REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL APPEAL NO 466 OF 2013

AIN.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from original Conviction and Sentence dated 16/07/2013 in Murang'a CM

Criminal Case No 7 of 2011 – J J Masiga, RM)

J U D G M E N T

1. The Appellant herein, **AIN,** was tried for and convicted of ***incest*** contrary to section **20(1)** of the ***Sexual Offences Act, No 3 of 2006***. He was sentenced to life imprisonment. It was alleged in the particulars of the offence that on diverse dates in the year 2011 in Murang'a District within Central Province, being a male person, he caused his penis to penetrate the vagina of one **JWI**, a female person who was to his knowledge his daughter. He has appealed against both conviction and sentence.

2. In his amended grounds of appeal tendered at the hearing of the appeal the Appellant raised the following complaints -

(a) That penetration was not proved beyond reasonable doubt.

(b) That the trial court erred in law and fact for not considering the possibility of a trumped-up charge on account of the separation of the Appellant and the complainant's mother.

(c) That the testimonies of PW2, PW3 and PW6 were doubtful regarding the dates of the alleged offence and the alleged injuries of the complainant.

(d) That the Appellant's defence was not properly considered by the trial court.

3. At the hearing of the appeal the Appellant raised another ground regarding the sentence as follows -

(e) That the learned trial Magistrate had no jurisdiction to impose imprisonment for life.

4. The Appellant relied on his written submissions which I have considered.

5. Learned prosecution counsel supported the conviction. She submitted that there was no dispute that the complainant was the Appellant's daughter who was living with him during the period of the offence.

6. As for penetration, learned counsel submitted that the same was proved beyond reasonable doubt by the complainant's testimony which was corroborated in material particulars by the testimonies of PW2 and PW6.

7. It was also learned counsel's submission that it was proved to the required standard that the complainant was well below the age of 18 years by the testimonies of the complainant herself (PW1), her mother (PW4) and the medical evidence by the Clinical Officer (PW6).

8. Regarding sentence, learned counsel submitted that the same was lawful and well merited. But she urged the court to check the law and ascertain if the trial magistrate (a Resident Magistrate) had power to impose imprisonment for life.

9. This being a first appeal, it is my duty to evaluate the evidence placed before the trial court and arrive at my own conclusions regarding the same. I must however give allowance for the fact that I neither saw nor heard the witnesses testify.

10. The prosecution case was simple and straight forward. The complainant (a girl of about 10 years) and her younger sister (PW5) aged about 9 years were living with their father (the Appellant) after the separation of their parents. The other two younger children were living with the mother (PW4).

11. When she testified in November 2012 under oath (after a *voire dire* examination by the trial court) the complainant stated that she was 11 years old and in class 4 primary. She recalled that the previous year she and her younger sister were living with their father, the Appellant.

12. The complainant further stated that all three of them (Appellant and his two daughters) used to sleep in the same bed. Many times, she stated, the Appellant would remove her clothes, lie on her, and do *"**bad manners"*** to her. He threatened her that if she told anyone about these incidents he would kill her with a metal bar. So she never told anyone.

13. After the latest incident of the "***bad manners"***, the complainant started bleeding from the vagina while she was in school and her dress became soiled. Her teacher told her to go home. Eventually one Jane Wanjiru (PW2) and one Catherine Wanjiru took her to ***Murang'a District Hospital*** where she was admitted. Her mother (PW4) came to see her after she left hospital.

14. Towards the end of her testimony-in-chief the complainant stated that at home they had only one bed on which they all three slept (Appellant, the complainant and her sister, PW5). The Appellant always used force when he did "***bad manners***" to her and hurt her in the vagina. He also injured her on the chest, legs and thighs, and around the knees. When she resisted the Appellant bit her with his teeth. He never did bad manners to the younger daughter. He told her to wait until she grows up.

15. In cross–examination the complainant stated that her mother asked her why she had been in hospital and she told her that the Appellant had been defiling her. She did not know what monthly periods were. She started bleeding before she was taken to hospital, and the Appellant had given her cotton wool. After hospital she started sleeping at her grandmother's house.

16. In further cross-examination the complainant stated that she never screamed when the Appellant did "***bad manners***" to her because he threatened to kill her. She bled from between the legs.

17. TN (PW5) was the complainant's younger sister. When she testified she said she was 9 years old. She gave unsworn testimony after a *voire dire* examination. She stated that she and the complainant used to live with their father. They were all three sleeping on the same bed. The complainant never told her anything that happened.

18. Agnes Waithera Maina (PW3) testified that on 14th June 2011 at about 9 am she was taking her child to school when she was called by a woman who was crossing the road. The woman asked her if she knew J. PW3 then saw the complainant hiding in a bush on the side of the road. She was bleeding from her genitalia. PW3 then called PW2, the chairlady of the village. PW2 and another Wanjiru took the complainant to hospital. PW3 did not go to hospital. In cross-examination PW3 stated that she asked the complainant what happened, but that she did not say anything.

19. CWK (PW4) was the complainant's mother and the Appellant's estranged wife. Her testimony was that in July 2005 she separated from her husband, the Appellant. She had 4 children. She went back to her maiden home with all of them, but the Appellant came and took away the complainant and PW5 while she remained with the two younger children.

20. PW4 further testified that on 16th June, 2011 she was called by one Rhoda Njeri who told her that the complainant was ill in hospital. She went and found that she had been discharged. So, she went to the police station and was given two police officers, and they proceeded back to hospital where she learnt that the complainant had been defiled. She proceeded to the ***Children's Office*** with the police officers, but nothing came out of that visit as the Appellant did not show up on the appointed day.

21. PW4 then went back to the police station where she recorded her statement. Thereafter she went to the complainant's school where she talked with the complainant. The child told her that her father had defiled her. PW4 also stated that the complainant was 11 years old when she (PW4) was testifying and was living with her. She did not know where the Appellant, the complainant and the second daughter had been living.

22. In cross-examination PW4 denied that she told the police that the complainant was in hospital because of monthly periods. She also denied that she wanted to take the complainant away from the Appellant, and, by implication, that that was why the charge was brought against him.

23. In re-examination PW4 confirmed that the complainant had not yet started having monthly periods.

24. Patrick Mwangi (PW6) was the ***District Clinical Officer*** based at Murang'a District Hospital. He testified that on 14th July, 2011 he had examined the complainant and filled her medical report (P3). He produced it in evidence as ***Exhibit 2***. He noted that she had human bite marks on the anterior chest and the right upper arm. She also had multiple scars similar to bite marks on the right and left legs.

25. PW6 further testified that the complainant's hymen was broken, and she had a tear in the vaginal wall which was in the process of healing. She had been admitted in hospital for 2 days for repair of the torn vaginal wall.

26. In his view the broken hymen and the tear in the vaginal wall were evidence of penetration. He assessed the injuries evidenced by the bite marks as grievous harm.

27. PW6 also produced in evidence the complainant's discharge summary as ***Exhibit 1***. It showed that the complainant, then aged about 10

years, had been admitted at Murang'a District Hospital with vaginal bleeding following a tear in the vaginal wall. She had given a history of sexual assault by a person known to her. She had also suffered human bite marks. She had been examined, treated, investigated and later discharged on 16th June 2011. Nothing of significance came out of the cross-examination of PW6.

28. PC Mildred Amati (PW7) was the investigating officer of the case. She and other officers had escorted the complainant to hospital after the alleged defilement had been reported at the police station. She also arrested the Appellant and later caused him to be charged. She had recovered from the Appellant the complainant's hospital discharge summary, along with some other documents which she produced in evidence as ***Exhibit 3***. She stated that the Appellant had told her that he had taken the complainant to hospital after he had been told that she was bleeding.

29. In cross-examination PW7 stated that she had visited the Appellant's house which had been destroyed, and that she had seen only one bed. She further gave time-frames as follows: the complainant was admitted in hospital on 14th June 2011; her mother reported the matter to the police on 21st June, 2011 after she was granted an off-duty by her employer; and the Appellant was arrested on 24th June 2011. PW7 denied that PW 4 had paid her to frame the Appellant.

30. In his own defence the Appellant gave an unsworn statement and called no witness. His statement concerned his arrest on 24th June 2011 and the complainant's hospitalization on 14th June, 2011. He also stated that he had been framed because of PW4. He denied that he ever defiled the complainant.

31. That was the totality of the evidence placed before the trial court. I will now deal with the issues as raised in the grounds of appeal.

Penetration

32. The medical evidence laid before the court by PW6 proved beyond reasonable doubt that there was either full or partial penetration. The broken hymen and the torn wall of the complainant's vagina were the salient facts proving penetration. The other facts - that the Appellant and the two girls slept in the same bed, and the various other injuries inflicted upon the complainant, are proof of the circumstances of the incest.

Time of the incest

33. The testimony of the complainant showed that the Appellant had repeatedly defiled the complainant over a period of time. The last episode of defilement was particularly brutal and the complainant suffered the injuries that saw her land in hospital. It was proved that the last defilement occurred in the night of 13th and 14th June, 2011. The complainant was taken to hospital on the morning of 14th June, 2011. She was admitted for two days.

34. The mother was not able to report the defilement to the police until 21st June, 2011 when she got permission to be away from work. The Appellant was arrested on 24th June, 2011 at his place of work. The complainant's medical report (P3) was filled on 14th July 2011. The complainant was then still taking medication at home. The testimonies of PW2, PW3 and PW6 did not at all raise any reasonable doubt that the complainant had been defiled by her own father.

Possibility of trumped-up charge

35. The trial court carefully analysed all the evidence placed before it, including the Appellant's unsworn statement. It found, as I do, that there was no possibility of the charge against the Appellant being false and contrived. Why now? The Appellant and PW4 had been separated for many years. The issue of the children had apparently been resolved at the ***Children's Office***, the Appellant taking the two older children while PW4 took the younger ones. Besides, the medical evidence produced by PW6 showed clearly that the complainant had been defiled and grievously injured.

36. Upon my own evaluation of the evidence placed before the trial court, the Appellant was convicted upon good and sound evidence. His conviction is safe. There is no merit in the appeal against the same.

37. Regarding the sentence, the issue raised by the Appellant is whether the Resident Magistrate who tried and convicted him had the power to impose imprisonment for life. **Section 7** of the ***Criminal Procedure Code*** (which provides for the sentences which subordinate courts may pass) states as follows in the relevant parts -

> **"7. (1) A subordinate court of the first class held by -**
>
> **(a) ...**
>
> **(b) a resident magistrate may pass any sentence authorised by law for an offence under sections 278, 308(1) or 322 of the Penal Code, or under the Sexual Offences Act, 2006."**

As seen in the provision set out above, indeed the Resident Magistrate who tried and convicted the Appellant had power to impose life imprisonment for the offence of incest under section 20(1) of the Sexual Offences Act.

38. Having said that, it is within the power of this court to consider whether life imprisonment was the appropriate sentence in this case. The first thing to note is that the sentence was not mandatory. A person convicted of incest with a person who is under 18 years of age **is**

liable to imprisonment for life, not that he **shall be** sentenced to the same. See section 20(1) of the Sexual Offences Act.

39. In my considered view, a definite term of imprisonment that would enable the Appellant to eventually get out of prison when all his 4 children are adults and therefore not in danger of being defiled by him would be the appropriate sentence. Imprisonment for life, without any hope of ever coming out, is a very severe sentence which should not be lightly handed down.

40. In the present case, I will partially allow the appeal against sentence by setting aside the imprisonment for life imposed upon the Appellant, and substitute therefor a term of imprisonment of **twenty (20) years**. This sentence will take effect from the date of the Appellant's sentencing by the trial court, which was 16th July 2013. It is so ordered.

41. The Appellant's appeal against the conviction is hereby dismissed for lack of merit. It is so ordered.

H P G WAWERU

JUDGE

DELIVERED AT MURANG'A THIS 29TH DAY OF OCTOBER 2021