REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

CRIMINAL APPEAL NO. 19 OF 2014

(FORMERLY MOMBASA HCCR A NO. 249 OF 2012)

J M .....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

[Being appeal from original conviction and sentence in Criminal Case No. 450 of 2008 made on 24th June 2009 by the Resident Magistrate's Court at Voi (the Hon. P.N. Ndwiga)]

JUDGMENT

Introduction

[1] This is a judgment on first appeal from original conviction and sentence of the Resident Magistrate's Court at Voi Criminal Case No. 450 of 2008. The appellant were convicted for the offence of incest by male person contrary to section 20(1) of the Sexual Offences Act No. 3 of 2006 and sentenced to imprisonment for life on the 24th June 2009.

[2] *The particulars of the offence were that –*

> ***"PARTICULARS OF OFFENCE**: J M On the 1st day of June 2008 at [Particulars withheld] village Ngolia Location in Taita Taveta District within the Coast Province had carnal knowledge of E W, a child aged 7 years who is to his knowledge his niece."*

[3] The prosecution called 4 witnesses in support of the charge and, when put on his defence, the appellant gave an unsworn statement and called no witnesses in defence.

The prosecution's case

[4] In brief, the prosecution's case was that the appellant had on four occasions culminating in an incident on the 1st June 2008 has sexual intercourse with the complainant who was his niece, being a child of his sister, and then seven years old and which incident was confirmed by the mother of the child, who as she bathed the child, discovered her private parts to be swollen and open and by medical examination which indicated broken hymen as evidence of penetration.

[5] The alleged facts of the case relied on by the Prosecution were set out in the evidence of the complainant PW1, who the court allowed to testify on oath following a *voire dire* examination pursuant section 19 of the Oaths and Statutory Declarations Act Cap 15 Laws of Kenya, and that of her mother, as

follows:

PW 1

On the next day I went to school. At break time we went to the field. I later went home for lunch. My uncle was herding cattle. He is called JM. He was far from home. He came at the evening. He called me to his house. I was in my home clothes. He told me to sit on his bed. He held me and placed me on the bed. He removed his thing and put it in me. I would cry and he would leave me a bit. I felt warm inside when he put his thing in me and pain in my private parts (points). I got injured. He put the thing in me 4 times. I saw a bit of blood.

He later told me to go to our house. I went home and found mum. I sat on the bed. I later slept. In the morning as my mother was bathing me she saw my private parts and asked me who had done that to me. I told her it was uncle (accused). She bathed me and I went to school. Later mum told me not to go to uncle's house again. Mum called another uncle. They said they would bring police. Police came and arrested the accused from his house. In the morning, mum bathed me and brought me to hospital. My private parts (points) were examined. I was given medicine and we later went home.

On the next day, we came back to Voi and returned to hospital with mum. We were treated and told to return the next day. We returned and saw the doctor. I saw this accused on the dock put his thing in me. He is my uncle. He is my mother's brother. He opened his zip and removed the thing for urinating. He then put it in my private parts (points).

PW 2

On 2/6/08 on a Monday, I was bathing my child the complainant. At about 1 pm. I saw her private parts were swollen and open. I asked her what had happened. She kept quiet. I took a stick and told her I would beat her. She then told me that she had made love with my brother, her uncle over 4 times. He had even done it before at home in the shamba and he would tell her not to say or he would beat her. I then called my brother in Voi. He was not at home. He said he would come. He came on Friday 6/6/08. I had taken the complainant to Mngolia hospital on 3/6/08. When my brother came on 6/6/08 he told me he had reported the matter to the chief and he would come at night to arrest the accused. Since accused was not home. At midnight, the chief came with police and arrested the accused. We came on 7/6/08 Saturday at Voi hospital. The complainant was examined. The P3 was not filled then. We kept coming and it was filled after 1 week. I had washed the complainant on 1/6/08 and did not note anything. I noted the swollen private parts which were open on 2/6/08 as I washed. The swelling went away in about a week. She was walking slowly and could not walk fast. The accused lives next to us in our compound which has 3 house. He is in the dock. He is my elder brother. He has no family.

The Defence Case

[6] When put on his defence, the appellant gave unsworn statement offering a one-line alibi defence that *"On 1/6/08 I woke up at 7.00am and proceeded to my place of work which is a bit far from home."* He confirmed that the complainant was his niece and that he was arrested on the night of 6/6/08 - 7/6/08 at 3.00am when he was awoken by the Chief and Administration Police Corporal.

[7] The learned trial magistrate considered the evidence finding the charge proved against the accused and sentenced him to imprisonment for life.

The Appeal

[8] The appellant set out his grounds of appeal in his Amended Grounds of Appeal filed in court,

principally, that the conviction was not supported by the evidence presented by the prosecution, as follows: that there was no dates, as well as no treatment notes officer's reference number which could show, when the PW1 medical examination was conducted; that the complainant went to Hospital seven days after the alleged defilement; no reasons were given for the 7 days delay in reporting the incident to the police; no birth certificate was produced for verification of the complainant's age; variance on the date of offence as given in particulars of the offence and the evidence of PW2, the complainant's mother and that the trial court failed to consider the alibi defence of the accused.

[9] During the hearing of the appeals, the appellant filed written submissions in court while, Ms. Karani, Counsel for the Director of Public Prosecution (DPP) made oral submissions in response thereto, and judgment was reserved.

THE ISSUE FOR DETERMINATION BEFORE THE COURT

[10] The issue for determination before the court is whether on the evidence presented before the court the charge of incest by a male person contrary to section 20 (1) of the Sexual Offences act 2006 had been proved.

DETERMINATION

The duty of the Court on first appeal

[11] The duty of the Court on first appeal is as set out in ***Okeno v. R***., 1972 EA 32, 36 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 v. R.****, [1957] E.A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (****Shantilal M. Ruwala v. R.****, [1957] E.A. 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 findings and conclusions; 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 witness, see* ***Peters v. Sunday Post****, [1958] E.A. 424.****"***

Requirement of corroboration

[12] The Evidence Act, cap 80 Laws of Kenya requires the corroboration of evidence of a minor except in sexual offences in providing at section 124 thereof as follows:

> *"****124.*** *Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim 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."***

Alibi principle

[13] It is cardinal principle that in offering an alibi, an accused does not thereby assume a duty to prove the alibi. See ***Karanja v. R.*** 1983) KLR 501. The duty to prove the falsity of the defence and the guilt of the accused and therefore to discharge the alibi remains with the Prosecution. As held in ***Kiarie v. R.***

(1984) KLR 739, 740:

> *"An alibi raise 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."*

[14] However, where the defence of alibi is offered through unsworn statements of the accused the same cannot be taken as raising a reasonable doubt because as held by the Court of Appeal in ***May v. R***., (1981) KLR 129, -

> *"An unsworn statement is not, strictly speaking, evidence and the rules of evidence cannot be applied to an unsworn statement. It has no probative value,* ***but it should be considered in relation to the whole of the evidence.*** *Its potential value is persuasive rather than evidential. For it to have value, it must be supported by the evidence recorded in the case."*

Analysis of Evidence

[15] PW1 evidence of the assault by her uncle by his putting *'his thing for urinating into my private parts'* was articulate and unshaken even under cross-examination by her accused uncle, when she said –

> *"Mum was at home when you called me and put your thing in me. My Grandmother was also there. I did not cry out loud. You threatened to beat me if I said anything."*

[16] PW2 testified to discovery of *'swollen and open private parts'* as she bathed the complainant on the second day after the alleged defilement. The evidence before the trial court is corroborative of an assault of sexual nature.

[17] The appellant presented his case on the basis that corroboration was necessary before conviction for sexual offences and that medical evidence was necessary to corroborate the evidence of the complainant PW1 and her mother PW2. That is not so. The proviso to section 124 of the Evidence Act is in clear terms that:

> ***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."***

[18] While there is no time limit for the reporting to police or otherwise taking action on an alleged crime, there being no statute of limitation with regard to criminal offences, because of the nature of sexual offences which require medical evidence to prove the occurrence of the alleged incident, it is imperative that the sexual offence be reported as soon as practicable to allow for preservation of evidence to support the charge. Medical examination after a victim has bathed and washed off her clothes after an attack may not produce much evidence to prove the occurrence of the incident alleged as the evidence will have been washed away, as it were.

[19] According to Medical Examination Report (P3) PEX No. 1 dated 16th June 2008, which is about two weeks after the alleged incident happened on 1st June 2008, the doctor who completed the form without indicating whether he filled the report on the basis of his own assessment of the complainant or treatment notes of previous examination by other doctors, indicated that "hymen – not intact – sexual penetration." PW4 who presented the P3 Form interpreted the entries thereon as follows:

> *"The approximate age of the injuries sustained was difficult to ascertain. On examination it was clear that the minor had been sexually assaulted. She was then given antibiotics (Amoxil). On examination the private parts, the external genitalia appeared normal. On parting the libia majora at the mouth, the hymen was not intact which was a sign of sexual*

penetration. There was discharge which was not foul smelling. Tests were carried out on El…. The dates of this examination are not given on the P3."

[20] The only default in the P3 is in not specifying the date when the examination of the complainant was done. However, it is clearly stated in the form that it was signed by the doctor on the 16th June 2008 on all parts of the P3. Section C of the P3 Form on which the results of examination are recorded is required to be completed after due completion of parts A and B of the P3. If Parts A and B are signed 16th June 2008 it must follow that the examination and consequent completion of the Part C of the P3 was done on the 16th June 2008. The important point is that the examination revealed that there was a broken hymen suggesting penetration. This evidence serves to corroborate the evidence of PW1 and PW2.

[21] An age assessment report was produced as PEX. 2 dated 9th June 2008. That the assessment alleged given on 9th June 2008 when the P3 filled by the Doctor on 16th June 2008 indicates that the child was sent to Hospital on 13th June 2008, may not amount to much as contended by the appellant. This court as an appellate court must, in accordance with the principle of ***Okeno v. R.***, supra, defer to the finding of the trial court which conducted a *voire dire* examination of the child, saw the child and determined she was, as shown in the part of judgment quoted above that she was 7 years old, that is under 18 years of age as prescribed in the proviso to section 20 (1) of the sexual Offences Act. Moreover, there was evidence also that between 7 and 16 June 2008, the child and its mother were in and out of various hospitals between Ngolia and Voi Hospitals. The assessment could have properly been made on one of those outings before the P3 was completed on the 16th June 2008.

Finding of the Court as 1st Appellate Court

[22] On account of her forthrightness, coherent and detailed narrative, and consistency in her testimony that it was the appellant who had put his thing into her private parts, this court in evaluating the evidence is entitled to find that the appellant had sexually assaulted the minor. Even if there had been no other witness, the court would under the proviso to section 124 of the Evidence Act been entitled to make a finding of guilt if it believed, as it does for reason shown above, that the complainant PW1 was telling the truth. I further find, however, that the evidence of the complainant PW1 was duly corroborate by the evidence of the mother PW2 and that of medical evidence presented by PW4. The complainant's age having been determined by a doctor by Age Assessment Report dated 9th June 2008, the ingredients of offence of incest by a male person with a female child aged under 18 years under the proviso to section 20 (1) of the sexual Offences Act is proved.

Findings of the trial court

[23] The trial court relied on the evidence the child, whom it believed, as corroborated by the evidence of PW2 and the Police Form P3 to find that the offence charged had been proved. The court said:

"From the foregoing details it is clear that the complainant was describing the act of sexual intercourse. The details given by the complainant on the entire experience in the hands of the accused are enough proof that she must have encountered them as it is very difficult for a 7 year old to know some of those details if she had not encountered them. Though the accused had a chance to cross-examine the complainant, he did not discredit her credibility and trustworthiness, in fact upon cross-examination, eh complainant confirmed that the accused had threatened to beat her if she told any one of what he had done. Further, taking into account the complainant's mien and demeanor, I have no doubt that her evidence was very direct, consistent and credible and she remembered all the details as she testified only 2 ½ months after the incident."

Making allowance, as an appellate court, *'for the fact that the trial court has had the advantage of hearing and seeing the witness'*, this court must accept the finding of the trial court in its assessment of the credibility of the complainant buttressing this court's own view with regard to the finding under section 124 of the Evidence Act.

[24] It is not correct that the trial court did not consider the appellant's alibi defence given in his unsworn statement. Without in any way shifting the burden of proof to the accused, I observe that the alibi defence case set out in unsworn statement by the accused upon being placed on his defence, suggesting as the trial court found that the accused was being framed, did not create any doubt at all in the mind of the trial court which, rightly in my view, found that –

> *"The accused in defence only stated that he was not told why he had been arrested by the Chief while in the company of his brother and when he was brought to court he denied the charges that were read to him. Looking at this defence it is clear that the same does not dispute the facts in issue herein.* ***The accused appears to allege that he was framed. This line of defence is clearly a sham as PW2 confirmed upon cross-examination by the accused that she had no grudge against him. Further the accused in defence had stated that before his arrest at 3.00am in the night he had been with the brother who initiated his arrest upto 9.00pm that same night. It therefore follows that there had been no grudge between the siblings herein prior to the arrest.*** *The siblings (PW2 and their brother) had no obligation to question him on the offence herein as they only let the law its [course].* ***This defence therefore does not discredit or create any take doubt on the prosecution witnesses' evidence and their trustworthiness."***

I agree.

ORDERS

[25] Accordingly, for the reasons set out above, I find that appellant's appeal herein is without merit and dismiss the same.

DATED AND DELIVERED THIS 9TH DAY OF JULY 2015.

EDWARD M. MURIITHI

JUDGE

In the presence of: -

Appellant in person

Ms. Karani for the Respondent

Ms. Linda Court Assistant.