REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL NO 14 OF 2020

KOK.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the Judgment of Hon C.L. Yalwala (PM) delivered at Maseno in Principal Magistrate's Court in Criminal Case No 51 of 2018 on 30th June 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 and an alternative charge of committing an indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act.

2. The particulars of the main charge were that on diverse dates between 13th August 2018 and 17th August 2018 in [particulars withheld] sub-location, Seme sub-county within Kisumu County, he unlawfully and intentionally caused his penis to penetrate the vagina of EAO a female juvenile aged fourteen (14) years who was to his knowledge his daughter.

3. The particulars of the alternative charge were that on diverse dates between 13th August 2018 and 17th August 2018 in [particulars withheld] Sub-location, Seme Sub-County within Kisumu County, he intentionally touched the vagina of the said EAO a child aged fourteen (14) years with his penis.

4. He was tried and convicted by Hon C. L Yalwala, Principal Magistrate of the main charge and sentenced to serve twenty (20) years imprisonment.

5. Being dissatisfied with the said decision, on 14th July 2020 he lodged the Appeal herein. He relied on four (4) grounds of appeal. In his undated Written Submissions that were filed on 16th June 2021, he set out five (5) amended grounds of appeal. The court found it prudent to address all the original grounds of appeal despite them appearing disjointed. The State's Written Submissions were dated and filed on 15th April 2021.

6. Both parties relied on their respective Written Submissions in their entirety. This Judgment is therefore based on the said Written Submissions.

LEGAL ANALYSIS

7. This being a first appeal, it is the duty of this court 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.

8. This was aptly stated in the cases of **Selle vs Associated Motor Boat Company Ltd [1968] EA 123** and **[1985] EA 424** where in the latter case, the court therein rendered itself as follows:-

> **"It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses…But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion…"**

9. Having looked at the Appellant's and State's Submissions, it was this court's considered view that the issue that have been placed before it for determination were :-

a. Whether or not the Appellant was accorded fair trial;

b. whether not the Prosecution had proved its case beyond reasonable doubt; and

c. whether or not the sentence that was meted upon him was unlawful and/or manifestly excessive.

10. However, the Appellant did not submit on the issue of fair trial. The court thus dealt with the issues (b) and (c) under the separate and distinct heads shown hereinbelow.

I. PROOF OF THE PROSECUTION'S CASE

11. Grounds of Appeal No (1), (2) and (4) were dealt with under this head as they were related.

12. The Appellant submitted that the only evidence relied upon by Prosecution was that of a single identifying witness, EAO (hereinafter referred to as "the Complainant") whose evidence, he submitted could not form the basis of a lawful conviction because it was not corroborated by an independent witness. He argued that her siblings and teacher were not called as witnesses. He questioned why she did not inform the neighbours or other adults within the vicinity of what had befallen her. He argued that while it was the prerogative of the Prosecution to call witnesses, the court was entitled to draw an inference if such witnesses were not called to testify.

13. He added that there was no bad blood between him and her which was evident from the fact that he took her to hospital and paid for her hospital bill after she attempted to poison herself.

14. He further submitted that there were discrepancies relating to the alleged offence prior to the diverse dates of 13th August 2018 and 26th July 2018 for the reason that the Complainant referred to a date after August as of the date of her second alleged defilement. He added that the Prosecution failed to prove that he was her biological father as it did not adduce any document from the Government Chemist to prove paternity.

15. On the other hand, the State submitted that the case was proved to the required standard. It pointed out that the evidence was adduced showing that the Appellant was the Complainant's father. It argued that the Complainant testified that the Appellant was her biological father and that she was living with him during the month of August 2018. It added that in his defence, the Appellant acknowledged that he was the Complainant's father and that further, No xxxx PC Stella Jepleting, the Investigating Officer (hereinafter referred to as "PW4") also testified that she established during her investigations that the Appellant was the Complainant's father.

16. It contended that an Age Assessment Report was produced which showed that she was aged fourteen (14) years at the material time. It added that she and Paul Owiti, the Registered Clinical Officer (hereinafter referred to as "PW3") proved penetration. It was categorical that the Appellant was a person well known to the Complainant and hence she properly identified him.

17. 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, 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."

18. To prove an offence of incest, the Prosecution must prove that there was an indecent act or an act which caused penetration, that the victim must be a female person, that the offender must know that the victim is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother.

19. The Complainant testified that the Appellant was her father. As the State correctly submitted, PW 4 investigated and established that the Appellant was the Complainant's father. In his unsworn defence, the Appellant admitted that he was her father. He stated as follows:-

"It is my niece who called me and told me that my daughter E was unwell…I passed them on a boda boda and went to Kombewa Hospital to check the state of my daughter…"

20. The issue of the Complainant's paternity was therefore not in contestation. What was contested was whether or not the Appellant had sexual relations with her. Indeed, this was a case of one person's word against the other calling for the analysis of the evidence that was adduced in court.

21. According to the Complainant, the Appellant had separated with her mother and her step-mother and that in the month of August 2018 she was living with him together with her younger siblings. She testified that during that period, the Appellant defiled her on two (2) occasions of diverse dates, the first being on 13th August 2018. It was her further evidence that she reported the matter to her teacher who took up the matter and he was arrested and charged.

22. According to Rose Atieno Oluoch, a Counselor based at Ramola Health Center, (hereinafter referred to as "PW2"), the Medical

Superintendent of Kombewa County Hospital notified her of the matter on 23rd August 2018. She stated that she proceeded to the hospital and had a counselling session with the Complainant who narrated to her how the Appellant had defiled her twice. She told the Trial Court that she reported back to the Medical Superintendent and the Police Station and later the Complainant was examined and a P3 form filled.

23. During her Cross-examination, she averred that the Complainant had been admitted in hospital for having taken poison and that the issue of defilement was dealt with after the Complainant had been discharged. She admitted that she could not tell whether the Appellant had indeed defiled the Complainant herein.

24. In his evidence, PW3 testified that the Complainant was admitted at Kombewa County Hospital on 21st August 2018 for poisoning but defilement was discovered in the course of treatment. He testified that when he examined her on 23rd August 2018, he found that she had tearing of the hymen on the posterior part of the vagina. There was a whitish discharge at the entrance and the laboratory results showed presence of protein in her urine which was indicative of inflammation. The pus cells were indicative of a bacterial infection while the epithelial cells were indicative of breakage of vaginal lining.

25. He concluded that the Complainant's vagina had been penetrated by a male genital organ whereupon she was infected with a sexually transmitted disease. He adduced in evidence the laboratory results, P3 Form and hospital treatment notes.

26. When he was cross-examined, he stated that evidence of defilement could last for seventy two (72) hours or more depending on the nature of the injuries. He admitted that DNA could have been done on the samples that were found in her vagina to show whose specimen **(sic)** was.

27. On her part, PW4 told the Trial Court that her findings showed that the Complainant had been defiled twice by the Appellant; on 13th August 2018 and 17th August 2018. She added that the Complainant took poison out of frustrations and was rushed to Kombewa County Hospital by the Appellant. She testified that she had the Complainant examined for age and was found to be fourteen (14) years old. She adduced in evidence the Complainant's Age Assessment Report issued on 4th September 2018 and X-ray report in this regard.

28. During her Cross-examination, she stated that the clothes the Complainant had worn at the material time of the defilement had been washed.

29. The Appellant gave unsworn statement. In his defence, he denied ever having committed the offence. He did not call any witness in his defence. His evidence was that on 25th August 2018 while at work, he received a call from his niece informing him that the Complainant was unwell. He rushed to Kombewa Hospital where he enquired about her status and paid the bill. He stated that on his way home, he was arrested and taken to Kombewa Hospital where he was examined and thereafter charged on 27th **(sic)**.

30. It is important to point out right at the outset that an accused person is under no obligation to adduce any evidence in his defence. He can elect to remain silent at the time of the defence hearing and leave the court to make its decision based on the evidence that has been adduced by the prosecution. On the other hand, the Prosecution has the legal burden to adduce evidence to prove its case beyond reasonable doubt. The high standard in criminal cases is imperative as the accused person is faced with the risk of having his or her liberty curtailed.

31. Having carefully scrutinised the evidence adduced during trial, this court was reluctant to find that the Complainant's evidence as envisaged in Section 124 of the Evidence Act Cap 80 (Laws of Kenya) was sufficient to satisfy it that the Appellant defiled her as she had alleged. This was due to several inconsistencies it found in her evidence, as was correctly submitted by the Appellant herein. There were gaps and contradictions that needed to have been corroborated by additional oral and documentary evidence.

32. While being cross-examined, the Complainant testified that the Appellant defiled her on 26th July 2018. This was inconsistent with the details in the Charge Sheet which indicated that the offences occurred on diverse dates between 13th and 17th August 2018 and her evidence during her Examination-in-chief when she stated that the Appellant defiled her on 13th August 2018.

33. The Learned Trial Magistrate conducted the v*oire dire* examination and was satisfied that the Complainant was intelligent enough to adduce evidence. She was aged fourteen (14) years at the material time and having testified on 8th October 2018 which was two (2) months after the alleged incident, it was not unreasonable to expect that her evidence would have been cogent as her memory was still expected to have been fresh as at this time. Indeed, there was nothing that was adduced in evidence to suggest that she was a person whose intelligence was compromised.

34. Having said so, while it may be argued that there was possibility a child witness could confuse the dates of when defilement occurred due to trauma, a court must be completely certain that that offence did in fact occur. The Prosecutor was under a duty and obligation to re-examine her to clarify the inconsistency of the dates. Failure to seek such clarification was fatal and detrimental to the Prosecution's case as it led to the Complainant's evidence of when she was first defiled being inconsistent and contradictory.

35. Going further, this court was hesitant to attribute the attempt of suicide to defilement. From the Complainant's evidence, she appeared to have had a troublesome relationship with her father. Right at the outset of her evidence, she told the Trial Court that in August she was schooling at [particulars withheld] School but that she went to [particulars withheld] School after the Appellant annoyed her.

36. By 13th August 2018 when the first defilement was alleged to have occurred, her relationship with the Appellant was still strained. She stated that she did not complete the chores he assigned her on that day and when he started assaulting her for not having completed the same, she told him that she had got tired. She testified that the Appellant cooked a meal and ate with her step siblings. It was her evidence that she took poison out of frustration and contended that she went to hospital because she took poison.

37. Her evidence of when exactly and why she took poison or when the Appellant allegedly defiled her the first time was not clear. The same was jumbled up making it difficult for this court to decipher the pattern of events. She stated that the Appellant defiled her after the meal, which she had said was at 3.00 pm. She then went on to say that he defiled her at night and she was able to recognise him from the solar light and that he was wearing a black trouser. It was not clear whether the lighting was in the room or outside the room. If the solar light was in the room, the colour of his trouser would have been obvious and need not have been an issue to prove recognition. It was for that reason that the court inferred that the solar light may have been outside the room.

38. Whereas the court did not doubt that she would not have been able to recognise him as he was her father, her assertion of the colour of his trouser troubled this court due to difficulties in identifying colours of clothing in an area that is lit by solar light.

39. Going further, this court found her evidence on the circumstances of the defilement to have raised more questions than answers. She explained that she used to sleep in the same room with her step siblings while the Appellant used to sleep in his own bedroom. Her evidence was that after he came to the room she was sleeping with her step siblings, he removed her pant then he inserted his penis in her vagina. She then stated that when the children woke up, they asked her why she was naked and she told them that she was naked. She did not explain how she ended up becoming naked because she had testified that the Appellant had only removed her pant. She further told the Trial Court that after she screamed, her siblings woke up and that he threatened her with a knife. He also strangled her not to respond when the siblings asked her why she was screaming.

40. Her evidence of when he left the house after she screamed was not clear and for how long he left them in hunger. However, going by the date in the Charge Sheet, he came back after four (4) days as this was the second time that he allegedly defiled her. Her testimony was that he took her to his bedroom by force, removed her clothes and defiled her. It was her evidence that on this day they had also argued about food and he asked her why he had left the children go hungry.

41. While offences are committed in ways that may not appear logical to third parties such as why the Appellant would defile her in the room where the other children were sleeping while he had his own bedroom, it was the considered view of this court that the Prosecution ought to have called the Complainant's step siblings to testify despite them having been of tender years.

42. Further, as the Complainant had testified that on the following Monday, she reported the defilement to the teacher who then informed the "sister" who was not a member of the school but was a doctor and the police were involved immediately, this teacher and "sister" were crucial witnesses to have corroborated her evidence. However, they were not called to testify.

43. In view of the sketchy evidence that was adduced by the Complainant and the omission to fill the gaps, this court took the firm position that the evidence of her step siblings, teacher and sister was crucial for the reason that this court had found and held that Section 124 of the Evidence Act was not applicable in the circumstances of the case herein.

44. Her evidence that her pant had blood stains did not assist her case for the reason that the same was not adduced an exhibit in court, PW 4, having stated that the same had been washed. Failure to call the Complainant's aforesaid witnesses to testify led this court to also draw a negative inference regarding the Prosecution's case.

45. In addition, this court came to the firm conclusion that the fact that the Complainant had been found to have had a Sexually Transmitted Infection (STI) was not sufficient proof that she got the same from the Appellant. The Appellant was arrested about eight (8) days after the incident and was taken to hospital for examination. He would definitely have been expected to have had the STI, a fact that would have linked him to the offence herein. Indeed, the Complainant appeared not to have had any sexual relations with any other person other than with him.

46. Be that as it may, assuming that the Appellant's evidence did not have weight as it was unsworn evidence and it was not true as he had contended that he was taken for examination, the police were under an obligation to have taken him for the medical examination as the Complainant had been found to have had a STI. Failure to have had him examined and/or failure to have adduce any medical evidence linking him to the STI that the Complainant had greatly weakened the Prosecution's case. It was the only the best way it could have linked the Appellant to the offence. This court could only draw negative inference on that omission.

47. The fact that the Complainant told PW 2, PW 3 and PW 4 that she took poison because the Appellant defiled her was rendered moot. In any event, this court was not entirely satisfied that the Complainant satisfied this court that she took poison because the Appellant had defiled her. Her evidence was that she took the poison due to frustrations. It was the obligation of the Prosecution to have sought this clarification during re-examination so that the real reason for taking the poison was properly captured in the proceedings.

48. Having analysed the evidence that was adduced in the Trial Court, this court came to the firm conclusion that the Prosecution did not present a water tight case so as to prove its case against the Appellant herein beyond reasonable doubt. There was doubt that was cast in this court's mind as to whether the charges were levelled against him due to disagreements between him and the Complainant herein because her evidence was inconsistent, sketchy and contradictory. The bottom line is that the Appellant had been charged with a very serious charge that could not be sustained with the kind of evidence that was adduced in the Trial Court. The line of examination by the Prosecution fell short of the required standard and was handled very casually.

49. In the premises foregoing, Grounds of Appeal No (1), (2), (4) were merited and the same be and are hereby allowed.

II. <u>SENTENCE</u>

50. Ground of Appeal No (3) and Amended Ground of Appeal No (5) were dealt with under this head.

51. Having found that the Prosecution did not prove its case to the required standard, which was proof beyond reasonable doubt, the issue of

the excessiveness of the sentence did not arise. However, in the event this court was to be found to have been wrong on that issue on appeal, it addressed its mind to the sentence.

52. The Appellant relied on the case of **Francis Karioko Muruatetu & Another vs Republic [2017] e KLR** where the court held that mandatory sentences deprive courts their legitimate jurisdiction to exercise discretion to individualise an appropriate sentence to relevant aspects of character and record of each accused person. He argued that the circumstances of an offence must be considered when it comes to sentencing as was held in **Alister Anthony Perreira vs State of Maharashtra at Paragraph 70-71** among other unreported cases. He urged the Court to consider his defence and mitigation. He invoked Section 333(2) of the Criminal Procedure Code that obligates the court to take into account the period already served in custody if the convicted persons had been in custody during trial.

53. However, the State's position was that the Trial Court considered his mitigation and the sentence the offence attracts before sentencing him to twenty (20) years imprisonment which it considered lawful.

54. Right at the outset, this court wished to point out that on 6th July 2021, the Supreme Court clarified that the import case of **Francis Karioko Muruatetu & Another vs Republic** (Supra), only applies in respect of sentences of murder under Sections 203 and 204 of the Penal Code. In view of the fact that the Appellant had been charged and convicted of the offence of incest and not murder, the issue of reviewing the sentence that was meted upon him as was set out in the case of **Francis Karioko Muruatetu & Another vs Republic** (Supra) would not have arisen herein.

55. Notably, the Complainant told the Trial Court that she was in primary school and that she was aged fourteen (14) years. PW 2 confirmed that she was a girl, a fact that was corroborated by PW 3, PW4 and Age Assessment Report which PW 4 adduced in evidence that showed that the Complainant was aged fifteen (15) years as at 4th September 2018.

56. In sexual offences, the age of a victim is an important ingredient to be considered when deciding the penalty to be meted out to an accused person. This was reinforced by the Court of Appeal in **Kaingu Elias Kasomo vs Republic Criminal Case No. 504 of 2010** as was cited in **NNC vs Republic [2018] eKLR** when it had this to say:-

> **"Age of the victim of sexual assault under the Sexual Offences Act is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim."**

57. Section 20(1) of the Sexual Offences Act is clear that if the offence of incest of a female person under the age of eighteen (18) years was proven, the accused person was liable to imprisonment for life. The use of the term "**liable**" implies that a person may be sentenced for any number of years until life imprisonment.

58. In such a case, the term of imprisonment to be imposed would be at the discretion of the trial court. However, such discretion must be exercised judiciously and not capriciously. The trial court must be guided by the evidence and sound legal principles. The appellate court would be entitled to interfere with the sentence imposed by the trial court if it was demonstrated that the sentence imposed was not legal or was so harsh and excessive as to have amounted to miscarriage of justice and/ or that the court acted upon wrong principles or the discretion was exercised capriciously.

59. As there was no dispute that the Complainant herein was a minor, in the event that this court would have found the Appellant to have been guilty for the offence of incest, it would have been in agreement with the State's submissions that the Learned Trial Magistrate had power to exercise discretion to mete out any sentence up to and including life imprisonment.

60. As was correctly submitted by the State, the Learned Trial Magistrate considered the Appellant's mitigation that he had his own children and those of his deceased sister to take care of at home. He acknowledged that the offence of incest was a serious offence that needed to be discouraged in order to protect children against such acts by their parents and other caregivers entrusted with their welfare. The sentence of twenty (20) years imprisonment was therefore fair in the circumstances of the case and this court would not have disturbed the same**.**

DISPOSITION

61. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was lodged on 14th July 2020 was merited and the same be and is hereby allowed. The conviction and sentence of the Trial Court be and are hereby set aside as it was unsafe.

62. It is hereby directed and ordered that the Appellant be and is hereby released from custody forthwith unless he be for any other lawful reason be held.

63. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 28TH DAY OF SEPTEMBER 2021

J. KAMAU

JUDGE