REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIMINAL APPEAL NO. 164 OF 2016

S K N.....APPELLANT

VERSUS

REPUBLIC……...…….RESPONDENT

(Being an appeal from the original conviction and sentence in ***Gatundu Chief Magistrate's Court Criminal Case No. 475 of 2012*** *by* ***D. M. Ndungi R M*** *on 27/02/14)*

J U D G M E N T

1. **S K N,** the Appellant, was charged with the offence of **Incest by Male** contrary to **Section 20(1)** of the **Sexual Offences Act No. 3 of 2006.** He was sentenced to **life imprisonment.** Particulars of the offence were that on the **22nd** day of **May, 2012** at **[particulars withheld]** in **Gatundu South District** within **Kiambu County,** intentionally and unlawfully committed an act which caused penetration with his genital organ namely penis into genital organ namely vagina of **A. N** aged **Eleven years** a child he knew to be his niece. In the alternative he was charged with **Committing an Indecent Act with a Female** contrary to **Section 11(1)** of the **Sexual Offences Act No. 3 of 2006.** Particulars of the offence were that on the **22nd** day of **May, 2012** at **[particulars withheld] Village** in **Gatundu South District** within **Kiambu County,** committed an indecent act with **A N** aged **Fourteen (14) years** by touching her genital organ namely vagina.

2. Aggrieved by the conviction and sentence he appealed on grounds that:

- The charge was not proved to the required standard.
- The learned Magistrate misdirected himself by failing to make an adverse inference in favour of the Appellant in view of the fact that medical examination of the victim was done seven (7) days later.
- The burden of proof was shifted to the defence.
- The provisions of **Section 169(1)** of the **Criminal Procedure Code** was not properly considered.

3. Brief facts of the case were that PW1, **A N M,** the Complainant lived with her maternal grandmother. On the **22nd May, 2012** while her grandmother was away from home, the Appellant her maternal uncle took her to a nearby banana plantation and defiled her. She sustained injuries and bled from her genitalia. He had promised to give her **Kshs. 40/=** but did not. She informed one **A M M** about the issue. The grandmother returned home late therefore she did not tell her. The following morning she went to school

and informed PW2, **P N K** her class teacher who in turn reported the matter to the head teacher. They reported to the Area Chief who acted by reporting the matter to the police. PW5 **[particulars withheld] Corporal Marian Chongo** interrogated the Complainant and escorted her to **Gatundu District Hospital** for examination and treatment. She had a broken hymen. Investigations were carried out that culminated into the Appellant being arrested and subsequently charged.

4. When put on his defence, the Appellant who gave an unsworn testimony stated that his wife was employed by her sister as a house help but she failed to pay her wage. He intervened and demanded the sum owing from her sister a fact that annoyed her. On **20th May, 2012** being a preacher he went to a crusade in **Githunguri** where he stayed for eleven (11) days.

On **31st May, 2012** he went to **Kiamwangi Shopping Centre** to buy airtime only to be arrested. He denied having defiled the Complainant.

5. The Appellant called his father **A N K** as a witness who testified that the teacher of the granddaughter is the one who found that the child had been defiled but she did not inform him. After the Complainant was examined he was not told anything. According to him, failure to notify him about what had happened meant that the Appellant had not done any wrong.

6. The Appellant's second witness **J N K** stated that the Appellant was a trustworthy person and called upon the court to acquit him.

7. The learned Magistrate analyzed evidence adduced and found that the act of penetration was proved and it was done by the Appellant, intentionally and unlawfully. He dismissed the alibi defence put up by the Appellant and found him guilty of the main charge.

8. The Appellant canvassed the Appeal by way of written submissions. He submitted that he was not in the vicinity of the scene of crime as alleged. He questioned why the Complainant was not subjected to medical examination immediately. He argued that there was no proof of penetration and concluded by stating that **Section 169(1)** of the **Criminal Procedure Code** was not complied with as no cogent reasons were given for disregarding the defence put up.

9. In response, **Ms. Maundu,** learned Counsel for the State opposed the Appeal. She submitted orally that injuries sustained by the Complainant were consistent with the offence of defilement. The age of the child was proved. The relationship between the Appellant and Complainant was proved. Further she stated that the Complainant was examined two (2) days later not seven (7) days as alleged and that no burden of proof was shifted to the defence.

10. This being the first Appellate Court, I am duty bound to subject evidence adduced at trial to a fresh evaluation and analysis bearing in mind that I had no opportunity of seeing or hearing witnesses who testified and come up with my own conclusion. **(See Okeno vs. Republic (1972) EA 32).**

11. The charge herein was brought pursuant to the provisions of **Section 20(1)** of the **Sexual Offences Act (Act)** that provides thus:

> ***"(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."***

12. In the instant case the Prosecution sought to prove that the Appellant herein committed an act that

caused penetration with the Complainant. PW1, the Complainant gave a vivid account of what transpired. She was at home alone when the Appellant took her to the banana plantation where he had spread a sack. He made her lie down on the sack and removed her pair of trousers and underpant. He proceeded to push down his pair of trouser, and underpants then applied some perfume on his penis which he inserted into her vagina. His male organ remained inserted into her genitalia for about four (4) minutes. He then wore his clothes and left her at the scene in the banana plantation. The Complainant was subjected to medical examination two (2) days later. Her genitalia, the external part was intact but the hymen was broken.

13. **Section 2** of the **Act** defines penetration as "the partial or complete insertion of the genital organ of a person into the genital organ of another." The fact that the hymen was broken was evidence of something having penetrated it and stretched it until it broke. This was proof of penetration into the Complainant's genital organ namely vagina.

14. The Prosecution adduced evidence to prove that the unlawful act was done by the Appellant. There was no eye witness to what happened. A conviction can be secured without corroboration as provided by the proviso to **Section 124** of the **Evidence Act** that states thus:

> ***"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:***
>
> ***Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."***

The Complainant was a minor aged eleven (11) years. The immunization card issued to the Complainant at birth had a date – **10th January, 2001** as the date of her birth. This was proof of her age. Prior to accepting her evidence the learned Magistrate took her through *voire dire* examination and formed the opinion that she was competent to give sworn evidence.

15. In the case of **Samuel Warui Karimi vs. Republic (2016) eKLR** the Court of Appeal sitting at **Nyeri** stated that:

> ***"…..voire dire is an examination that serves two purposes; one, it is a test of the competency of the witness to give evidence and two, a means of testing whether the witness understands the solemnity of taking oath. Thus under the evidence Act the test is one of competency as the court is supposed to consider whether the child witness is developmentally competent to comprehend the questions put to him or her and to offer reliable testimony in criminal proceedings. It therefore follows that if the child is not competent to comprehend the evidence, they cannot also give sworn evidence."***

16. In the instant case the learned Magistrate failed to form an opinion whether the child understood the nature of the oath. The learned Magistrate also failed to make a finding and record reasons in proceedings as to whether he was satisfied that the alleged victim was telling the truth as required by the proviso to **Section 124** of the **Evidence Act.**

17. The learned Magistrate made a finding that the Complainants evidence was credible and consistent. Credible evidence may be worth of being considered but it may not necessarily be true. In her testimony the Complainant was silent on having been defiled before. But per the history given to the Doctor, she had been defiled previously. This would be an indicator that the hymen was not broken on the material date.

18. The Appellant came up with an alibi defence at the point of defending himself. He alleged that he was

away at the time doing his pastoral work elsewhere. The learned Magistrate considered it and found that he had not proved it. In the case of **Kiarie vs. Republic (1984) KLR** the Court of Appeal held that:

> ***"An alibi defence raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable. The judge had erred in accepting the trial Magistrate's finding on the alibi because the finding was not supported by any reasons."***

19. **Section 309** of the **Criminal Procedure Code** provides thus:

> ***"If the accused person adduces evidence in his defence introducing new matter which the advocate for the prosecution could not by the exercise of reasonable diligence have foreseen, the court may allow the advocate for the prosecution to adduce evidence in reply to rebut it."***

Had the Prosecuting Officer sought an opportunity to rebut evidence adduced at the defence stage then the learned Magistrate would have had the basis upon which to disregard the alibi defence.

20. The Magistrate has been faulted for not complying with **Section 169(1)** of the **Criminal Procedure Code.** The alluded to section provides thus:

> ***"(1) Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it."***

21. The learned Magistrate came up with points for determination. He analyzed evidence adduced and gave reasons for the decision therefore this ground of Appeal fails.

22. Having reconsidered the case as a whole I find the conviction having been unsafe due to failure to comply with the proviso to **Section 124** of the **Evidence Act.**

23. In the result the Appeal is allowed. The conviction is hereby quashed and the sentence meted out set aside. The Appellant shall be set at liberty unless otherwise lawfully held.

24. It is so ordered.

Dated and **Signed** at **Kitui** this **20th** day of **April,** 20**17.**

L. N. MUTENDE

JUDGE

Dated, Signed and **Delivered** at **Kiambu** this **12th** day of **June,** 20**17.**

PROF. J. NGUGI

JUDGE