REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 155 OF 2010

D M.....APPELLANT

V E R S U S

REPUBLIC.....PROSECUTOR

JUDGMENT

The Appellant, David Mwingirwa was charged with the offence of incest by a male person contrary to section 20 (1) of the Sexual Offences Act No. 3 of 2006. In the alternative, the Appellant faced a charge of indecent act with a child contrary to section 11 (1) of the Sexual Offences Act No. 3 of 2006.

The Appellant was tried and at the end, was convicted of the main charge and sentenced to life imprisonment.

In the initial petition of appeal dated 30.2.2010, the appellant seemed to be challenging the sentence alone and merely pleaded for leniency. However, at the hearing, he filed four grounds which are challenging the conviction. The grounds that can be gleaned from the submissions are as follows:

1. **That the prosecution failed to call material witnesses;**

2. **That the complainant failed to report the incident immediately;**

3. **That the court erred when court did not consider his defence;**

4. **That the case was not proved to the required standard.**

The appellant did not make any oral submissions to add to the written grounds and submissions.

The appeal was opposed. Mr. Mulochi for the State submitted inter alia that there was overwhelming evidence tendered to implicate the Appellant; that the evidence of PW1 was corroborated by that of PW3 who was an eye witness; that the medical evidence of PW5 showed that the hymen had been broken, which is evidence of penetration. He therefore urged this Honourable court to dismiss the appeal.

This being the first appellate court, I have subjected the evidence adduced before the trial court to a fresh evaluation and analysis and will draw my own conclusions. I am alive to the fact that I neither saw nor heard any of the witnesses and so cannot comment on their demeanor. I am guided by the Court of

Appeal decision of **Okeno Vrs. Republic** 1972 EA 32 where it is stated as follows:-

> **"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya Vrs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vrs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters Vrs Sunday Post [1958] E.A 424."**

The facts of the prosecution case were that the complainant, PW1 who was a girl aged 11 years lived with her parents and other siblings in a one roomed house at [particulars withheld] Estate in Isiolo. The said room was divided into three other smaller rooms using curtains. One room was the parents' bedroom whereas the other was the children's room.

It was PW1's evidence that on 3rd March 2010, at about 10.00 PM she was sleeping on her bed with her younger sister whereas the Appellant was in his bedroom. Her mother was in Timau visiting her parents. In the middle of the night, she was surprised to find herself on her father's bed. Her father had carried her to his bed when she was asleep and had removed her pants and biker. She then started crying but her father threatened to kill her and he increased the volume of the radio.

The Appellant then pinned her down and defiled her. When he finished, he asked her to go back to her bed. In the morning, she went to school and did not inform anyone. In the evening, she told the Appellant that she would not sleep in that house but the Appellant prevented her. In the evening, they went to sleep as usual and at around 3 am, she found herself in the Appellants bed. The Appellant then defiled her again and told her to go back to her bed.

In the morning she went to school as usual and when she returned home in the evening, she found her mother having returned but she could not tell her what had happened since the Appellant was there.

At night, while sleeping, the Appellant started quarreling her mother (PW2, S N) whereupon her mother went to sleep away. When PW2 returned in the morning, she narrated to her what had taken place and her mother asked her to take a bath whereupon they went to Isiolo Police Station and reported the matter. They then proceeded to Isiolo District Hospital where PW1 was examined. She was later issued with a P3 form and the Appellant was later apprehended and charged with the current offence. PW2 confirmed that she was away from home from 2.3.2010 till 5.3.2010 upon her return, PW1 told her that the father did "tabia Mbaya" to her but she did not explain. She later met PW3, J M who was their neighbor who told her that he had seen the husband defiling PW1 for two nights. PW2 was not able to confront the appellant on the same night because he picked a fight with her. PW2 interrogated PW1 next day and took the complainant to Isiolo District hospital where she was treated. The complainant was examined by PW4 Mohammed Duba, a Clinical Officer at Isiolo Hospital on 8.3.2010. He found the child's hymen broken with indications of a continuous process of defilement. PW3's evidence was that on 3rd March, 2010, at about 10:00 pm he was in his house when he heard the Appellant's bed making noise, the volume of the radio was very high and that there was somebody groaning as if in distress. He said that their houses are one roomed and made of timber. He peeped into the Appellant's house through an opening in the wall and saw the Appellant on top of PW1 and that the Appellant was having sex with PW1. He further testified that he was aware that the Appellant's wife had travelled to Timau. On the following day, he heard the same noise again from the Appellant's house and he called a neighbor one K and her husband to witness and they came, peeped into the Appellant's house and saw him defiling PW1.

The Appellant denied the charge. It was his defence that this was a frame up because he had fought with PW2 (his wife) at night and that because there was a grudge between him and M (PW3)

I have considered the grounds of appeal, submissions and the evidence on record. I have no doubt in my mind that the complainant is the appellant's daughter.

PW2 told the court that when she got married to the appellant, she had given birth to the complainant who was then 2 years and they have lived with the appellant as father to the complainant since. The Appellant admitted that he has been a father to the complainant. Under section 22 of the SOA, a father includes a half father. The appellant is not the biological father of the complainant but having married the mother, he is the half or 'presumed father'. Black's Law dictionary defines presumed father as follows.

> "**the man presumed to be the father of a child for any of several reasons: (1) because he was married to the child's natural mother when the child was conceived or born (even though the marriage may have been invalid; (2) because the man married the mother after the child's birth and agreed either to have his name on birth certificate or to support the child or (3) because the man welcomed the child into his home and held out the child as his own.**

From the above definition, it is clear that though the appellant was not the complainant's biological father, he falls in the definition of a father under section 20(1) of the SOA.

There is overwhelming evidence on record that the complainant was involved in a sexual activity. PW1 narrated in detail how her father defiled her on two consecutive nights when the mother was away. PW1's testimony was further corroborated by the findings of PW4 who examined PW1 and found that she had a broken hymen and was of the view that there was continuous process of defilement.

The only question is who committed this heinous act. The trial court described the complainant as an honest and truthful witness. There was no reason at all for PW1 to fabricate the case against the appellant. The court had an opportunity to observe her and there is no reason to doubt the trial courts findings on her demeanor. Even before the complainant informed the mother (PW2) about her ordeal, PW3 was the first to break the unpleasant news to her, that the appellant had defiled the complainant. PW3 said the lantern lamp was lit and he saw the appellant through the opening in the timber wall. The appellant admitted that when in his house one can hear what goes on in the next house. Although the appellant alleged during the cross examination of PW3 that PW3 was PW2's lover which PW3 denied and said that their wives were cousins, nowhere in the defence did the appellant allege that indeed PW3 was his wife's lover. In fact in cross examination by the prosecutor, the appellant denied that PW3 had an affair with PW2. But in the same breadth alleged that there is a grudge between him and PW3 and that they had differences because PW3 used to send his children to the shop at night. Clearly the appellant was very inconsistent in his defence as to how he related with PW3. In my view, the inconsistencies point to the fact that he was not telling the court the truth. Otherwise, the defence was a general denial and he only referred to the events of 5/3/2010 and avoided to talk about 3/3/2010 and 4/3/2010 when the offence was allegedly committed. I am satisfied that PW3 was a truthful witness too and had no dispute with the appellant and had no reason to frame him. I do not believe that PW2 framed the appellant because they fought over money. If at all they fought on 5/3/2010, it was over the allegations made by PW1 against the appellant. I am satisfied that PW3's testimony further corroborated PW1's testimony as to how she was defiled by the appellant. I have no doubt in my mind that it is the appellant who defiled the complainant.

The appellant complained that all material witnesses were not called. The appellant did not mention who was not called as a witness that should have been called. PW3 mentioned that on the night he saw the appellant defiling the complainant, he called one K together with her husband to come and witness what the appellant was doing. The said K was not called as a witness. However failure to call K does not amount to miscarriage of justice because there is no requirement that the prosecution calls many witnesses to prove a fact. Under section 143 of the Evidence Act, one witness is sufficient to prove a fact unless a particular law requires otherwise.

Whether the defence was considered; I find that the court did consider the defence and found it to be false and a mere denial.

Having considered all the above grounds and the evidence on record, I find no merit in any of them. There was sufficient evidence upon which to found a conviction and the trial courts finding cannot be faulted. I hereby confirm the conviction. The complainant was a child aged about 11 years when the offence was committed. The sentence of life imprisonment is lawful and I will not interfere with it. The appeal is therefore dismissed in its entirety.

DATED AT MERU THIS 6TH DAY OF MARCH, 2015.

R. P. V. WENDOH

JUDGE.

Appellant in person

Mr. Mungai for State

Kirimi/ Jane Court Assistant