



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL APPEAL NO. 97 OF 2015

DKN.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the Original conviction and sentence in Mwingi Senior Resident Magistrate's Court Criminal Case No. 44 of 2014 by G. W. Kirugumi R M on 09/10/15)

J U D G M E N T

1. **DKN**, the Appellant was charged with the offence of **Incest** contrary to **Section 20(1)** of the **Sexual Offences Act**. Particulars of the offence were that on the **10th** day of **June, 2014** in **Migwani District** of the **Kitui County**, intentionally touched the vagina of **ANK** with his penis who was to his knowledge his daughter.

2. Facts of the case were that the Complainant herein was the Appellant's daughter. On the **23rd March, 2007** at about **6.30 p.m.** **PW1 PMM** the mother of the Complainant was bathing her siblings from outside while the Complainant was inside the main house. **PW1** asked her to avail the Kenyan Leso that she would use to wipe the children. When she came out of the house her manner of walking was different from the usual. She confronted her only to learn that her father, the Appellant had violated her sexually. She checked her genitalia and found that she had some discharge. They reported the matter to the police and took the Complainant to **Migwani District Hospital** for treatment. **PW3 Thomas Gichoni** who examined and treated her found her hymen broken. She had a foul smelling discharge too. She had lacerations on the labia minora and majora. Thereafter **PW6 Doctor Christopher Waihenya** examined her and filled a **P3** form in her respect. He found evidence of sexual penetration. Investigations carried out culminated into the arrest and charging of the Appellant.

3. When put on his defence the Appellant denied having defiled his daughter. It was his evidence that when he got home on the material date his wife, the mother of their seven (7) children was beating up the Complainant. He threatened to report her to the Chief and she threatened to report him to the police. He left going to charge his phone. He returned home at **9.00 p.m.** but did not find her. He went back to his place of work. Three days later he was required to present himself to the police station. At **3.00 p.m.** he saw his wife and police officer who arrested him.

4. Further he stated that after staying in marriage with **PW1** for five (5) years, she changed. And when he was released on bail he found her having moved away from her marital home with their children. Their difference came about as she would leave the home and go off with some other people and return very late.

5. **DW2 EK** his daughter stated that her mother was beating the Complainant because she had a dirty dress. Her father (Appellant) intervened and the Complainant escaped. Thereafter the Complainant returned and she left with her mother. They returned at **3.00 a.m.** Subsequently the mother asked her to lie but she refused. Thereafter she was accused of stealing **Kshs. 10,000/=** and a title deed that she had taken from the Appellant's house so as to take to his step brother. That she disagreed with her mother when she accused her of lying. When her mother went back to her maiden home she (**DW2**) went to stay with her paternal uncle.

6. The trial Magistrate analyzed evidence adduced, convicted the Appellant and sentenced him to **twenty (20) years imprisonment**.

7. Aggrieved by the conviction and sentence the Appellant appealed on grounds that the trial Magistrate misdirected herself by not considering that: There was a possibility that the entire matter was premised on a grudge; the case was not proved to the required standard; medical documents were doubtful; his rights were violated and the defence put up was not considered.

8. In his written submissions the Appellant argued that the learned Magistrate did not consider that since there existed a grudge between him and his wife **PW1** their differences would make **PW1** frame him. That the age of the Complainant was not sufficiently proved. That the medical evidence was insufficient as he (Appellant) was not examined to establish if he had an infection. His constitutional rights were violated for being held in custody for three days and that the defence put up was not given any consideration.

9. In response it was submitted on behalf of the State that the case was proved to the required standard. That the Appellant did not deny that the Complainant was his biological daughter. The age of the child was proved by her mother who adduced in evidence the child immunization card and the defence adduced did not exonerate the Appellant from commission of the offence.

10. This being a first Appeal, I am duty bound to re-evaluate and re-consider all evidence adduced at trial afresh bearing in mind that I had no opportunity of seeing or hearing witnesses who testified. I must therefore come to my own conclusion with that in mind. (**See Okeno vs. Republic (1973) EA 32**).

11. It is admitted by the Appellant that the Complainant was his biological daughter. She was examined by a Medical Practitioner and a P3 form filled. PW3 **Thomas Gichoni** a Clinical Officer at Migwani District Hospital was the first person to attend to the Complainant when she was taken to hospital on the material date. On examining her, she had a broken hymen and laceration of labia majora. The Post Rape Care form that was filled indicated the Complainant's inability to walk and also painful micturation. Further investigations carried out revealed an infection that she had contracted.

12. Penetration is defined as:

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

13. The findings of PW3 who made treatment notes that were adduced in evidence and ultimately filled a P3 form that was subsequently produced by PW6 **Doctor Christopher Waihenya** opined that there was evidence of sexual penetration. The degree of injury sustained by the Complainant was assessed as harm. This was evidence beyond any reasonable doubt that the Complainant was violated sexually. Medical evidence produced was not doubtful.

14. The issue to be determined is whether the perpetrator of the sexual offence was the Appellant?

15. Evidence of what transpired was adduced by PW2. She was a child of tender years. A child health (immunization) card adduced in evidence proved that she was born on **23rd March, 2007**, therefore she was seven (7) years old. Prior to testifying she was taken through *voire dire* examination by the trial Court. In the case of **Muiruri vs. Republic, Criminal Appeal No. 44 of 1982** the Court of Appeal stated thus:

"When dealing with the taking of oath of a child of tender years, the inquiry as to the child's ability to understand the solemnity of the oath and the nature of it must be recorded, so that the cause the court took is clearly understood The judge is under duty to record the terms in which he was persuaded and satisfied that the child understood the nature of the oath. The failure to do so is fatal to the conviction. The correct procedure for the court to follow is to record the examination of the child witness as to the sufficiency of her intelligence to satisfy the reception of evidence and understanding of the duty to tell the truth."

The learned trial Magistrate recorded the questions and answers that the child gave. Ultimately she formed the opinion that the child was seized of sufficient intelligence and she understood the duty of telling the truth. The child tendered sworn evidence.

Section 124 of the **Evidence Act** provides thus:

"Notwithstanding the provisions of section 19 of the Oaths and Statutory

Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

16. At the point of being violated sexually the Complainant was alone. She gave a vivid account of what befell her. She explained that she did not scream because the Appellant, her father, threatened to beat her. Her mother noticed her inability to walk well soon after she came out of the house. Although the Appellant claimed that he went home and found his wife beating up the Complainant, this evidence was disapproved by the evidence adduced by the Prosecution. The fact that he was inside the house with the Complainant and a baby was not discredited.

17. In his defence the Appellant argued that he was framed following a disagreement he had with PW1, his wife, because of her wayward behaviour. The Complainant, a child of tender age had absolutely no reason to frame her father. The trial Magistrate did not misdirect herself in believing her. In the result reaching the finding that the perpetrator of the offence was the Appellant was not erroneous.

18. It is argued by the Appellant that he was not produced in Court within the timeframe provided by the Constitution which was in violation of his constitutional right. Every arrested person has a right to be produced in Court within reasonable time and not later than 24 hours. Where the 24 hours end outside the ordinary Court hours or on a day that is not an ordinary Court day, he/she must be produced at the end of the next Court day. (**See Article 49(1)(f)(i)(ii) of the Constitution**).

19. A perusal of the Lower Court record shows that the Appellant was arrested on the **13th June, 2014** and arraigned in Court on **16th June, 2014**. The **13th day of June, 2014** was a Friday therefore the **16th day of June, 2014** was the next ordinary Court day that the Appellant

could be produced. In any case it has been held that where the Accused person feels aggrieved he should raise the issue before the trial Court. In the case of **Francis Macharia Gichangi & 3 Others vs. Republic Criminal Appeal No. 11 of 2004** it was held that:

“It is reasonably expected that an Accused person who claims that his or her trial rights have been violated will at the very least raise issue with the trial court.”

20. It is only the Lower Court that could have called upon the Prosecution to render an explanation. But, in event that the Appellant feels truly aggrieved this is a Civil Matter that should be pursued in a Civil Court. (See **Julius Kamau Mbugua vs. Republic (2010) eKLR**).

A violation of an Accused person’s constitutional right of this nature does not render the trial a nullity for he can claim for general damages.

21. It is agitated by the Appellant that the sentence passed was excessive. **Section 20(1)** of the **Sexual Offences Act** provides thus:

“(1) 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, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years:

Provided that, if it is alleged in the information or charge and proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person.”

In the case of **Ogola s/o Owour (1954) EA CA 270** the Court held that:

“The court does not alter a sentence unless the trial Judge has acted upon wrong principles or over-looked some material factors.”

The Appellant herein is a man of an advanced age given as between 85-89 years. This was a material factor that the trial Court should have considered. In the circumstances the sentence imposed was harsh. Therefore, I do set it aside and substitute it with a sentence of **fifteen (15) years imprisonment** that shall run from the date of conviction.

22. It is so ordered.

Dated, Signed and Delivered at Kitui this 7th day of June, 2018.

L. N. MUTENDE

JUDGE