REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

CRIMINAL APPEAL NO.10 OF 2020

MNM .....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

Coram: Hon. Justice R. Nyakundi

Mr. Mwangi for the state

The appellant in person

J U D G M E N T

1. This is an appeal by **MNM,** hereinafter referred to as the appellant, who was tried before the lower court for the offence of Incest contrary to Section 21 of the Sexual Offences Act.

2. The particulars of the charge as framed by the prosecution were that on diverse dates between 15th March 2019 and 11th July 2020 at Hindi Location Lamu West Sub County within Lamu County, being a female person, allowed her vagina to be penetrated by **JMN,** a male person who was to her knowledge her uncle.

3. At trial, the appellant pleaded guilty and was sentenced to 10 years' imprisonment.

4. However, she has appealed the conviction and sentence on the following grounds:

1. That the learned magistrate erred in law in failing to see that the plea of guilty was not unequivocal.

2. That the trial magistrate erred in law in failing to appreciate that the plea was taken virtually with the appellant being at the police station frightened and intimidated by the presence of fierce looking fully uniformed all male police officers who were full house in the proceedings room.

3. That the trial magistrate erred in law and fact in accepting the plea of guilty from the appellant who pleaded through blackmail and false promises of her liberty as the charge was said to be a minor charge punishable by a short probation sentence.

4. That the trial magistrate failed in law and fact in failing to appreciate that the appellant was not in her right state of mind when the plea was taken

5. That the trial magistrate failed in law in failing to ask the appellant the language which she understands and prefers to be used to her.

6. That the learned magistrate erred in law in failing to warn the appellant on the severity of the charges and the consequences of the sentence.

7. That the learned magistrate erred in law and in fact by failing to establish that the prosecution did not satisfy the test of niece-uncle relationship beyond reasonable doubt through evidence when the facts were read by the prosecutor.

8. That the trial magistrate erred in law and fact in relying on medical evidence that was fished out after the appellant was arraigned.

9. That in any event the sentence was manifestly excessive in the circumstance.

5. The above grounds were condensed by the appellant into 5 issues for determination through her submissions dated the 16th of December 2020. The issued as identified by the appellant are:

a. Did the learned magistrate erred in law and in fact by failing to establish that the prosecution did nit satisfy the test of Niece-Uncle relationship beyond reasonable doubt through evidence when facts were read by the prosecutor.

b. Did the trial magistrate erred in law when he failed to see that the Plea of Guilty was unequivocal?

c. Did the learned magistrate erred in law in failing to warn the appellant on the severity of the Charges and the Consequences of the sentence.

d. Did the trial magistrate erred in law and fact in accepting the plea of guilty from the appellant who pleaded through blackmail and false promises of her liberty as the charge was said to be a minor charge punishable by a short probation sentence

e. Was un any event the sentence manifestly excessive in the circumstances.

6. On the first issue, the appellant submitted that Section 22(1) of the Sexual Offences Act (SOA) defines uncle to mean the brother of a person's parent, with an aunt having a corresponding definition. The appellant thus submitted that her relationship with one **JM** does not fit the definition under Section 22(1) of the SOA since **JM** is a cousin to the appellant's mother and not her brother. Consequently, it was her submission that she is not related to the co-offender as a niece as the co-offender **JM** is an uncle of the second degree and not first degree as provided for under Section 22(2)(a) of the SOA.

7. On the second issue, the appellant was of the view that it is trite law that a plea of guilt should be unequivocal. This, she submitted is the essence of Article 50(2)(b) of the Constitution. The appellant thus contended that an unequivocal plea should not be coupled with any threats or coercion and referenced the case of **Elijah Njihia Wakianda vs Republic [2016] eKLR**, submitting that the appellant was never informed about the consequences of waiving her trial rights. While relying on the same case and the decision in **Adan vs Republic [1973] E.A 445**, the appellant further submitted that she was unrepresented and that she did not understand the consequences of her plea and thus urged court to quash that decision.

8. On the third issue, it was the appellant's view that considering the nature of the sentence, she ought to have been warned of the consequences of pleading guilty, taking into account the fact that the plea was taken virtually with the appellant being at the police station frightened and intimidated. Reliance was placed in the case of **Boit vs Republic [2002] eKLR** with the appellant arguing that had she been appropriately forewarned of the 10 year imprisonment, she would have reconsidered her plea of guilty.

9. On the fourth issue, the appellant submitted that she had been intimidated by the police who also misled her that the charge was a minor one and that if she pleads guilty, she would be released. She thus relied on the case of **Olel vs Republic [1989] and Abdallah Mohamed vs Republic [2018] eKLR** and submitted that she was never warned of the consequences of pleading guilty and the sentence awaiting her.

10. Lastly, the appellant relied on the decision in **Issa Abdi Mohamed vs Republic [2006] eKLR** where the court opined that an order for retrial would have been most appropriate in the circumstances submitting that in the circumstances of the instant appeal, the court should allow the appeal rather than ordering for a retrial, as the prosecution would plug the loopholes already alluded to in this judgement. She thus urged court to allow the appeal and quash the conviction and sentence of the lower court and set the appellant at liberty.

Analysis and Determination

11. Having looked at the submissions of the appellant and the material before the court, all the issues raised can be condensed into a single for determination and that is whether the uncle-niece relationship was proved beyond reasonable doubt to warrant conviction of the appellant.

The Law

12. The offence of incest is stated in **Section 20(1) of the Sexual Offences Act** as:-

(1) 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 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.

13. The above provision by virtue of Section 21 of the same Act, apply **Mutatis Mutandis** with respect to any female person who commits an indecent act or act which causes penetration with a male person who is to her knowledge her son, father, grandson grand father, brother, nephew or uncle.

14. Consequently, the ingredients for the said offence, that is, Incest, are:-

a. Knowledge that the person is a relative and,

b. Penetration or Indecent Act

15. The Act proceeds to define penetration under Section 2 as means "*the partial"* or complete insertion *of the genital organs* of a person into the genital *organs, of another* and defines **Indecent act** to mean "any contact between any part of the body of a person with the genital organs, breast or buttocks of another but does not include an act that causes penetration."

16. Furthermore, the Act identifies the test of relationship under Section 22 in the following manner:

22. (1) In cases of the offence of incest, brother and sister includes half-brother, half-sister and adoptive brother and adoptive sister and a father includes a half father and an uncle of the first degree and a mother includes a half mother and an aunt of the first degree whether through lawful wedlock or not.

(2) In this Act –

(a) "uncle" means the brother of a person's parent and "aunt" has a corresponding meaning; (emphasis added.)

(b) "nephew" means the child of a person' s brother or sister and "niece" has a corresponding meaning;

(c) "half-brother" means a brother who shares only one parent with another;

(d) "half-sister" means a sister who shares only one parent with another; and

(e) "adoptive brother" means a brother who is related to another through adoption and "adoptive sister" has a corresponding meaning.

17. It flows therefore from the above provision that there must exist a defined relationship between offenders, which relationship in contemplated under the Act. As such, any other relationship not contemplated under the Act does not pass the test of relationship under the Sexual Offences Act.

18. Notably, under the Act, the prohibition of certain relationships as incestuous arise from consanguinity (blood relationship) or from affinity (relationship by marriage). In the case of consanguinity, the prohibition is largely based on moral and eugenic grounds. That is, most people view sexual intercourse or marriage between relatives such as father and daughter, brother and sister, uncle and nice with abhorrence and against the morals of society and family unit. On the other hand, others view the same as carrying the greater risk of having children inheriting undesirable genetic characteristics. **(See Nigel Lowe and Gillian Douglas, Bromley's Family Law, 9th Edition, Butterworths,1998 at 31)**. This theory, championed generations ago by **Lewis H. Morgan** and others, and not without defenders today, is that incest was defined and prohibited because inbreeding causes biological degeneration. This theory seems so plausible as to seem self-evident, but it has been challenged. For example, biologists have argued that inbreeding as such does not cause degeneration; with their testimony being conclusive on this point. On the contrary, they argue that inbreeding intensifies the inheritance of traits, good or bad so that if the offspring of a union of brother and sister are inferior, it is because the parents were of inferior stock, not because they were brother and sister. **(See Leslie A. White, The Definition and Prohibition of Incest, American Anthropologist, New Series, Vol. 50, No. 3, Part 1 (Jul. – Sep.), pp. 416-435, 1948).**

19. In the case of affinity, **Nigel Lowe and Gillian Douglas (supra),** note that the prohibition was largely based on the theological concept that a husband and wife were one flesh, so that one's sister-in-law was considered as incestuous as marriage with one's own sister. Admittedly, today the justification must be sought on social and moral grounds but in a pluralist society such as Kenya, this must be a matter for individual conscience. This could perhaps explain the reason for the relaxation of the rules relating to affinity.

20. Back to the case at hand, the primary issue is whether the appellant is indeed a niece to her co-offender, one **JM**. Considering that this court is a first appellate court, it is its duty to reexamine and re-evaluate the evidence before drawing its conclusion.

21. The record indicates that there was no confirmation by the magistrate as to whether the ingredients of the offence were met. This is because the appellant plead guilty.

22. However, the facts of the case as presented by the prosecution before the trial court was that the appellant aged 20, approached her father seeking permission for marriage to one **JM** aged 22 years. In utter shock, the father told the appellant that **JM** was her uncle, a fact the prosecution noted the appellant knew. In response, the prosecution presented that the appellant informed her father that she would not end the relationship despite knowing that **JM** was her uncle. The father thus summoned an emergency family meeting at his home where the appellant, **JM**, the appellant's father and **JM's** two brothers attended and the blood relations were fully explained to the appellant and **JM.** The prosecution then argued that the appellant disregarded the resolutions of the family meeting and eloped with **JM** as his wife. The family thereafter contacted a Pastor to offer spiritual guidance and counselling but the same failed which necessitated the parents of the appellant to report the matter to police.

23. The prosecution thus noted that one **PC Bigambo** was assigned the case and in the course of his investigations found the appellant and her co-offender **JM** living together as husband and wife. The prosecution noted that the investigating officer confirmed the uncle-niece relationship and took the appellant to a health centre where she was examined and found to be actively engaging in sexual intercourse. She

was then charged and convicted on her own plea and sentenced to 10 years imprisonment.

24. The question I pose here is how did the court get convinced that the relationship had been proved? Whereas the prosecution indicated that they established an uncle-niece relationship, the appellant argues that there is no such relationship. On the contrary, the appellant argued that **JM** is a cousin to her mother and not the brother.

25. A look at Section 22(2) highlighted above indicates that the term uncle has been defined to mean the **brother of a person's parent.** On the other hand, the term niece has been defined to have a corresponding meaning to the term nephew which means the child of a person' s brother or sister. Notably, the Act does not define the term brother. However, the **Black's Law Dictionary, 18th Edition** defines brother as a male person who has one parent or both parents in common with another person and further defines consanguine brother as a brother who has the same father but a different mother.

26. As such, if indeed **JM**, the co-offender is a cousin to the appellant's mother and not her brother, there is no uncle-niece relationship as defined in the Act. This is because **JM** is not a brother to the appellant's mother and neither is he a consanguine brother to the appellant's mother. This means that there is no first-degree relationship between the appellant and **JM.** In my view, it was intentional and deliberate for parliament to limit the relationship to first degree relationships and exclude the rest. If their intention was to prohibit a relationship between 2nd degree relatives, they would have expressly said so.

27. Furthermore, taking into account the age of the appellant, the nature of the offence and the consequences thereof, I am convinced that the court should have conducted a *voire dire* examination to establish the relationship between the appellant and the co-offender. The prosecution cannot simply claim that they established the relationship with no proof how the same was done and the same becomes admissible in court. The admission of such facts/evidence without proof carries the risk of injustice and lowering the standard of proof in criminal case. Even where an accused person pleads guilty, the court must satisfy itself and ensure that that the accused person is not being convicted on any quantum of evidence less than proof beyond a reasonable doubt. This is especially critical where an accused person forfeits his or her right to a trial and pleads guilty. In such a case, caution and circumspection must be taken to ensure that there is no miscarriage of justice.

28. It is for the above reason that the court in **Boit vs Republic [2002] 1 KLR 815** stated that for plea of guilty, certain safeguards must be strictly complied with. These are:

> **a. The person pleading guilty must fully understand the offence with which he or she has been charged with. That is, the person must be told in detail and in a language familiar to them, the substance of the offense, the elements or ingredients which constitute it, the date and the approximate time on which the offence was committed and the person against whom the offence was committed.**
>
> **b. The court must show in its record, that the person pleading guilty understands the consequences, including sentence, that they will face as a result of the guilty plea.**

See also Patrick Kiage, Essentials of Criminal Procedure in Kenya, lawAfrica, 2010 at 93.

29. Furthermore, the court must ensure and be satisfied that the accused person wishes to admit, without any qualification, each and every ingredient of the offence they have been charged with. This was the position of court in **Lusiit vs Republic [1977] KLR 143**. Consequently, if a person is informed as above and proceeds to plead guilty, then they cannot come afterwards and complaint. The same would not be a genuine complaint. However, if they were not duly informed, then they can raise a complaint and the same would be genuine.

30. In the instant appeal, there is no indication from the record of the lower court that the trial court explained the safeguards to the appellant or that she was explained to the consequences of her plea. Rather, the court recorded her plea without informing her of the consequences of that decision.

31. It was therefore wrong for the magistrate to enter the plea and also not question the facts of the prosecution to establish that they had discharged their burden of proof as regards the existence of a uncle-niece relationship.

32. In the foregoing, I am convinced that there was a miscarriage of justice that cannot be cured by a retrial. I therefore proceed to quash the conviction and sentence of the trial court and set it aside.

33. The upshot being that the appeal is hereby allowed and the appellant is set at liberty.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 17TH DAY OF DECEMBER,2021

…….

R. NYAKUNDI

JUDGE

In the presence of

1. ……..

2. .....