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Date Delivered:	02 Dec 2011
Case Class:	Criminal
Court:	High Court at Nyeri
Case Action:	Judgment
Judge:	Joseph Kiplagat Sergon
Citation:	D. N. N v REPUBLIC [2011] eKLR
Advocates:	-
Case Summary:	-
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Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL NO.322 OF 2007

D. N. N...APPELLANT

-versus-

REPUBLIC...PROSECUTOR

(Being an Appeal from the Judgment of Hon. Ndung'u H. N. Ag., Senior Principal Magistrate,

in Criminal Case No.2491 of 2005 delivered on 6th March, 2007 at Nyeri)

J U D G M E N T

D. N. N., the appellant herein, was tried on a charge of three counts. The first count is in respect of the offence of Incest by Male Contrary to Section 166(1) of the Penal Code. It is alleged that on 20th

October, 2005 in Laikipia District of the Rift Valley Province being a male person he unlawfully had carnal knowledge of P. W. N. a female person who was to his knowledge his daughter. In Count II the appellant faced a charge of Indecent Assault on female contrary to Section 144(1) of the Penal Code. In Count III the appellant was accused of assault causing bodily harm contrary to Section 251 of the Penal Code. After undergoing a full trial, the appellant was convicted in Counts I and II but was acquitted in Count III. In Count I he was sentenced to 14 years imprisonment while in Count II he was sentenced 5 years imprisonment. He was dissatisfied with the decision hence this appeal.

On appeal the appellant put forward the following grounds in his petition:

"1. That I pleaded not guilty to the charge.

2. That the trial magistrate erred in law and facts by failing to find that complainant did not scream for help as the place she claimed that she was defiled there were neighbours around and to make the matter worse my wife was at home during the material day of the alleged offence.

3. that the learned trial magistrate erred in law and facts by failing to consider that I had requested complainant's mother to come and testify in court as my crown witness but she came late after I have already given out my defence.

4. That the learned trial magistrate erred in law and facts by relying on P.W.1's evidence which said that she (P.W.1) was defiled during the day which was pure lies as the very material day my wife was at home nursing her newly born baby.

5. That the learned trial magistrate erred in law and fact by relying on P.W.2's evidence which said that the scratches on P.W.1's face were caused by the accused person during the struggle. This statement had no supportive evidence to show that there was struggling between P.W.1 and 1.

6. That the learned trial magistrate erred in law and facts by failing to find that these was a misunderstanding between P.W.2 and I for no apparent reason.

7. That the trial court erred in law by failing to consider my defence adequately.

8. ***That I wish to be available at the hearing of this appeal."***

The appellant filed and relied on written submissions. The prosecution's case before the trial court was supported by the evidence of five witnesses. P. W. (P.W.1) told the trial court that she was at home with her father, (the appellant) on 20th October, 2005. The complainant's (P.W.1's) mother was away. The appellant is said to have summoned P.W.1 into the house, where he removed P.W.1's clothes including her under pants. He unzipped his trouser and then placed her on the bed before raping her for about 20 minutes. P.W.1 said the appellant had developed the habit of raping her whenever her mother was away from the home. P.W.1 said she dressed up after the ordeal and went to inform her teacher of what had transpired. The complainant said her mother found the appellant doing the act on another date. P.W.1 teacher reported the complaint to Nanyuki Police Station who referred her to Nanyuki District Hospital. P.N.M. (P.W.2), a class teacher of P.W.1, told the trial court that she noticed P.W.1 had some scratch marks on her face while she was taking the class roll call on 25th October, 2005. Upon inquiring from her, P.W.2 said P.W.1 told her that she had been defiled by her father (appellant) on 20th October, 2005 and that the appellant had scratched her face when she refused to go to bed with him. P.W.2 informed the school headmaster who in turn took steps to report to the police and take the girl to hospital. On 11th November, 2005, P.C. Robert Rono (P.W.3) arrested the appellant. Dr. Walter Kayaywa (P.W.5) examined the complainant. He noted that the complainant had bruised labia and that she had bacterial infection. P.W.5 concluded that P.W.1 had been penetrated.

When put on his defence, the appellant denied committing the offence. He claimed that P.W.1 and her mother had a quarrel on 20th October, 2005. In the process P.W.1 was facially injured by her mother before leaving for school. The appellant said the complainant did not come back that evening. He later learnt that she had been taken to the police by her teachers. The appellant claimed that his wife had a grudge with one of P.W.1's teachers by the name Miss Mugambi.

The learned Senior Principal Magistrate considered the evidence and came to the conclusion that the prosecution had established its case beyond reasonable doubt. The trial magistrate further considered the appellant's defence and found it to be of no evidential value.

The main ground argued on appeal is that there was no cogent evidence to link the appellant with the offence. It is the submission of Miss Ngalyuka that the evidence of P.W.1 was corroborated by the medical evidence tendered by P.W.5. I have considered the rival submissions. It is not in dispute that the complainant was defiled. The question is whether there was credible evidence to link the appellant with the offence. The medical evidence tendered indicates that the complainant had bacterial infection. The appellant was not medically examined to establish whether he was the person who infected the complainant with the infection. I do not know why the appellant was not subjected to medical examination. A careful consideration of the evidence of P.W.1 will reveal that the complainant had alleged she had been defiled many times by the appellant. She claimed that at one given time, her mother found the appellant on top of her. The question which has persisted in my mind is why was the

complainant's mother not summoned to testify. P.W.1 claimed that on the date i.e. 20th October 2005, she was raped for 20 minutes after which she quickly put on her clothes and ran out to hide in the bush. The question which remains unanswered is if the complainant had been defiled previously on many occasions then what prompted her this time round to run and hide in the bush" According to P.W.1 she reported the incident to her teacher the same day and that the teachers took action to inform the police. That piece of evidence is contradicted by P.W.2 who said the complainant reported the incident to her on 25th October, 2005. It is a matter of common notoriety that 20th October every year is a Public Holiday hence it is inconceivable for any teacher or pupil to be at school. In my view the evidence of P.W.1 appears to be unreliable and not credible. Her evidence needs corroboration. Her evidence could not be corroborated by the medical evidence because that piece of evidence did not create the link between the offence and the appellant.

In the end, I find that there was no credible evidence to sustain the appellant's conviction. I will give the appellant the benefit of doubt. The appeal is allowed. The conviction and sentence are quashed and set aside respectively. The appellant is set free forthwith unless lawfully held.

Dated and delivered this 2nd day of December, 2011.

J. K. SERGON

JUDGE

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