



**IN THE HIGH COURT OF KENYA AT EMBU**

**CRIMINAL APPEAL 166 OF 2012**

**PIN** .....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

**From original conviction and sentence in Cr. Case No. 471 of 2012 at the Principal Magistrate's Court Runyenjes by HON. J.P. NANDI – RM on 13/11/2012**

**J U D G M E N T**

1. **PIN** the Appellant herein was charged with the offence of Defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act No.3/06. The particulars being that the Appellant, on the 21<sup>st</sup> day of May 2012 in Embu County intentionally and unlawfully caused his penis to penetrate into the vagina of NM a child aged 13 years without her consent.
2. The Appellant was convicted and sentenced to twenty one years (21 years) imprisonment.
3. He filed this appeal citing the following grounds;
  - i. The trial Magistrate erred in law and fact when he convicted the Appellant relying on the evidence which was inconsistent and uncorroborated.
  - ii. The learned trial Magistrate erred in both law and facts when he failed to consider that there was bad blood between the Appellant and the teacher PW2.
  - iii. The learned trial Magistrate erred in law and facts when he failed to consider that the Appellant was not examined by a medical officer to ascertain the truth.
  - iv. The learned trial Magistrate erred in law and facts when he failed to consider that the Appellant's wife who also slept in the same house did not witness the alleged offence.
  - v. The trial Magistrate erred in law and fact when he failed to consider that no adequate reason was given as to why the Appellant's defence was rejected.
4. The case of the Prosecution was that the Appellant is the father of the complainant (PW2). She was aged thirteen years (13 years) at the time of the alleged commission of this offence. She testified that the Appellant had a habit of defiling her and she would inform her mother (DW2) but she would do nothing.
5. She testified that on 21<sup>st</sup> May 2012 morning the Appellant who had chased away her mother (DW2) came where she was sleeping and removed her clothes and had sex with her. On this day the Appellant woke up and found the complainant (PW2) going to her neighbour's home. He took a stick and caned her.
6. On this day PW1 who was a teacher at Kithungutha Primary School where PW2 schooled received a report from PW2 to the effect that she was in pain. Her dress had blood stains and her hands were bleeding. PW2 reported to PW1 that her father (Appellant) had defiled her. The teacher saw some fluid flowing from PW2's private parts. She took the child (PW2) to the school Deputy

- Head Teacher for further action.
7. PW3 – CPL Grace Kathure received PW2 in her office. She was taken there by the Chairman of Kithungutha Primary School. Necessary action was taken and the Appellant who had gone at large was arrested later. DW4 – Ann Mburu examined PW2 and found her to have a creamish vaginal discharge, missing hymen, perennial tear and a foul smell. The vaginal swab showed the presence of spermatozoa and epithelial cells. He found the complainant to have contracted a sexually transmitted disease. He filled and signed the P3 form EXB1. PW5 – Dr. Njiru Godfrey produced a medical report by Dr. Ndungu of Embu Provincial General Hospital confirming that PW2 was aged under eighteen years (18 years).
  8. The Appellant in his unsworn defence denied the charges. He admits canning PW2 for not going to school. The next day he saw people coming to his home and he ran away to his sister's place to avoid being arrested. He said he was framed by the teacher (PW1) because he had questioned the issue of PW2 working for her.
  9. DW2 – AK who is the Appellant's wife and mother of PW2 testified that the Appellant did not commit the offence. And that she had slept with the accused that night.
  10. When the appeal came before me for hearing, the Appellant presented this Court with written submissions. He basically expounded on his grounds. He referred to what PW2 had told the Court on 19/9/2012 to the effect that the Appellant had not done anything to her. He questions the medical report by PW4 and says he was framed. He has also raised the issue of the investigating officer not having testified.
  11. Mr. Miiri the learned State Counsel opposed the appeal saying the evidence of the Prosecution witnesses was sufficient to sustain a conviction.
  12. This is a first appeal and this Court is enjoined to re-evaluate and reconsider the evidence on record and arrive at its own conclusion. I am alive to the fact that I did not see nor hear the witnesses. See **OKENO –V- REPUBLIC [1972]EA 32, MWANGI –V- REPUBLIC[2004]2 KLR 28, AJODE –V- REPUBLIC [2004]2 KLR 81.**
  13. I have carefully considered the evidence on submissions by both the Appellant and the State plus the grounds of appeal. I have equally considered the evidence on record and the findings by the trial Court.
  14. I have condensed the grounds of appeal and the only issue for determination is whether there was sufficient evidence to support the conviction for defilement.
  15. When PW2 appeared in Court for the first time on 19/9/2012 she told the Court that her mother and grandmother had told her not tell the Court what had transpired. She had to be taken to a Children's Home for safety. When she next came back on 16<sup>th</sup> October 2012 she was able to testify.
  16. The medical evidence by PW5 – Dr. Njiru Godfrey confirmed that PW2 was under the age of eighteen years (18 years) but above twelve years (12 years) of age (EXB 2). Further the evidence of PW4 Ann Mburu a clinical officer confirmed beyond any doubt that PW2 had been defiled. She gave a detailed explanation on the condition of PW2's genitals and the result of the vaginal swab taken (EXB 1). There is therefore no doubt that the minor was defiled.
  17. The child said the Appellant who is her father defiled her early that morning. Her mother (DW2) was not at home as she had been chased away by the Appellant. It is so strange to hear DW2 tell the Court that she had slept with the Appellant that night.
  18. Besides the evidence of PW2 that DW2 was not at home that night the Appellant in his own defence told the Court that he has his own bedroom, DW2 has her own bedroom and their children have their own bedroom. This clearly confirms that DW2 was lying when she testified before this Court that she had shared the night with the Appellant. It is the same DW2 and the mother in-law who had advised PW2 not to tell the Court what had happened to her. I find her to be an unreliable witness, and a bad influence to her daughter.
  19. PW2 also testified that the Appellant had sexually molested her before and her grandmother and mother knew about it but chose to do nothing about it. This explains why on 21/5/2012 when this happened she confided to her teacher (PW1) who took the necessary action. It has not been shown that PW1 acted out of malice as is claimed by the Appellant.
  20. In his defence, the Appellant said he beat PW2 to go to school and on the following day he saw people coming to his home and he ran away to his sister's place to avoid being arrested. Why was he running away if he had not done anything wrong? The record shows the Appellant disappeared

after commission of this offence and was arrested by Administration Police on 26<sup>th</sup> May 2012. As a parent, if he had reasonably punished the child he would not have had a reason to run away.

I concur with the learned trial Magistrate when he stated the following at page 12 lines 1-3;

***“If the accused had not committed an offence he would not have run away to his sister’s place. This shows that the accused had a guilty mind and that is why he ran away”.***

21.The trial Court considered all the evidence on record including the Appellant’s defence and arrived at the correct conclusion. I however note that the complainant is a daughter to the Appellant. He ought to have been charged with the offence of ***incest by male persons contrary to section 20(1) of the Sexual Offences Act No.3 /06***. The sentence for this offence against a minor is ***Life imprisonment***. The Appellant was sentenced to twenty one years (21 years) imprisonment. Since the State did not note the anomaly and the Appellant was well aware of the charge against him and the trial was well conducted, I have no intention of interfering with the charge and sentence.

22.I find no merit in the appeal which I dismiss. The conviction and sentence are upheld.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 9<sup>TH</sup> DAY OF SEPTEMBER 2014.**

**H.I. ONG'UDI**

**JUDGE**

**In the presence of:-**

M/s Ing’ahizu for State

Appellant

Mutero/Kirong – C/c