



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CRIMINAL APPEAL NO E016 OF 2020

GORDON OTIENO NYAMBADE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the Judgment of Hon F. M. Rashid (SRM))

delivered at Winam Senior Principal Magistrate's Court

in Sexual Offence No 04 of 2019 on 18th May 2020)

JUDGMENT

INTRODUCTION

1. The Appellant herein was charged with the offence of incest contrary to Section 20(1) of the Sexual Offences Act No 3 of 2006. He was also charged with an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No 3 of 2006. The Learned Trial Magistrate, Hon F. M Rashid, SRM convicted him of the main charge. He sentenced him to life imprisonment. She did not therefore make any finding on the alternative charge.
2. Being dissatisfied with the said Judgement, on 18th December 2020, the Appellant lodged the Appeal herein. His Petition of Appeal was undated. He relied on four (4) grounds of appeal.
3. His undated Written Submissions were filed on 8th February 2022 while those of the Respondent were dated and filed on 21st February 2022.
4. This Judgment herein is based on the said Written Submissions which parties relied upon in their entirety.

LEGAL ANALYSIS

5. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.
6. This was aptly stated in the case of **Selle & Another vs. Associated Motor Boat Co Ltd & Others [1968] EA 123** where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses and thus make due allowance in that respect.
7. Having looked at the Grounds of Appeal and the respective Written Submissions, it appeared to this court that the issues that had been placed before it for determination were as follows:-
 - a. **Whether or not the Prosecution proved its case beyond reasonable doubt.**
 - b. **Whether or not in the circumstances of this case, the sentence that was meted upon the Appellant by the Trial Court was lawful and/ or warranted.**

8. The court dealt with the two (2) issues under the following distinct and separate heads.

I. PROOF OF PROSECUTION'S CASE

9. Grounds of Appeal Nos (2) and (4) of the Petition of Appeal filed on 18th December 2020 were dealt with together under this head as they were all related.

A. RELATIONSHIP BETWEEN THE COMPLAINANT AND THE APPELLANT

10. The Appellant submitted that the relationship between the Complainant, Iddah Anyango (hereinafter referred to as "PW 1") and himself was not proven. He argued that PW 1's evidence was marred with contradictions and inconsistencies which created doubt that ought not to have been relied on. He contended that minors had a tendency of calling elders, "mum" or "dad".

11. On its part, the State submitted that PW 1 testified that the Appellant was her step-father and that she had been living with him since the year 2018. It added that it was apparent from the evidence that the mother was not willing to testify against him as he was her husband and PW 1 indicated to court that each time she reported the matter to her, she took no action.

12. It was its contention that Brenda Luvembe, a Clinician at Jaramogi Oginga Odinga Teaching and Referral Hospital (hereinafter referred to as "PW 2") also testified that PW 1 informed her that the Appellant was her step-father.

13. Notably, the Trial Court conducted a *voire dire* examination and PW 1 was found fit to give sworn evidence. She testified that in December 2018, she was living with her step-father, who was the Appellant herein. PW 2 also testified that PW 1 told her that she had been defiled by her step-father. PW 1's mother did not testify.

14. Having critically analysed the evidence on record, this court was satisfied that the relationship between PW 1 and the Appellant of step-father and step-daughter was proven to the required standard.

B. IDENTIFICATION

15. None of the parties submitted on the issue of identification. Notably, PW 1 testified to have lived with the Appellant since 2018 as he was her step-father. This court was therefore convinced that the Appellant was well known by PW 1 and was therefore positively identified.

C. AGE

16. The Appellant placed reliance on the case of **Joseph Kuoti vs Republic [2014]eKLR** where the court stated that it is trite law that the age of a victim can be determined by medical evidence and another cogent evidence. He further cited **Francis Omuoroni vs Republic Court of Appeal Cr No 02 of 2000** (eKLR citation not given) where the court held that in defilement cases medical evidence is paramount in determining the age of a victim and the doctor was the only one who could professionally determine and that in the absence of any other evidence, age could be proven by birth certificate, victim's parents or guardians and by way of observation and common sense.

17. He argued that, however, in the instant case, none of the aforesaid documents were adduced and the Learned Trial Magistrate solely relied on PW 1's evidence that she was born on 2nd May 2006 which was contrary to the date indicated on the Post Rape Care (PRC) form which showed her date of birth as 5th August 2005.

18. He pointed out that he was not disputing that PW 1 was subjected through a *voire dire* examination but argued that her testimony was untruthful and therefore cast doubt on its credibility for the court to rely on it. In this regard, he placed reliance on the cases of **John Otieno Oloo vs Republic** and **Gabriel vs Republic** (eKLR citations not given) where the common thread was that courts should ascertain the competence of a child to give evidence and ensure that a child understands the difference between truth and falsehood. He was emphatic that PW 1's age was not proven.

19. On its part, the State submitted that PW 1 testified that she was thirteen (13) years old and the Trial Court was satisfied by this position. It placed reliance on the case of **Musyoki Mwakavi vs Republic High Court Criminal Appeal No 172 of 2012** (eKLR citation not given) where the court held that apart from medical evidence, the age of a complainant may also be proved by birth certificate, the victim's parents or guardian and observation or common sense.

20. Notably, during the *voire dire* examination, PW 1 testified that she was thirteen (13) years of age and while testifying, she stated that she was born on 2nd May, 2006. The estimated age on the charge and the PRC form was thirteen (13) years of age.

21. Notably, no birth certificate or baptismal card was produced in court to prove PW 1's age. No age assessment was done. If the same was done, the Prosecution did not tender in evidence an age assessment report. However, this court was not persuaded by the Appellant's submissions that PW 1's age had not been proved to the required standard.

22. Indeed, the fact that the mother did not testify and there was no baptismal card or Certificate of Birth did not mean that PW 1's age was not proven. In the absence of documentary evidence, observation and common sense can assist the court in determining a minor's age. In the case of **Joseph Kieti Seet vs Republic [2014] eKLR**, the court therein held that a minor's age could be proved by common sense, a position this court agreed with.

23. In the case of **Evans Wamalwa Simiyu vs Republic [2019] eKLR**, the court therein accepted the doctor's indication of the minor's

approximate age in the P3 Form to have been the apparent age of that minor. This court fully associated itself with the said holding.

24. Going further, the Trial Court conducted a *voire dire* examination of PW 1 where she observed that PW 1 understood the meaning of telling the truth and therefore understood the meaning of oath and thus directed that she adduces sworn evidence.

25. As this court did not have the benefit of seeing her, common sense leads this court to conclude that the Trial Court did not err when it determined that PW 1 was (13) years of age at the material time of the incident and it was satisfied that she was a child.

26. This court came to the firm conclusion that the discrepancy attributed to by the Appellant regarding PW 1's age was immaterial to have amounted to a material contradiction. This is because the sentence of incest involving children below eighteen (18) years is the same. The discrepancy in PW 1's age was therefore inconsequential.

D. PENETRATION

27. The Appellant submitted that the Learned Trial Magistrate failed in not calling crucial witnesses such as the doctor who treated the child, PW 1's mother, the investigating and arresting officers. He placed reliance on the case of **Michael Kinuthia Muturi vs Republic Criminal App No 51 of 2002** (eKLR citation not given) where the court stated that although no particular number of witnesses was required to prove a fact, the failure to call certain witnesses where the evidence on record was not sufficient to sustain a conviction would attract adverse inference. He was emphatic that the omission of the aforesaid witnesses affected the proof of PW 1's defilement and that her testimony ought to have been corroborated by an adult.

28. On its part, the State submitted that the Prosecution proved its case beyond reasonable doubt. It added that the witnesses that were called by the prosecution were sufficient to prove the case against the Appellant. It pointed out that it has been held by courts that failure to call the investigating and arresting officers was not fatal to a criminal charge as was held in the cases of **Kenneth Kimnetich Sol vs Republic [2014]eKLR** and **Kiriungi vs Republic (2009) KLR 638**.

29. It further submitted that the PRC form produced by the Prosecution was conclusive medical evidence in the absence of a P3 form as it records everything in a P3 form. It was emphatic that failure to call the doctor was not prejudicial as the medical evidence tendered by the clinical officer was sufficient.

30. It further contended that in criminal cases involving sexual offence, if the evidence is that of the alleged victim of the offence only, the court can still receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth. It added that in the instant case the victim's evidence was corroborated by that of PW 2.

31. PW 1 testified that on 18th December 2018, the Appellant came from work and started caressing her while threatening her that if she ever reported the same to her mother, he would kill her. She testified that he proceeded to defile her on that date and two (2) other occasions. When she reported the incident to her mother, she did not take any action whereupon she reported the matter to Nyamasaria Police Station. She was then taken to Agape Children's Home.

32. Having critically analysed the evidence on record, this court was satisfied that the Learned Trial Magistrate did not err when she believed the evidence of PW 1. The consequence of whether testimony was sworn or unsworn was pertinent. Ordinarily, sworn evidence does not need corroboration.

33. Notably, Section 124 of the Evidence Act Cap 80 (Laws of Kenya) provides:

“Provided that where in a criminal case involving a sexual offence the only evidence is that of a child of tender years who is the alleged victim of the offence, the court shall receive the evidence of the child and proceed to convict the accused person if, for reasons to be recorded in the proceedings the court is satisfied that the child is telling the truth.

34. Even so, PW 1's evidence was corroborated by PW 2 who testified that on examining PW 1, she observed that her hymen was absent, there were healing bruises around the labia and there was a greenish yellow discharge. She added that a swab that was done showed pus. She was found to have had STI and her HIV test was positive. She was emphatic that there was evidence of penetration.

35. Section 108 of the Evidence Act Cap 80 (Laws of Kenya) states that:-

“The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”

36. Further, Section 109 of the Evidence Act stipulates that:-

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

37. The Appellant's defence was simply a denial. He was obligated to call a witness to corroborate his *alibi* defence to prove that he was at work on the material dates so as to rebut the Prosecution's evidence, the burden of proof having shifted to him. Having failed to call such a witness, he failed to prove his *alibi* evidence and hence his evidence failed to outweigh the Prosecution's evidence on defilement. This court was thus persuaded that the Prosecution proved its case beyond reasonable doubt.

II. SENTENCE

38. Grounds of Appeal Nos (1) and (3) of the Petition of Appeal filed on 18th December 2020 were dealt with under this head.

39. The Appellant submitted that the Learned Trial Magistrate erred in both fact and law when he failed to exercise discretion in light of the Court of Appeal Rules on discretion during sentencing.

40. On its part, the State submitted that the sentence imposed was lawful as provided in the Sexual Offences Act.

41. Section 20(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, 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 for 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.” (emphasis court).

42. The Trial Court did not therefore err when it convicted the Appellant to life imprisonment as that was the sentence that was stipulated by the law. However, use of “**liable**” does not connote a mandatory sentence. Its use connotes that the trial court has discretion to impose a lesser sentence where the circumstances so dictate. This was the holding in the case of **Daniel Kyalo Muema vs Republic [2009] eKLR** where it stated that the words “shall be liable to” did not in their ordinary meaning require the imposition of the stated penalty but merely expressed the stated penalty which could be imposed at the discretion of the court.

43. Guided by the above decision, a person convicted of the offence of incest ‘is liable’, upon conviction to life imprisonment imprisonment under Section 20(1) of the Sexual Offences Act. As the same does not stipulate refer to a mandatory minimum sentence, the court has discretion to impose a lesser sentence, or a fine.

44. In the premises, Grounds of Appeal Nos (1) and (3) of the Petition of Appeal filed on 18th December 2020 were merited and the same be and are hereby allowed.

DISPOSITION

45. For the foregoing reasons, the upshot of this court’s decision was that the Appellant’s Petition of Appeal that was lodged on 18th December 2020 was partially merited and the same be and is hereby upheld to the extent of reduction of the sentence. The Appellant’s conviction be and is hereby upheld as it was safe to do so. However, his sentence of life imprisonment be and is hereby reduced to twenty five (25) years imprisonment.

46. It is hereby ordered that the time the Appellant spent in custody during trial be taken into consideration when computing his sentence as provided in Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya).

47. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 26TH DAY OF APRIL 2022

J. KAMAU

JUDGE