REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 36 OF 2013

M M ……..…… APPELLANT

VERSUS

REPUBLIC

(Being an appeal from the conviction and sentence of Hon. B.M Mararo (SRM) delivered on 20/04/2011 in Kyuso Senior Principal Magistrate's Court Criminal Case No. 39 of 2010)

****

(Before Hon. B. Thuranira Jaden J)

J U D G M E N T

1. The Appellant, **MM**, was charged with the offence of incest contrary to **section 20 (1)** of the **Sexual Offences Act No. 3 of 2006**.

The particulars of the offence were that on the 16th day of June 2010, in **Mumoni District** within **Eastern Province** being a male person caused his penis to penetrate the vagina of **NM** a female person who was to his knowledge his daughter.

2. When the Appellant was arraigned in court, he pleaded not guilty. The case proceeded to a full hearing.

3. The prosecution called five witnesses. The prosecution case was that on 16/06/2010 at 2.00 a.m., **NM** a girl aged about three years and the other members of her family who included her sister, PW1 **JM**, mother PW2 **M MM**, a new born baby and the father who is the Appellant were at home sleeping. The family was woken up by cries from the three year old child. The mother lit a torch. They saw the Appellant who had lowered his trousers up to the knees 'sodomising' the three year old child.

4. The Appellant left the house in the morning at about 5.00 a.m. Later in the day the child's mother reported the matter to the assistant chief. They were referred to **Kyuso Police Station** where they made a report. The child was referred to **Kyuso District Hospital**. The child was examined by the Clinical Officer, PW4 **Muema Mutunga** who confirmed that the child had been defiled. The Appellant was arrested and charged.

5. When called upon to give his defence case, the Appellant denied the offence and stated that the child is his own child and therefore he cannot do such a thing. The Appellant further stated that the child was examined by the doctor after a long time after the evidence had been compromised. He further stated that he had disagreed with his wife over some money and the wife took the children and returned to her

father's home. That in July 2010 two village elders went to where the Appellant was working and escorted him to the chief's office. The Appellant was then taken to the assistant chief's office where he stayed overnight and the following day he was escorted to **Kyuso Police Station** where he was charged with an offence that he had not committed. According to the Appellant, the wife maliciously had him charged so that she could get him out of the picture and return to her "friend".

6. At the conclusion of the case, the trial magistrate found the prosecution case proved beyond reasonable doubts. The Appellant was convicted and sentenced to 21 years imprisonment. The Appellant was aggrieved by both the conviction and sentence and appealed to this court on the following grounds:-

i. That the case was not proved beyond reasonable doubts.

ii. That the evidence adduced was at variance with the charge sheet.

iii. That the charge sheet was defective.

iv. That the Clinical Officer was not competent to give medical evidence.

v. That crucial witnesses were not called to testify.

vi. That the prosecution case was full of contradictions and inconsistencies.

vii. That the defence case was not considered.

7. During the hearing of the appeal, the Appellant relied on his grounds of appeal and written submissions which I have duly considered. The written submissions essentially reiterate the grounds of appeal.

8. The appeal was opposed. The learned counsel for the State submitted that the evidence on record was sufficient to sustain a conviction. It was pointed out that the evidence from the scene is that of recognition with the aid of torchlight and therefore there was no possibility of error.

9. This being a first appeal, this court is duty bound to re-evaluate the evidence and the record afresh and come to its own conclusions and inferences – *See* **Okeno –vs- Republic (1972) EA 32**.

10. The witnesses from the scene were the mother to the complainant, PW2 **MMM** and her daughter, PW1 **JM**. The mother testified that she had given birth three days before the material date. Her evidence is that she used a torch when she heard the complainant's cry and saw the Appellant who had lowered his trousers 'sodomising' the complainant. During cross-examination, the mother further stated that the complainant lay on her side when she was being 'sodomised'. The mother further stated that she confronted the Appellant but he kept quiet.

11. PW1 the daughter gave her age as fifteen years. Her evidence corroborates the mother's (PW2's) evidence. According to PW1, she was awoken by the complainant's cries and with the aid of the torch light she saw her father (Appellant) sleeping on top of the complainant. PW1 further testified when the mother confronted the father (Appellant), the father kept quiet.

12. The evidence of the Clinical Officer (PW4) confirmed that the complainant was 2 years and 7 months old and that she had been defiled. According to the Clinical Officer, the hymen was broken and there was swelling of the vulva but there were no injuries or blood on the genital organs. The Clinical Officer estimated the incident as three days prior to his examination and treatment. The evidence of the Clinical Officer further corroborates the evidence of PW1 and PW2.

13. The evidence of PW3 **APC David Thiyaini** and the evidence of PW5 **PC Njoki** confirmed that a report was made and the Appellant arrested and after investigations the Appellant was charged.

14. The Appellant in his defence blames this case on the differences between him and his wife (PW2)

who wanted to return to her "friend". No issues concerning any differences arose when the wife (PW2) testified. However, there are no reasons why the daughter (PW1) would give false testimony against the Appellant. As confirmed by the Clinical Officer's evidence, the defilement was real.

15. The Appellant in his grounds of appeal and written submissions termed the prosecution evidence as contradictory and inconsistent. The Appellant picked issues with PW1's and PW2's evidence on the number of people who were sleeping in the house, whether they were sleeping on the bed or on the floor or whether he was dressed or undressed at the material time. However, the witnesses from the scene are not expected to give an exact replica of evidence. The evidence of the mother (PW2) is more detailed and shows that the Appellant had lowered his trousers to the knees while the daughter (PW2) stated that the Appellant had his clothes on. Whether the witnesses slept on the floor or on beds, they had a place to sleep which they described in various terms. I have found no material contradictions in the evidence of PW1 and PW2 or any inconsistencies.

16. The chief, the assistant chief and the neighbours who were informed by PW2 about the matters in question were not in my view crucial witnesses who ought to have been called to testify. The police officers who received the report testified (PW3 and PW5). Although the chief is said to have examined the child, the Clinical Officer who testified herein was the one competent to adduce medical evidence.

17. Is a Clinical Officer a competent witness to give medical evidence? The answer is found in the Court of Appeal's dictum in the case of **Kavoi Kiilu –vs- Republic (2010) e KLR** the **Court of Appeal** where it was stated as follows:-

> **"Under** section 2 **of the** Clinical Offences Act (Training, Registration and Licensing Act Cap 260 (LOK) **a clinical officer means:-**
>
> ***"a person who, having successfully undergone a prescribed course of training in an approved training institution, is a holder of a certificate issued by that institution and is registered under the*** *Act****……..."***
>
> Section 7(4) **of the** Act **states:-**
>
> ***"A person who is registered by the council shall be entitled to render medical or dental services in any medical institution in Kenya approved for the purposes of this section by the Minister by Notice in the Gazette."***
>
> **The Act goes further to provide that such officers may engage in private practice *"in the practice of medicine, dentistry or health work for a fee."* It follows that the clinical officer did testify in this case on his area of competence."**

18. On the issue that the charge sheet was defective, **section 20 (1) Sexual Offences Act** under which the Appellant was charged is the one that creates the offence of incest by male persons. The proviso to the said section provides for the sentence thereof if the victim is a minor under the age of eighteen (18) years. There is therefore no defect in the charge sheet.

19. The evidence on record is not at variance with the charge. Although the mother (PW2) stated that the child was 'sodomised', the medical evidence clearly shows that on examining the complainant's genital organs, he found the hymen was missing and vulva swollen. This evidence clearly shows that the Clinical Officer's evidence is in respect of the vagina and not the anus. However, the trial magistrate ought to have recorded what the witnesses described and not sum it up in one word as 'sodomised'. It is doubtful if the witnesses used such a word. Semantics aside, the medical evidence is clear.

20. The trial magistrate also carried out a *voire dire* on PW1 who gave her age as 15 years. This was a superfluous exercise as a fifteen year old is not a child of tender age.

21. Section 19 of the **Statutory Oaths** and **Declarations Act Cap 15 Laws of Kenya** provides that:

> **"Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with** section 233 **of the** Criminal Procedure Code**, shall be deemed to be a deposition within the meaning of that section."**

22. Under **Section 2** of the **Children's Act Cap 141 Laws of Kenya**, a child of tender years is a child of ten years of age and below. (*See* also **Samson Oginga Ayieyo –vs- Republic – Criminal Appeal 165 of 2006**).

23. Having evaluated the evidence on record afresh and considered the grounds of appeal and the submissions, I arrive at the conclusion that the prosecution case was proved beyond any reasonable doubt. The trial magistrate who had the advantage of seeing the witnesses testify and observed their demeanour arrived at the same conclusion. I have found no reasons to differ with the finding of the trial magistrate. The sentence is also within the law. Consequently, I find no merits in the appeal and dismiss the same. The conviction and sentence are upheld.

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B. THURANIRA JADEN

JUDGE

Dated and **delivered** at **Machakos** this **16th** day of **July 2014**.

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B. THURANIRA JADEN

JUDGE