

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

CRIMINAL APPEAL NO. 58 OF 2016

JMO.....APPELLANT

=VRS=

REPUBLIC.....RESPONDENT

[Being an Appeal from the Conviction and Sentence of Hon. R. M. Kitagwa - RM Nyamira dated the 16th day of August 2016 in the Nyamira Chief Magistrate's Court Criminal Case No. 1059 of 2015]

JUDGEMENT

The appellant was sentenced to life imprisonment after being found guilty of defiling his nine-year-old daughter contrary to Section 20 (1) of the Sexual Offences Act. Being aggrieved by the conviction and sentence he preferred this appeal.

As the first appellate court I have a duty to reconsider and evaluate the evidence in the trial court so as to arrive at my own independent conclusion concerning the appellant's guilt. I do so bearing in mind that I did not see or hear the witnesses giving evidence and making provision for that.

The particulars of the charge are that on 3rd August 2015 at Bomanyanya Sub-location within Nyamira County the appellant intentionally and unlawfully caused his penis to penetrate the vagina of SMM aged 9 years a female person who to his knowledge is his daughter.

The complainant's evidence was that on the material day her mother had gone to work and left her at home with the appellant and her older sister. Her sister left for school before her and she was left alone with her father, the appellant. She stated that the appellant carried her to her mother's bed and after removing all her clothes he climbed on her and touched her stomach. When pressed further she stated that he did bad things to her private parts. She stated that she was feeling pain in her stomach. She stated that although the incident occurred on Monday she reported the matter to her mother on Tuesday and was then taken to hospital in Nyamira. Her mother (Pw3) testified that she had left for work at 7am and did not go back until 12pm. She stated that on arrival the complainant told her that the appellant had defiled her. She testified that she interrogated her and confirmed she was telling the truth. She also stated that she noticed that the complainant was walking with difficulty and that she had blood in her vagina and the vagina was different. She testified that the complainant told her that the appellant had threatened to cut her and her mother into pieces if she told her (mother) what he had done. On 23rd August 2015 Pw3 reported the matter to Mokua (Pw2) a member of community policing who apprehended the appellant and took him to Nyamira Police Station. The complainant was subsequently taken to Nyamira County Hospital.

Dr. Nicholas Isinta Gichana (Pw4) testified that when he examined the complainant there was no evidence of penetration and although her hymen was broken indicative of being sexually active the perforation was not fresh. He testified that there was no bleeding or discharge. In the P3 Form his remarks were "***it is not clear if hymen torn due to penetration because no spermatozoa was seen. No DNA was done.***"

In his defence the accused testified that he was framed by his wife after finding her with Master (Pw2) and demanding to know why he was buying sugar and soap for her as if her husband was dead. He stated that the charge was the result of her vow that she would show him something he had never seen. He wondered why it took them three weeks to arrest him if he had indeed defiled his daughter. He accused his wife of being a drunkard and stated that he loved his wife though their marriage was troubled. He denied that he defiled the complainant.

As the first appellate court my duty is to reconsider and re-evaluate the evidence in the trial court in order to arrive at my own independent finding. I do so bearing in mind that I did not see or hear the witnesses giving evidence and being careful to make provision for that (**see Okeno Vs Republic [1972] EA 22**). I have also considered the submissions by both sides.

Section 124 of the Evidence Act provides that the court can convict on the evidence of the victim of a sexual offence alone provided it believes her and records the reasons for doing so. In this case the complainant was not the only witness. It is my finding however that the evidence adduced by the other witnesses rather than corroborate her evidence it cast a shadow of doubt to her evidence. For starters her mother's evidence was somewhat exaggerated and contradicted that of the complainant. Whereas the complainant stated that she reported the incident to her mother the next day her mother claims it was on the same day when she returned home at noon. Secondly the complainant did not allude to any threats by the appellant. Neither did she allege that she had blood in her private parts or that she had difficulty walking. This rendered incredible her mother's evidence that she told her the appellant had threatened to cut both of them into pieces if she dared reveal what he had done and that she was walking with difficulty and had injuries in her genitalia. It is also perplexing that the doctor did not find any injuries or evidence of her having been injured in her private parts. The doctor testified that although the hymen was broken there was no evidence that the perforation was fresh and therefore he could not conclude the broken hymen was due to penetration. The police officer (Pw5) who investigated this case alleged that that was not the first time the appellant had defiled the complainant; that he had done it many times before. One wonders where she got that information from since neither the complainant nor her mother (Pw3) gave evidence to that effect.

The complainant's evidence was that the appellant climbed on her stomach and that she was feeling pain in the stomach. It is not clear if the pain she was feeling was before or after or if indeed it was the reason he "**climbed**" on her stomach. When she was pressed further she stated that he did bad things to her in her private parts. She did not mention that he penetrated her vagina with his penis. That would perhaps explain why the doctor did not find injuries in her genitalia. Given the contradiction between her evidence and that of her mother it is difficult to determine if she was a witness of truth. She was also very inconsistent. Whereas she claimed she was all alone with the appellant when he defiled her in cross examination, she stated her sister M was present. Because of this inconsistency and the contradictions her evidence is unreliable and untrustworthy. The appellant's defence that he was framed by his wife because of differences between them was somewhat convincing given that she reported the matter three weeks after the incident. Why after three weeks yet she herself had not been threatened by the appellant? That coupled with the child's evidence that "**what I have said here is what mum told me to come and say**" confirms that the child may not have told the truth. It is my finding that there is a shadow of doubt in the prosecution's case and the appellant is entitled to benefit of doubt. The evidence did not meet the threshold required to convict the appellant. This appeal is merited. Accordingly, it is allowed and the conviction is quashed and the sentence of life imprisonment is set aside. He shall be set free forthwith unless otherwise lawfully held. It is so ordered.

Signed, dated and delivered in Nyamira this 11th day of July 2019.

E. N. MAINA

JUDGE