REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CRIMINAL APPEAL NO. 27 OF 2019

JOHN NJUKI KITHUMBU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal against conviction and sentence by Hon. Omwange J. in Siakago

Criminal Case (Sexual Offence) No. 16 of 2017 delivered on 10.09.2019).

JUDGMENT

1. The appellant herein filed the instant appeal wherein he challenged his conviction and sentence by the trial court in Siakago CM's Criminal Case No. XX of 2017. He was charged with the offence of incest contrary to section 20(1) of the Sexual Offences Act, No. 3 of 2006. Particulars of the offence being that on diverse dates between 01.09.2016 and 11.05.2017, at [particulars withheld] village, Riandu Location in Mbeere North Sub–County within Embu County, intentionally and unlawfully committed an act which caused his genital organ namely penis to penetrate the genital organ namely vagina of G. M. N., a girl aged eleven years who to his knowledge was his daughter. And an alternative charge of an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006; and particulars being that on diverse dates between 01.09.2016 and 11.05.2017 at [particulars withheld] village, Riandu Location in Mbeere North Sub–County intentionally and unlawfully committed an act which caused his genital organ namely penis to come into contact with the genital namely vagina of G.M.N., a child aged 11.

2. The appellant was tried and convicted of the offence of incest contrary to Section 20(1) of the Sexual Offences Act and sentenced to 20 years imprisonment.

3. It is that conviction and sentence that necessitated the instant appeal wherein he raised Six (6) merged grounds of appeal as set out in the petition of appeal filed on 24.09.2019.

4. At the hearing of the appeal, the parties elected to rely on their written submissions to argue the appeal.

5. The appellant argued that the prosecution witnesses' evidence was contradictory, inconclusive and equally unreliable thus the same could not form a sound basis for conviction. To support his case, he quoted section 164 of the Evidence act whereby he stressed the aspect of inconsistency which renders evidence inconclusive.

6. The respondent on the other hand submitted orally conceding that the conviction of the appellant was not safe since the complainant was not sure of the date when she was defiled. They proceeded to submit that although her age was proved by her birth certificate, it is not the same age that was in the charge sheet and the same is not the age that she gave before the court. It is their case that sufficiency of evidence of a single identifying witness who is the victim thus was wanting. Further that, the teacher who saw the incident did not testify; reliance was made on the case of **Elphas Musundi v Republic HCCRA No. 128 of 2017.**

7. The duty of this court while exercising its appellate jurisdiction was set out by the Court of Appeal in **Okeno v Republic [1972] E.A. 32** and re-stated in **Kiilu and another v R (2005) 1 KLR 174** and is to submit the evidence as a whole to a fresh and exhaustive examination, weigh conflicting evidence and draw its own conclusions. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses. Further, the court should be alive to the principle that a finding of fact made by the trial court shall not be interfered with unless it was based on no evidence or on a misapprehension of the evidence or that the trial court acted on the wrong principles (See **Gunga Baya & another v Republic [2015] eKLR).**

8. In the re-evaluation of the trial court's evidence, there is no set format to which this court ought to conform to, but the evaluation should

be done depending on the circumstances of each case. What matters in the analysis is the substance. (See the Supreme Court of Uganda's decision in **Uganda Breweries Ltd v. Uganda Railways Corporation [2002] 2 EA 634** and **Odongo and Another v Bonge Supreme Court Uganda Civil Appeal 10 of 1987 (UR)** as was quoted with approval by Odunga J in **Alex Nzalu Ndaka v Republic [2019] eKLR).**

9. I have considered and analyzed the evidence which was tendered in the trial court by both the appellant and the prosecution following the principles in **Okeno v Republic (supra)** and re-stated in **Kiilu and another v R (supra)**), the grounds of appeal and the written submissions by the appellant herein, and identified only one issue for determination; whether the case was proved beyond reasonable doubt.

10. It must be appreciated that under Section 107(1) of the Evidence Act, the burden of proof is on the prosecution to establish every element in a criminal charge beyond reasonable doubt. This was well buttressed in the principle in the cases of **Woolington v DPP 1935 AC 462** and **Miller v Minister of Pensions 2 ALL 372-273.**

11. Section 120(1) of the Sexual Offences Act provides that: -

> ***"Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years: Provided that, if it is alleged in the information or charge and proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person."***

12. The section above creates the offence and ingredients of incest and also prescribes the punishment in the event that it is proven that the complainant is a minor.

13. As such, from the above definitions, the prosecution had a burden of proving;

> ***i. Knowledge that the person is a relative.***
>
> ***ii. Penetration or indecent Act.***
>
> ***iii. Age of the complainant.***

14. It is not in doubt that the appellant is the father of the complainant and the same is not controverted.

15. On the age of the complainant, PW1 testified that she was in Class Eight (8); this was on the day she gave evidence in court which was on 18.07.2018 while the alleged offence took place on diverse dates between 01.09.2016 and 11.05.2017. PW1 further testified that she was 13 years of age at the time of testimony and further, a Birth Document was produced in evidence which showed that the minor herein was born on 01.04.2003.This means that at that time of the offence, PW1 was still a minor; the difference in dates or acquisition of late birth certificate as opined by the prosecution notwithstanding.

16. In the case of **Edwin Nyambaso Onsongo v Republic (2002) eKLR**, in which the court cited the case of **Mwolongo Chichoro Mwanyembe v Republic, Mombasa Criminal Appeal No. 24 of 2015 (UR)** the Court of appeal held that:

> ***….the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents, guardian or medical evidence among other forms of proof…..***

17. As such, I am satisfied that the complainant was a minor which satisfies the legal requirement.

18. In regards to whether there was penetration, Section 2 of the Sexual Offences Act defines penetration to mean the ***'partial' or complete insertion of the genital organs of a person into the genital organs of another.***

19. In this case, trial court having conducted *voire dire* and satisfied itself that the minor appreciated the aspect of telling truth and thus PW1 proceeded to give a detailed evidence of how the incident occurred. PW1 testified on 18.07.2018 and at that time, she was 13 years old and was in class eight (8); where she proceeded to state that

> ***"…….At night my father came carried me from the bed room where I was sleeping to his bedroom. He took off my clothes starting with a skirt and then removed my pant. He did bad manners on me. He off took his male genital organ into my female genital organ. (The subject points towards her female genital organ). He then left me sleeping in his bed until morning when I woke up and went to school and I informed Mrs. Kariuki our mathematics teacher. I had developed stomach pains and she told the deputy and headmaster who called the area chief. And after interrogation I was taken to the police station from where I was taken to the hospital Siakago District Hospital and was treated and the area chief was given the medical documents.***

20. PW3, Dr. John Mwangi produced a P3 medical form as Exhibit 2. The reports show that the complainant was sexually abused and describes in detail injuries as follows:

> ***"On vaginal examination, there was an old perennial tear and an old perforated hymen. Lab examinations were done; there were some pus cells on HVS and bacterial infection. My conclusion was that a forceful vaginal penetration….I can't tell the age***

of the injury but they were not fresh. The perennial area doesn't normally have a tear when it's not forceful."

21. The complainant gave a graphic account of all that transpired. Even without corroboration her evidence was cogent enough for the court to return a verdict of guilty. It is now well established that the oral evidence of a single witness is indeed sufficient to warrant a conviction. (See **George Kioji v R Nyeri Criminal Appeal No. 270 of 2012** (unreported). The court was of the view that:

> ***"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 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."***

22. The prosecution did submit that the evidence was contradictory; the Uganda Court of Appeal in **Twehangane Alfred v Uganda, Crim. App. No 139 of 2001, [2003] UGCA, 6** quoted with approval by the Court of Appeal of Kenya in **Erick Onyango Ondeng' v Republic [2014] eKLR**. The Uganda Court of Appeal held:

> ***"With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."***

23. Further, in **Joseph Maina Mwangi v Republic CA No. 73 of 1992** (Nairobi) **Tunoi, Lakha & Bosire JJA** held: -

> ***"In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the working of Section 382 of the Criminal Procedure Code, viz whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentence."***

24. Therefore, each case must be considered on its own particular circumstances. There are cases where the inconsistency is so minor that clearly it will be of little effect and certainly would not necessarily mean that the witness is lying or that his testimony cannot be relied on. The court must take all the evidence and all the circumstances of the case into account in deciding whether to accept a witness's evidence or any part of his testimony. (See **Nyakisia v. R. E. A. C. A. Crim. App. 35-D-71; -/5/71**; Duffus P., Spry v. P. & Lutta J. A., in the East African Court of Appeal).

25. This court has subjected the evidence adduced before the trial court to a fresh scrutiny and though it is true that there were inconsistencies in the evidence of the witnesses more so the complainant, I find that the complainant having positively identified the accused and the fact that PW3 confirmed the injuries on the complainant, the mere fact that the minor could have forgotten the exact dates did not take away the culpability of the appellant being responsible for committing the offence he was charged with, of incest.

26. PW2, Julieta Njagi, the area assistant chief stated that she received call from the head teacher where the child schools informing her that the complainant was being defiled by her father and that he had been defiling her since the previous year's 3rd term. The matter was reported at Siakago Police Station and thereafter, the complainant was taken for medical exanination. That the mother of the subject had been chased away after having found that the appellant herein was defiling the first-born daughter. That she had known the appellant since 1990.

27. PW3, Dr. John Mwangi stated that he examined the complainant aged about 11 years having been referred from the OCS Siakago Police Station; that upon vaginal examination, there was an old perennial tear and an old perforated hymen and that there were some pus cells on HVS and bacterial infection. He then concluded that there was a forceful penetration in as much as he could not determine the age of injury. From the above premises, I am convinced that the complainant was sexually assaulted by the appellant.

28. As for the sentence, the appellant was sentenced to 20-years imprisonment; the provision of law under which he was charged with, provides for life imprisonment.

29. The legal position on sentencing was stated succinctly by the Court of Appeal for East Africa in the case of **Ogola S/O Owoura Vs Reginum (1954) 21 270** as follows: -

> ***"The principles upon which an Appellate Court will act in exercising its jurisdiction to review sentences are firmly established. The Court does not alter a sentence on the mere ground that if the members of the Court had been trying the appellant they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless, as was said in James V R., (1950) 18 E.A.C.A 147:***
>
> ***"It is evident that the Judge has acted upon some wrong principle or overlooked some material factor."***
>
> ***To this we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case: R. v Shershewky, (1912) C.C.A. 28 T.L.R. 364."***

30. The sentence imposed despite being harsh according to the appellant, was within the law and within the discretionary powers of the trial court. This court cannot interfere with the exercise of the said discretion as the appellant has not justified the interference. He has not proved that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong

principle.

31. In the end, it is my finding that the conviction and sentence of the trial court was proper and lawful in the given circumstances.

32. In view of the above, I find that the appeal has no merit and I hereby dismiss it.

33. It is so ordered.

Delivered, dated and **signed** at **Embu** this **26th** day of **January, 2022.**

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the Respondent