



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**  
**CRIMINAL APPEAL NO. 24 OF 2012**

*(An appeal from the Judgment and sentence of the Principal Magistrate, Embu in CMCR. Case No. 474 of 2011)*

JACOB KARIUKI KIMOTHO..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

**J U D G M E N T**

This is an appeal against the judgment of Embu Principal Magistrate in Criminal Case No. 474 of 2011. The appellant was charged and convicted with the offence of incest contrary to Section 20(1) of the Sexual Offences Act and sentenced to serve life imprisonment. He was dissatisfied with the both conviction and sentence and lodged this appeal.

In his petition of appeal the appellant relied on the following grounds:-

1. *That his constitutional rights were violated as he was retained in custody for more than 24 hours before being taken to court.*
2. *The magistrate erred when he convicted the appellant on uncorroborated evidence.*
3. *The magistrate failed to consider that there was parental conflict between the mother of the complainant and the appellant and that the complainant's mother was serving community service because of assaulting the appellant.*
4. *The magistrate failed to consider that the medical examination report indicated that the complainant was not sexually assaulted.*
5. *The magistrate failed to consider that the appellant was not tested to prove that he committed the offence.*
6. *That the magistrate failed to consider that the complainant was the biological daughter of the appellant and there was no way he was going to defile her.*

The appellant filed written submissions in which he argued that the case against him was not proved to the standards required. He submitted that he was convicted on uncorroborated and inconsistent evidence. He stated that there was a domestic conflict between him and the complainant's mother who was his wife. He alleges that his wife framed him in this case because she wanted his land. He further states that a young boy called B was not called to testify and yet he was said to be an eye witness. It was also stated that the magistrate convicted him on a defective charge sheet and the case was reported late. He argues that his defence was rejected by the trial court without good reasons.

The respondent filed written submissions in which it relied on in opposing the appeal. It was submitted that the case was proved beyond any reasonable doubt and that the evidence of the prosecution was

consistent and well corroborated. The doctor confirmed that there was penetration and produced documents to that effect. There was no eye witness to the incident and that the complainant's evidence was corroborated by that of the doctor. The respondent argued that the issue of domestic conflict was irrelevant.

The duty of the first appellate court was explained in the case of **OKENO VS REPUBLIC [1972] EA 32** where it was held as follows:-

*An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination [Pandya Vs. Republic (1957) EA 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 conclusion (Shantilal M. Ruwala Vs. Republic [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 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 witnesses, (see Peters Vs. Sunday Post, [1958] EA 424).*

The evidence of the prosecution consisted of five (5) witnesses. PW1 told the court that she lived with the appellant and they had children together, one of them being the complainant. On the 1/3/2011, she left home at 3.00 p.m. for Kangaru and returned at around 5.00 p.m. She was informed by her grandson that the appellant had sexually assaulted her daughter PW1. The complainant later came crying and told her that while she was working in the kitchen the appellant had gone there and knocked her down. He removed her inner wear and also removed his pair of trousers and underpants and then defiled her. PW1 to Manyatta police station where she was issued with a P3 form and took the complainant to hospital.

The complainant PW2 gave unsworn evidence. She told the court that she is a class 3 pupil at [particulars withheld] Primary School. She said she lives with her mother PW1 and her nephew one B who does not go to school. On the material day she was in the kitchen when the appellant who is her father found her there. He knocked her down, removed her biker and underwear. He also removed his trousers and inner wear before defiling her. He inserted his penis in her private parts and she felt pain. She resisted by trying to bite him but he went on. He later left to go to the shamba to pick macadamia nuts. When her mother returned home she informed her and was taken to hospital.

Dr. Linda Kenome of Embu Provincial Hospital produced the P3 form filed by a Dr. Kithome on 1/3/2011. She testified that the doctor filed the P3 form and the PRC. On examination the doctor found laceration in the vagina and a perforated hymen which was evidence of penetration. According to the doctor, the complainant had not had intercourse before. The doctor noted that the torn clothes of the complainant were brought to the hospital in a plastic bag.

PW4 PC John Mutai commenced investigations in this case on 5/3/2011. The report had been made earlier at the station that PW2 had been defiled by her father. He recorded the statements of witnesses, arrested the appellant and charged him with the offence. He obtained the torn inner wear and biker of the complainant which he produced as evidence. The Postnatal Clinic card was produced in court as evidence.

In his defence the appellant denied the offence. He told the court that PW1 had chased him away from home after an attempt to kill him together with her sons who are issues of a previous marriage. He told the court that he had been implicated by his wife because he had failed to show her a place to build on his land.

The appellant complained that his constitutional rights were violated for he was not taken to court within 24 hours. On perusal of the court record, it is noted that the appellant was arrested on 5/3/2011 and arraigned in court on 7/3/2011 when the plea was taken. The appellant did not raise the issue of delay before the trial court. It was held in the Court of Appeal case of **MUSEMBI KULI VS REPUBLIC**

[2013] eKLR that:-

*It is our respective view that extra judicial detention, otherwise known as prolonged detention or delay has nothing to do with the nature of the charges facing the accused person. Criminal culpability or liability is an offence committed against civil order of an individual..... We think the accused has a cardinal duty to raise the delay at the earliest opportunity, so that the court could satisfy itself from all surrounding circumstances, and make an informed view based on the scales of justice...The violation of the right to be brought to court within the constitutional time limit cannot lead to a conclusion that the entire trial becomes a nullity.*

The appellant lost his opportunity to raise the issue of delay at the earliest opportunity. The delay has no bearing to the criminal charges facing him.

The evidence of the complainant was clear and consistent and was corroborated by that of the doctor as required by the law. The proviso to Section 124 of the evidence Act allows the court to convict the accused person in a sexual offence relying on the evidence of the complainant provided the reasons are recorded in the proceedings. The evidence of the doctor confirmed that there was penetration. This evidence sufficiently corroborated that of the complainant. It is not true as alleged by the appellant that the medical evidence was inadequate.

The appellant raised the issue that he was not medically examined to prove that he defiled the complainant. It was held in the case of **DENNIS OSORO OMBIRI VS REPUBLIC [2014] eKLR** that examination of the accused person was not necessary in a sexual offence case provided there was sufficient medical evidence to prove that the complainant was defiled and that her evidence was trustworthy.

The appellant alleged that the prosecution did not prove that he was the biological father of the complainant. The evidence of PW1 which was corroborated by that of PW2 was sufficient proof that the appellant was the father of the complainant and that the couple had lived together for many years and had children who included the complainant. The investigating officer PW4 investigated the matter and confirmed that the appellant was the father of PW2. The appellant did not deny the blood relation between him and the complainant.

In his defence the appellant alleged that he had been framed by PW1 because she wanted to take his land. During cross-examination, PW1 denied any such intention. He did not give any particulars of the land he was referring to. The complainant is the one who reported to her mother what the appellant had done to her which prompted PW1 to take the necessary action. The appellant did not dispute that he has stayed with PW1 as his wife for many years and there has been no other incident of that nature. The evidence of the doctor and that of the investigating officer dislodged the defence of the appellant.

The magistrate in her judgment stated that she did not doubt that there were indifferences between the appellant and his wife. However, she ruled out the allegation that the case had been framed against him. I am in agreement that the allegation of framing up the case against the appellant has no basis. It was also irrelevant that PW1 may have probation for an offence of assault.

The trial magistrate in her judgment analyzed all the relevant evidence and arrived at a conclusion that is entirely justified considering the overwhelming evidence of the prosecution. The conviction is founded on sound evidence and I have no reason to disturb the trial court's finding.

Section 20(1) of the Act provides for a sentence of not less than ten (10) years imprisonment. In the case where the victim is under the age of 18 years the sentence provided is life imprisonment.

The health Clinic Card shows that the child was born on the 25/10/1998. She was therefore aged 12 years at the time the offence was committed. The appellant was sentenced to serve life imprisonment which sentence is within the law.

I find and hold that the conviction was safe and the sentence was lawful. The appeal has no merit and is hereby dismissed.

It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 14TH DAY OF OCTOBER, 2015.**

**F. MUCHEMI**

**JUDGE**

**In the presence of:-**

**The Appellant**

**Ms. Nandwa for the State**