IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 24 OF 2015

ANTHONY NKAABU NDATHO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Criminal Case No.186 of 2014 of the Senior Resident Magistrate's Court at Githongo by Hon. C.A Mayamba – Senior Resident Magistrate)

JUDGMENT

The appellant, **ANTHONY NKAABU NDATHO**, was charged with an offence of incest contrary to section 20(1) of the Sexual Offences Act No. 3 of 2006. He was alternatively charged with an offence of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No.3 of 2006.

The particulars of the offence were that during the month of October , 2013 at Makandune location in Imenti Central District of Meru County, he caused his penis to penetrate the vagina of **B.M**, a female child who was to his knowledge his daughter. Alternatively he touched the vagina of **B.M**, a child aged 16 years with his penis.

The appellant was found guilty of the offence in the substantive charge and sentenced to serve life imprisonment. He now appeals against both conviction and sentence.

The appellant was in person relied grounds of appeal dated 29th June 2015 as follows:

1. That the learned magistrate erred in law and in fact by failing to consider that the proceedings were in a language he did not understand.

2. That the learned magistrate erred in law and in fact by failing to appreciate that there existed a grudge between him and the complainant's mother.

3. That the learned magistrate erred in law and in fact by failing to consider his defence.

4. That the learned magistrate erred in law and in fact in by convicting him without any exhibit linking him to the offence.

Briefly the prosecution case is that the appellant went to his daughter's bedroom and defiled her. After the act, he warned her not to tell anybody or else he was going to chase her out of their home and was not

going to pay school for her.

In his defence, the appellant denied any involvement with his daughter sexually.

The state opposed the appeal through Mr.Kariuki, the learned counsel. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated Case of **OKENO VRS. REPUBLIC 1972 EA 32.**

The record indicates that all the prosecution witnesses testified in Kiswahili. It is not indicated whether any interpretation was done. However since the appellant asked the witnesses questions, am satisfied that he was able to follow the proceedings and fully participate in the trial. It is important for the trial court where interpretation is done, to indicate so and the language used. In the instant case I make a finding that on the issue of language no miscarriage of justice was occasioned by the failure I have observed.

During his cross examination of his wife, **Ruth Kaloki (PW2)** the appellant did not ask her of any existing grudge or ask any witness for that matter. He also did not bring up this issue in his defence. This was therefore not available for the learned trial magistrate to make a finding on. I dismiss it as an afterthought.

From my reading of the judgment of the trial court, I find that the appellant's defence was considered in spite of his contention that it was not.

I have looked at the circumstances the prosecution allege the incident took place. The complainant was in a room with three other siblings one is left wondering why they did not hear any commotion. Similarly the complainant's mother testified that she did not hear the appellant leave their bed and room. These are reasonable concerns especially if we consider that the complainant said that the incident took place at about 9 pm or thereabouts. These concerns would have been dispelled one way or the other had the DNA results been availed to the court.

After the complainant delivered a baby while this matter was still pending in the trial court, the prosecutor applied to be allowed to take samples from the appellant for DNA test. The application was allowed with no objection from the appellant. He is therefore right to complain that there was no exhibit that linked him to the offence. There were several adjournments occasioned by the delay in releasing the DNA results. Finally the prosecution closed their case without availing the results or even making a comment about it. The judgment of the trial magistrate was equally silent about it. The DNA results would have been the best evidence to either link the appellant to the offence or exonerate him altogether. Failure by the prosecution to produce the results was not fair in the interest of justice especially given the circumstances of the alleged offence I had discussed earlier. For this reason I am persuaded to allow the appeal. I therefore quash the conviction and set aside the sentence meted out by the trial court. The appellant shall be set at liberty unless if otherwise lawfully held.

Dated at MERU this 11th Day of May 2016

KIARIE WAWERU KIARIE

JUDGE