REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL APPEAL NO. 35 OF 2017

J S O…….APPELLANT

VERSUS

REPUBLIC…..RESPONDENT

(From the original conviction and sentence in SOA case No. 121 of 2015 of the Chief Magistrate's Court at Busia by Hon. M.A Nanzushi– Senior Resident Magistrate)

JUDGMENT

1. J S O, the appellant herein, was convicted of the offence of incest contrary to section 20 (1) of the Sexual Offences Act No.3 of 2006.

2. The particulars of the offence were that on diverse dates between the year 2014 and 19th May 2015 within **BUSIA** County, he intentionally and unlawfully caused his penis to penetrate the vagina of **K.A,** a child aged 10 years, who to his knowledge was his daughter.

3. He was sentenced to serve ten years imprisonment. He has appealed against both conviction and sentence.

4. The appellant was in person. He raised six grounds of appeal that I have summarized as follows:

a) That the learned trial magistrate erred in law and in fact by relying on a confession that was not proved or produced.

b) That the learned trial magistrate erred in law and in fact by relying on evidence that was not adduced.

c) That the learned trial magistrate erred in law and in fact by relying on circumstantial evidence.

d) That the learned trial magistrate erred in law and in fact by relying on insufficient and contradictory evidence.

5. The state opposed the appeal through Ms. Ngari, the learned counsel.

6. The facts of the prosecution case were briefly as follows: The appellant was living with his daughters and sons. Apparently these children's mothers were living elsewhere. At night the appellant would go to where the girls were and he defiled two of the three girls. The matter was reported to the authorities and the appellant was arrested and charged.

7. The appellant denied any involvement in the offence and contended that he was framed up.

8. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **OKENO vs. REPUBLIC [1972] EA 32.**

9. The appellant contended that the trial court relied on a confession that was not proved or produced. This ground has no basis. My perusal of the record did not reveal any such alleged confession. The judgment of the learned trial magistrate did not make any reference to a confession. I accordingly dismiss this ground.

10. For any decision by any court to stand, it must be based on the evidence adduced. Any reference to evidence that has not been adduced may result in the trial being vitiated depending on the weight such evidence was given. In the instant case, the claim by the appellant that the trial magistrate relied on evidence that was not adduced is not supported by any facts. I have perused the judgment and this claim is a mere allegation with no basis.

11. What is circumstantial evidence was restated in the case of **MOHAMED & 3 OTHERS vs. REPUBLIC [2005]1KLR 722** by Osiemo Judge as follows:

> ***Circumstantial evidence means evidence that tends to prove a fact indirectly by proving other events or circumstances which afford a basis for reasonable inference of the occurrence of the fact at issue. The circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved.***

What kind of evidence is circumstantial evidence? In the case of **REPUBLIC vs. TAYLOR WEAVER & DANOVAN [1928]21 CRIMINAL REVISION 20** it was stated as follows:

> **Circumstantial evidence is very often the best evidence of surrounding circumstances which by intensified exam is capable of proving proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial.**

12. From the above decision, it is abundantly clear that circumstantial evidence is as good as any other evidence. However, the court relying on circumstantial evidence is enjoined to analyze such evidence before making a finding in the following manner as was stated in the case of **REPUBLIC vs. VERONICA WANJUE NJUE [2014] eKLR** :

> ***A*** **Court relying on circumstantial evidence must be satisfied that:**
>
> **(a) the incriminating acts are incompatible with the innocence of the accused or the guilt of any other person.**
>
> **(b)The incriminating facts are incapable of explanation upon any other reasonable hypothesis than that of his guilt.**
>
> **Before drawing the inference of the accused's guilt – from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.**

13. While evaluating the evidence to ascertain sufficiency of the same or otherwise, I will revisit the issue of circumstantial evidence.

14. One curious fact is the allegation that apart from defiling **K.A**, the appellant defiled his other daughter **P.A.S**, aged 12 years old. He was not charged with this offence and no explanation was tendered. This in my view ought to have raised a red flag and the learned trial magistrate ought to have sought an explanation from the investigating officer. This omission cannot be explained from the facts on record.

15. In her evidence **K.A (PW1)** testified that the appellant defiled her severally. This is a child who at the time of the offence was eleven years old. She did not testify of any pain. Sexual liaison between an adult man with a child of eleven years must have been an excruciating experience. The alleged several defilements ought to have left indelible evidence. Firstly, the pain would have been unbearable. She could have involuntarily cried aloud to attract the attention of her siblings, the threats notwithstanding. Secondly, the medical evidence would have revealed more than it did.

16. Kennedy Yatich (PW4) examined K.A on 11th August 2015. The positive findings were a broken hymen and the presence of epithelial cells. Two issues emerge here. One, a child of such a tender age ought to have displayed more injuries to her genitalia especially where she said that the appellant repeatedly defiled her. Two, epithelial cells manifest in cases of recent sexual encounter. It was not explained, if it was true, why they showed when the last encounter was said to have occurred on 19th May 2015. This was after a period of about three months.

17. There is a misconception that once a hymen is found to be broken is a pointer to sexual liaison with a male. There are other numerous ways a hymen may be absent in a girl. The court of appeal in the case of **P. K.W vs. REPUBLIC [2012] eKLR** at paragraph 16 observed as follows:

> **Hymen, also known as vaginal membrane, is a thin mucous membrane found at the orifice of the female vagina (sic) with which most female infants are born. In most cases of sexual offences we have dealt with, courts tend to assume that absence of hymen in the vagina of a girl child alleged to have been defiled is proof of the charge. That is, however, an erroneous assumption. Scientific and medical evidence has proved that some girls are not even born with hymen. Those who are, there are times when hymen is broken by factors other than sexual intercourse. These include insertion into the vagina of any object capable of tearing it like the use of tampons, masturbation injury, and medical examinations can also rupture the hymen when a girl engages in vigorous physical activity like horseback riding, bicycle riding, and gymnastics, there can also be a natural tearing of the hymen. See the Canadian case of The Queen vs Manuel Vincent Quintanila [1999] AB QB 769."**

In the instant case, the absence of the hymen will be taken in conjunction with the other evidence on record and not separately.

18. K.A (PW1) testified that they all used to sleep in a one roomed house with the appellant and the other five siblings. From her narration, this was a different house from the kitchen. In cross examination she said:

> **The kitchen door is usually closed. The kitchen door is usually closed by ourselves.**

The evidence of her sister **P.A.S** was that the appellant would first sleep in the main house before pushing the kitchen door which was usually secured with a log. This is where he would defile her and her sister. There was no attempt by the prosecution to reconcile these obvious contradictions.

19. The complainant sought shelter outside their home after her sister had beaten her while her father was away. She therefore did not run

away from home due to defilement. It is very curious why Jacqueline her benefactor was not called to testify. She could have shed more light as to what she complained to her.

20. It is very depressing to note that the appellant's family is dysfunctional. This is an issue of six children with two mothers who no longer stay with them and a mostly absentee father. There is a possibility that this could have motivated the complainant and her sister to make non-existent claims. In Jacqueline's home the complainant suddenly became the owner of ten clothes and she was also happy in the orphanage. Could this new-found life outside home have contributed to this case? I may not know but certainly these are issues the learned trial magistrate ought not to have ignored.

21. The learned trial magistrate ought also to have interrogated the reason as why the prosecutor bought Afia juice to the complainant and whether this affected her testimony in any way and make a finding. This having not been done is a dangerous trend that ought to be discouraged for it a very fertile ground for breeding injustice.

22. Though the appellant contended that the learned trial magistrate relied on circumstantial evidence, I did not find any single instance when she did so. Even if that were the case, so long as it satisfied the requirements as spelled out in the case of **REPUBLIC vs. VERONICA WANJUE NJUE** (supra), then no fault would be attributed to the learned trial magistrate.

23. From the foregoing analysis of the evidence on record, the conviction of the appellant was unsafe. The same is quashed and the sentence set aside. The appellant is set at liberty unless if otherwise lawfully held.

DELIVERED and **SIGNED** at **BUSIA this 7th day** of **May, 2018**

KIARIE WAWERU KIARIE

JUDGE