REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL APPEAL 61 OF 2011

W N ..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Appeal arising from Judgment of the Senior Resident Magistrate's Court at

Butali in Criminal Case No. 1165 of 2010 [S. N. ABUYA, SRM])

JUDGMENT

The Appellant, **W.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 the 21st day of August 2010 L[.....] Kakamega North District within Western Province being a male person caused his penis to penetrate the vagina of T.N, a female person aged 12 years who was to his knowledge his daughter.

The appellant pleaded not guilty. After a full trial, the lower court found the appellant guilty and convicted and sentenced him to life imprisonment. Aggrieved by the sentence, he appealed to this court. The appellant filed a petition of appeal and raised several grounds of appeal. The appellant also filed Supplementary grounds of appeal.

The grounds of appeal can be summarized as follows:-

- The prosecution evidence was insufficient and failed to prove the case beyond reasonable doubts.
- Lack of medical evidence.
- Crucial witnesses were not called to testify.
- Lack of corroboration.

- Lack of pre-trial disclosure of the prosecution evidence.
- Evidence of PW2 and PW3 was worthless and failed to link the appellant to the offence.
- Lack of proper investigations.
- Rejection of his alibi defence.

The appellant in his submissions stated that this was a case of frame up due to non payment of dowry and a debt of Kshs.10,000/=.

Mr. Limo, the State Counsel supported the conviction but stated that the sentence was excessive.

This being a first appeal, it is the duty of this court to re-evaluate and to re-consider the evidence adduced before the trial magistrate's court so as to reach its own independent determination whether or not to uphold the conviction of the appellant. In reaching its decision, this court is required to put in mind the fact that it neither saw nor heard the witnesses as they testified and therefore cannot be expected to make any determination regarding the demeanour of the witnesses (*see* **Okeno v Republic [1972] EA 32**).

The facts of the prosecution case were that on the night of 21.8.10, the complainant, PW T.N, a 12 year old Std. 4 primary school pupil was at home sleeping in the kitchen. Her father, the appellant called her to his bed and told her to sleep with him. The complainant entered the bed. The appellant told her to remove her pants. The appellant then went on top of her and slept on her.

The complainant reported the matter to her maternal grandmother. The complainant's parents were separated and the complainant and her two younger brothers lived with their father.

The grandmother picked the children from the appellant's house and took the complainant to hospital. The complainant was examined by the doctor and confirmed to have been defiled. PW3 MALE MAKONGE, the complainant's teacher who heard of the incident questioned the complainant who told her that the appellant who was her father used her as a wife at night and told her that she was not his biological child and that the complainant wanted to be assisted and shown her dad and mum.

The teacher reported the matter to the police and the District Education Officer's office. The appellant was subsequently arrested and charged.

In his defence the appellant gave sworn evidence. He stated that he was a businessman and a farmer. He stated that he was working in the farm when he was summoned to the police station and locked up. He was questioned on whether he had raped a child. He denied but he was brought to court on charges that he did not know about. That his children were picked from his home by their maternal grandparents and one child was found to be unwell and was taken to hospital. Later the claims before court cropped up. The appellant denied the charge and stated that this case was a frame up. That his father-in-law was claiming dowry payment from him. The appellant stated that the investigating officer and the doctor did not testify and blamed PW3 the teacher from the complainant's school for giving false evidence due to a bad blood after one of the school teachers had injured the complainant.

From the record of the lower court, it is clear that the conviction is based on the complainant's evidence on the issue of defilement. The complainant's evidence is that the appellant called her to his bed, told her to remove her pants and slept on her.

The grandfather (PW2) and the teacher (PW3) stated that the child was defiled. According to the teacher (PW3) the complainant told her that the appellant was using her as a wife at night. On the other hand, the appellant's evidence is that this case is a frame-up. According to the appellant, PW2, the grandfather was claiming dowry payment from him and the teacher (PW3) gave false evidence due to the existent of bad blood after one of the school teachers had injured the complainant. These allegations by the appellant are farfetched because in essence it would mean the grandfather and the teacher had colluded.

The child gave cogent evidence that was believed by the trial magistrate who gave reasons for believing the same.

Under Section 124 of the evidence Act, the proviso to the same provides 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 appellant is charged under Section 20 (1) of the Sexual Offences Act which provides as follows:-

"Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of the offence termed incest and is liable to imprisonment for a term of not less than ten years.

Provided that, if it alleged in the information or charge and proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person."

It is not denied by the appellant that the complainant was his child. The child gave her age as 12 years and in Std. 3. However there is no reliable evidence on the child's age. There is no evidence of age assessment. The prosecution closed its case before any medical evidence was adduced.

The question of complainant's age however only counts when it comes to sentencing. It is therefore safe to sentence the appellant for the offence of incest with a female person who is over 18 years of age.

I have perused the record of the lower court. The appellant did not apply to be supplied with copies of the statements of prosecution witnesses during the trial. The issue has therefore cropped up at the appeal stage as an afterthought.

Although the appellant has stated in his grounds of appeal that his alibi defence was rejected, his defence before the lower court did not raise any alibi. The appellant did not talk of his whereabouts on the material date i.e. 21.8.2010.

With the foregoing, the conviction of the lower court is upheld but the sentence of life imprisonment is reduced to ten years imprisonment.

Delivered, dated and signed at Kakamega this 12th day of July, 2012

B. THURANIRA JADEN
J U D G E