



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

HIGH COURT CRIMINAL APPEAL NO. 05 OF 2013

E O A.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being appeal from the conviction and sentence in Kisii SRM NO. 439 of 2012) (Hon. R.B.A. Maloba SRM)

JUDGMENT

1. The appellant, **E O A**, appeared before the Senior Resident Magistrate at Kisii, charged with incest, contrary to **Section 20(1)** of the Sexual Offence Act, in that on the **8th March 2012**, at [particulars withheld] sub-location Marani District Kisii County, defiled **D O**, a female person who was to his knowledge his daughter.

Alternatively, the appellant was charged with indecent act, contrary to **Section 11 (1)** of the Sexual Offences Act.

2. After a full trial, the appellant was convicted on the main count and sentenced to life imprisonment. He was aggrieved by the conviction and sentence, hence the present appeal based on the grounds contained in the petition of appeal filed herein on **6th February 2013** and the supplementary grounds dated **4th February 2016**.

At the hearing of the appeal, the appellant appeared in person and presented written submissions in support of his case.

The learned prosecution counsel, **M/s Boyon**, opposed the appeal on behalf of the state/respondent by submitting that the appellant did not during the trial state that he was framed due to the differences between his wife and mother. That, the issue was never raised at all even during the appellant's defence.

3. Learned prosecution counsel also submitted that the appellant took advantage of the absence of the complainant's mother to prey on his daughter. That, there was no necessity for the appellant to be medically examined as the medical examination was only necessary with respect to the complainant only. That, the appellant was duly identified and placed at the scene of the offence by the complainant as well as pw3. That, the appellant was the complainant's biological father and the evidence adduced against him was consistent, credible and sufficient to prove the charge against him beyond any reasonable doubt.

4. Learned prosecution counsel further submitted that the medical examination report (p3 form) and the accompanying treatment notes proved that the complainant had been sexually assaulted.

In contending that the trial court rightly convicted the appellant, the learned prosecution counsel urged this court to dismiss the appeal for want of merit.

5. Being the first appellate court, the duty of this court is to re-visit the evidence and draw its own conclusion bearing in mind that the trial court had the advantage of seeing and hearing all the witnesses.

Briefly, the prosecution case was that at the material time the appellant was married to **A K (pw2)**, and were blessed with five (5) children including the complainant **D N (pw1)**.

6. On the material **8th March 2012**, the complainant's mother (pw2) left the children at a neighbour's house even as she proceeded to a funeral. Later, the father of the children (appellant) proceeded to the neighbour's house in the night and took away the children. He proceeded with them into their house where he put them to sleep on the floor of the house after the neighbor called **J**, who had accompanied them left. Later, the appellant moved to where the children were sleeping and immorally approached the complainant who was the eldest child. He touched and made indecent gestures at her before he eventually defiled her for the remainder of the night.

7. The complainant reported the matter to her mother when she arrived home from the funeral on the following day. The mother examined and found on her semen discharge. She (mother) reported the matter to a nearby A.P camp and thereafter took the complainant to hospital. She learnt from her neighbor, **J K** (pw3), that indeed the complainant and the other children were taken from her (pw3's) home by their father. She (pw3) was however, not aware that the complainant was defiled by her father.

8. The father (appellant) was apprehended by members of the local policing group led by **D A (pw4)**, and handed to the area chief who handed him over to the police. A clinical officer at Kisii Level five (5) hospital **Dennis Omurwa (pw6)** examined the complainant on **19th March 2012**, and concluded that she had been sexually assaulted. He therefore completed and signed the necessary P3 form (p.ex1).

9. **Cpl. Hellen Bii (Pw5)**, investigated the case and thereafter preferred the present charge against the appellant. She produced an age assessment report (p.ex3) which established that the complainant was aged between ten (10) and twelve (12) years at the material time of the offence.

10. In his defence, the appellant narrated the circumstances leading to his arrest and implied that he did not commit the offence. He stated that the complainant was indeed his daughter and on the material **8th March 2012**, he found her and other children at home on his return from work. His wife had gone to a funeral without leaving food for the children. He gave the complainant money (Kshs.100) for food and other items and briefly left the house.

11. On his return home, he found that the children had prepared and eaten food. They served him his share of the food before they retired to bed. He also retired to bed in a separate room. He slept upto the morning when he woke up and went for a walk. He later returned home and found that his wife had returned from the funeral. They quarreled over why the children were left without food. She then called members of the local policing group who apprehended and took him to the police. He was brought to court two days after being held in police custody.

12. From all the foregoing evidence as well as the submissions presented herein by both sides, it is apparent that there was no dispute that the complainant (pw1) and the appellant are daughter and father respectively. There was also no dispute as proven by the age assessment report that the complainant was aged between 10 and 12 years at the material time.

13. It is an offence under **Section 20(1)** of the Sexual Offences Act, for a father to defile or commit an indecent act with his own daughter. Indeed, 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, is guilty of the

offence of incest and is liable to imprisonment for life if the daughter is under the age of eighteen (18) years.

14. There was sufficient and credible evidence from the complainant's mother (pw2) and the clinical officer (pw6) establishing that the complainant was sexually assaulted by being defiled on the material date. This fact was never disputed by the appellant but his defence was essentially a denial of involvement in the offence. However, evidence from the complainant indicated otherwise. She vividly narrated to the court the circumstances under which she was sexually assaulted by her own father.

15. The learned trial magistrate believed the complainant testimony and acted on it in convicting the appellant. This court did not have the advantage of seeing the witnesses and therefore any finding made by the learned trial magistrate on the basis of credibility would hold sway unless it is shown that no reasonable court could have made such findings on the basis of the evidence available.

It is not for this court to interfere with findings of a trial court based on ample and credible evidence (see, **Karingo vs Republic [1982] KLR 213**).

16. In any event, this court holds the view that there was sufficient credible evidence from the complainant establishing that she was sexually assaulted by no other but the appellant.

The fact that the appellant was not subjected to a medical examination was neither here nor there as it would not have added further value to the prosecution case which was never herein watered down by failure to call as witness the mother of the appellant.

It is therefore the finding of this court that the conviction of the appellant by the trial court was safe and sound.

17. With regard to the sentence, the prosecution indicated that the appellant was a first offender. His mitigation was a plea of innocence and a request for pardon. Therefore, the sentence of life imprisonment imposed upon him by the trial court was rather harsh and excessive. The same is herein set aside and substituted with twenty (20) years imprisonment. Otherwise, the appeal is dismissed.

J.R. KARANJA

JUDGE

[Delivered and signed this 9th day of February 2016].