REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCRA NO. 24 OF 2019

PMK.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(From the original conviction and sentence of Hon. Otieno J. (RM)

in Makueni Senior Principal Magistrate's Court SPMCR *No. 33 of 2018*

delivered on 20th February, 2019).

JUDGMENT

1. The Appellant was charged in the magistrates' court with incest contrary to section 20(1) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on 2nd October 2018 at 01:00 hours at [Particulars Withheld]village Mukuyuni Sub-location in Makueni Sub-county within Makueni County being a male person caused his penis to penetrate the vagina of MM(*name withheld*) a person who was to his knowledge his grandmother aged 77 years.

2. In the alternative, he was charged with committing an indecent act with an adult contrary to section 11(A) of the Sexual Offences Act, whose particulars were that on the same day and place intentionally touched the vagina of MM with his penis against her will.

3. He denied both charges. After a full trial, he was convicted of the main count of incest and sentenced to serve twelve (12) years imprisonment.

4. Dissatisfied with the decision of the trial court, the Appellant has come to this court on appeal relying on five (5) amended grounds of appeal as follows –

1. The trial court erred in law and fact by convicting him on the basis of a defective charge sheet.

2. The trial court erred in law and fact in that, due process was not adhered to when the Appellant was arrested.

3. The trial court erred in law and fact by failing to take note that the prosecution did not prove its case beyond reasonable doubt.

4. The trial court erred in law and fact in that due process was not sustained upon investigation of the offence.

5. The trial court erred in law and facts when it failed to take into consideration that the prosecution failed to produce essential witnesses during the course of the trial.

5. The appeal proceeded by way of filing written submissions. I have perused and considered the submissions of both the Appellant and the Director of Public Prosecutions.

6. This being a first appeal, I have to start by reminding myself that I am duty bound to re-evaluate the evidence on record and come to my own independent conclusions and inferences – See **Okeno –vs- Republic (1972) E.A 32.**

7. I have re-evaluated the evidence on record. In establishing their case, the prosecution called four (4) witnesses. In his defence the

Appellant rendered sworn testimony.

8. The first issue is whether the Complainant who testified as Pw2 was penetrated sexually. In this regard, I note that she testified that she is an old woman aged about 77 years and went to visit her daughter's home and was alone in the house at 9pm sleeping, when someone pushed the door open after knocking the window. She was then pulled by this person outside the house and raped for 10 minutes and left for dead. She screamed and proceeded to another daughter's house, reaching there about 1:00 am. That other daughter was Pw3 AN.

9. On arrival she narrated the incident to Pw3 and was taken to hospital then to the police. She was treated at Makueni hospital and Pw1 Dr. Alex Makau produced the treatment notes and medical examination (P3) form, in which it was noted that Pw2 had bruises on the neck and was bleeding in vaginal wall and orifice, and the injuries suffered were classified as harm.

10. Having re-evaluated the evidence on record, I find just like the trial magistrate, that indeed the prosecution proved beyond reasonable doubt that Pw2 the Complainant was forcefully penetrated sexually on the alleged day.

11. The second issue is whether the person who sexually penetrated the Complainant that night was the Appellant. On this, I note that the incident occurred at night. Thus the court has to warn itself that it is important for the trial court to be satisfied that the circumstances were favourable for positive identification to avoid the possibility of mistaken identity. As the Appellant was known to the Complainant before, this is a case of recognition. In **Wamunga -vs- Republic (1989) KLR 424** the court reiterated the principle that recognition is more reliable than identification but there is still need for caution as mistakes can be made by even close relatives.

12. In the present case the Complainant must have been scared by the incident, as she was alone at night. The light in the house and outside was also not described by her except for a mention of moonlight outside, whose intensity was not described by the Complainant. However, according to the Complainant both herself and the culprit talked during the incident. These were two people who knew each other well as grandmother (*Complainant*) and grandson (*the Appellant*). Thus in my view there was also evidence of voice identification – see **Libambula –vs- R (2003) KLR 688**, which is also legally acceptable.

13. In my view, the evidence on record was sufficient to prove that the Appellant was identified by the Complainant both visually and by voice as there was moonlight and verbal exchange between them. I thus find that the prosecution proved beyond reasonable doubt that the Appellant was identified as the culprit.

14. The third issue is on the relationship of the Complainant and the Appellant. It is not disputed that the Complainant was the grandmother of the Appellant therefore the blood relation between them was proved by the prosecution beyond reasonable doubt, that the Appellant and Complainant were grandson and grandmother, which satisfied the requirements under section 20(1) of the Sexual Offences Act.

15. Lastly the Appellant raised a defence of alibi. Indeed, an accused person does not have the burden to prove such defence of alibi. I am guided by the case of **Leonard Asineth –vs- R (1957) E.A 566** in which it was held that when a prisoner raises a defence of alibi as an answer to a charge, he does not assume any burden of proving that answer.

16. However, even when a defence of alibi is raised, the court is entitled to consider all the evidence on record for the prosecution and the defence, and may disbelieve the alibi defence. In this regard, in the case of **A.M.M –vs Republic (2015) eKLR** in which the case of **Kossam Ukuno –vs- Republic (2014) eKLR** was cited, the court held that –

> **"the defence of alibi may be rejected as an afterthought when it is not raised at the earliest opportunity and when weighed against all other evidence if it is established that the Appellant's guilt has been established.**

17. In the present case, I am of the view that the prosecution evidence on record displaced the defence of alibi raised by the Appellant. His allegation also that he had a land dispute with the Complainant did not hold water as he did not attempt to identify the subject land and infact went further to state that he did not own any land. I thus dismiss the Appellant's alibi defence.

18. I thus find no merits in the appeal against conviction and will uphold the conviction.

19. With regard to sentence, the trial court imprisoned the Appellant for 12 years. Section 20(1) of the Sexual Offences Act provides as follows –

> **20(1) A 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.**

20. In the present case where the Appellant had forceful carnal knowledge of a defenceless old woman, strangled her by the neck, dragged her out of the house at night and caused serious lacerations to her genital organs, in my view the sentence imposed by the trial court was neither harsh nor excessive. I will uphold the sentence.

21. I thus find no merit in the appeal. I dismiss the appeal and uphold both the conviction and sentence of the trial court.

DELIVERED, DATED AND SIGNED THIS 17TH DAY OF MARCH 2021 IN OPEN COURT AT MAKUENI.

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GEORGE DULU

JUDGE