IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KOOME & ODEK, JJ.A)

CRIMINAL APPEAL NO. 72 OF 2013

BETWEEN

AGM .....APPELLANT

AND

REPUBLIC …..... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Meru (Sitati, J.)

dated 29th June, 2006

in

H.C.C NO. 137 OF 2002)

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JUDGMENT OF THE COURT

1. AGM was charged with the offence of incest. The particulars are that on diverse dates between the year 1998 and November, 1999, in Isiolo District within the then Eastern Province, the appellant being a male person had carnal knowledge of NA, a female person aged 13 years who was to his knowledge his daughter. He was tried, convicted and sentenced to life imprisonment by the trial magistrate's court. His first appeal to High Court ***(Sitati, J.)*** was dismissed. Aggrieved by the dismissal, he lodged a second appeal to this Court.
2. The appellant raised five grounds in his memorandum of appeal *to wit:*

- ***That the learned appellate Judge erred in law in failing to observe that the trial magistrate conducted the trial partially and irregularly; that he was the only bread winner of the family and he has no parents.***

- ***That the learned appellate Judge erred in law in failing to make a finding that the trial magistrate erred both in law and facts in not making a finding that the prosecution witnesses tendered uncorroborated and conflicting testimonies.***

- ***That the learned appellate Judge erred in law in failing to observe that the prosecution failed to summon vital witnesses mentioned during the trial for a just decision to be reached.***

- ***That the learned appellate Judge erred in both law and facts in failing to observe that the trial magistrate erred in law in relying upon the evidence of the clinical officer without his qualifications as the law demands.***

- ***That the learned appellate Judge erred in law in failing to observe that the trial magistrate erred in law in rejecting and dismissing the appellant's sworn defence and the evidence of the defence witnesses without any cogent reasons***.

3. At the hearing of the appeal, the appellant was unrepresented and acted in person. The State was represented by **Mr. Job Kaigai,** the Assistant Director of Public Prosecution. The appellant conducted the appeal in person in the Borana language through an interpreter **Mr. Galgallo Wario Yusuf.**
4. The appellant reiterated his grounds of appeal and submitted that he did not commit the offence. He submitted that the offence was a mere allegation instigated by a politician whom he did not support. He admitted that the complainant was his daughter and the only thing he did was to punish the daughter for refusing to go to school. He submitted that the learned Judge erred in failing to find that the witnesses who testified before the trial magistrate were false witnesses who had colluded with his neighbour and the politician. He submitted that the doctor's report was not accurate.
5. The State in opposing the appeal submitted that there was clear evidence that the appellant committed the offence as charged; that the prosecution had proved its case to the required standard and there were concurrent findings of fact by the two lower courts that the appellant committed the offence. The State submitted the evidence of PW1 the complainant child was consistent as she gave a detailed account of what had happening to her in the hands of her father, the appellant. To illustrate the consistency of the complainant's testimony, the record shows that the complainant had previously reported to the authorities the ordeal that she was undergoing at the hands of the appellant. The State submitted that the testimony of the complainant was not shaken in cross-examination and other witnesses testified to show the consistency of her evidence. It was submitted that although the complainant was a child of 13 years, the trial magistrate did not conduct a *voir doire* examination but this aspect was analyzed and evaluated by the High Court which found that the complainant was a child of sufficient intelligence who understood the importance of telling the truth. The State supported the conviction and sentence of the appellant and submitted that the appeal had no merit and should be dismissed.
6. On our part, we note that the appellant is unrepresented and it is the duty of this Court to consider all the issues raised by the appellant in his grounds of appeal although he made no submission on all the grounds. This is a second appeal and we are only concerned with points of law on the authority of a myriad of cases such as ***David Njoroge Macharia – v- R [2011] eKLR*** wherein it was stated that under ***Section 361* of the *Criminal Procedure Code*:**

> ***"Only matters of law fall for consideration and the court will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings."***

7. The appellant in his submission contends that he did not commit the offence. The critical evidence on record is the testimony of PW1, the complainant. The law requires that the court must satisfy itself that in all circumstances, it is safe to act on the testimony of a single witness. In the case of ***Charles O. Maitanyi vs. Republic (1986) KLR 198,*** this Court held that:-

> ***"Although it is trite law that a fact may be proved by the testimony of a single witness, this does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification."***

However, in a case involving a sexual offence such as this one, the provisions of ***Section 124*** states as follows:

" 124. Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, whre the evidence of alleged victim admitted in accordance with that section on behalf of the prosectuion in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.

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 if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

8. We have gone through the evidence on record and in our considered opinion, there is no possibility of mistaken identity. The appellant is the father to the complainant and they were living together in one house and hence the issue of mistaken identification does not arise. The critical issue is whether the appellant committed the offence of incest as charged. PW1 the complainant testified that she was staying with the appellant and in December, 1998, while she was sleeping, the appellant came to her room at about 3.00 am and asked her to remove her clothes including her pants. The appellant then had sexual intercourse with her. The same event was repeated the following night at 1.00 am. The learned Judge in re-evaluating the evidence observed that the record showed that PW1, gave a detailed account of how the appellant started molesting her sexually from the year 1998 and how thereafter he made it a habit and even going to the extent of telling PW1 that all fathers slept with their daughters like he did. PW 1 in company of PW 2 made a report to PW 3, Simon Mwiraria, the Elder of KN Estate where the appellant resided. Upon receipt of the complaint, PW 4 Daudi Abdi Jillo, the Chief of Central Location Isiolo, summoned the appellant before a panel of elders and questioned him as to his relationship with PW1. PW 4 testified that the appellant admitted that he had done what PW 1 was alleging he was doing and he was sorry. The learned Judge observed that appellant failed to put any question to PW 4 on his testimony. PW 1 testified that although no one saw the appellant sleep with her, she had complained to so many people about her tribulations at the appellant's hands. PW 1 testified that she failed to go to school due to lack of school fees. PW 2, Mohammed Jillo, testified that he was a neighbour to the appellant and that on many nights in the year 1999, he used to hear PW 1 crying while the appellant ordered her to remove her clothes. PW 2 testified that on most of those occasions, he would shout at the appellant to stop sleeping with his daughter but every time the appellant retorted that he could do whatever he wanted with his daughter.
9. PW 7, Lawrence Marianne, a clinical officer at Isiolo District Hospital testified that the complainant was about 13 years when she examined her in the month of November 2001. PW 7 testified that upon examination, she established that PW1's genital area had no evidence of injury and there was no evidence of sexually transmitted disease. PW7 testified that PW 1 had healed scars on her thighs which appeared to have been inflicted some four weeks before the date of examination.
10. DW 2, Mohammed Abid Abkira, testified that he knew the appellant very well and he did not believe he was capable of committing the offence as alleged. In cross-examination, DW 2 testified that he knew nothing about what transpired between the appellant and PW 1 in the years 1998 to 1999.
11. One of the grounds of appeal is that the learned Judge erred in law and fact in failing to observe that the prosecution failed to summon vital witnesses mentioned during the trial. We have considered this ground of appeal and we reiterate that the prosecution is not duty bound to call any given number of witnesses. ***Section 143*** of the ***Evidence Act***, (Chapter 80 Laws of Kenya) provides that no particular number of witnesses shall in the absence of any provision of the law to the contrary be required for proof of any fact. In ***Julius Kalewa Mutunga -vs- Republic, Criminal Appeal No. 31 of 2005 (Unreported),*** this Court held that:

"As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive".

12. We are satisfied in the instant case, as correctly pointed out by the learned Judge of the High Court, that there is overwhelming evidence on record to support the conviction of the appellant. The complainant and the appellant lived together in one house and as the complainant testified, she was the only eye witness. Also PW 2 testified that he used to hear the appellant ordering his daughter to undress and he even confronted him. For the aforestated reasons, there is no evidentialy value that would be added by summoning a multitude of persons who never witnessed the offence being committed?
13. Another ground of appeal is that the learned Judge erred in failing to find that there was no corroborative evidence and that the prosecution's evidence was made up of conflicting testimony. On this ground, the learned Judge expressed:

> ***"A look at the evidence on record reveals that nothing could be further from the truth. PW 1 gave a detailed account of how the appellant started molesting her sexually. PW1 made a report to PW3 and PW 4 came to learn about the appellants behaviour from PW 2 who stated that he not only heard the appellant beating PW1 and ordering her to remove her clothes but, that he even used to hear the sound of the appellant's bed as he sexually assaulted PW1. What PW1 reported to those from whom she sought help was consistent with what she alleged the appellant was doing to her. Even the injuries which PW 1 suffered - being on her thighs and next to her genital parts were not inconsistent with the evidence that the appellant did indeed assault her. PW1's testimony is fully corroborated by the evidence given by all other witnesses namely PW2, PW3, PW4 and 7."***

14. On our part we have been unable to decipher any inconsistency and contradictions on the evidence on record that led to an error of law or miscarriage of justice on the appellant. We concur with the concurrent findings of fact by the two lower courts on this issue. As was emphasized in ***Chemagong vs. Republic, (1984) KLR 213*** at page 219:

> ***"A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of facts arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did. (Reuben Karari s/o Karanja vs. Republic 17 EACA146)"***

15. The appellant contends that the learned Judge erred in law in failing to find that the trial magistrate conducted the trial partially and irregularly and that the appellant was the only bread winner of the family. The fact that the appellant is the sole bread winner for his family is irrelevant as this is not an ingredient for the offence charged. As regards the allegation that the trial was conducted partially and irregularly, it is our considered view that the appellant has not illustrated any basis for this allegation. Mere allegations cannot dislodge the evidence on record as tendered by the prosecution.
16. The appellant contends that his sworn defence and the testimony of DW2, the defence witness, were ignored. This ground was argued before the High Court Judge who observed that the complaint had no merit as both the defence and DW 2's testimony were considered. On our part, we have considered the testimony of DW2 who stated that he knew nothing about the relationship between the appellant and the complainant in relation to the offence. We are satisfied that DW2 had no direct, circumstantial or credible evidential material to the charge facing the appellant. We have also examined the record to analyze if any error of law occurred when the High Court re-evaluated the defence evidence. We concur with the learned Judge's finding that the defence testimony did not shake the prosecution evidence that proved that the appellant committed the offence as charged.
17. A critical issue raised in the memorandum of appeal relates to the qualification of the clinical officer who testified as PW 7. We have examined the record of appeal and it is apparent that when PW 7 testified on 20th November, 2001, he stated that he was a clinical officer. No objection was raised by the appellant as to the competence of PW 7 to give evidence. It is our considered view that even if the testimony of PW 7 is given little or no weight, the testimony of the complainant is

adequate to prove that the appellant committed the offence as particularized in the charge sheet.

18. A further ground raised in this appeal is that the learned Judge erred in failing to find that the witnesses who testified were false witnesses who were instigated by a politician to give evidence against the appellant. We note that through this ground, the appellant is questioning the credibility and veracity of the witnesses who testified. The law is clear that an appellate court would not normally interfere with those findings by the trial court which are based on the credibility of witnesses unless, among other things, no reasonable tribunal could have made such findings. See ***Republic vs. Oyier 1985 KLR 353***. The credibility of the complainant, PW2, P3 and PW4 was not impugned. The real question in this case is an issue of fact – whether the appellant had carnal knowledge of the complainant with the full knowledge that she was his daughter. There is no dispute that the complainant was the daughter of the appellant. Both the trial magistrate and the High Court considered the evidence and made findings of fact associating the appellant to the carnal knowledge of the complainant. It has not been shown that the trial court or the learned Judge misdirected themselves in any material particular. Indeed, there is credible and overwhelming evidence connecting the appellant with the offence as charged.
19. The totality of our consideration of the grounds of appeal and the submissions made by the appellant and the State is that this appeal has no merit and is dismissed.

Dated and delivered at Nyeri this 5th day of February, 2014.

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

.....

JUDGE OF APPEAL

J. OTIENO-ODEK

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR