IN THE HIGH COURT AT HOMA BAY

CRIMINAL APPEAL NO. 37 OF 2013

BETWEEN

L O A…….…..…... APPELLANT

AND

REPUBLIC ….....……..... RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 923 of 2012 at Chief Magistrate's Court at Homa Bay, Hon. S. Ongeri, PM dated on 8th November 2013)

JUDGMENT

1. The appellant **L O A** was charged with incest contrary to **section 20(1)** of the ***Sexual Offences Act, 2006.*** He also faced an alternative charge of committing an indecent act with a child contrary to **section 11(1)** of the ***Sexual Offences Act, 2006*** based on the same facts. The particulars were of the principal charger were that on the night of 20th February 2012 to 21st February 2012 at [Particulars Withheld] in Mbita District he caused his penis to penetrate the vagina of FAO, a female child aged 17 years, who was to his knowledge his daughter.

2. He was tried, convicted on the main charge and sentenced to serve 10 years imprisonment. The gravamen of the grounds of appeal set out in the petition is that all the charges against him were fabricated by his second wife, who is the mother of the complaint. In his written submissions, the appellant submitted that the complainant's mother ran away with his household goods and got married to another man. It was after the appellant reported this matter to the area chief, DW2, that the complainant's mother fabricated the charges. He also submitted that in convicting him, the learned trial magistrate relied on the evidence of a single prosecution witness. He urges the court to set aside the conviction.

3. Mr Oluoch, learned counsel for the State, opposed the appeal. He submitted that the complainant's evidence was clear and that it was corroborated by the evidence of PW2 and that of the Investigating Officer and that in light of **section 124** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)***, the appellant could still be convicted on the basis of the evidence of a single witness. Mr Oluoch pointed out that even though the evidence was sufficient to convict the appellant, the court did not consider the issue of the grudge between the appellant and the complainant's mother and the court as the first appellate court is obliged to consider the same and come to its own conclusion.

4. In considering this matter, I am guided by the principles set out in ***Okeno v Republic*** **[1972] EA 32** where it was stated that, *"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and the Appellate Court's own decision on the evidence. The first Appellate Court must itself weigh conflicting evidence and*

draw its own conclusions. It is not the function of the first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusion; 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."

5. The prosecution called 5 witnesses. PW 1, the complainant, testified that she was a 17 year old secondary school student. She produced a birth certificate which showed that she was born on 7th December 1995. She recalled that on the night of 20th/21st February 2012 at around midnight, she was sleeping in her mother's bed. Later at night, her father, the appellant, came and knocked and that she opened for him. She then woke up her two sisters who were sleeping in another room so she could sleep with them. Later in the night, she heard someone holding her blanket, and felt the person removing her biker. She saw him using a flashlight that he had. He told her to keep quiet. The person took a handkerchief and covered her mouth. He removed her underpants, held her legs, removed his trousers and inserted his penis into her vagina had sexual intercourse and left.

6. On the following day she informed her mother, PW2, what had happened to her. They reported the matter to the Children's office and Mbita Police Station. She was taken to Mbita District Hospital where she was examined ant treated. She testified that she was able to identify the accused person when he flashed the light and also from his voice. She told court that this was the second time her father was defiling.

7. PW2, the complainant's mother, testified that the appellant was her second husband and that before she got married to him she had two children, the complainant being one of them. On the night of 20th/21st February 2012, she left her children at home to go for overnight prayers. She stated that her home was a single room separated by a curtain. When she came back the following morning, PW1 told her that she had been defiled. She reported the matter to the Chief, Children's Officer and took PW1 to hospital where she was treated and examined. She stated that the appellant had defiled PW1 before.

8. PW 3, police constable, testified that on 21st February 2012, while at Mbita Police Station, he received a report of an incident of defilement concerning the appellant from PW1 and PW2. He recorded their statements and issued them with a P3 form. He went to the appellant's home but he didn't arrest him as he had ran away. On 20th August 2012, the appellant was arrested by Administration Police from Ogongo.

9. PW 4, a Clinical Officer from Mbita District Hospital, confirmed that he examined PW 1. He noted that biker was torn and that she had bruises on the right anterior thigh which he classified as harm and which he concluded must have been the result of a struggle. Her vagina had blood and that pregnancy, HIV and syphilis tested negative. The urinary test revealed blood and epithelial cells. From his examination, he concluded that PW1 had delivered before and that she had been defiled. He said that there was no evidence of penetration and that the blood in PW1's vagina was a result of her menses.

10. The last witness, PW5, an Administration Police Officer from Lambwe Divisional headquarters, testified that on 20th August 2012 he was at work when he received an order from Mbita Police Station to arrest the appellant. He was accompanied by a female police officer and together with PW1 and PW2 they proceeded to the Assistant Chief's office at [Particulars Withheld] where the appellant was. He was positively identified and was arrested.

11. The appellant was placed on his defence. He gave unsworn evidence. He denied the charges and stated that the complainant was his daughter and that PW2 had come with her when they got married. He further stated that on the night of 20th/21st February 2012, he had gone to the lake fishing and that when he was there, PW2 telephoned him and requested him to send her money which he did. He stated that he later received information from the BMU chairman that his wife

had left with all his children and property and that she had been married by another man. He called PW2 who told him that it was not true. On July 31st, he reported to the assistant chief about his missing wife and property. The Assistant chief referred him to the chief and that he went to Rodi and found the Chief with a pastor who was PW2's new husband. He visited the pastor's home and found his property there and that it is the reason he was charged.

12. DW 2, the Chief of [Particulasrs Withheld], testified that the appellant hailed from her location and that PW1 was the appellant's daughter. She further testified that on 24th January 2012, PW2 reported to her that the appellant had defiled PW1 in the past and that she wanted assistance to collect her belongings from the appellant's house as she no longer wanted to live with the appellant. She stated that she referred PW2 to the Children's office at Mbita and that PW2 later came with summons addressed to the appellant. She referred PW2 to the BMU chairman. In August 2012, the appellant reported to her that PW2 and his property were missing. The appellant told DW2 that he had not received the summons from the Children's department. She said that the appellant was arrested in her office.

13. I have considered the entire evidence and it is clear that PW 1 knew the appellant and the appellant admitted that PW1 is his daughter. Although she is not his biological daughter, **section 22** of the ***Sexual Offences Act*** regards a step-daughter as a daughter. Besides, the appellant has always regarded PW1 as such.

14. The next issue is whether there was sexual intercourse between the PW 1 and the appellant. It is the testimony of PW1 that the appellant tore her biker, removed her underpants and inserted his penis into her vagina. PW 4 however testified that on his examination of PW1, there was no evidence of penetration and that the blood in her vagina was as a result of her menses.

15. Much as there was no evidence of penetration, the learned trial magistrate correctly relied on the provision of **section 20(1)** of ***the Sexual Offences Act, 2006*** which provides as follows:-

20. (*1) Any male person who commits <u>an indecent act or an act which causes penetration</u> with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years ……* [Emphasis mine]

16. An *"indecent act"* under **section 2(1)** of the ***Act*** is defined as an unlawful intentional act which causes, *"(a) any contact between any part of the body of a person with genital organs, breasts or buttocks of another, but does not include an act that causes penetration."* It was the evidence of PW4, the clinical officer, that the presence of bruises on PW1's thighs indicated that there was a struggle between PW1 and the appellant. It was on this ground together with the provisions of **section 20(1)** of the ***Sexual Offences Act, 2006*** that the learned trial magistrate convicted the appellant. In the offence of incest the prosecution must prove either penetration or an indecent act. Having considered the evidence I also find that the indecent act was proved.

17. The appellant faulted that the learned trial magistrate convicted him on the evidence of a single witness and that PW1's sisters were not called to testify. The proviso to **section 124** of the ***Evidence Act*** states, *" .. 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 ……."* In this case the evidence of PW1 was clear and concise as to what happened. It was corroborated by the medical evidence of PW4 and the fact that she reported the matter so soon thereafter to her mother PW2 and to the police supports the consistency and veracity of the evidence. I therefore find that this is evidence that could properly found a conviction.

18. As regards the failure to call the complainant's sisters as witnesses, **section 143** of the ***Evidence Act*** states, *"No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for proof of any fact."* Further in ***Bukenya and Others v Uganda*** **[1972]**

EA 549, the Court held that that where essential witnesses were not called, the court was entitled to draw an inference that if their evidence had been called, it would have been adverse to the prosecution case. In my view, I do not think, the complainant's sisters would have added anything to the prosecution case other than fortify the fact that they were in the room when PW1 was assaulted by the appellant.

19. I have also considered the defence of the appellant in light of the evidence. The thrust of the defence is that the charges against him were planted by PW2 so that he does not disrupt the love between the PW2 and her new husband. These issues were not raised in cross examination and the evidence of PW1 and PW2 remained unshaken in cross-examination. The defence therefore lacks merit.

20. The age of the complainant was proved by the production of the birth certificate which showed that she was 16 years old. Under **section 20(1)** of the ***Sexual Offences Act***, the minimum sentence is 10 years imprisonment and the maximum sentence is life imprisonment. In the circumstances, the sentence was neither harsh nor excessive.

21. Having evaluated and analysed the evidence, I find that the conviction was sound, it is affirmed and the appeal dismissed.

DATED and DELIVERED at HOMA BAY this 15th day of September 2014

D.S.MAJANJA

JUDGE

Appellant in person.

Mr Oluoch, Senior Assistant Director of Public Prosecutions, instructed by the Office of the Director of Public Prosecutions, for the respondent.