopping the house and he pulled her. She threatened to spill the beans if he raped her again. He had a knife and threatened her and he raped her. She later became sick. Her limbs became numb. She was taken to Marsabit hospital and later referred to Gertrude hospital in Nairobi. While in Nairobi she was told to do exercise and her hand became normal. She talked to a counsellor and explained what had happened at home. She suddenly got relieved and became healed. She informed PW2, her sister that she had been raped. She feared telling her mother. It is her mother who took her to the hospital in Nairobi. When she was five years old a relative by the name Burge who was in class six raped her. Her parents had their own disagreements over finances.

**PW2** is PW1's younger sister. She was 12 years old. She too testified under oath. On the material day they watched Television and she went to sleep. Later PW1 told her that their father wanted to rape her but she refused and he did not succeed. On several occasions their parents differed over money. **PW3** is the mother to PW1 and PW2 as well as the appellant's wife. On 8.12.2017 PW1 was sick. Her right leg and hand were paralyzed. She took her to hospital and was advised to take her to a specialist. The appellant told her that PW1 was pretending. They went to Gertrude hospital where PW1 was admitted. She was told that PW1 had Psychological problem and required guiding and counselling. PW1 was examined in her presence but was uncooperative. During guiding and counseling sessions she was not present. She used to disagree with the appellant who was not providing maintenance for the family. PW1 stated that she had been raped by her father. He has a sister by the name H KL. Her sister obtained her identity card and she denied that it was obtained fraudently.

**PW4 Dr. Kingi Kimunto Mocheche** is a Medical Doctor who was based at Gertrude Children's hospital. She examined PW1 three times. She examined PW1's genitalia. She found a rugged hymen. There was a white discharge followed by a candida pattern which is normal flora in female genitalia. It could be an acquired infection or a normal infection from the hormonal cycle. Examination was done on 19.12.2017 at noon. PW1 had low mood and was pre-occupied. She disclosed to her clinical Psychologist who had attended to her. She stated that her father had penetrated her on two occasions in March 2017. She filled the Post Rape Care Form on 20.12.2017. It is her further evidence that rugged hymen means it was not complete. PW3 informed her that PW1 had a case with another minor that was dealt with.

**PW5 Dr. Carolyn Odula Obonyo** is a Gynecologist and Obstetrician based at Gertrude hospital. She examined PW1's genitalia. She found the external genitalia was normal but the hymen was rugged. There was discharge and foul smell. She attempted to examine further but it was difficult. She suggested that to examine her under anesthesia at a later date. The hymen was damaged. Penetration would be the most possible cause for the rugged hymen.

**PW6 PC Njogu** was attached at the Marsabit Police Station. On 26.12.2017 the matter was reported at the Police station by PW1 and PW3. He issued a P3 form and escorted them to Marsabit Hospital. He saw the report by PW4 and PW5. He investigated the case and caused the appellant to be charged. He did not talk to the complainant. The complainant's statement was recorded in Nairobi. He talked to the appellant who denied committing the offence. **PW7 Dr. Dub Halake Dido** was stationed at Marsabit county referral hospital. He is a general practitioner. He filled the P3 form on 26.12.2017. He examined PW1 and found the hymen was rugged. There was whitish vaginal discharge. The hymen did not have smooth out light. There could be several causes for that such as forceful penetration or congenital. The white discharge is caused by candidiasis which is not a sexually transmitted disease but is common with ladies. Had they done semen analysis they could have confirmed that it was penetration. One cannot differentiate between rugged hymen caused by forceful penetration and that which is caused by congenital unless semen analysis is done.

The appellant gave sworn testimony. He is an assistant chief. In September 2017 he was having NHIF workshop. Members were informed that they could have a full medical check up each year. PW1 had been sickly for about three years. He told his wife to take PW1 to hospital in Nairobi for the full check up. In mid December 2017 his wife called him while she was with H K. H told him that she was thankful since she had obtained her identity card. His wife later told him that she had helped H to obtain the identity card by using his stamp. H is an Ethiopia and she threatened his wife and told her that he would report to the District Commissioner. His mother in law and H are siblings. He told his wife that since he had put his life and job under threat he would marry a lady who is in college. It is his evidence that it is his wife who narrated the story of the alleged incident and not PW1. One A who is working with Social Services called him and told him to leave the issue of the identity card. He was later arrested and charged with the offence. He denied committing the offence. He used to keep his stamp in his office but sometimes he would keep it in his house. The case was framed against him by his wife.

The issue for determination is whether the Prosecution proved its case beyond reasonable doubt against the appellant. The appellant contend that the Prosecution did not prove its case beyond reasonable doubt and that the medical evidence does not prove penetration. The Prosecution maintain that the evidence against the appellant is overwhelming.

The charge sheet indicate that the complainant was defiled between 26<sup>th</sup> and 28<sup>th</sup> day of March, 2017. During her evidence in chief, PW1 testified that she was defiled on three occasions namely 26<sup>th</sup>, 27<sup>th</sup> and 28<sup>th</sup> March, 2017. During cross examination, she stated that she was defiled only on 26<sup>th</sup> and 27<sup>th</sup> March, 2017. According to PW2, PW1 told her about the incident on 12.4.2017. While testifying during

examination in chief PW2 stated that PW1 told her that the appellant lifted her dress and did bad things to her. At the same time PW2 stated that her sister told her that her father wanted to rape her (PW1) but she refused. While being cross examined, PW1 stated as follows:

***“My sister told me about the incident on 12.4.2017. She said my father did bad things to her on 11.4.2017. My sister told me that my father wanted to rape her and she refused and he did not succeed.”***

During Re-examination PW2 maintained that PW1 told her about the incident on 12.4.2017. On her part, PW1 testified that she told her sister (PW2) on 27.3.2017.

According to the complainant her leg became numb. It is the evidence of her mother, PW3 that PW1's right leg and hand were paralysed. She was just in bed. This was on 8.12.2017. The defilement incidents occurred in March 2017. PW2 testified that she was told that the incident occurred on 11<sup>th</sup> or 12<sup>th</sup> April, 2017. PW1 did not tell her mother from March 2017 until she was taken to Nairobi in December, 2017 almost nine months later. According to the appellant, PW1 was sickly for sometime and when he realized that the National Hospital Insurance Fund (NHIF) could pay for full body check up, he sent his wife and pW1 to Nairobi for the Check up. It is the evidence of PW1 that on 26.3.2017 in the evening her father asked her to show him where she was feeling the pain. She showed him her stomach. The essence of this evidence is that by March, 2017, PW1 was not feeling well. This casts doubts as to the cause of the numbness to PW1's limbs. It is clear that pW1 was sickly before the alleged incident and this is in line with the defence evidence.

The evidence of PW4 is that PW1 told another person, a clinical Psychologist that her father had defiled her. Similarly, PW4 testified that she examined PW1's genitalia and found a rugged hymen with white discharge. This was on 19.12.2017. PW1 was in low mood and restless. PW4 was called in after pW1 had revealed to the clinical Psychologist that she had been defiled. According to PW4 a rugged hymen indicated penetration. It is her evidence that a rugged hymen means the hymen is not complete.

PW5 examined the complainant. It is her evidence that PW1 told her that she started her menstrual periods when she was eleven years old. Equally PW5 found rugged hymen PW1 had no foul smell or discharge on examining her genitalia. It is her evidence that her examination on PW1 was not complete and she suggested that PW1 be examined further under anesthesia. According to PW5, she examined pW1 on 20.12.2017 and she was cheerful. However, PW1 was uncooperative. PW5 made an impression of vaginal penetration but recommended further examination.

**PW7 Dr. Hub Halake** examined PW1 on 26.12.2012. It is clear that by then PW1 had travelled from Nairobi to Marsabit. PW7 observed white vaginal discharge on PW1's genitalia. The hymen was rugged. It is PW7's evidence that a rugged hymen is not caused by penetration only. It can be caused by congenital. The concise Oxford English Dictionary (12<sup>th</sup> edition) explain the word **“congenital”** as **“of a disease or abnormality present from birth”**.

The medical evidence of the three medical officers indicate that PW1's hymen was present although it was rugged. According to PW1, it is her father who defiled her. There is doubt as to how PW1 could be defiled three times on three different occasions at the age of 11 years but still retain her hymen. Although there is a possibility of such an occurrence, it is highly doubtful that PW1 could be defiled in three occasions on three consecutive days by her father without the hymen being fully ruptured. It is the complainant's evidence that while aged only five (5) years old, she was defiled by a boy who was in class six. This could offer another explanation as to why PW1's hymen was rugged.

It is equally not clear to me as to why PW1 could not trust her mother and explain to her what had happened to her. Why couldn't PW2 also inform her mother that the appellant had tried to defile PW1 since PW1 told her that their father had attempted to defile her but did not succeed. The explanation that PW1 feared her father is mainly brought out by PW4 and not the complainant. If PW1 feared her father, what about her mother. Did PW1 had to travel all the way to Nairobi and claim that she had been defiled. PW1 was initially attended to by doctors in Marsabit before she was referred to Nairobi. She did not tell the Marsabit doctors that she had been defiled. The evidence shows that she was sick even before the date of the alleged defilement. The prosecution evidence is not full proof. There is doubt as to whether indeed PW1 was defiled.

Before this appeal was heard, the complainant and her mother (PW3) filed two affidavits. The affidavits were preceded by a letter filed in Court on 18.1.2019. The appellant was sentenced on 15.11.2018. The letter filed on 18.1.2019 pleads with this Court to have mercy on the appellant. PW3 was in Court on 11.3.2019 when the appeal was heard. She told the Court that it is true that she swore the affidavit and that PW1 also swore her affidavit on 8<sup>th</sup> March, 2019.

Paragraphs 4 and 5 of the complainant's affidavit states as follows:-

***4. That I was under immense pressure to testify against my father especially after being counselled at Gertrude's Children Hospital after a period of 9 months when the alleged incident took place.***

***5. That I support this appeal because I never gave my side of the story to the investigating officer.***

Mr. Ochieng submitted that the two affidavits can be used to mitigate the sentence. However, it is not clear to me as to why PW1 would state that she was under immense pressure to testify against her father. Who was exerting the pressure. What would have been her side of the story apart from what she told the Court. Is it that PW1 was feeling guilty after she gave false testimony to the court? It could be possible that the family is undergoing financial hardships due to the incarceration of the appellant as stated in the two affidavits. At the same time it could be possible that PW1 and PW3 are feeling guilty after causing the appellant to be convicted on framed up charges. It is not clear how PW1, a child of 13 years old, would hold on for nine(9) months about the defilement without telling her mother or a close relative. It is also doubtful that the alleged incident occurred taking into consideration the evidence of PW2 that she was told by PW1 that their father wanted to defile PW1 but he did not succeed. Being a Criminal case, the prosecution has to prove its case beyond reasonable doubt. The medical evidence is doubtful and does not prove beyond reasonable doubt that penetration did take place. Penetration is the core ingredient

of the offence of incest under Section 20 of the Sexual Offences Act. PW1's rugged hymen could be due to congenital or could have been caused by the defilement which occurred while she was only five (5) years old.

Given the evidence on record, I do find that the prosecution did not prove its case beyond reasonable doubt. The medical evidence is not conclusive. PW5 opined that a further examination be done on the complainant. The reason behind such opinion is that PW5 could not positively conclude that PW1 was defiled. PW1 was defiled by another person while she was five years old. The rugged hymen cannot be the proof of penetration by the appellant. The prosecution evidence is doubtful and the appellant is entitled to the benefit of doubt.

In the end, I do find that the appeal is merited and is hereby allowed. The appellant shall be set at liberty unless otherwise lawfully held.

**Dated, Signed and Delivered at Marsabit this 2<sup>nd</sup> day of May, 2019**

**S. CHITEMBWE**

**JUDGE**