



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MUSINGA, GATEMBU & MURGOR, J.J.A.)

CRIMINAL APPEAL NO. 97 OF 2014

BETWEEN

R K APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Kakamega, (Chemitei, J.) dated 15th May, 2014

in

HCCRA NO. 35 OF 2012

JUDGMENT OF THE COURT

1. The appellant was convicted by the trial court of incest and sentenced to life imprisonment. He was accused of defiling his daughter, **SB**, aged 10 years. His first appeal to the High Court was unsuccessful, hence this second appeal.
2. The complainant testified that she was born in the year 2000 and that the appellant is her biological father. The appellant separated from his wife, the mother of the complainant, and married another wife. The appellant was however living together with the complainant and her sister, **PW 1**.
3. The complainant testified that her father had defiled her on a number of occasions. On 30th July, 2010 the appellant sent **PW 1** to the shop then called the complainant to his bed and defiled her. He repeated the heinous act on the following day. He threatened to kill her if she ever reported the incident to anyone. The complainant told the trial court that at some point the appellant was defiling her repeatedly whenever the other children were asleep and sometimes in the morning after returning from his night guard duties.
4. **Kizito Sifuna, PW 3**, a Clinical officer who examined the complainant on 7th August, 2010, testified that he had assessed her age as 10 years. Her hymen was missing. She told him that she had been defiled by her father, the appellant.

5. In his memorandum of appeal, the appellant stated that the trial court's record did not show the language of the court and whether there was any interpretation; that the charge sheet was defective as the name of the complainant stated there was different from the one stated by the complainant during the trial; that there was no medical evidence that he was the one who had defiled the complainant; that witness statements had not been availed to him; that the first appellate court did not re-evaluate the evidence properly; that the prosecution failed to summon material witnesses; and that both courts below failed to evaluate his defence.

6. When the appeal came up for hearing, the appellant relied on written submissions that he tendered in court.

7. **Mr. Ketoo**, prosecution counsel for the Republic, opposed the appeal. He submitted that there was sufficient evidence that the appellant had defiled the complainant. Her evidence was corroborated by PW 3, who had also assessed the complainant's apparent age. He urged the Court to dismiss the appeal.

8. We have carefully perused the record of appeal as well as the appellant's written submissions. Although the language of the court was not stated, the record shows that there was interpretation into Kiswahili language. The appellant took the plea in Kiswahili. He denied the charges by stating in Kiswahili "*si ukweli*", meaning, "*it is not true*". When the hearing commenced he told the court that he understood Kiswahili. Consequently, we find no merit in the first ground of appeal and hereby dismiss it.

9. Turning to the second ground of appeal, we notice that the complainant's name as it appears on the charge sheet is slightly different from the one stated in the proceedings. There is however no dispute that the names referred to one and the same person. That slight variation in the second name did not occasion any miscarriage of justice. We must therefore dismiss that ground of appeal.

10. Regarding provision of witness statements, **Article 50 (1) (j)** of the **Constitution** stipulates that every accused person has the right to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence. We do not know whether in this case the appellant requested for copies of the statements recorded by prosecution witnesses. An accused person, however, need not make any demand for such statements. The prosecution ought to supply them as a matter of course before the commencement of a trial. But where that is not done, an appellant has to demonstrate to an appellate court that the failure to do so was prejudicial to him or occasioned the miscarriage of justice. That was not demonstrated by the appellant.

11. We now turn to the appellant's contention that there was no medical examination to prove that he had defiled his young daughter. Whereas such evidence would have been conclusive, one way or other, we must state that the absence of such evidence did not weaken the prosecution case. The complainant was examined seven days after the last incident of defilement occurred. In view of the time it had taken before she was taken to the hospital by one of her uncles, a medical examination of the appellant would not have been viable. That notwithstanding, on the basis of **section 124** of the **Criminal Procedure Code** we find that the complainant's evidence against her father was credible and believable.

12. Lastly, we are satisfied that the first appellate court carefully re-evaluated the evidence tendered before the trial court and reached its own conclusion. The two lower courts considered the appellant's defence but rejected it.

We do not find any merit in this appeal and dismiss it in its entirety.

DATED and Delivered at Kisumu this 23rd day of September, 2016.

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR.