REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 20 OF 2017

(From original conviction and sentence in Criminal Case No. S. O. 22 of 2016 of the Principal Magistrate's Court at Baricho)

C W W ..... APPELLANT

V E R S U S

REPUBLIC ..... STATE

JUDGMENT

The appellant C W W was charged before Baricho Magistrate's Court Cr. Case No. 22 of 2016, with the offence of incest contrary to Section 20(1) of the Sexual offences Act No-3- of 2016 with particulars that on 31/7/2016 at [Particulars withheld] area in Mwea West Sub-County within Kirinyaga County intentionally and unlawfully penetrated the vagina of B W I with his penis, a girl aged 13 years who to his knowledge was his step daughter. After a full trial the appellant was convicted and sentenced to serve life imprisonment.

The appellant was aggrieved with both conviction and sentence and filed this appeal which raises the following grounds:

a) Not giving the appellant fair hearing.

b) Failing to appreciate that there was discrepancies and inconsistencies regarding the evidence tendered.

c) Not considering investigation done was shoddy.

d) Not considering that the complainant's evidence was incredible.

e) Not considering that penetration was not proved to the required standard.

f) Not considering that the provider of expert evidence did not prove he was qualified to provide the same in court.

g) Not considering the appellant's plausible defence.

Brief facts of the case:

The complainant B W -1- is a girl aged 13 years as proved by her birth certificate which was produced in court as exhibit -1-. She testified that on the material date, the accused who is her step-father sent her sister G to the shop. The appellant told the complainant B W 1 (to be referred to as the complainant herein after) to take her brother outside to play. The appellant then held her hand and was armed with a knife then led her to her bedroom, undressed her, undressed himself, then penetrated her vagina with his penis. She did not take a bath but she changed her clothes. When her mother (PW-2-) came back as she had gone to Nyeri, PW-1- informed her of the incident. PW-2- called her brother to seek advise on what action to take. She was advised to report the matter to the police. On realizing that the police had been called, the appellant took his ID Card and left home. He was however accosted by members of the public who arrested and beat him before he was rescued by the police. The police officer CPL Peter Mwangi visited the scene then took the appellant, the complainant and her mother to the police station. The complainant was referred to Kerugoya District Hospital where PW4 the Clinical Officer examined her and filled a P3 form, **exhibit 3.** He confirmed that the complainant had bruises on her vaginal wall, bloody discharge and her hymen was freshly broken. On vaginal swab, numerous pus cells and bacteria were seen. The conclusion was that there was evidence of defilement. The Investigating Officer P.C Joseph Kisau, P.W.5 preferred the charges against the appellant.

APPELLANT'S DEFENCE

The appellant claimed that he went with his son H on a ride until 11 a.m where a neighbour borrowed his bicycle. He went back home at 11:20 a.m and found his brother D M and they sat outside the compound. PW 1 served them food. At 2 p.m he called his friend Washington

Macharia who was passing by and they all sat until 4 P.m when PW 2 came back. PW 2 seemed gloomy and was not willing to talk to him. He informed her he was leaving since he had argued with mama W. While he walked away, he was accosted by 2 men and he went back home whereby PW 1 informed them the appellant had defiled her. He was later arrested.

DW 2 Washington Macharia, confirmed that he visited the appellant's home around 4 P.m until 6 P.m when PW 2 came back and he left shortly after. He learnt the next day that PW 1 had been defiled.

I have considered the appeal. This court has a duty to analyse the evidence, evaluate it and come to its own independent finding but bearing in mind that the trial magistrate had an opportunity to see the witnesses and assess their demeanor then leave room for that. This is a duty which the first appellate court has and the appellant has a legitimate expectation that the evidence will be analysed and evaluated by the appellate court and a finding be made. This was so held in the case of ***Okeno –V- R (1972) E.A. 32.***

Having analysed and evaluated the evidence which was before the trial court my finding is that the prosecution proved its case beyond any reasonable doubts. The entire evidence adduced was consistent and credible and left no doubt that it is the appellant who defiled the complainant in the manner described. PW-1- the complainant gave direct evidence, she knew the appellant who was his step-father and they were living together. The age of the complainant is not in dispute. The fact of defilement was well corroborated by the medical evidence adduced by PW-4- the Clinical Officer who examined her and filled the P3 form and treatment notes which show there was evidence of defilement which includes:

- Bruises on the vaginal wall.

- Blood discharge

- The hymen was freshly broken.

Furthermore, the appellant admitted that he was at home with the complainant at all the material time until PW-2- the complainant's mother came back. The evidence was overwhelming. My view is that the conviction of the applicant was proper.

Refer to **N.K v Republic [2011] eKLR** where in dismissing the appeal, the Court of Appeal stated;

> **We think for ourselves that the case rested on the credibility of the child E whose evidence the appellant did not challenge. The trial court had the advantage of seeing and hearing her in the witness box and was therefore a better judge on credibility. We have no reasonable basis for interfering with that assessment. Medical evidence further confirmed her complaint that there had been penetration in her private parts which was a finding of fact. The law does not require any number of witnesses to be called for proof of corroboration of the facts stated by the complainant and therefore the first ground of appeal has no legal basis.**

The prosecution evidence was intact and credible. The defence was a mere denial. His witness, DW-2- only testified that he came later at 4.00 P.m and was therefore not privy to the whereabouts of the appellants at around 10.00 a.m when the offence was committed. The trial Magistrate having considered all the evidence presented before it came to the inevitable conclusion that the appellant was guilty as charged.

The appellants submits that he was not afforded a fair trial as provided under Article 49(1) of the Constitution. He submits that he has a right to be brought before court as soon as is reasonable but not later that 24 hours after being arrested. That trial process commences from the time the accused is arrested, arraigned in court until a final verdict is made. That he was arrested on 31/7/16 and arraigned in court on 5/10/16. This is far from the truth, the date 5/10/16 is a slip because the record of the court Page -2- of the record shows that he was arraigned in court on 2/8/16 when the plea was taken. There was a charge sheet which was amended and indicated that the date of apprehension report to court was 2nd August. The charge sheet was signed by the Magistrate on 2/8/16 and the initial charge was defilement. The amended charge sheet with charge of incest is the one which has a date of 5/10/2016. These are facts within the knowledge of the appellant and the ground is therefore a waste of precious judicial time. He was before the court and has the record of appeal to confirm these facts. In any case the violation of rights does not entitle him to an acquittal. The Court of Appeal in ***Julius Kamau Mbugua –V- R CR. APP NO. 80/08.***

In any case this is not a valid ground against conviction and sentence. An allegation of violation of rights by an accused person does not entitle him to an acquittal. The remedy lies in a Civil Suit for an award of damages if proved there was such a violation.

The appellant further submits that he was ambushed by the prosecution on 26/10/16 with an amended charge sheet changing the charge to incest contrary to ***Section 20(1) of the Sexual Offences Act.*** He opines that being a new charge, it required a different legal approach. The charge remained a sexual offence against a minor which was not an ambush and it is not demonstrated what the different legal approach is all about. In any case the law allows the prosecution to amend the charge sheet at any stage before the close of its case. This is provided at Section 214(1) of the Criminal Procedure Code which provides:

> ***Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case.***

The charge was amended after the prosecution realized that the appellant was a step father to the complainant. The charge sheet was amended before the hearing started, the nature of the

application was explained, the charge was read and the appellant pleaded not guilty. There was no miscarriage of Justice. The appellant never

asked for more time to prepare. He proceeded and took part in the proceedings. He had ample time to prepare his defence and call witnesses. The prosecution relied on the same evidence. As submitted by the state that the amendment was necessary and did not prejudice the appellant in anyway. This ground must fail.

The decision in **Albonas Mwangi Mutua –V- R. Appeal No. 120/2004** was found to be bad law. The Court of Appeal in various decisions have stated that the violation of rights entitle a party to file a suit for damages against the respondent but cannot for a ground of appeal. This is indeed the position. The criminal trial is a separate and independent trial.

The appellant submits that the relationship between the appellant and the victim did not fall within the meaning of ***Section 20(1) OF the Sexual Offences*** Act. This is far from the truth. The appellant acknowledges that the complainant was his child. He states at Page 18 line 8-9 of the proceedings:

"I was left with our children B W (complainant), G M and H W."

The act provides under **Section 20(1) of the Sexual Offences Act No. 3 of 2006** that:-

> ***"(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."***

It's clear that in the knowledge of the appellant, the complainant ***B W (PWI)*** was his daughter which falls within the ambit of Section 20(1) of the ***Sexual Offences Act No. 3 of 2006***.

The appellant raises a second ground that the evidence was inconsistent. Failure to avail the clothes which the complainant was wearing or blood stained beddings are flaws in the prosecution case which do not affect the finding of the court. If they were availed they would have added more weight in the prosecution case. However in a charge of incest the prosecution needed to prove penetration. The clothes of the complainant and stained bedsheets cannot prove such penetration. It is settled law that it is medical evidence which must corroborate the charge of incest. I have stated above that the evidence of penetration was proved to the required standard by the medical evidence. Failure to produce the clothes and beddings is immaterial and cannot aviate a conviction. Furthermore ***under Section 124 of the Evidence Act*** it is sufficient to convict on the evidence of the complainant if the trial magistrate for reasons to be stated believed the complainant. The trial magistrate was best placed to determine the issue of credibility. This was stated in ***N. K –V- R*** (Supra). As submitted by the prosecution the prosecution needed to prove three key ingredients which are, the age of the victim, penetration and the identity of the perpetrator. They were proved beyond any reasonable doubts and were not dependent on production of the clothes of the complainant or blood stained bedding. The evidence adduced was well corroborated and the appellant confirmed the testimony of the complainant that she was at home throughout the day. Medical evidence confirmed that the complainant was defiled that day. The appellant did not offer any explanation as to how the child who was in his care was defiled. The child (PW-1-) did tell the appellant to his face that he is the one who defiled her- he did on her ***"tabia mbaya"***(bad manners). I find that the evidence was sufficient to support the conviction of the appellant and the ground must fail.

The appellant submits that the investigations were shoddy. This is based on the fact that the investigating officer did not visit the scene. The scene was not indispute. The appellant has not submitted how visiting the scene would have added more value to the case. The state submits that visiting the scene would not have yielded any further, better or new evidence beyond the overwhelming evidence that is already available. The scene visits would have added weight to the case but where the scene was not indispute the visit was of no probative value. The ground is without merits.

It is also submitted that the expert witness did not prove he was qualified. PW-4- testified that he was a Clinical Officer at Sagana Sub-county Hospital. Though he did not state his qualifications, it is his testimony that he examined the complainant on allegation of defilement and recorded his findings on the treatment notes and signed the P3 Form. The documents bear the official stamp of the hospital. The competence of PW-4- to examine the complainant and fill P3 form was not challenged before the trial court. The appellant was satisfied with his testimony and he never raised any issue.

It is further submitted that the trial magistrate did not consider the defence of the appellant. The record shows that the trial magistrate did actually consider the defence and arrived at her conclusion based on all the evidence.

I find that the ground is without merits.

In conclusion I find that the conviction of the appellant was based on cogent evidence which proved the charge against him beyond any reasonable doubts. The appeal is without merits and is dismissed.

Dated at Kerugoya this 19th Day of July 2018.

L. W. GITARI

JUDGE

Read out in open court,

Appellant – present,

Mr. Ombiri S/C for State this 10/5/2018

L. W. GITARI

JUDGE