



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KIAMBU**

**CRIMINAL APPEAL NO. 28 OF 2017**

**M K M .....APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

**(Being an appeal against conviction and sentence in a case of incest contrary to Section 20(1) of the Sexual Offences Act No. 3 of 2006 at Kikuyu Law Court before Hon. M. Micheka-(SRM) Judgment awarded on 29<sup>th</sup> October 2015)**

**JUDGMENT**

1. The appellant was charged with the offence of incest **Contrary to Section 20(1) of the Sexual Offences Act No. 3 of 2006** and upon conviction was sentenced to life imprisonment.

Particulars were that on the 25<sup>th</sup> June 2014 in Kiambu County the appellant intentionally caused his penis to penetrate the vagina of P V a child aged 10 years who was to his knowledge his daughter, with a second count of assault to his 10 year old son J causing him injury **Contrary Section 127 (10 (9) of the Children Act No. 8 of 2001.**

Subject of this appeal is on the first count only.

2. The prosecution called seven witnesses. As a first appellate court, I am obligated to scrutinise and re-examine the entire evidence afresh, and find for myself whether the evidence adduced supports the conviction. While doing so, I ought to take into account that I neither saw nor heard the witnesses testify – **Court of Appeal Case Isaac Ng'ang'a Alias Peter Ng'ang'a Criminal Appeal No.272 of 2005 and quoted in Republic -vs- George Onyang Anyang & Another No.53 of 2016 (2016) e KLR, and Joseph Ndung'u Kagiri -vs- Republic (2016) e KLR.**

3. **PW1**, a nine(9) year old girl at date of trial was put through a vore dire examination and the trial Magistrate made a finding that she did not appreciate the nature of an oath and therefore gave unsworn evidence.

It was her evidence that her mother did not stay with her father, the appellant, and her brother, and that she slept with the brother in the same bed. She testified that on the night of 25<sup>th</sup> June 2014, while asleep with her brother, the father came to their bed, woke her up and told her to remove her clothes which she did including her inner pants. She continued that he then told her to go to his bed in this room where he placed her on his bed and defiled her. She testified that she felt pain and cried and after he was done and slept, she went back to their bed. She further testified that in the morning she told a lady neighbour, **PW2** what had happened who then took her to hospital and later to the police.

Upon cross examination by the appellant, she stated that she was telling the truth and that he was her father.

4. **PW2** was the victim's 12 years old brother. He testified on oath upon the court being satisfied that he understood the meaning of an oath after a vore dire examination.

He confirmed that the appellant was their father, and that he shared a bed with **PW1** while the Appellant slept alone in a different room. It was his testimony that on the 25<sup>th</sup> June 2014, he slept at home and nothing happened and that later he and his sister were taken to a children's home.

5. **PW3** was **Teresia Waithera** also known as Mama Anne. She testified that she knew the children, their father (the appellant) and that sometimes in June 2014, **PW1** told her that her father used to have sex with her about twice a week in his room and that the father had told her not to tell any body including the brother.

On cross examination, she confirmed that she was their neighbour and that she was the one who reported the incident to a social worker,

**Mary, PW4.**

6. **PW4** Mary Muthoni, a social worker confirmed taking the victim to Nairobi Women's hospital on 27<sup>th</sup> June 2014, where she was examined and a P3 form filled.

**PW5 Edward Mbugua**, a clinical officer produced the Post Rape Care(PRC) form and P3 form filled by **Dr. Muema** who examined the victim on 27<sup>th</sup> June 2014. It showed her hymen was not intact and her vagina had a foul smell.

7. Upon closure of the prosecution case it is evident that **Section 211 of Criminal Procedure Code** was complied with. The appellant stated that he would tender sworn evidence and that he would call no witnesses.

It was his defence that he did not commit the crime and that he was arrested when he reported that his daughter – the complainant – was missing, having been taken away together with his son (**PW2**) by **PW3** to a Children's home.

8. It is upon the above evidence that the trial Magistrate based his conviction. He captured the evidence well including that the claimant nine(9) years, used to sleep on the same bed with her brother, a twelve(12) years old boy and that the brother denied that anything happened on the night of 25<sup>th</sup> June 2014 when the offence of incest is alleged to have been committed upon the victim, by the appellant.

9. On the issues framed for determination, the trial court made findings that there was overwhelming evidence stated in the PRC and P3 form that penetration was committed on the complainant in that the complainant's hymen was not intact.

10. The issue of who committed the act of penetration was thorny – but the trial magistrate had no difficulty in coming to a finding that it was the appellant, based on direct evidence of the complainant.

The trial magistrate while coming to that conclusion stated:

**“PW2 (brother of complainant) asserts that he did not hear anything that night which I did find was because he was fast asleep.”**

11. I have not seen such evidence on record. What is on record is that **PW2** used to sleep on the same bed with his sister (**PW1**) and on the night of 25<sup>th</sup> June 2014, he was home and nothing happened. No where did he say that he heard nothing because he was fast asleep. That conclusion in my opinion is not supported by any evidence - see **Okeno -vs Republic (1972) EA 32 and Isaac Ng'ang'a Alias Peter Ng'ang'a(Supra)**.

**PW3**, Mama Ann who reported the incident testified that the child had told her that the father used to have sex with her about twice in a week. The prosecution did not follow up that link more so that the doctors report – PCR and P3 – showed that the victim's hymen was not intact. In medical terms, does hymen being not intact mean there was penetration, or was it broken? If it was so, would not the victim a young girl, had difficulties in walking or having signs of injury to the genitals?

12. The prosecution never probed the brother(**PW2**) as to whether other nights, other than the 25<sup>th</sup> June 2014, something happened, as to establish whether **PW3**'s evidence was credible or had any probative value, in other words whether the appellant had been defiling the victim twice or so in a week and on the material date the 25<sup>th</sup> June 2014. The prosecution failed in this aspect.

13. I fail to agree that the victim would have been awakened by the appellant, while sleeping on the same bed with her brother by being called, as she stated, in Kiswahili and told to wake up and remove her clothes, then told to go to the appellants room and bed, without the brother hearing the conversation, and her movements.

Is it possible that such actions would have been done without the brother (**PW2**) noticing or hearing the conversation or the sister's movements? Or even her cries during the act as she testified that she felt pain and cried?

14. My considered findings are that either **PW2** decided to tell lies to the court or it was true that nothing happened going by his evidence.

It also escaped the trial magistrate's mind while analysing the prosecution evidence that the twelve(12) year old brother at the time was sharing a bed with the victim. Is there no possibility that the act of incest/defilement may have been committed by other person other than the appellant taking into account that no direct corroboration existed?

15. I am minded that the **proviso to Section 124 of the Evidence Act, Cap 80 Laws of Kenya** provides that uncorroborated evidence involving sexual offences where the only evidence is that of the alleged victim may be received by the court, but upon reasons to be recorded in the proceedings and the court is satisfied that the victim is telling the truth. However, whenever a doubt is raised in the court's mind, that benefit must be given in favour of the defendant more so where the appellants conviction was based purely upon circumstantial evidence. See **HCRR No.46/2011 Solomon M'rukaria -vs- Republic (2014) e KLR**.

16. In the case **Abanga Alias Onyango – vs- Republic (UR) Cr. Appeal No. 32 of 1990**, the Court of Appeal stated the **test** for admission of circumstantial evidence as:

**“1. It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests that:**

- (i) the circumstances from which an inference of guilt is sought to be drawn must be cogent and firmly established.
- (ii) Those circumstances should be of a definite tendency, unerringly pointing towards guilt of the accused.
- (iii) The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that with all human probability the crime was committed by the accused and no other.”

17. The court must also draw **inference that no other co-existing circumstances would weaken or destroy the inference of guilt failing which the accused is entitled to an acquittal** (emphasis mine).

Given the circumstances I have stated above, doubts linger in my mind as to who between the father and brother would have committed the penetration to the complainant, which act is not disputed.

The co-existing circumstances stated above, two men sleeping in the same house (albeit one also a minor, 12 years) and sleeping in the same bed with the victim, 8 year old girl, and going by the evidence that on the material date nothing happened, raises doubts in my mind as to weaken the inference of guilt reached by the trial magistrate - **Criminal Appeal No. 12 of 2014(Nyeri) DMW -VS- Republic (2016) e KLR.**

18. At all times the burden of proof in a criminal trial lies with the prosecution to establish its case beyond reasonable doubt.

The accused does not have to establish his innocence in our adversarial legal system.

What the accused ought to do in his defence is to establish reasonable doubt as to the strength of the prosecution case.

The totality of the appellant's defence was that the two children were his children and the victim went missing from home and was arrested after visiting the police station three times, and further that the victim could have been told to tell a lie due to business rivalry with **PW3** – Mama Ann – who made the report of the alleged incest. - See also **Cr. Appeal No.49/2015 – George Ochieng Ongule -v- Republic. (2016) e KLR.**

19. Having carefully considered the submissions by both the appellant and the respondent, I come to the conclusion that there was no proper investigation by the investigating officer into the alleged offence and in deed none as **PW1**, conducted no investigations at all as to who or under what circumstances the crime was committed, but arrested the appellant without any basis, when he went to make a report of his missing child, the complainant.

20. For the foregoing reasons, I find that the appeal lodged by the appellant on the 10<sup>th</sup> January 2017 and Amended on the 12<sup>th</sup> June 2018 to be meritorious.

Accordingly, I proceed to quash the conviction and set aside the sentence.

Unless otherwise lawfully held, the appellant is set free.

**Dated, signed and delivered at Kiambu this 20<sup>th</sup> Day of September 2018.**

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J.N. MULWA

**JUDGE**