



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.221 OF 2011

PSN.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal arising out of the conviction and sentence of Hon. D. Mulekyo PM delivered on 4th August 2011 in Kikuyu SPM Court Cr. Case No. 636 of 2011)

JUDGMENT

The Appellant, PSN was charged with the **incest** contrary to **Section 20(1)** of the **Sexual Offences Act**. The particulars of the offence were that, on 2nd July 2010 in Kiambu County, the Appellant unlawfully and intentionally caused his sexual organ to penetrate the genital organ of MWW, a girl aged nine (9) years who was to his knowledge his daughter. In the alternative charge, the Appellant was charged with the offence of **committing an indecent act with a child** contrary to **Section 11(1)** of the **Sexual Offences Act**. The particulars of the offence were that on 2nd July 2010 in Kiambu County, the Appellant unlawfully and intentionally caused contact between his body and the genital organs of MWW, a girl aged nine (9) years. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charges. After full trial, the Appellant was convicted on a substituted charge of **defilement** contrary to **Section 8(1)** and **Section 8(2)** of the Sexual Offences Act. He was sentenced to life imprisonment.

In his petition of Appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He faulted the trial court for failing to observe his constitutional rights under **Article 50(1)(g) & (h)** of the **Constitution**. He was of the view that the evidence adduced by the prosecution was not sufficient to sustain a conviction. He was aggrieved that the trial magistrate failed to appreciate that the ingredient of penetration was not established by the prosecution. He was further aggrieved that the trial court relied on the evidence of the prosecution witnesses which was full of contradictions. He took issue with the trial court's decision to admit in evidence medical documents contrary to **Section 33** of the **Evidence Act**. Finally, he faulted the trial court for failing to consider his defence in arriving at its decision.

During the hearing of the appeal, the Appellant presented to court written submissions in support of his appeal. He urged this court to allow his appeal. Ms. Atina for the State opposed the appeal. Learned State Counsel submitted that penetration was established. PW2, the complainant narrated to the court how she was sexually assaulted by the Appellant. She told her mother about the incident. Medical evidence adduced corroborated the complainant's testimony. Learned State Counsel submitted that the Appellant was the complainant's father. She stated that the complainant was nine (9) years old at the time of the sexual assault. She maintained that the prosecution had proved its case to the required standard of proof beyond any reasonable doubt. In the premises therefore, she urged this court to dismiss the appeal.

The facts of the case according to the prosecution are as follows: On the night of 2nd July 2010, the complainant was in the house with her two brothers. Their mother PW1, JWN left the house at about 9.00 p.m. to attend a funeral wake. The complainant stated that the Appellant was her father. The Appellant came to the house after her mother had left the house. He was drunk. The door was locked. He broke the window and gained entry into the house. Her brother opened the bedroom door. The Appellant asked about their mother's whereabouts. They went back to bed. The Appellant proceeded to sexually assault her. She stated that he lifted her dress and pulled down her underwear. He inserted his penis into her vagina. After he was done, she went to sleep in the living room. She stated that her mother came back to the house but the Appellant chased her away. The following morning, the Appellant gave her Ksh.10/-. He warned her against informing her mother of the ordeal. He left the house. The complainant proceeded to her aunt's house where her mother was. She narrated to her how the Appellant had sexually assaulted her.

PW1, JWN is the complainant's mother. She stated that the Appellant was her estranged husband. They had been separated for about a week prior to the incident. She testified that she left the house on the material night of 2nd July 2010 to attend a funeral wake at her employer's house. She left her three children sleeping in the house. She came back to the house at about 1.00 a.m. She found the Appellant in the house. The Appellant confronted her. He wanted to know where she was coming from. She got scared. She left the house and spent the night at her sister's house. The following morning, the complainant came to her sister's house. She narrated to her how the Appellant had sexually

assaulted her. She noticed the presence of a whitish discharge from the complainant's vagina. The complainant also had difficulty in walking. PW1 reported the incident at Kikuyu Police Station. She afterwards took the complainant to Nairobi Women's Hospital for medical examination. She was later taken to Tigoni District Hospital.

PW3, JNW is the complainant's brother. He testified how the Appellant broke into the house on the material night of 2nd July 2010. He was asleep with his brother and sister. The Appellant was drunk. He asked about their mother's whereabouts. He thereafter ordered them to go back to sleep. The following morning, his sister (the complainant) refused to go to school. She told him that the Appellant had sexually assaulted her the previous night. PW3 stated that he did not witness the incident. Dr. Ogutu (PW4) examined the complainant on 6th July 2010. He stated that she had earlier received treatment at Nairobi Women's Hospital. He told the court that the complainant's external genitalia was normal. She however had a fresh hymenal tear at 3'O'clock position. She also had a whitish vaginal discharge. He stated that her vaginal injuries were about four days old. PW5 investigated this case. She stated that PW1 and PW2 came to Kikuyu Police Station on 2nd July 2010 and reported the sexual assault. She visited the house where the complainant lived. She confirmed that the window was broken. She stated that the Appellant was arrested by members of the public and brought to the police station. After her investigations, she made the decision to charge the Appellant with the present offence.

The Appellant was put on his defence. He gave an unsworn statement. He stated that on the material day of 2nd July 2010, he got home at about 4.00 p.m. He found the door was locked. He however gained entry into the house. He inquired from the complainant on the whereabouts of PW1. He afterwards went to sleep. His wife (PW1) came back to the house at about 1.00 a.m. She asked to have a word with him outside the house. He found six men outside the house. They asked him whether he had paid the rent. A scuffle ensued. He hit one of them. They arrested him. He was taken to Kikuyu Police Station. He denied that he had sexually assaulted the complainant.

As the first appellate court, it is the duty of this court to subject the evidence adduced before the trial court to fresh scrutiny and re-evaluation, before reaching at its own independent determination whether or not to uphold the conviction and sentence of the Appellant. In doing so, this court is required to bear in mind that it neither saw nor heard the witnesses as they testified and cannot therefore make a comment regarding the demeanour of the witnesses (**See Okeno vs Republic [1972] EA 32**). In the present appeal, the issue for determination is whether the prosecution established the charge of **defilement** contrary to **Section 8(1)** and read with **Section 8(2)** of the **Sexual Offences Act** against the Appellant to the required standard of proof beyond any reasonable doubt.

This court has re-evaluated the facts of this case. For the prosecution to establish the charge of **incest** against the Appellant, it was required to establish the following: that the Appellant was related to the complainant, that there was penetration, and in the case where the complainant is a minor, the age of the complainant. **Section 22** of the **Sexual Offences Act** sets out the specific relationships that may constitute an offence of **incest**. The said Section provides as follows:-

“In cases of the offence of incest, brother or sister includes half-brother and adoptive brother and adoptive sister and a father includes a half father and an uncle of the first degree and a mother includes a mother and an aunt of the first degree whether through lawful wedlock or not.”

In the present appeal, the Appellant was the complainant's step-father. The complainant stated that the Appellant was her father. PW1 stated that she was married to the Appellant for about eight (8) years. The Appellant in his defence did not deny the same. He referred to PW1 as his wife. He was therefore the complainant's step-father. From the provisions of the above Section, a father who is not a biological father also falls among the relationships where sexual relationship is prohibited with a daughter. In the case of **BNM v Republic [2011] eKLR**, this Court held as follows:-

“my own understanding is that ‘half father’ is a term which means exactly the same as ‘step-father’ – it means one who is not a biological father of the child. Therefore by dint of this S 22(1) of the Act the appellant being a step-father of the complainant and one who stood in ‘loquo parenthesis’ can legally be charged and indeed convicted of the crime of incest with her.”

In the present case, this Court is of the view that the prosecution established that there existed a father-daughter relationship between the Appellant and the complainant. With regards to the complainant's age, her mother (PW1) stated that she was nine (9) years old at the time of the sexual assault. No documentary evidence was adduced by the prosecution to establish PW2's age. However, jurisprudence has held that the age of the complainant can be ascertained by documentary evidence, oral testimonies or by professional age assessment. In **Francis Omuroni vs Uganda Court of Appeal Criminal Appeal No. 2 of 2000** the court held that-

“In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense....”

The complainant as well as her mother (PW1) stated that she was nine (9) years old at the time. She was in Class Four. The same was not challenged by the Appellant on cross-examination. **The P3 form produced in evidence also indicated that the complainant was nine (9) years of age. The trial magistrate, who had the benefit of seeing the complainant testify**, assessed her age to be that of a child of tender years. This is evident since the trial magistrate deemed it necessary to conduct a *voire dire* examination on the complainant before proceeding to take her evidence. **This court therefore holds that the prosecution did establish that the complainant was a child within the meaning of Section 2(1) of the Children Act.**

This court now turns to the ingredient of penetration. **Section 2(1) of the Sexual Offences Act defines penetration as:**

“the partial or complete insertion of the genital organ of a person into the genital organs of another person.”

As regard to whether the prosecution proved penetration, the medical evidence adduce by PW4 established that indeed the complainant's vagina was penetrated. He stated that she had a **fresh hymenal tear at 3'O'clock position. She also had a whitish vaginal discharge. From his assessment, he stated that the complainant had been sexually assaulted. He produced a P3 from in evidence.** The complainant narrated to the court how the Appellant defiled her. He lifted her dress and pulled down her underwear. He proceeded to insert his penis into her vagina. He tied her hands backwards with a bedsheet. **Taking into consideration the P3 form produced in court, as well as the evidence by PW4 and the complainant, this court is of the view that the prosecution did establish the element of penetration to the required standard of proof beyond any reasonable doubt.**

The third issue is whether the sexual assault was perpetrated by the Appellant. PW1 was married to the Appellant for about eight (8) years. The Appellant was the complainant's step-father. The complainant therefore knew the Appellant. There was no room for mistaken identity. She told the court how the Appellant came to the house drunk and defiled her. Her mother was not in the house at the time. Although PW3 was in the room when the incident occurred, he was asleep and therefore did not witness the Appellant sexually assault the complainant. He however stated that the complainant refused to go to school the following morning. She told him that the Appellant had had sexually assaulted her. PW1 noted that the complainant had a whitish discharge between her legs the following morning. She was walking with difficulty. She told him that the Appellant had sexually assaulted her. There is no doubt that the complainant implicated the Appellant as the one who defiled her. The Appellant in his testimony placed himself at the scene of crime. The Appellant's defence that he had been framed with the offence does not hold.

In this court's assessment, the complainant was telling the truth. The defence of the Appellant was merely evasive and did not dent the otherwise strong culpatory evidence adduced by prosecution witnesses. It was properly dismissed as being of no evidential value. His guilt was established to the required standard of proof beyond any reasonable doubt. The trial court in preparing its judgment substituted the charge of **incest** contrary to **Section 20** of the Sexual Offences Act with that of defilement contrary to **Section 8(1)** and **Section 8(2)** of the **Sexual Offences Act**. The trial magistrate was of the view that the charge of incest was not established since the prosecution failed to prove that the Appellant was the complainant's biological father. However, as discussed earlier in this judgment, a step-father falls under the prohibited degrees of consanguinity. Therefore any sexual act between such father and daughter constitutes the offence of incest. However, since the particulars that form the ingredients of the charge of **defilement** and that of **incest** are the same (save for the relational aspect in the case of incest) and also the fact that the sentence to be meted out is the same, the court holds that the Appellant was not prejudiced by his conviction on the substituted charge of **defilement**.

The upshot of the above reasons is that the Appellant's appeal against conviction by the trial court on the charge of **defilement** contrary to **Section 8(1)** and **Section 8(2)** of the **Sexual Offences Act** is **upheld**. The sentence meted out by the trial court was therefore legal. The same is hereby confirmed. The Appellant's appeal on sentence is similarly dismissed. It is so ordered.

DATED AT NAIROBI THIS 7TH DAY OF MAY 2019

L. KIMARU

JUDGE