REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CRIMINAL APPEAL NO.189 OF 2017

(Appeal Originating from Nyahururu CM's Court Cr.No.1215 of 20125 by: Hon. A.W. MUKENGA)

DKG.....APPELLANT

- V E R S U S –

REPUBLIC.....RESPONDENT

J U D G M E N T

DKG, the appellant herein, was convicted for the offence of incest contrary to section 20(1) of the Sexual Offences Act.

The particulars of the charge are that on 25/5/2015 within Laikipia, unlawfully and intentionally caused his penis to penetrate the vagina of M W who was to his knowledge, his daughter, aged 10 years.

The appellant was sentenced to serve life imprisonment.

In the alternative, the appellant also faced a charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act.

The appellant was aggrieved by both the conviction and sentence and filed this appeal on 15/9/2017 and further grounds of appeal were filed by Mr. Waichungo Advocate on 18/12/2017. The 14 grounds of appeal were collapsed into three grounds which are as follows:

1. **That the identification of the appellant by the complainant was not watertight;**

2. **That the medical evidence was not sufficient to prove the offence of incest;**

3. **That the offence was not proved to the required standard.**

The appellant therefore prays that the appeal be allowed, the conviction quashed and sentence be set aside.

This being a first appeal, it behoves this court to examine all the evidence tendered in the trial court, analyze it and make its own findings and determinations. See ***Okeno v Republic (1972) EA 32***.

PW1 M W aged 11 years underwent a *voire dire* examination by the court which found that she understood the meaning of the oath and directed that she gives sworn evidence. PW1 recalled that on 25/5/2015 at night, she was asleep with her sister in one bed while her mother was asleep on the couch as she waited for the appellant – **DKG**.

She woke up with a lot of pain, found she did not have her pant, her petticoat pulled up and was feeling pain in her genitalia as if she had been raped. Her sister was still asleep and she called her mother; that the appellant had left when the sister woke up; that her sister and denied seeing the ordeal. Her mother came, she informed her of the pain and that there had been someone on top of her and it was the appellant; that by then the appellant was not there and the mother started to scream. She also noted a watery substance in her private parts; she dressed and they went to report at Manguo Police Station where they were referred to Nyahururu Hospital. She said that as they went to police station, they saw the appellant walking away.

PW1 described their house as one roomed and was partitioned using a curtain. PW1 shared a bed with her older sister. She said that the appellant used to leave early in the morning and return about 9.00 p.m. to 10.00 p.m. In cross examination, PW1 said that she saw the appellant before he opened the curtain and left. She knew it was the appellant because she saw his brown hands; that there was light and the appellant warned her not to scream. She denied having seen the appellant clearly and that when she screamed, he disappeared and never

returned to that house that night.

PW3 SN, the mother of the complainant recalled that on 25/5/2015, about 10.00 p.m. the complainant returned home and found her washing clothes; that she gave him food and slept on the couch, whereas the children were sleeping on the bed. She heard her child scream '***uchungu***' meaning pain. She woke up and saw the appellant leave the house. PW2 went to check on PW1 and found she had no pant and a watery substance was on her thighs. She screamed. She went to report at Manguo Police Station, then Nyahururu Police Station. They were told to go back to hospital next day when PW1 was examined. She identified the appellant as her husband of 1½ years. She produced PW1's Birth Certificate which indicates that PW1 was born on 25/9/2004.

PW2 further said that after she gave the appellant food, she slept on the couch as he fetched water from outside and was woken up by PW1's screams. On going where PW1, was, she said that she had been raped by 'Daddy' and that she saw the appellant get off the bed yet the appellant and her used to sleep on the floor.

PW2 Dr. Joseph Karui Kinywa of Nyahururu Sub County Hospital examined the complainant who was then aged 10 years on 26/5/2015 with a history of defilement; that the hymen was missing, with no tear or bleeding and she was started on treatment and counseling. He formed the opinion that she was defiled. He however found no injury to the genitalia, bleeding or discharge and that there was evidence of spermatozoa after the High vaginal swab, (HVS) was done.

PW4 Sgt. Mark Marube said that while in company of PW2, they found the appellant on 25/5/2015 at Mairo Inya Matatu Stage in Nyahururu town and he took him to the station.

PW5 PC Hillary Kiprono, the investigating officer received a report from PW1 and 2 who reported that PW1 had been defiled by the father. He booked the report. On 26/5/2015, they were given a P3 form to go to the hospital. He later charged the appellant.

The appellant was called upon to enter his defence and made a sworn defence in which he stated that on 25/5/2015, he came home about 11.00 p.m., was given food by his wife (PW2). After eating, he went to fetch water from outside. After fetching 2 containers, he entered the house and found the child calling the mother while in her bed which she shared with her sister; that PW2 asked the complainant what was wrong and she came back and asked him why he had done that, and went out screaming. People in the plot came out including the landlord who chased them from the plot and he went to sleep in the matatu. Next day, PW2 called him to ask for money but he did not respond.

The appellant confirmed that they lived in one roomed house and he had frequent disagreements with PW2 over her infidelity but had no problem with the children though sometimes PW1 was rude.

Mr. Waichungo, counsel for the appellant submitted that PW1 confirmed that she did not see the assailant as she was woken up from her sleep but only saw the hands of a light skinned person. He also submitted that since the appellant was fetching water and PW2 was a sleep on the chair, somebody may have sneaked into the house and committed the offence.

As for the medical evidence, counsel submitted that medical examination found that the complainant had no injuries to her genitalia but some spermatozoa were found. However, the spermatozoa were not subjected to analysis to confirm whether the appellant was the culprit. It was counsel's submission that the conviction was based on mere suspicion.

Counsel also urged that the medical evidence did not support the fact of penetration and there was need for corroboration.

Mr. Mutembei, learned counsel for the State submitted that he partially opposed the appeal. He submitted that PW1 who lived with the appellant was able to identify him from his hands using the light in the house; that PW2 saw the appellant soon after the incident; that upon examination, PW1's hymen was missing and the vaginal swab disclosed presence of spermatozoa, evidence that she was defiled.

I have carefully considered the evidence tendered in the trial court, the grounds of appeal and the oral submissions.

The appellant faced a charge of incest contrary to section 20(1) of the Sexual Offences Act. The Section 20(1) provides as follows:

> ***"20(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."***

To prove an offence of incest, the prosecution has to prove:

> ***(1) Identity of the perpetrator;***
>
> ***(2) Proof of knowledge of the relationship between the perpetrator and complainant falls within the degrees of consanguinity set out under Section 20 Sexual Offences Act;***
>
> ***(3) Proof that there was penetration of the complainant or an indecent act on the complainant;***

(4) That the complainant is a child under 18 years of age. The last ingredient is only relevant for purposes of sentencing.

The complainant was a minor aged just over 10 years having been born on 23/9/2004 as evidenced by the birth certificate that was produced in evidence by her mother, PW2. Section 22 of the Sexual Offences Act sets out what consists the specific relationships covered Under Section 20 of the Sexual Offences Act and provides as follows:

> ***"22(1) In cases of the offence of incest, brother and sister includes half brother, half sister 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 half mother and an aunt of the first degree whether through lawful wedlock or not.***
>
> ***(2) in this Act:-***
>
> ***(a) "uncle" means the brother of a person's parent and "aunt" has a corresponding meaning;***
>
> ***(b) "nephew" means the child of a person's brother or sister and "niece" has a corresponding meaning;***
>
> ***(c) "half-brother" means a brother who shares only one parent with another;***
>
> ***(d) "half-sister" means a sister who shares only one parent with another; and***
>
> ***(e) "adoptive brother" means a brother who is related to another through adoption and "adoptive sister" has a corresponding meaning."***

There is no dispute that PW2, the mother of the complainant was cohabiting with the appellant as husband and wife. The appellant admitted that he had been living as husband and wife with PW2 for 1½ years and they were living together with PW2's two daughters in their one roomed house. The complainant was therefore a step child to the appellant and falls under the category of relationships listed under Sections 20 and 22 of the Sexual Offences Act.

From the submissions of both counsel, the issues for determination are as put forth by the appellants counsel:

> ***1. Whether the appellant was properly identified as the perpetrator;***
>
> ***2. Whether the medical evidence was sufficient to connect the appellant to the offence;***
>
> ***3. Whether the prosecution proved the offence beyond reasonable doubt.***

<u>On identification:</u>

The alleged offence was committed at night when PW1 was asleep in her bed. It was a one roomed house divided into two by a curtain. PW1, was asleep in bed with her older sister who according to PW1 never heard or saw what happened. PW1 said there was light in the house. However, neither PW1 nor PW2 alluded to what kind of light was in the said room. PW1 only said, 'the light was on'. The only identifying witness to this incident was PW1. It is trite that the court must warn itself of the dangers of relying on the evidence of a single identifying witness under unfavourable conditions. The case of ***<u>Republic v Turnbull (1972) 2 ALL ER</u>*** discussed in detail some of the considerations the court has to take into account in such a case.

The Court said:

> ***"... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way....? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? how long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?.... Recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."***

It is necessary that the witness tells the court what kind of light there was, where the light emanated from in relation to where the victim was; how long the victim observed the perpetrator e.t.c. In this case, the court was not told what type of light was in use in that house, was it on the side where PW2 was lying on a sofa or on the side PW1 was sleeping? So far these questions are not resolved because the trial court never interrogated the question of the intensity of the light.

PW1 admitted that she was not able to see the assailant well though she said it was the appellant. She stated '***I saw DKG before he opened the curtain and left. The light was on. I did not see him properly, I knew it was him because of brown hands and he disappeared….'.***

Earlier PW1 had said "***I went to sleep with my sister. I woke up with a lot of pain as if I had been raped. Rape is 'tabia mbaya'. I called my mother. My sister was still sleeping. DKG is the one who removed my panty and touched me. He did tabia mbaya here.***" pointing

to her vagina.

PW1's narration of events in itself was not very clear as to whether she saw the perpetrator or not. It is a fact that PW1 lived with the appellant and knew him well but the court has no idea how she was able to identify the appellant's hands alone, how long did she have the hands under observation and how much light was available?

PW1 also testified that, the appellant told her in a medium voice that he would beat her. She did not tell the court whether she recognized his voice.

In the case of ***Roria v Republic (1967) EA 583 (P584)***, the court considered the evidence of a single identifying witness under unfavourable conditions and had this to say;

> ***"A conviction resting entirely on identity invariably causes a degree of uneasiness as LORD GARDNER L.C. said recently in the House of Lords in the course of debate on S.4 of the Criminal Appeal Act 1966 of the United Kingdom which is designed to widen the power of the court to interfere with verdicts.***
>
> ***`There may be a case in which identity is in question, and if any innocent people are convicted today I should think that in nine cases out of ten - if there are as many as ten - it is in a question of identity.'"***

The court considered identification by voice in ***Republic v Turnbull Supra*** where the court said:

> ***"Recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."***

PW1 did not tell court exactly what the appellant told him to enable her recognize his voice.

There was no doubt that the appellant was at the scene on the material night. He admitted to having returned home about 11.00 p.m. PW2 said that after the appellant had eaten food, he started fetching water from outside which the appellant admits. PW2 then fell asleep on the chair. She was woken up by screams and that at that time the appellant left the house. She later said she saw the appellant getting off the bed; that the child screamed that she was in pain and that she said:

"***I have been raped by daddy***.."

In cross examination of PW2, she admitted that in her statement to the police, she never recorded that she saw the appellant leave the house. From that admission, it is doubtful whether PW2 saw the appellant leave the house at any time, or PW2's testimony on whether or not she saw the appellant on that night is contradictory in itself. Apart from PW2 claiming that PW1 told her that she had been raped by 'daddy', her evidence does not corroborate PW1's evidence at all. It is even questionable how a child of 10 years talked of having been raped. Rape is a legal term and the court should have been told exactly what PW1 said the appellant did to her. Having found PW1 said happened to her. Having found PW2's evidence to be questionable, it did not corroborate PW1's testimony.

An offence of incest is proved when there is penetration or an indecent act committed on the victim.

As to the medical evidence, the complainant was examined only a day after the incident. The incident was on 25/5/2015 and the Doctor examined PW1 on 26/5/2018. The doctor found that PW1 did not have any injuries or bruises to her genitalia and the hymen was missing.

The Doctor did not tell the court whether the hymen was freshly torn or it was an old tear. If there were no injuries, then it means the hymen was not freshly torn. I find these findings surprising because it would be expected that if a child of 10 years was defiled, there would certainly be some injuries or bruises to her genitalia.

What was more surprising is that the Doctor took a high vaginal swab and found there to be spermatozoa. If there was spermatozoa in PW1, then it means there was penetration but it is then questionable how the penetration occurred without any injury to PW1's genitalia? The findings of the Doctor (PW4) do not just add up unless of course PW1 had been defiled before or frequently took part in sexual activity.

Once it was found that the high vaginal swab contained spermatozoa, it would have been expected that the investigating officer would take samples from the appellant for analysis to confirm whether indeed the appellant was the culprit. Ordinarily, under Section 124 of the Evidence Act, corroboration is not required where the court believes the complainant's evidence and gives reasons for the belief. The trial court believed PW1.

Even though the trial court may have believed PW1, yet there were doubts in her evidence on the identity of the perpetrator and therefore there was need for other independent evidence to corroborate hers.

As to whether an indecent act was proved, PW1 said she found that her pant had been removed, there was a liquid substance on her thighs that resembled semen. PW1 also said somebody lay on her. Even if defilement was not proved, I believe an offence of indecent act was committed on PW1. Section 2(1) of the Sexual offences Act defines an indecent act as:

> "***indecent act" means an unlawful intentional act which causes:-***

(a) any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration

(b) exposure or display of any pornographic material to any person against his or her will"

Even though there is ample evidence to the effect, that a person may have come into contact with PW1's genital organs, the only question is, who committed the said offence. It seems there was even an opportunity for a stranger to sneak into the house and commit the offence as PW2 was asleep and the appellant outside drawing water.

One of the reasons why the trial court believed that the appellant committed the offence is because of his conduct, that he ran away after the incident. PW1 and PW2 said the appellant did not come back home that night. PW2 did not say whether the appellant never returned. The appellant explained that when PW1 started to scream and neighbours came, the landlord chased them from the plot he left to go and sleep in the matatu. Unfortunately, none of the neighbours were called to tell the court what happened thereafter.

The appellant alleged that he used to have disputes with PW2 over issues of infidelity which allegation PW2 denied. PW1 however, confirmed that indeed the appellant used to have frequent fights with PW2. The appellant claims to have been framed because of these fights. Whereas I doubt that PW1 may have been used to frame the appellant since spermatozoa was indeed found in her, yet I have found earlier in this judgment that identity of the appellant was not full proof. The medical evidence was not conclusive. For the above reasons, I find that the trial court fell into error in finding that the prosecution had proved its case beyond any doubt." If indeed PW1 was defiled, the appellant is a prime suspect but suspicion, however strong, cannot form the basis of a conviction. The doubts in this case must be resolved in favour of the appellant. The result is that the conviction is, hereby quashed and sentence set aside. The appellant is set at liberty forthwith unless otherwise lawfully held.

Dated, Signed and **Delivered** at ***NYAHURURU*** this ***3rd*** day of ***July,*** 2018.

……..

R.P.V. Wendoh

JUDGE

PRESENT:

Ms. Chinga - Prosecution Counsel

Ms. Wanjiru – counsel for appellant

Soi - Court Assistant

Appellant - present