REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NYERI

Criminal Appeal 186 of 2010

P.K.W…….…….....….APPELLANT

AND

REPUBLIC……RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nyeri (Sergon, J) dated 5th February, 2010

In

H.C.CR.A. NO. 331 OF 2008)

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JUDGMENT OF THE COURT

1. This appeal has caused us considerable anxiety. Considerable anxiety because we have on the one hand a vulnerable minor child aged only six years old whom **Section 31(1)** of the **Sexual Offences Act No. 3 of 2006** (the Act) requires us to protect and her father who has been sentenced to life imprisonment for allegedly defiling her. Considerable anxiety because the two courts below have made a concurrent finding that the child was indeed defiled by her own father. As this type of crime is nowadays, unfortunately, common in this country we suppose due, inter alia, to the decadence of our moral values, one mighty wonder why it should cause us anxiety. Read on to the end and you will see the cause.

2. **P.K.W**, the Appellant was charged before the Senior Resident Magistrate's court at Nyeri with the offence of incest by male contrary to **Section 20(1)** of the **Sexual Offences Act No. 3 of 2006**. The particulars of that charge were that on 8th day of May 2008 in Nyeri District of Central Province, being a male person, he had carnal knowledge of **L.W.K,** a female aged 6 years who was, to his knowledge, his daughter. He was also charged with an alternative count of indecent act to a child contrary to **Section 11(1)** of the same Act. The particulars of that charge were that on the same day and at the place he indecently assaulted the said **L.W.K** a child under the age of 11 years by touching her private parts. He pleaded not guilty to both charges but after trial, he was convicted on the main count and sentenced to life imprisonment. His appeal to the High Court having been dismissed, he has come to this court on a second appeal raising three main grounds of appeal against both conviction and sentence. They are that the first appellate court erred in failing to find that (1) the Appellant's constitutional right to a fair trial under **Section 72(3) (b)** of the retired constitution were violated; (2) that in the absence of spermatozoa in the

complainant's vagina, there was no medical evidence to support the charge of incest; and (3) that his alibi defence was ignored.

3. At the hearing of this appeal the Appellant said he relies entirely on the written submissions he had filed. On the first ground, he argued in those submissions that although he was arrested on 12th May 2008, he was not taken to court until 15th May 2008. He submitted that in the case of **Albanus Mutua Vs Republic, Cr. App. No. 120 of 2004**, which the learned Judge cited, it was held that a violation of the accused person's right under the said **Section 72(3)(b)** leads to automatic acquittal irrespective of the evidence against him. The learned judge therefore erred in sustaining his conviction in the light of the violation of his constitutional rights.

4. On ground 2, he submitted that there was no evidence to support his conviction. The learned judge erred in failing to note that PW2 having been chased from the Appellant's home for misconduct, she was bitter with the Appellant and used their daughter to tramp-up the charge against him. Having considered this point, he said the state counsel correctly conceded the appeal but the learned Judge overruled him and created a non-existent conspiracy by the prosecution to get him off the loop. He wondered how the police who had charged him would later be sympathetic to him.

5. On ground three, the Appellant faulted the first appellate court for failure to adequately consider his defence. He submitted that had that been done, it would have been noted that PW2 actually cajoled the defence witnesses to testify against him.

6. Mr. Kaigai, learned Principal State Counsel, strongly opposed the appeal. He submitted that the minor complainant's evidence was not only clear and consistent but it was also amply corroborated by that of PW2 and the medical evidence that the complainant had been defiled. The two courts below having concurrently made that finding, this court has no option but to dismiss this appeal in its entirety.

7. We have carefully read the record of this appeal and considered these rival submissions. On the first ground of violation of the Appellant's constitutional rights to a fair trial, it is not in dispute that **Section 72(3)** of the former Constitution required people arrested for non-capital offences like the one against the Appellant in this case to be arraigned before court within 24 hours. That requirement is retained under **Article 49 (1)(f)** of our current Constitution which makes it quite clear that except where the 24 hours end outside the ordinary court hours, or on a day that is not an ordinary court day, an arrested person as a suspect in a non capital offence should be taken to court not later than 24 hours of his arrest.

8. That provision is quite clear. We should not try to equivocate or justify any delay on the complexities of the cases or lack of personnel or physical facilities in complying with it as was done in **Paul MwangiMurunga Vs Republic, Cr. App. No. 35 of 2006**, **Eunice Kalama Jabu Vs Republic, Cr. App. No. 327 of 2008** and others. We want to believe that the framers of the Constitution bore in mind our local circumstances before they came up with that provision. Accused persons should be taken to court within the time stated. Failure to do so, however, does not lead to the acquittal of the accused persons irrespective of the evidence against them. It would be a violation of the constitutional rights of the victims of crime and a travesty of justice if that were to be done. Failure to take an accused person to court within the stipulated time entitles him to a claim for damages against the state and/or those who violate his rights. Delay in complying with that requirement can therefore only be a factor to be taken into consideration in the assessment of damages. In the circumstances, we find that the learned Judge was right in rejecting the Appellant's plea for acquittal on account of delay in taking him to court. Consequently ground 1 fails.

9. Grounds 2 and 3 can be considered together as they relate to the evidence in the trial. This being a second appeal, we are not entitled to consider factual issues. The second appellate court is required to only consider issues of law. Besides **Section 361** of the **Criminal Procedure Code**, there are a host of decisions on this point including this court's decision in **Njoroge Vs Republic, [1982] KLR 388.**The second appellate court is bound by the concurrent findings of fact of the two lower court and can only depart from those findings if it is persuaded that no reasonable tribunal could, on the evidence on record, could have come to those concurrent findings. In other words the second appellate court must be shown

that the concurrent findings of the two lower courts were perverse and therefore bad in law— **Christopher Wanyoike Kangethe Vs Republic, Nairobi Criminal Appeal No. 306 of 2005, [2010] eKLR**. To be able to come to that conclusion or otherwise, where an appellant is unrepresented as in this appeal, the second appellate court has no choice but to examine the evidence on record when such ground is raised. In the circumstances, we are in this case obliged to determine whether or not the concurrent findings of the two lower courts, gauged on the evidence on record, are perverse and therefore bad in law.

10. As pointed out, the Appellant complains that as he was not medically examined and there was no spermatozoa found in the complainant's vagina, his conviction was untenable. Moreover, he further argues, in the absence of any evidence of PW2's alleged sickness, failure to report the matter to police for three days is clear proof that the charge against him was a frame-up.

11. As the defence witnesses testified, on learning of the alleged defilement, people in the Appellant's village, in particular DW2, asked the child's mother if indeed the Appellant had defiled their daughter but she did not respond. DW3 testified that although the alleged defilement occurred on a Thursday, the child was in church with the Appellant the following Sunday. We are not told whether or nor her mother was with them. Although significant, that on its own does not displace the allegation of defilement as the Appellant could have forced the child to go with him to church to camouflage his crime. But in cross-examination, that witness said he talked with the child who told him that her mother bought her porridge and a cake to induce her to lie that the Appellant had defiled her.

12. There is also the evidence of the child's teacher, James Maina Mwangi, DW4, who testified that although the incident is alleged to have occurred on 8th May 2008, the child was in school the following day, that is 9th May 2008, with no unusual behavior noted.

13. During the voir dire examination in court, the child appeared traumatised and at times she refused to answer some questions. She had behaved in more or less the same way when Dr. Mutahi was examining her on 13th May 2008. That behavior may be explained in two ways. It may be because the child was indeed defiled or alternatively because she was worried of the consequences of lying in court.

14. Dr. Mutahi did not find any injuries on the child's genitalia. That also does not prove much because if she was defiled on 8th May, any injuries may have healed by 13th May when she was examined.

15. In their analysis of the evidence on record, the two courts below do not seem to have directed their minds to these details. They appear to have placed a high premium on the finding that the child's hymen had been broken.Was this justified? Is hymen only ruptured by sexual intercourse?

16. Hymen, also known as vaginal membrane, is a thin mucous membrane found at the orifice of the female vagina with which most female infants are born. In most cases of sexual offences we have dealt with, courts tend to assume that the absence of hymen in the vagina of a girl child alleged to have been defiled is proof of the charge. That is, however, an erroneous assumption. Scientific and medical evidence has proved that some girls are not even born with hymen. Those who are, there are times when hymen is broken by factors other than sexual intercourse. These include insertion into the vagina of any object capable of tearing it like the use of tampons. Masturbation, injury, and medical examinations can also rupture the hymen. When a girl engages in vigorous physical activity like horseback riding, bicycle riding, and gymnastics, there can also be natural tearing of the hymen. See the Canadian case of **The Queen Vs Manual Vincent Quintanilla, 1999 ABQB 769.**

17. In this case the doctor who examined the complainant child was not asked whether or not the rupture of her hymen was as a result of sexual intercourse or any other factor. As we have pointed out the complainant child aged only six behaved normally after the alleged defilement. That together with her mother's behavior, issues that the two lower courts do not seem to have addressed their minds to, has raised doubt in our minds as to the guilt of the appellant. In other words the concurrent findings of the two lower courts are not fully supported by the evidence on record. Consequently we have no option but to give the appellant the benefit of doubt.

18. Taking all these factors into account, especially the fact that the Appellant had a sour relationship with the child's mother, we believe the evidence of DW2 that the child confessed she was cajoled by her mother to lie against the Appellant. We therefore allow this appeal, quash the conviction and set aside the sentence of life imprisonment. We direct that the Appellant be set free forthwith, unless otherwise lawfully held.

19. As O'Kubasu JA who sat and heard this appeal with us is unable to give his decision in the matter, this judgment is delivered pursuant to the provisions of **Rule 32(3)** of the Court of Appeal Rules.

DATED and delivered at Nyeri this 5th day of July 2012.

K.H. RAWAL

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JUDGE OF APPEAL

D.K. MARAGA

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JUDGE OF APPEAL

I certify that this is a true Copy of the original

DEPUTY REGISTRAR