

Having considered the submissions by both sides, the duty of this court is to re-consider the evidence and arrive at its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses.

Briefly, the prosecution case was that on the material date, the complainant **R N (PW1)**, daughter to the appellant, was at home with her younger siblings. Their mother had been chased away by the appellant earlier in month of February, 2011. At 3.00 p.m. on that material date, the complainant went to Kachibora and bought a dress for herself. She returned home thereafter and cooked for the family. After eating, the complainant went to the Kitchen from where she was called by the appellant into his bedroom.

He asked her to lie on the bed after he had asked her to count her mother's clothes. She declined to lie on the bed but he pushed her to the bed and told her to remove her clothes. She declined and raised alarm. He however managed to have sexual intercourse with her and was found in the act by the complainant's sister, **M W (PW2)**.

M rushed to the bedroom after being attracted by the complainant's cries. She found the appellant lying on top of the complainant who was not wearing her skirt at the time. Later, the complainant told her that the appellant had forced her (Complainant) to have sex with him. The complainant's mother, **E N (PW3)**, received information that the complainant had been sexually assaulted by the appellant. She later questioned the complainant who told her that the appellant had made her his wife since she (PW3) left him.

P.C. Richard Rutto (PW5), investigated the matter after it had been reported at th Cherangani Police Station. He arrested and charged the appellant with the present offence.

Linus Lugare (PW4), a clinical officer at Kitale district Hospital examined the complainant and completed the necessary P3 form which indicated that the complainant had been sexually assaulted.

In his defence, the appellant denied the offence and stated that he quarrelled with his wife on 27th January, 2011 after which she disappeared from home and went to her parent's Pokot home where she remained for two months. She returned home on 8th April, 2011 but chose to stay at a neighbour's home. He (appellant) went to see her with a view to reconciling their differences. They did not agree. She left the place in anger but on 11th April, 2011, he was confronted by two plain clothes police officers. They arrested and took him to a police station at Kachibora. He was later arraigned in court on a charge which was strange to him.

From all the foregoing evidence, it is the opinion of this court that there was no dispute that the appellant and the complainant are father and daughter and that they lived in one house in the absence of the complainant's mother (PW3) who had previously moved out of the matrimonial home apparently due to differences with her husband (appellant).

Although it was indicated in the particulars of the charge that the complainant was aged 16 years at the material time, it was later confirmed that she was born on 22nd December, 1992 meaning that she was aged approximately 19 years at the time of the offence. Her age was a vital factor for purposes of sentencing only.

Be that as it may, the complainant's evidence alongside that of the clinical officer (PW4) and that of M (PW2) was sufficient and credible enough to establish that the complainant was indeed sexually assaulted.

What became crucial was the alleged identification of the appellant as the offender. He denied the offence and implied that he was or could have been implicated by the complainant's mother (PW3). However, other than the complainant's evidence there was the evidence of the complainant's sister (PW2) who actually caught the appellant in the act of having sexual intercourse with his daughter (complainant) in his bedroom.

As it were, the complainant's sister caught the appellant with his pants down. He could not therefore be heard to deny the offence and imply that he was implicated without good cause by the complainant's mother who was not even present at the matrimonial home when the incident occurred.

Simply put, the appellant's defence was clearly discredited by evidence from the prosecution which was cogent and credible.

This court must therefore find that the appellant's conviction by the learned trial magistrate was based on sound evidence and is hereby upheld.

The sentence imposed by the learned trial magistrate was proper and lawful.

In the upshot, this appeal is lacking in merit and is hereby dismissed in its entirety.

[Delivered and signed this 4th day of March, 2014.]

J.R. KARANJA.

JUDGE.