REPUBLIC OF KENYA

High Court at Machakos

Criminal Appeal 142 of 2011

JOHNSTONE NGEMU NZOMO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original convicting and sentencein TawaResident Magistrate's Court

Criminal Case No. 133/2011 by Hon. J.W. Gichimu,RM on 28/6/2011)

JUDGMENT

The appellant, **Johnston Ngemu Nzomo** was charged before the Resident Magistrate's Court at Tawa with the offence of incest contrary to section 20(1) of the Sexual Offences Act. The particulars were that on 16th April, 2011 at Nzeeni Village, Kisau location in Mbooni East District being a male person caused his penis to penetrate the vagina of **FNN** a female person who was to his knowledge his granddaughter.

Alternatively, he was charged with the offence of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act, particulars being that on the same day and place he intentionally and unlawfully did an indecent act to **FNN** a child aged 13 years by touching her private parts. The appellant denied both counts and the prosecution called a total of seven witnesses in a bid to prove its case against the appellant.

PW1, **FNN** was the complainant. She was aged13 years old at the time. On 16th April, 2011 at 2pm she was at the appellants home, who is her grandfather, when the appellant forced her into his bedroom and proceed to defile her. The complainant bled in the process. The appellant then cleaned the blood on the bed with her pant and pair of socks and ordered her to dispose the same in the toilet. The appellant warned her that if she told anyone about the incident, he would kill her and bury her at a secret place. Oblivious of the warning however, the complainant proceeded to the home of the neighbour **MM** (PW5) from whom she borrowed a cell phone and called her father, **NN** (PW2), the son of the appellant and informed him about what had happened to her. Her father came down from Nairobi the following day and found the complainant at the police station. She had been taken there by **Jonathan Mutua Ngulo** (PW6), the local assistant chief. He later took the complainant to hospital. Prior to this, the complainant had gone to her school, Kimandi Primary School. Whilst in school her teacher, **Jones Mutua** heard pupils talking about the appellant having turned the complainant into his wife by defiling her. A short while later, the village elder, assistant chief and the chief came to the school looking for the complainant. He called for the complainant and together they left.

PW5, **MKM** is a neighbor to the complainant. On 17th April, 2011 she noticed that the complainant was walking with difficulties and crying. When she enquired, the complainant told her that the appellant had defiled her. She then called the complainant's father who also talked to the complainant.

PW6, **Jonathan Mutua,** the assistant chief of Ngoni sub-location, on 17th April, 2011 he received a call from the complainant's father who informed him that the appellant had defiled his daughter. He threatened to kill him unless he was arrested immediately. He visited the complainant's school and picked her. He also arrested the appellant and took him to Mbumbuni Police Station and left them there. On the way back he met the complainant's father. The complainant was subsequently taken to hospital.

She was examined by **Geoffrey Mutua** (PW4) a clinical officer at Kisau sub-district hospital. His examination revealed a haematoma on both labia majora. Her hymen was ascent. There was a whitish discharge. From the high vaginal swab, he noted mortal spermatozoa. His conclusion was that there was evidence of penetration because of high vaginal swab and because of the haematoma on both labia majora.

When put on his defence, the appellant denied the offence. He said that he had been framed because of a land dispute.

The court had having carefully considered the evidence tendered by the prosecution and the appellant, found the prosecution case against the appellant proved beyond reasonable doubt, convicted him and sentenced him to life in prison.

Aggrieved by the conviction and sentence, the appellant lodged the instant appeal on 5 ground to wit;-

§ That the learned magistrate erred in law and fact by convicting him without considering that the evidence tendered was contradictory,

§ That there was bad blood between PW1, PW2, PW3 and the appellant over land,

§ Ehen there was no evidence linking the appellant to the alleged offence

§ key witnesses were not called and his constitutional rights had been violated

When the appeal came before me on 25th June, 2012 for hearing, the appellant submitted and pleaded that this court should release him as he was framed with the case due to disagreements over land, the complainant was his granddaughter whom he had brought up. He could not therefore have committed on her the act complained of.

Mr. Mukofu, learned State Counsel responded on behalf of the state. He vehemently opposed the appeal by submitting that circumstances favoured positive identification. The offence was committed in broad daylight. This was a case of recognition. The age of the complainant was proved. The evidence of the complainant was corroborated by 2 witnesses, a clinical officer and MKM**.** The appellant's conviction was therefore safe.

As required of me as a first appellate court, I have subjected the evidence tendered at the trial to afresh and exhaustive re-evaluation and or assessment so as to reach my own independent conclusion as to the guilt of the appellant.

It is common ground that the complainant is a granddaughter to the appellant. The appellant admits that much. So that if the appellant indeed had sex with the complainant, then he was obviously committing the offence of incest charged. It is also common ground that the complainant was sexually assaulted. Her own evidence was corroborated in material particulars by the evidence of the clinical officer and the neighbour. The clinical officer testified that he examined the complainant and noted tenderness on the thigh region. More important, the complainant had a haematoma on her labia majora. There was also whitish discharge from the complainant's private parts and presence of spermatozoa. The clinical officer too formed the opinion that as a result of his examination, the complainant was penetrated. It is instructive that the clinical officer examined the complainant on 18th April, 2011. This was hardly 2 days after the incident, so that the injuries were fresh.

The complainant's neighbor, **MKM** testified that on 17th April, 2011 she left for church. On the way she saw the complainant walk in pain. When the complainant entered the church, she chose to sit alone at the corner with her legs wide apart. At about 5.30 p.m. she met again with the complainant seated in a farm. She called her and noted that she had been crying. On asking her she owned up and told her that she had been sexually assaulted by her grandfather. No doubt, the behaviour of the complainant was consistent with that of a person suffering from a traumatic experience. Given that she was behaving that way, hardly a day after the incident, it can only mean that indeed the incident did occur.

The issue then is who committed the act on the complainant. The complainant maintained that it was her grandfather, the appellant who did so. The appellant however, vehemently denies and points to being set up in the case over land. However, as correctly observed by the learned magistrate in the judgment, the appellant did not tell the court who was it that had framed him and or whom he had a land dispute with. I may also add that the appellant did not tell the court the genesis of the land dispute if at all. I also doubt very much, that someone would go to the extent of injuring the complainant in her private part merely to set up the appellant. There was presence of spermatozoa in the private parts of the complainant. Would someone have sexually assaulted the complainant merely to frame the appellant with the case" I have my doubts. If that had been the case, the complainant would have been a willing participant. However, from her evidence tendered, the act was involuntary. The clinical officer confirmed the fact of the sexual assault. If indeed it was a set up, what power could the person involved in the set up have had over the clinical officer as to prevail upon him to testify falsely against the appellant" All said and done, I do not think that the appellant was at all set up in the case. Just like the learned magistrate, I find this defence a mere afterthought concocted by the appellant to escape from the consequences of his mischief.

The offence was committed place in broad daylight. Infact it was about 2pm. The appellant and complainant are close relatives. The appellant is a paternal grandfather to the complainant. During the incident, they were in close proximity. Therefore, the circumstances obtaining favoured positive recognition of the appellant by the complainant. Indeed this was a case of recognition as opposed to visual identification of the appellant. The evidence of the complainant as to what transpired was clear and consistent. It is not the kind of evidence that will have been given by a person who did not undergo the harrowing experience, or one who had been coached as the appellant wanted the court to believe. She could not have conjured up the evidence of the appellant taking her underpants and his pair of socks which he had used to clean the blood on the bed and ordered her to dispose off the same in the toilet. At her age, she could not have just come up with such a story. It must have been true. The flow of the complainant's evidence was such that she could not have been tutored on what to say. Even under cross examination, she remained consistent.

On the whole, I am satisfied just like the learned magistrate, that the appellant committed the offence. His conviction was not in doubt at all. The age of the complainant was proved by cogent

evidence. She is below the age of 18 years. Accordingly, the sentence imposed was legal.

The appeal on the whole lacks merit. It is dismissed in its entirety.

DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **15TH** dayof **OCTOBER, 2012.**

ASIKE-MAKHANDIA

JUDGE