REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 55 OF 2014

M W .....APPELLANT

V E R S U S

REPUBLIC ..... RESPONDENT

(from original conviction and sentence in Mwingi SRM Criminal case No. 655 of 2012 I. W. Gichobi R.M).

The appellant was charged in a subordinate court with incest contrary to Section 20(1) of Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on the 4th December 2012 at 6.00 am at [particulars withheld] in Mwingi Central District within Kitui County being a male person made his penis penetrate the vagina of MM a female person who is to his knowledge was his daughter aged 8 years. He denied the charge. After a full trial, he was convicted of the offence and sentenced to serve life imprisonment.

Dissatisfied with the decision of the trial court the appellant filed his appeal in person on 3rd September 2013. However on 15th July 2014 he filed a petition of appeal through his counsel C. K. Nzili & Co. Advocate. The grounds of appeal filed by the counsel are the ones relied upon. They are as follows:-

1. The learned trial magistrate erred in law and in facts in hearing the evidence of the complainant in the absence of the appellant hence breaching his constitution rights.
2. The learned trial magistrate erred in law and in facts in abducting her responsibility, in conducting the proceedings hence occasioning miscarriage of justice.
3. The learned trial magistrate erred in law and in fact in irregularly admitting evidence of non witnesses of the case hence occasioning miscarriage of justice.
4. The learned trial magistrate erred in law and in facts in failing to conduct vior dire proceedings hence occasioning miscarriage of justice.
5. The learned trial magistrate errand in law and in fact in convicting the appellant on uncorroborated evidence.
6. The learned trial magistrate erred in law and fact in failing to consider the appellant's defence.
7. The learned trial magistrate erred in law and in fact in failing to record crucial parts of the proceedings hence mis directing herself and arrived at the wrong findings.
8. The learned trial magistrate erred in law and in facts in failing to establish the vital ingredients of the offence of incest.

Counsel for the appellant also filed written submissions and relied on several case authorities. These authorities included Musyoka Mwansya –vs- Republic (2013) eKLR, Madaraka Kasyuko Mwendwa –vs- R(2013) eKLR, Benson Ngima –vs- R (2013) eKLR. Mr. Nzili who appeared for the appellant at the hearing of the appeal also submitted orally that PWI was not cross examined. That the court also on its own motion ordered that the proceedings should proceed in the absence of the appellant because the

complainant could not testify before men. However the only man who was removed was the appellant which was wrong. In effect that evidence of the complainant was not tested as required under Section 146 of the Evidence Act, as the appellant neither heard the evidence nor asked questions and yet he was convicted on that evidence which was a nullity and in contravention of Section 302 of the Criminal Procedure Code. According to counsel, the only situation where an accused person in a trial could be removed from proceedings was where he had misconducted himself or intimidate witnesses and the record should indicate that misconduct. The mistake of the magistrate herein therefore rendered the whole proceedings annulity.

Counsel also complained that the record at page 13 and 14 of the proceedings showed that the presiding officer used non witnesses to prepare the complainant to testify. This was further mistake as the appellant was not involved. Counsel argued that the procedure adopted by the trial court denied the appellant a fair hearing.

A learned Prosecuting Counsel Mr. Orwa opposed the appeal. Counsel submitted that it was very clear from the evidence on record, that the appellant was the biological father of the complainant. Counsel submitted that the court correctly applied the rules relating to vulnerable witnesses under the Constitution and under the Children's Act to protect the complainant who was a minor. On that day the complainant felt threatened and could not give evidence. Since the complainant is a young girl of 8 years and the mother had given clear facts on the threats from the appellants and a probation report was filed, the trial court weighed all the options available before excluding the appellant from court of and did not violate any provision of the law. Counsel emphasized that Article 159 of the Constitution was clear that the court should administer substantive justice instead of unduly relying on technicalities.

Counsel relied on a case of Fappyton Mutuku – v – Republic (2012) EKLR. Counsel submitted that age did not require scientific evidence to be proved. Counsel emphasized that in rural Kenya birth certificates were not readily available as most delivery of children were done outside medical facilities. Counsel submitted further that the complainant was not couched. Counsel also submitted that under the Children's Act children could be assisted by a councilor or Probation Officer while tendering evidence the Counsel submitted that the P3 form indicated that the complainant did not have a hymen which confirmed penetration. Counsel also submitted that the evidence for the defense was merely hearsay evidence. In addition there was no record that the court did not take or record all relevant evidence. Counsel sought to distinguish the cases cited by counsel for the appellant. Counsel urged this court to dismiss the appeal.

In response the prosecuting counsels submissions, Mr. Nzili learned counsel for the appellant submitted that there was no record that the appellant was asked about his view before the court decided to exclude him from the proceedings. On non witnesses assisting the complainant, counsel argued that page 14 of the record was clear on that. Counsel submitted that age was an important element in sentencing in sexual offences. Therefore it was necessary for the age of the complainant to be scientifically established. Counsel submitted further that Article 150 and 159 of the Constitution protected the rights of accused persons and that justice was a balance between the interest of the contesting parties.

At the trial, the prosecution called 6 witnesses, PWI L D M was the mother of the complainant. It was her evidence that the complainant was her daughter born on 5th June 2004. That she was married to the appellant under Kamba customary law and they had a total of 7 children, with the complainant being a 3rd born and the only girl. She testified that on 4th December 2012 at 6.00 am she had put a fire to prepare porridge in the kitchen. When she into the main house which is a single room that was used by both herself and her husband and the seven children, she found the appellant on top of the complainant. The appellant had removed his trousers and remained with his underwear while the girl did not have clothes. She saw the husband lower the underwear and engaged in sexual intercourse with the complaint. PW1 did not say anything but walked out and called the child who did not answer. The appellant then told PWI to place the jerrican outside and that the girl would come to fetch the water.

When the girl never came out she went back into the house and saw the appellants still engaging in sexual intercourse with the girl. When the appellant saw her he got scared and asked her to pass to him his

trousers which she did. PWI did not scream or do anything. When the girl came out she sent her to fetch water and then she proceeded to Kairungu hospital with her one year old child whom she was taking for treatment. At around 4.00 Pm as she was coming back home, she met a lady friend called W and informed her the incident. W then informed the Assistant Chief on the phone and they went to the house of the appellant. PWI arrived there earlier but, though she met the girl, she did not talk to her about the incident. When the Assistant Chief and others arrived at the house, they spoke to the girl who just kept quiet. They also interrogated the appellants but he denied the incident. They then went to [particulars withheld] market and found a police car waiting for them. The appellant and the complainant were put into the police vehicle and the witness went back home. It was her evidence that she witnessed the appellant previously having sexual intercourse with the complainant in August 2012. She however did not report the incident to anybody because she was afraid of the husband who is the appellant.

PW2 who was complainant MM. She initially was recorded as having been reluctant to give evidence and was stood down. Later a Children's Officer Francis Kyalo informed the court that the girl only opened up to him after all men had left. The court decided that the child would testify and would give unsworn testimony and in the absence of all men. The record shows that the people who were present were Prosecutor Orwa and Court Clerk Irene and the Magistrate. It is then that the complainant in the absence of the appellant, stated that the appellant had sexual intercourse with her on that day, and that it was not the first time. That the appellant had told her not to tell anybody or he would beat and kill her. She stated that the appellant used to beat the mother PWI and chase her away and take that advantage to have sexual intercourse with her.

PW3 was A M K. It was her evidence that on the 4th of December 2012 she saw PWI passing by her kiosk from [particulars withheld] dispensary. They talked a bit about the sickly child that PWI was carrying. According to this witness the child was malnutrition. The witness who was an official of the food programme for malnutrition children. As they talked PWI disclosed to her that she found her husband having sexual intercourse with her daughter. The witness being a community health worker reported the matter to the Assistant Chief and action was taken.

PW4 was Felister Nduku and Assistant chief of [particulars withheld] sub location. It was her evidence that she was called on the phone by A K PW3 and informed of the incident. That she informed the Assistant chief Peter David Kairungu to accompany him. They were also accompanied by the village elder P K to the home of the appellant. On arrival, they found the complainant but the complainant refused to disclose to them anything. As they walked with the girl towards the police vehicle, she opened up and stated that she could not talk in the presence of her father because of the threats to kill her. They handed over the matter to the police.

PW5 was doctor Moses Gicheru attached to Mwingi District Hospital. He filled the P3 form for the complainant. He did not find any abnormalities. There was no blood discharge or semen. However the hymen was broken. He filled a P3 form which he produced in court as an exhibit.

PW6 was police Constable woman Pauline Otukanya. She was the investigating officer. She gave a summary of what she was told by the complainant, the mother of the complainant, the appellants and the doctor. She arrested and charged the appellant.

When put on his defence, the appellant gave a sworn statement. He stated that quarrels between him and his wife PWI started in 2012. He started noted that his wife was not sleeping at home all nights. One day he went to the kitchen and as he approached his wife ran away. Shortly thereafter, he saw a man also run out. He tried to chase them but was not successful. From the kitchen he recovered a gunny bag, 3 lessos, a skirt and an electric torch which he hid under his mattress. According to him there was another time when his wife slept outside the house and he took her to her parents and she begged for forgiveness,. According to him his wife usually went to [particulars withheld] Clinic instead of [particulars withheld] which was near, due to interior motives. He stated that he even brought this issue to the attention of a pastor. He wanted to involve the parents of both sides in the matter and that was why the wife got annoyed and decided to implicate him. On the date in question alleged in the charge sheet, the wife did not sleep at home. He looked for her in vain and told the children that they should go and cultivate or

plough in his mother's farm. While there one of the children went back to check on the animals and found his wife digging on the farm. His wife then asked for money to go to the clinic. According to him he was framed. If indeed it was true that his wife found him red handed having sexual intercourse with her daughter, she would have screamed and told village elders, and relatives instead of going to tell a distant lady friend.

DWI was KM a child of the appellant. He gave unsworn evidence. It was his evidence that on that morning the appellant looked for his mother in the morning but could not find her. However in the same morning when the witness came back to check on livestock, he saw her cultivating in the farm and she said that she wanted money to go to [particulars withheld] clinic. She proceeded to the clinic and when she came back some people came and arrested his father.

DW3 was J M the mother of the appellant. It was her evidence that the appellants was a person of good conduct. That he even took care of girls, at a young age. According to her he was framed due to family problems which started when the wife joined [particulars withheld] church. This is because she used to go to [particulars withheld] and sleep there. According to her even on the day of arrest she was planning to intervene to try and solve the domestic problems between the appellant and his wife.

DW4 was T M a niece of the appellant. It was her evidence that the appellants had brought her up without molesting her . She was now surprised that the appellants would molest his own daughter.

DW5 was G M a cousin of the appellant. It was his evidence that the appellant used to fight with his wife since she joined [particulars withheld] church. This was because the wife used to spend nights outside her home.

DW6 was D M a younger brother of the appellant who stated that the problems beteewn the appellant and his wife began in February 2012 when the appellant found his wife with someone else after she had disappeared from for 2 weeks. He named the lover of the wife as M and another lover by the name K a village elder. According to him the appellant was framed with the charge.

This is a first appeal. As a first appellate court, I am duty bound to evaluate all the evidence on record afresh and come to my own conclusions and inferences I have to take into account the fact that I did not see witnesses testify to determine their demeanor. See the case of ***Oken –vs- Republic (1972) EA 32.***

The appellant has raised several grounds of appeal. It is admitted that the appellant was excluded from the proceedings when the complainant testified in court.The prosecuting counsel has justified the procedure adopted by the trial magistrate. He has not cited any law which allows the court to do that. Clearly in my view, an accused person cannot defended himself on evidence that he does not know. There is a constitutional requirement these days that accused persons be provided with witness statements. It would defeat the purpose of that requirement if any evidence can be given which an accused person does not know. There is no record that the appellants was given any information about the evidence that was given by the complainant in his absence.

That in my view was a miscarriage of justice. On that account alone this appeal will have to succeed.

The main reason why this appeal will succeed is because the learned magistrate did not weigh the prosecution case against the defence case. The judgment does not even say which evidence and from which witness was believed or was not believed. The magistrate seems also to have shifted the burden of proof on the appellant. That the complainant might have been involved in prior sexual activities is not in dispute. The hymen was broken. However in my view even the breaking of the hymen is not synominous with sexual activities. The hymen could be broken for other various reasons.

Weighing the evidence of the prosecuting against the defence, I find it unbelievable that PWI would go into the house and find the appellant in the very act of having sexual intercourse with a child and then keep quiet and go out without screaming. I would find it very incredible that she would come back later and find him still having sexual intercourse and not say anything. It is unbelievable that thereafter she

could be willing to be told by the appellant to bring him his trousers and she would do so that without any complaint at all. I find it unbelievable that she did not report the incident to any of their own relatives or the relatives of the appellant.

The evidence of the appellant was sworn evidence expect that of DW2 who was a minor. That defence evidence is also very believable. The appellant called several witnesses who testified and their evidence was not shaken. The burden is always on the prosecution to prove an accused person guilty beyond reasonable doubt. In my view the defence of the appellant sufficiently dented the prosecution evidence. The balance tilted in favour of the appellant and he should have been acquitted of the offence.

To conclude I allow the appeal quash the conviction and set aside the sentence. I order that the appellant be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Garissa this 3rd day of June, 2015

GEORGE DULU

JUDGE