IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 33 OF 2009

W O C ……..…………. APPELLANT

V E R S U S

REPUBLIC ……..……………………………… RESPONDENT

(Appeal from the original Criminal Case No. 2610 of 2007 in the Chief Magistrate's Court Kakamega from the judgment of MR. KIMANI NDUNGU, P.M. delivered on 8.7.2008)

J U D G M E N T

The appellant 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 the appellant *on the 1.9.2007 in Kakamega South District within Western Province unlawfully had carnal knowledge of* ***R M*** *who is to his knowledge his niece*.

The appellant was convicted and sentenced to serve 14 years' imprisonment. The grounds of appeal are that he did not plead guilty to the charge, that he was not brought before the court within 24 hours, that the other witnesses were brothers of the complainant, that no relevant exhibit such as inner pant were produced, that his blood was taken for DNA test and that he was not given ample time to defend himself. The appellant argued his appeal by way of written submissions. He contends that the prosecution evidence was marred with inconsistence and fabrication. The name of the complainant is not clear whether it is R M or R M. If there was struggle then the complainant's clothes ought to have been torn but nothing of the sort was proved. The injuries allegedly sustained by the complainant are not in line with the medical evidence. No DNA test was conducted on him. The appellant also contends that during the hearing he was sick and asked for another date but he was not given.

Mr. Ngetich, State Counsel, opposed the appeal. Counsel submitted that the complainant was 17 years old and she was forcefully defiled by the appellant. The complainant's brother respondent to the complainant's screams and met the accused running away. The complainant was examined by a doctor and found to have been defiled. The appellant disappeared from home for some time. There was no grudge between the families.

I have gone through the record of the trial court. **R M** testified that she was 17 years old. The appellant is her uncle. On 1.9.2007 at about 2.00 p.m. she was in her grandmother's house when the appellant went there and found her reading. She was a standard 8 student at [particulars withheld] Primary School. The appellant closed the door and started dragging her to the bedroom. She started screaming and struggled with him. She stumbled on some sheets and fell down. The appellant carried her to the bed. She struggled again until she managed to get out of the bed but fell down. She continued to struggle with the appellant up to the sitting room. The appellant then strangled her neck and she could not scream as he was stronger than her. The appellant then removed her clothes and put them under his armpit. He then

defiled her. She sustained injuries on the neck and the back due to the struggle. She started screaming again. It was raining that time. The appellant ran away but met PW1's brother A who asked the appellant what was the problem. The appellant did not answer and just fled. A went to enquire from the complainant what had happened and she told him that the appellant had raped her. A went to inform his father and other brothers as well as the appellant's mother who is the grandmother PW1 was living with. According to PW1 the appellant was living in Vihiga with another uncle but had gone there and stayed for two weeks. In those two weeks he was living with A (PW2) in the same house which is near the appellant's mother's house. The matter was reported to the police the following day. PW1 was taken to Kakamega General Hospital and was issued with a P3 form.

PW2 A A A testified that he is a brother to PW1. The appellant is his uncle. On the 1.9.2007 he was working in his farm when it started raining. He went to his house where he was living with the appellant. The appellant went in the house and took his jacket and left. When the rain had subsided he heard screams coming from the appellant's mother's house. He rushed there and found the appellant leaving the house running while carrying PW1's clothes in his hands. He enquired from him what was the problem, the appellant did not respond. He went in and found PW1 only having a petticoat. He saw PW1 crying and she had injuries on the neck, legs and back. She informed him that the appellant had defiled her. PW2 went to inform his father and other brothers. It is his evidence that the appellant was staying with him and had just visited them for about two weeks.

J M A was PW3. He is a brother to PW1 and PW2. He testified that the appellant is their uncle being a cousin to their father. On the 1.9.2007 at about 3.00 p.m. he was at a friend's place where there was a ceremony when PW2 went to inform him about the incident. He called the area assistant chief and notified him. The appellant disappeared from home. The following day the matter was reported to the police and PW1 was taken to Kakamega hospital. The appellant had no wife or child. **PW4 DR. BERNARD OBURU ORENGE** produced the P3 form on behalf of Dr. Eric Kibet who was undergoing further studies. The report showed that PW1 had bruises on the thorax and abdomen. She also had bruises on the back and neck. There were bruises on the upper thigh of the left leg. Laboratory test showed that there was penetration. **PW5 ALEX MUTENDE OREMBO** was the assistant chief of the area. He received a call on the 1.9.2007 from PW3 informing him about the incident. He advised him to take the complainant to Kakamega police station. On the 3.9.2007 he was given police officers and went to arrest the appellant whom they found at his mother's home. He was arrested and taken to Kakamega police station.

PW6 PC LILIAN MORA investigated the case. The incident was reported at the Kakamega police station where she was based on the 2.9.2007 in the morning. The complainant gave her the name of the appellant as her defiler. She had her baptismal card which showed that she was 17 years old. She referred her to hospital and issued her with a P3 form. She organized to have the appellant arrested and charged him with the offence.

The appellant was put on his defence. He opted to keep quiet.

The main issue for determination is whether the prosecution proved its case against the appellant. It is the evidence of PW1 that the incident occurred at about 2.00 p.m. inside the appellant's mother's house. She knew the appellant. She struggled with him and sustained injuries. That line of evidence is corroborated by the evidence of PW2 and PW4. According to PW2 he saw his sister with injuries on the neck, legs and back. The same injuries were noted by the doctor who examined PW1. It is the evidence of PW2 that he saw the appellant coming out of the house carrying PW1's clothes. According to PW1 she had a blue skirt and a purple T-shirt. The clothes were taken by the appellant and she remained with a petticoat. The appellant contends that if there was a struggle the clothes ought to have been torn. Since the clothes were not recovered it is clear that there was no way of knowing whether they were torn or not. The complainant remained with a petticoat and it is not necessary that in all the struggles the clothes will be torn. Although PW1 was the only eye witness and victim of the offence, her evidence is corroborated by her brother PW2 who saw the appellant coming out of the house shortly after the incident. It is clear to me that it is the appellant who defiled the complainant.

The appellant contends that the prosecution case was not proved and the evidence was from the same members of the family. It is clear from the evidence that when PW1 screamed PW2 heard her and went out. He was the only person who was in the neighbourhood and he is a brother to PW1. PW3's evidence was only meant to show that the area chief was informed and he took PW1 to the police. There is no evidence that there was grudge between the appellant and the witnesses. There was no other witness other than those who testified. There was no prejudice to the appellant. With regard to the time taken to arraign the appellant before the court it is clear that the appellant was arrested on the 3.9.2007. The time of arrest is not given. The appellant did not testify to dispute that fact. The record of the trial court shows that he was arraigned before the court on the 5.9.2007. It is therefore not established that the appellant stayed for more than 24 hours before he was arraigned in court. Even if that were to be the case I do find that there was no unreasonable delay in taking the appellant to court as there was only one day difference.

The record of the trial court shows that the prosecution closed its case on the 14.3.2008. Ruling was fixed for 28.3.2008 and it was delivered whereby the appellant was put on his defence. The trial court fixed the defence hearing on 14.3.2008. On that date the case did not proceed and was fixed for the following day 15.3.2008. The appellant informed the court that he was sick and the court adjourned the matter for a mention on 15.4.2008. On that date the trial magistrate was away and it was fixed for mention on 13.5.2008. The defence hearing was fixed for 26.5.2008. The appellant informed the court on that date that he had no defence to give. The appellant's ground of appeal that he was sick and he was not given an opportunity to defend himself is disproved by the record of the trial court. I find that ground to be of no assistance to the appellant. There was no defence and I do find that the prosecution proved its case as required. It is established that the appellant is related to the complainant. The complainant was living with her grandmother who is the appellant's mother. I do find that the two were related and fall within the relationship under **section 20(1)** of the Sexual Offences Act.

In the end I do find that the appeal lacks merit and same is hereby disallowed.

Delivered, dated and signed at Kakamega this 14th day of October 20140

SAID J. CHITEMBWE

J U D G E