REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 35 OF 2012

(Appeal against conviction and sentence from the

judgment of [S. N. ABUYA, PM] dated 20.02.2012 in the

Principal Magistrate's Court at Butali in Criminal Case No.937 of 2010)

R K …….…… APPELLANT

V E R S U S

REPUBLIC ……..……. RESPONDENT

J U D G M E N T

The appellant was charged with two counts of incest contrary to **section 20(1)** of the Sexual Offences Act No. 3 of 2006. He was also charged with two alternative counts of indecent act with a child contrary to **section 11(1)** of the Sexual Offences Act No. 3 of 2006. The appellant was convicted of the second count of incest and sentenced to life imprisonment. The particulars of the offence were that the appellant *on the 30.7.2010 in the Kakamega North District within the Western Province being a male person caused his penis to penetrate the vagina of* ***S A*** *a child aged 10 years who was to his knowledge his daughter.*

The appellant's grounds of appeal are that the charge sheet was defective, the particulars of the charge were not proved, the prosecution evidence was full of contradictions, the sentence is too harsh, the burden of proof was shifted to the appellant, the proceedings and judgment is defective, the paternity and age of the complainant was not established, that the appellant's defence was not considered and he was not given ample time to defend himself.

Mr. Nandwa, counsel for the appellant argued all the grounds of appeal together. Counsel submitted that the age of the complaint was not considered, no age assessment was done. Baptismal cards were shown to the court but were not produced as exhibits. Those cards show that the 1st complainant was 18 years while the 2nd complainant was 14 years. PW2 complained that she is infected with HIV while PW3 who was a doctor testified that there was no HIV. PW1 denied that she saw the appellant having sex with PW2. The investigating officer did not testify. Counsel further submitted that there was bad blood between the complainants and their mother on the one side and the appellant on the other side as the appellant separated with his wife. The complainants were living with their step mother in the same room together with the appellant. The appellant produced a letter to show that there was a dispute. PW1 was declared a hostile witness and her evidence before she was declared was in favour of the appellant.

Mr. Okoth, State Counsel, opposed the appeal and submitted that the evidence on record proved the

charge. PW1 testified that the appellant took and dropped her on the bed and wanted to undress her. The appellant slept with her for two days. PW2 testified that the appellant took her to a bed and defiled her. According to Mr. Okoth even if PW2 was 14 years the charge of indecent act was proved. Counsel further submitted that the appellant asked PW2 whether her periods were over and he raped her. According to PW2 the appellant used to rape her every morning and every night. PW2 testified that she was born in the year 2000 and there was no challenge to that evidence.

The record of the trial court shows that the prosecution called 3 witnesses. **PW1 S A**, testified that on the 24.6.2010 at about 5.00 a.m. the appellant held her and she struggled with him. The appellant left her and did nothing. She denied that she slept with the appellant. She denied her statement and was declared hostile. **PW2 S B**, testified that she was born in the year 2000 and was in standard 5 at [particulars withheld] Primary School. On 30.7.2010 at about 6.00 a.m. she was at home preparing breakfast before leaving for school. The appellant sent PW1 to the shop and carried PW2 to the bed. He removed his pant and defiled her. The appellant covered her mouth with a blanket. The following morning the appellant once again sent PW1 to the shop and asked PW2 whether her period had started. PW2 did not respond and the appellant raped her again. The appellant is their father and they were living together. The appellant told her not to report otherwise he would stab her with a knife and go to work in Nairobi. At one time the appellant sent PW2 to the shop and tried to rape PW1 but PW1 was strong enough and she defended herself. It is the evidence of PW2 that the appellant raped her several times even when they were living in Nairobi. On the 5.8.2010 the appellant raped her and PW2 agreed with PW1 that they report to their uncle. The two were taken to Malava hospital and were issued with P3 forms. The matter was then reported to the police. According to PW2 the appellant had made her his wife. The appellant used to rape her every morning and night when other children were asleep. The appellant used to live in Nairobi with PW1 and PW2 where he was working as a watchman.

PW3 KIZITO SIFUNA, was a clinical officer based at Malava hospital. He produced the P3 forms for the two complainants. He saw the complainants on the 7.8.2010. PW2 had no HIV and she was aged 10 years old. Her hymen was missing and he confirmed that she was defiled. According to PW3 the 1st complainant (PW1) was 12 years old while PW2 was 10 years old.

The appellant was put on his defence. In his unsworn testimony, he stated that he used to be a watchman and used to live with the children at Thika where they used to go to school. The mother of the complainants left him in 1996 and he was the one taking care of the children. He took the children in 2003 and went with them to Thika and they were attending [particulars withheld] Primary School. They were living with their step mother and three children of his brother. He returned with the children to Kakamega and took them to [particulars withheld] School. PW1 was in class 4 while PW2 in class 5. In July 2010 he came back from Thika and the children closed school on 30.7.2010. He was not happy with their results and he called the Headmaster on 2.8.2010. The headmaster told him that the children go to school late and they like playing with the boys. On the 6.8.2010 he was with his wife when two Administration police officers went to arrest him. They were in the company of two uncles of the complainants. He was taken to Imbiakalo AP camp and later to Malava police station. He was then charged with the offence. The complainant's uncles were claiming dowry and informed the complainants to talk about the defilement. The appellant denied committing the offence.

DW2 E M N K was the wife of the appellant. Her evidence was that on the 27.7.2010 she was with the appellant when two policemen in the company of the complainant's uncle went to arrest the appellant. The appellant was taken to Imbiakalo police station and later transferred to Malava police station. She is the complainants' step mother and she never saw any act of defilement. She got married to the appellant in the year 2001 and they had stayed together for 11 years. She produced a letter from the school where the children were attending.

The main issue for determination is whether PW2 was defiled, whether PW2 is a daughter to the appellant and whether it is the appellant who defiled PW2. The appellant was not convicted on Count I and its alternative charge in relation to PW1. The evidence of PW2 is that she was defiled. That evidence is corroborated by that of PW3, the clinical officer, who testified that PW2 was defiled. From the evidence on record I am satisfied that PW2 was defiled. The evidence also shows that PW2 is the

daughter of the appellant. Their mother left the appellant. According to PW2 her mother left the appellant in the year 2000 while the appellant contends that she left in 1996. The bottom line is that the appellant is the father of the complainant.

Counsel for the appellant contends that the charge sheet was defective and its particulars were not proved. Counsel also contends that the paternity and age of the complainant was not established. It is clear to me that the paternity of the complainant was established. She is the daughter of the appellant. Even the appellant and his witness confirmed that. The other issue relates to whether it is the appellant who defiled PW2. According to PW2 the appellant defiled her several times. It is her evidence that the appellant had made her his wife. He used to send PW1 to the shop and defile her. She was defiled in Nairobi as well as at [particulars withheld]. At one time the appellant asked her whether her periods had started and PW2 did not respond. The appellant then closed the door and defiled her. The complainant gave detailed accounts as to how she was defiled by the appellant. The defence evidence is to the effect that the school headmaster informed the appellant that PW1 and PW2 used to play with boys. It is also alleged that the complainants' uncle were demanding dowry from the appellant and that is why the complainants' brought up the issue. The evidence of PW2 is corroborated by that of PW3. It is not clear to me as to why no police officer such as the investigating testified in this matter. However, the evidence on record was sufficient as there was no relevant document that was not produced. Counsel for the appellant maintains that the complainants were over 18 years old. According to PW2 she was born in the year 2000 and her mother left the same year. That would mean that by the time the offence occurred in 2010 she was 10 years old. Although PW2 talked of her periods it is not unusual for a ten year old girl to have periods. According to PW3 PW2 was ten years old. It is the evidence of PW1 that her baptismal card was changed to read her date of birth as 2.8.1992. If that were to be the case then she would have been over 18 years by 2010. The trial magistrate saw the witness testifying before her. According to PW1 she denied that she was 18 years old. It is her evidence that she was 12 years old. She is an older sister to PW2. PW1 denied that PW2 was 13 years old.

Given the evidence on record I do find that PW2 was defiled by the appellant who is her father. The evidence of PW2 is believable and I am satisfied that PW2 was telling the court the truth. The age of the complainant is crucial under section 20(1) of the Sexual Offences Act as if the victim is under the age of 18 the accused suffers life sentence. I am satisfied in this case that the complainant was under the age of 18 years old and the trial magistrate passed the correct sentence. The defence alleged dispute with the complainants' uncles and their mother. There is no evidence to that effect. The evidence of DW2, the appellant's wife, to the effect that she did not witness the defilement cannot help as it is clear that the acts were done in her absence.

In the end I do find that the prosecution proved its case beyond reasonable doubt. The appeal lacks merit and the same is disallowed.

Delivered, dated and signed at Kakamega this 15th day of May 2014

SAID J. CHITEMBWE

J U D G E