



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 44 OF 2014

E K G APPELLANT

VERSUS

REPUBLIC RESPONDENT

(From Original Conviction and Sentence in Criminal Case No. 40 of 2013 of the Chief Magistrate's Court at Malindi – L. Gicheha, SPM)

JUDGEMENT

The appellant was charged with the offence of incest contrary to section 20 (1) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that the appellant between the 1.1.2013 and 18.10.2013 at **[particulars withheld]** within Kilifi County, being a male person intentionally and unlawfully caused his penis to penetrate the vagina of M C a child aged 8 years who was to his knowledge his daughter.

The appellant was also charged with an alternative count of committing an indecent act with a child contrary to section 11 (1) of the Sexual Offences Act No. 3 of 2006. The trial court convicted the appellant on the main count of incest and sentenced him to life imprisonment. The grounds of appeal are that: -

- i) The element of penetration was not proved as required by the law.
- ii) The evidence of PW1 and PW5 contradicted each other.
- iii) The case was made up and the sentence is not safe.
- iv) The prosecution did not prove its case as required by the law.
- v) The trial court did not consider the appellant's defence

In his written submissions, the appellant submit that there was no evidence that the appellant penetrated the complainant. The medical evidence indicate that the injuries were caused by a blunt object which is not mentioned. The age of injuries is not stated. It is not known when the injuries were sustained. There are many incidents which cause penetration. The appellant contends that he disagreed with his mother in law and that is why he was framed. The mother in law had taken the children and the appellant decided to take them back as the father of the children. It was alleged that the appellant used to beat his daughter and that is why the case was made up.

The appellant further submit that it is common in most defilement cases for the alleged victim to state that she was threatened with a knife and that is why she did not scream. If the complainant was defiled by him there could have been blood coming out of the complainant. The complainant's mother contradicted PW1's evidence to the effect that the complainant's brother had his own room and was therefore not sleeping with the complainant. The source of the alleged defilement was the beating of the complainant. The case is based on the allegation of penetration and no weapon which caused the penetration is stated. It was alleged that the complainant had an infection but the type of that infection is not stated. No DNA was done to confirm if the appellant also had the same infection. The conviction was not based on the evidence on record. The appellant relies on the case of **OKETH OKALE VS REPUBLIC 1965 EACA 555** where the court held that conviction can only be based on actual evidence adduced in court.

It is further submitted that the medical evidence does not support the conviction. There was no conclusive evidence to show that the complainant was defiled. The age of the injuries suffered by the complainant is not stated. The appellant has only one hand yet the complainant alleged that the appellant used to clean the sheets every morning as they had blood. It was not possible for the appellant to clean the sheets as he has only one hand.

The State opposed the appeal. It is submitted that the prosecution proved its case beyond reasonable doubt. The evidence of the complainant was corroborated by the evidence of PW2, PW3 and PW4. Medical evidence proved that the complainant was defiled.

This is the first appeal and the court is duty bound to evaluate the evidence adduced before the trial court and make its own conclusions. PW1 was the complainant. She testified that she was eight years old and a class one pupil. The appellant is her father. She used to sleep with her brother on the same bed. Her father used to go to the room and remove her brother. He would then sleep on top of her. Her father told her if she screamed he would cut her with a knife. Whenever that happened she would feel pain in her private parts. She went to her grandmother and did not return. She was taken to hospital and treated. The appellant would use one hand to push aside her brother. He would remove her panty and sleep on her. During the process her brother would not wake up.

PW2 IBRAHIM ABDULAHI is a clinical officer who was based at the Malindi District hospital. He examined the complainant on 23.10.2013 and filled a P3 form. Vaginal examination revealed that PW1's hymen was broken and there were injuries on her vaginal walls. She had a foul discharge. PW1's date of birth was given as 11.5.2005. Urine analysis indicated the presence of puss cells. PW2 concluded that there was incest on an eight year old girl. The injuries were not fresh.

PW3 L K was fifteen years old and a class seven pupil. PW1 is her sister's child. On 18.10.2013 at about 4.00 pm she had come from school when she saw PW1 and her brother E playing. In the evening, they were told to go home but PW1 started crying. She asked PW1 why she was crying. PW1 informed her that whenever they sleep her father would put E in another bed and sleep with her. He would then defile her while showing her a knife. PW3's mother went home and PW3 informed her what PW1 had said. The matter was reported to the chief. PW1 did not go to her father that day. PW3 knew the appellant as the father to PW1.

PW4 L K testified that on 19.10.2013 she went home and was told that the complainant had refused to go back to her home. She talked to the complainant who informed her that her father used to defile her. The complainant informed her that she was tired of being defiled. PW4 could not believe it and the following day she took the child to be examined by a doctor. The doctor confirmed that the child had been defiled and was found to have gonorrhoea. She went to report the matter to the area chief who referred them to the Watamu police station. The complainant told the police what she had told PW4 and also stated that the appellant had threatened her with a knife.

PW5 K W testified that on 18.10.2013 she was in Kilifi. She got information that the child had been defiled. She went to Watamu and talked to the child who informed her that she was defiled. They went to Gede hospital and were referred to Malindi hospital. She is the mother of the child and the appellant used to be her husband. The complainant is the appellant's child. She left the children with her mother

but the appellant went and took them away. The appellant was later arrested and charged.

PW6 CPL. MARGARET TERONOI was stationed at the Watamu police station. She investigated the case. She talked to the complainant who was eight years old. The child told her that her parents had separated and she was living with her father together with her brother E. She was told by the complainant that the appellant used to push E aside when the children were sleeping and then defiled the complainant. The child was referred to hospital and the appellant was charged with the offence. PW6 visited the scene.

In his unsworn defence, the appellant testified that on 10.10.2013 he sent his children to visit their grandmother. Only E returned but the complainant did not. E told him that the complainant was to return the following day. She did not return and he sent E for her. He went to the grandmother's place and was told that the complainant had been taken to hospital. On the same day at about 9.00 pm police officers went to his home and arrested him. He was later charged with the offence.

The appellant has raised issues with the medical evidence. It is submitted that there is no evidence of penetration and the age of the injuries is not stated. According to PW2, the complainant's hymen was broken and vaginal examination revealed injuries on her vaginal walls. PW2's evidence is that the complainant was penetrated. The complainant was eight years old. The medical evidence is that she had her hymen broken. She also had foul discharge. The incident took place for a period of about nine months. The contention that the age of the injuries was not given cannot assist the appellant as the incident took place over a period of time. Similarly, the evidence of PW1 is that it was her father who used to defile her. The blunt object which penetrated PW1 according to the evidence would be a male organ.

The appellant submit that the evidence of PW1 contradicted that of PW5, her mother. This relates to whether PW1's brother, E had his own room. It is the evidence of PW1 that she used to sleep with E in the same room. The appellant would remove E and place him on another bed or push him aside. That time E would not wake up. PW1 would then be defiled. I do not see any contradictions on that evidence with that of PW5. PW5 was only informed. The main issue is whether PW1 was defiled. Whether the other child was in the room or not is not important. In any case E is PW1's younger brother. He could not know what was happening. There is the contention that the appellant has only one hand. The evidence shows that PW1 was a young girl of eight years and she was threatened with a knife. She could not offer any strong resistance. E was less than eight years old. He could be pushed aside or lifted from the bed using one hand. Anyone using one hand can undertake his duties including washing clothes. It all depends on how that person has adapted to his situation.

The appellant's defence is that he was being framed as he used to discipline the complainant. That evidence has to be weighed against the entire prosecution evidence. There is the evidence of PW1 that she was defiled. That allegation is supported by the medical evidence. PW4 also checked the complainant. She could not believe her and took the child to a doctor for examination. The doctor confirmed that PW1 was defiled. PW1 knew the accused as her father. I do find that the prosecution evidence is consistent and this was not a made up case meant to frame the appellant. Indeed, PW1 was defiled.

The age of PW1 was proved. Her immunization card was produced and it indicate that she was born on 6.5.2005. By October 2013 the child was eight years old. The appellant's relationship with the child was also proved. PW5 is the mother of the child. She testified that the appellant is the child's father. The appellant does to deny that fact. He was living with his children.

Given the evidence on record, I am satisfied that PW1 was eight years old and she was defiled. There was no need for a DNA test or any other tests under section 36 of the Sexual Offences Act. The evidence on record was sufficient to prove the case. The prosecution proved its case beyond reasonable doubt. PW1 decided not to return to her father as she was tired of being defiled. When PW1 was examined, it was found that she had been defiled. The conviction is safe and the defence evidence does not raise any doubt on the prosecution case.

In the end, I do find that the appeal lacks merit and is hereby disallowed.

Dated, signed and delivered in Malindi this 15th day of February, 2017.

S.J. CHITEMBWE

JUDGE