IN THE COURT OF APPEAL

AT ELDORET

(CORAM): MARAGA, GATEMBU & MURGOR, JJ.A)

CRIMINAL APPEAL NO. 235 OF 2014

BETWEEN

W K K.....APPELLANT

AND

REPUBLIC .....RESPONDENT

(Appeal from judgment of the High Court of Kenya

at Eldoret (Ochieng, J.) dated 19th May 2014,

in

H.C.CR.A No 242 of 2011)

****

JUDGMENT OF THE COURT

The appellant ***WKK,*** was charged in the Principal Magistrates' Court at Kabarnet with the offence of incest by a male contrary to ***Section 20 (1)*** of the ***Sexual Offences Act No. 3 of 2006,*** the particulars of which were that on 9th July 2011, in marigat District within the Baringo County the appellant did cause his penis to penetrate the vagina of the complainant, ***JK, PW1*** a girl aged 7 years who the appellant knew to be his daughter.

He also faced an alternative charge of indecent act contrary to ***section 11(1)*** of the ***Sexual Offences Act,*** the particulars of which were that on the same day and place he intentionally and unlawfully caused his penis to come into contact with the complainant's vagina. The appellant denied committing the offence.

After hearing the case, the trial magistrate having found that the main charge was proved, convicted and sentenced the appellant. Dissatisfied with that decision, he appealed to the High Court that upheld the trial court's decision.

The appellant has now preferred an appeal to this Court. In the grounds of appeal and the written submissions that were presented in Court, the appellant submitted that firstly, the prosecution failed to properly investigate the offence as required by ***section 2 (i)*** of the ***Sexual Offences Act*** as the appellant was not subjected to a mandatory forensic or DNA examination and further that vital exhibits were not

produced in court; and secondly that, the courts below disregarded his defence, and further failed to appreciate that there was a conspiracy to frame him with the offence. The appellant submitted that ***RK (PW2)*** was a hostile witness who had the charges instituted against him so as to frame him.

In her submission ***Ms. Karanja*** opposed the appeal and submitted that the record shows that the appellant was medically examined. Though no DNA test was conducted, counsel submitted that this is not a mandatory requirement. Regarding the offence of incest, counsel submitted that the proceedings showed that the appellant was aware that MK was his daughter. Counsel further submitted that the appellant was properly identified as he was known to her and further MK's mother caught him in the act.

Briefly, the facts are that, while MK was asleep in the house with her siblings, the appellant came in and woke her up. He ordered her to remove her underpants and clothes, and after she told him she would not, he forcefully removed them. He then unzipped his trousers and defiled her. She felt pain and cried softly so as not to awaken the other children. He told her not to tell anyone and gave her Kshs. 5/- to buy sweet. Just then, her mother had taken her sick brother to Kimalel Health Hospital returned and caught the appellant in the act of defiling MK. She said she heard the appellant tell MK to keep quiet as he knew what he was doing. She also heard MK tell her father that he was disturbing her, and that he was hurting her. She raised the alarm and a watchman who was nearby assisted her to tie up the appellant until she was able to call the chief the next morning.

Regina examined MK and found that she had suffered visible injuries on her vagina and anus.

The next day the appellant was taken to the police station, while MK was taken to Marigat District Hospital where she was examined by ***Henry Kemboi Chepkonga (PW 5),*** a clinical officer, who found lacerations on her labia majora and her hymen torn. The appellant was also examined and laboratory tests showed no abnormality, but as he was experiencing difficulty passing urine he was referred to Kabarnet District Hospital for surgical review.

We have considered the record of appeal and the submissions of the parties and find that the issues for our consideration are whether a DNA test was mandatory, and whether the appellant was framed with the offence by Regina.

Beginning with the complaint that no proper investigations were conducted, as contrary to the provisions of ***section 26*** of the ***Sexual Offences Act*** the appellant was not subjected to a scientific medical examination or DNA test, this court had stated time without number that a DNA test is not a mandatory requirement in sexual offence.

Section 26 provides**,**

> ***"where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence."***

In ***Geoffrey Kionji vs Republic Cr. Appeal No 270 of 2010***, this Court stated thus,

> ***"Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by the accused person. Indeed, under the proviso to section 124 of the Evidence Act, Cap 80, Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief."***

As such, it is evident that subjecting an accused to DNA test is not a mandatory requirement of law, to prove that he committed the offence, and it is not the only evidence upon which a conviction can be based. In this case the courts below relied on the evidence of MK and R who had caught the appellant in the act. We find no reason to interfere with those decisions and as a consequence, this ground fails.

The appellant has also complained that he was framed and that his defence was not taken into consideration by the courts below.

In his defence the appellant denied being at the scene. He testified that he was at his home in [Particular Withheld] and was arrested a day after the incident. He confirmed that he had separated from his wife R and claimed that this was a scheme to get back at him.

In considering the appellant's defence the trial court stated;

> ***"The appellant claims to have been away at the time of the alleged offence. The evidence on record places him at the scene. The area chief found him in PW2's house, where he was tied up with a rope. Even though the watchman who allegedly tied the accused up did not turn up, the evidence on record was still sufficient to place the accused at the scene".***

With regard to the contention that R had a grudge against him and so had framed him, the High Court stated thus;

> ***"Finally, the presence of a grudge between the Complainant's mother and the appellant, even if it had been proved, it could not have been a sufficient defence to the otherwise consistent and corroborative evidence which had proved that the Appellant committed the offence". The Complainant had real injuries in her private parts. These were caused by the actions of the Appellant. The injuries cannot have been caused by the alleged grudge between the appellant and the mother of the Complainant. The injuries were caused by the deliberate actions of the Appellant."***

The excerpts of the trial court and the High Court unequivocally show that the appellant's defence was taken into consideration, and that the existence of a grudge between the appellant and R was not a defence against the heinous offence committed against MK. We are satisfied that both courts took the appellant's side of the story into account and rightly discounted it in the light of the overwhelming evidence leading to his conviction. Accordingly, this ground fails.

In sum, we find that the appellant's appeal is without merit, and we order that the same be and is hereby dismissed in its entirety.

It is so ordered.

DATED and delivered at Eldoret this 28th day of October, 2016.

D. K. MARAGA

.....

JUDGE OF APPEAL

S. GATEMBU KAIRU

.....

JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR