



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

HCRA NO. 99 OF 2013

M W APPELLANT

VERSUS

REPUBLIC RESPONDENT

[Arising from the decision of C.L. Yalwala Ag. PM delivered on 18th July, 2013 in Bungoma CMCC No. 590 of 2012]

JUDGEMENT

1. This is an appeal preferred from the decision of C.L. Yalwala Ag. PM delivered on 18th July, 2013 in CMCC No. 590 of 2012 where the appellant had been charged with the offence of defilement and in the alternative indecent act with a child.
2. The appellant was found guilty, convicted and sentenced on the main count of the offence of incest contrary to section 20 (i) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence being that on the 13th March, 2012 in Bungoma County being a male person he caused his penis to penetrate the vagina of **E N W**, a female person who was to his knowledge his niece aged 3 years.
3. Being dissatisfied with the judgment as a whole the appellant preferred this appeal based on grounds that; he was convicted on insufficient and contradictory evidence; the prosecution did not prove its case beyond all reasonable doubt; the trial court shifted the burden of proof from the prosecution to the accused person; the trial court erred in rejecting the defence evidence with no reasons; and the key witness did not testify.
4. At the hearing the appellant relied on his written submissions which may be summarized as follows; there was no direct evidence against him and the trial court had thus convicted him based on assumption; on contradiction he submitted that the evidence of **PW2** and **PW4** were in contrast; **PW2 & PW3** were minors and therefore their testimony could not be trusted as it was susceptible to coaching and manipulation given that there was a grudge between the family of the appellant and the complainant; the P3 form was not properly filled; the appellant did not plead to the charge, as he had only pleaded to the alternative count: he was never supplied with relevant documents which was an infringement to his rights under Article 50 (2) (j) of the Constitution.
5. The State being represented by Mr. Oimbo opposed the appeal in that **PW5** gave evidence that he formed an opinion that the victim had been defiled; it is not true that the appellant pleaded only to the alternative count, further at all times during trial t appellant indicated he was ready to proceed and did not ask for statements. As to the evidence of the minor the court verified credibility of their evidence and found the two intelligent enough so as to testify. The evidence against the appellant was circumstantial

and was strong against the accused.

6. This is the first appellate court and has the duty to interrogate the evidence afresh and analyze the same in order to arrive at an independent opinion. **See Okeno V. R [1973] E.A at 322.**

7. The prosecution case briefly is that on the 13th day of March, 2012 in Bungoma the appellant defiled his 3-year-old niece thus committing the offence of incest. The prosecution called a total of 5 witnesses to testify against the appellant as follows;

PW1: E N W – mother to the victim, who recalled that on 13th of March, 2012 at 10.00 a.m. she went to fetch firewood and left her two children sitting near the appellant who was lying behind her house. The appellant is step brother to her husband. On returning she did not find one of the children namely E N W then aged 3 years nor the appellant. She started looking for her child, and after about 10 minutes of searching she found her child with two other children at the road standing. Her child had soil all over her body, she examined her private parts, the child had no under pants and she saw sperms in her vaginal area through to the buttocks. There was no blood. The child was crying and could not walk properly. On interrogating the child, the child told her that the accused had led her to a sugar plantation, and laid on her. The child complaint of pain on the chest and private parts.

The other two children namely B N and M N told her that they saw the child and the appellant leave the sugar plantation. The two pointed to the appellant the direction the appellant headed to. He was caught 500m away. The witness made a report at Ngalache A.P. post and took the child to the dispensary where she was examined and treated. Later a P3 form was filled. On cross examination, she denied fixing the appellant.

PW2 N N aged 10 years. She gave a sworn statement to the effect that on a certain day at around 11.00 a.m. while in the company of **PW3** on their way home they found the victim crying by the road side and the appellant coming from the sugar plantation. They asked the victim why she was crying but she did not answer. Shortly **PW1** emerged and they informed her that they had seen the child emerge from the sugar plantation with the appellant.

PW3 B N B narrated similar evidence to that of **PW2**. In that the victim on the material day emerged from the sugar plantation being followed by the appellant.

PW4 C.I.P. Eunice Kanga of Bungoma Police station was the investigating officer. She recalled that as the duty officer on 13th March, 2012 at 9.00 p.m a child aged 3 years known as E was taken to her by its mother who then reported that the child had been defiled by its uncle the appellant. The child had been taken to Ngalache dispensary. She referred the matter to Bungoma District hospital for treatment and filing of the P3 form and for age assessment. She further testified that the appellant was arrested by members of same night and had been brought at the same time as the victim. According to her investigation two children had seen the appellant come from a sugar plantation with the victim. That the victim had told the two children that the appellant had defiled her. She had not known the appellant before.

PW5 Dr. Mansur Ramzan of Bungoma District Hospital examined the victim on 15th of March, 2013 when he filed the P3 form. Upon examination, he found that the vaginal linings were red and the hymen was disrupted. He formed the opinion that defilement took place.

8. The trial court after close of the prosecuting case found the appellant had a case to answer. He denied both the main count and the alternative stating that he had been framed by **PW1** as a result of a family land dispute. The victim is his step brother's daughter.

9. The issues for determination are;

- i. Whether the victim was a minor
- ii. Whether she was defiled
- iii. If so who is culpable?

10. The appellant has raised the issue of contradiction in the prosecution case. In my view having considered the evidence there are no major contradictions save in the evidence of **PW4** who said that in her investigations she learnt that **PW2** and **3** were informed by the victim that she had been defiled yet the two said the victim had not talked to them as she was crying. There is no doubt that the victim was defiled. There is ample evidence from **PW1 & PW5**. The documentary evidence namely the treatment notes and the P3 form corroborate the fact. The contradiction alluded to in my view does not go to the core of the issue. Whether the victim spoke or not is not so significant as to defeat the rest of the evidence.

There was age assessment. And corroboration that the victim was a minor aged 3 and this is not an issue in dispute and therefore I find as a matter of fact that E N W a female child of 3 years was defiled.

11. Who is culpable?

There is no direct evidence pinning down the appellant. The prosecution relied on the evidence of two minors age 8 and 10 years respectively. The court having interrogated them put them on oath. They told the court that they saw the appellant emerge with the victim who was crying from a sugar plantation. The appellant argues that due to the age of **PW2 & 3** their evidence cannot be relied upon as they are susceptible to coaching and manipulation.

Section 125 (1) of the Evidence Act provides;

“All persons shall be competent to testify unless the court considers that they are prevented from understating the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease (whether of body or mind) or any similar case.”

The trial court carried out *voire dire* examination on the two witnesses and found that they are fit to give their evidence on oath. I have considered their evidence and I find that the witnesses were credible and worthy of being believed.

12. The circumstantial evidence relied upon by the prosecution in that **PW1** left her child in the company of the appellant, the child and the appellant disappeared; the child was seen emerging from the sugar plantation crying and in the company of the appellant; was soiled; upon medical examination the child was found to have semen in her genitalia, swollen labia majora, hymen perforated and had bruises in her labia (see treatment notes) and in further examination the above confirmed (see P3 form). It is my opinion that all the above pierced together no other hypothesis can be arrived at other than the person culpable is none other than the appellant, who went missing in the company of the child and was seen with her coming from the sugar plantation.

13. I am therefore in agreement with the trial court that the prosecution proved its case beyond reasonable doubt.

I will therefore not interfere with the conviction and the sentence. The same are safe and within the law and therefore the appeal stands dismissed.

DATED and DELIVERED at BUNGOMA this 2ND day of MARCH, 2017

ALI-ARONI

JUDGE.

