



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 141 OF 2013

M N..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the sentence of Hon. W.K. Cheruiyot (Ag. SRM) delivered on 2/07/2013 in Tawa Senior Resident Magistrate's Court Criminal Case No. 31 of 2013)

(Before Hon. B. Thurairaja J)

J U D G M E N T

1. The Appellant, **M N**, 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 diverse days between the month of March 2010 and 29th December 2012 at *[particulars withheld]* village, **Waia Location** in **Mbooni East District** within **Makueni County** being a male person caused his penis to penetrate the vagina of **F W M** a child aged 17 years who was to his knowledge his daughter.

2. In the alternative the Appellant was charged with the offence of committing an indecent act with a child contrary to **section 11 (1)** of the **Sexual Offences Act No. 3 of 2006**.

3. The particulars of the offence were that on diverse days between the month of March 2010 and 29th December 2012 at *[particulars withheld]* village, **Waia Location** in **Mbooni East District** within **Makueni County**, intentionally and unlawfully did an indecent act to **F W M** a child aged 17 years who was to his knowledge his daughter by touching her private parts namely vagina with his penis.

4. When the Appellant was arraigned before the trial court, he pleaded not guilty. The case proceeded to a full trial.

5. The prosecution case was that the complainant lived and attended school in **Nairobi** while staying with her aunt's family but would visit her family in **Makueni area** during the school holidays. That when the complainant returned to **Nairobi** at the end of December 2012 she appeared sad and refused to eat. The complainant then wrote a letter to her aunt stating that she had been 'raped' by her step father. The aunt took the complainant to a clinic and the matter was thereafter reported to the police. Investigations commenced and the Appellant was arrested and subsequently charged with the offence

herein.

6. The complainant narrated to the trial court how one day in the month of March 2010 after she arrived home from church, the Appellant entered the house and closed the door. He then held her hands and pushed her on the sofa set in the sitting room and had sex with her. That the Appellant then threatened to chase her away, stop her education or kill her if she told anybody. The complainant explained that her mother had gone to church when the incident happened.

7. The complainant further testified that after about a month, when the complainant came from church and her mother was still in church, the Appellant quarreled her asking her why she had not swept the house. The Appellant then had sex with her on the sofa again. That the following year, while the complainant was in standard eight (8), the complainant again came home from church. Her mother was still in church. The Appellant asked her to prepare porridge for him. The complainant prepared the porridge. The younger children took the porridge and the Appellant sent them to the grandmother. The Appellant asked the complainant to arrange the house. The Appellant then held her by the hand and when she tried to resist he threw her on the sofa and had sex with her. Thereafter the Appellant continued having sex with her in a similar fashion but after Kenya Certificate Primary Education (**KCPE**) the complainant went for secondary school education in **Nairobi** where she was staying with her aunt. The complainant did not however inform her mother what was happening as the Appellant had threatened her. According to the complainant, the Appellant never used to remove her inner pants but would push the same to the side then have sex with her.

8. The complaint further testified that on the day before she left for **Nairobi** on 25/1/2012 the Appellant came from the farm and called her to the house and had sex with her on the sofa set then left. The following day the complainant left for school in **Nairobi**. The complainant joined form one and the Appellant paid the school fees. In December 2012, the Appellant sent for the complainant to go home to assist with farm work. One day when the complainant was at home with the brother and the mother was in church the Appellant asked the complainant for water. The Appellant then threw her forcefully on the sofa and had sex with her. The following day the complainant left for **Nairobi**. The complainant developed some rashes on her hands but did not have money for treatment. She then wrote to her aunt and informed her what her step father had done to her. It is then that the aunt took her to hospital and the matter was reported to the police.

9. The Clinical Officer **Geoffrey Mutua**, examined the complainant and confirmed that she had been defiled. The complainant's mother, PW3 **R K M** confirmed that the Appellant was the complainant's step father who had married her when she already had three daughters but their marriage was also blessed with three boys. After the investigations the Appellant was charged.

10. When called upon to give his defence, the Appellant described himself as a farm worker and denied the offence. He stated that on 19/1/2013 he went on with his work as usual. That Administration Police officers arrived at his employer's home and arrested him. The Appellant was escorted to Administration Police Post where he found the complainant and the aunt. The Appellant was then accused of having defiled the complainant.

11. The Appellant stated that this case was a frame up and that he heard the allegations of defilement for the first time at the police station. The Appellant stated that he lived with the complainant and the rest of his children. He wondered why it was the aunt who was informed of the matter first and not the complainant's mother, the complainant's sisters or grandmother. The Appellant further stated that his wife worked in the farm and was at home most of the times and would have known if such a thing happened. The Appellant further stated that the complainant lied to the court as she could not remember all the dates she was defiled and that the mother would have noticed if there was something amiss. The Appellant testified that the complainant's aunt **Jacinta** (PW2) was the mastermind behind this case as the said aunt **Jacinta** and the Appellant's mother were not in good terms and the said aunt **Jacinta** had been sent away from their compound. According to the Appellant, when the complainant went to stay with the said aunt **Jacinta's** family, the aunt got a chance to revenge.

12. The Appellant further stated that there was no conclusive medical evidence that points at him as the perpetrator of the offence. That the complainant could have had sexual relations with her age mates or the defilement may have taken place in **Nairobi**. The Appellant denied that he was not the complainant's step father but the biological father and had other older daughters and two wives and cannot engage in such shameful conduct.

13. The trial magistrate was satisfied that the prosecution case was proved beyond reasonable doubts in the main count of incest. The Appellant was sentenced to life imprisonment. The Appellant was aggrieved by both the conviction and sentence and appealed to this court on the following grounds:-

- **That the case was not proved beyond reasonable doubts.**
- **That the medical evidence was unreliable.**
- **That there was no eye witness.**
- **That the plausible defence case was not considered.**
- **That the trial magistrate did not give any cogent reasons in support of the conviction.**

14. The complainant, PW1 **F W M** gave her age on the day she testified in court as seventeen (17) years. The complainant was not a child of tender age. It was therefore superfluous for the trial court to conduct a *voire dire*.

15. **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.”

16. 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**).

17. The complainant's evidence was that from the year 2010, the Appellant who is her step father defiled her severally on the sofa set in the sitting room on Sundays while the mother was away in church. The complainant was a big girl who knew what she was talking about when she talked about sex. All the sexual encounters over a three year period were in broad daylight. The complainant's evidence is that of recognition. There was no possibility of mistaken identity. The complainant gave a detailed and candid account on what transpired.

18. The complainant's narrative to her aunt on the day following the last such sexual encounter is consistent with the evidence given by the complainant in court. During cross-examination, the complainant denied any suggestions by the Appellant that the case was a frame up. The complainant also explained in her evidence that she did not make a prompt report because she feared the Appellant who had threatened to chase her away, stop her education or kill her.

19. The complainant produced the letter she wrote to her aunt as an exhibit. The letter dated 13/1/2013 informs her aunt **Jacinta** (PW2) that her father had “raped” her. Aunt **Jacinta** (PW2) in her evidence confirmed having received the letter, then investigations were commenced. Aunt **Jacinta** (PW2 **J N M**) also denied any suggestions by the Appellant that they had a grudge and she had threatened to fix the Appellant.

20. The complainant's mother (PW3) testified that the complainant was born on 06/05/1995. She produced the Birth Certificate as exhibit. The mother's evidence is that the Appellant is her husband. According to the mother, after the matters in question were revealed, she talked to her daughter (PW1) who informed her that the Appellant had defiled her (PW1) when the mother was away in church or attending functions.

21. The mother's evidence also shows consistency in what the complainant told her and what the complainant said in court. The mother also clarified that the Appellant was not the complainant's biological father. According to the mother, she had three daughters including the complainant from a previous relationship. The mother's evidence settles the issue of whether the Appellant is a biological father to the complainant or a step father. In any event, **section 20** of the **Sexual Offences Act** does not distinguish a step father and a biological father. Whether a step father or a biological father, both relationships are within the prohibited degrees of consanguinity in matters of sexual acts.

22. Although there was no eye witness, the proviso to **section 124** stipulates as follows:-

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."

The trial magistrate believed the complainant and made the following observation in her judgment:-

"I have not seen any reason on record that could motivate the complainant and PW2 to frame up the accused."

23. The evidence by the Clinical Officer (PW4) confirmed that the complainant had been defiled. According to the Clinical Officer the hymen was broken and there was dark pink colour on the wall which was evidence of penetration. The Clinical Officer produced the P3 form which gave the complainant's age as seventeen (17) years on the date of examination on 21/01/13. It is noted from the complainant's evidence that the defilement had been going on over a period of about three years prior to 21/01/13. The complainant was therefore not a border line case on the verge of the age of minority on the date of the first sex encounter complained about.

24. The evidence by PW5 **APC Osia Mula Kenneth** and PW6 **PC Vincent Sururi** confirmed the question of arrest and the investigations carried out.

25. The defence by the Appellant is that this case is a frame up by aunt Jacinta (PW2). Although the Appellant stated that the said aunt Jacinta was out on a revenge mission, it is noteworthy that the Appellant had no problems with his daughter going to **Nairobi** to stay with the family of aunt Jacinta who is a wife to the Appellant's brother. Although the Appellant stated that he had given the child (complainant) to his brother and not the wife (PW2), it is the same family. The differences the Appellant talked about date back to the year 2009, yet the Appellant was comfortable enough to take the complainant to aunt Jacinta's (PW2) family in the year 2012.

26. The complainant explained in her evidence that she was threatened by the Appellant and that is why she did not promptly what had befallen her. Taking into account that the defilement complainant about happened in a family situation, the complainant cannot be blamed for keeping quiet.

27. For the reasons stated above, I have not found the defence case convincing. The trial magistrate who had the benefit of seeing the witnesses testifying and observed their demeanour believed the complainant. I have found no reasons to differ with the finding of the trial magistrate.

28. Having evaluated the entire evidence on record, I am satisfied that the conviction was based on sound evidence. The sentence was within the law. The appeal has no merits and is dismissed.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 3rd day of July 2014.

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B. THURANIRA JADEN

JUDGE