REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 58 OF 2019

VOM.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the judgment of the Chief Magistrate Nyeri S.O No. 23 of 2019 delivered on 26th September 2019).

JUDGMENT

Brief Facts

1. The appellant was charged with the offence of incest contrary to Section 20(1) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence are that on diverse dates between February 2018 and 2nd April 2019 at **[Particulars Withheld]** Village within Nyeri County intentionally and unlawfully caused his penis to penetrate the vagina of AW [full name withheld], a child of 9 years who is the appellant's step-daughter. He was convicted and sentenced to serve twenty (20) years imprisonment.

2. Being aggrieved by the decision of the trial court, the appellant has lodged the instant appeal citing 6 grounds of appeal which may be summarised as follows:-

a) The learned trial magistrate erred in fact and in law by failing to appreciate that the elements of defilement were not proved as required by law;

b) The learned trial magistrate erred in law and in fact by failing to consider the appellant's defence without giving cogent reasons contrary to Section 169(1) of the Criminal Procedure Code;

c) The learned trial magistrate erred in law and in fact by failing to find that the evidence adduced was full of material contradictions and inconsistencies capable of unsettling the verdict;

d) The learned trial magistrate erred in failing to observe that the charges as laid out were incurably defective contrary to Section 214 and 135 of the Criminal Procedure Code and the Sexual Offences Act occasioning a prejudice.

3. By consent the parties agreed to dispose of the appeal by written submissions. The respondent filed their submissions but the appellant did not do so.

Respondent's Submissions

4. It is the respondent's case that it failed to prove the charge beyond reasonable doubt and thus a miscarriage of justice occurred. The key witnesses were not called to testify being the members of public who raised the alarm that the minor was being defiled. One Grace, whom the minor spoke to and Madam Lilian who in the company of PW1 escorted the minor to the police station did not testify. Their evidence was crucial to the case and no explanation was given for their absence during trial nor did the trial court make any enquiry.

5. Additionally, it is not clear why respondent did not involve the victim's mother, DW1 in the investigations. The allegations against her that she beat up the minor when the minor reported the incidents to her only came up in court when the victim was testifying. PW1, PW2 and PW4 did not have that information prior to the investigation. The respondent submits that the investigation officer ought to have taken down the statement of the defence witness to ascertain whether her testimony would be adverse to the prosecution's case and hence the need to drop her as a prosecution witness. The respondent further submitted that the defence witness testimony vindicated the accused when she stated that she was not aware of the alleged defilement. Further, that the respondent did not bring up anything on cross examination to discredit the defence testimony stating that the victim did not at any point bring up that issue.

6. The respondent further submitted that DW1 stipulated the timelines which the appellant left the house each day and when he returned. The circumstances were such that there was no time available for the appellant to undertake the alleged atrocities against the minor. The respondent submits that it did not challenge that bit of testimony as the minor confirmed the stipulated timelines of the goings and comings of the appellant.

7. Nevertheless, the respondent submits that the prosecution did not demonstrate a deliberate intention by DW1 to shield the appellant from the charge. Notably, DW1 being the biological mother of the victim, ought to have been extremely sensitive over her daughter's predicament if indeed it occurred. Further, the respondent submits that the situation should have been direr considering the appellant was not the biological father of the minor.

8. The respondent further submits that apart from the evidence of the minor, and the expert evidence of PW3 whose opinion of the broken hymen was speculative owing to the allegations, the rest of the witnesses simply gave testimony based on hearsay. Based on the above reasons, the respondent contends that it was not safe to convict the appellant at the trial court.

Issues for determination

9. The issues for determination are as follows:-

a) Whether the prosecution proved the case beyond reasonable doubt.

b) If so, whether the sentence was lawful and commensurate to the offence

The Law

10. This being a first appeal, this court is guided by the principles set out in the case of **David Njuguna Wairimu vs Republic [2010] eKLR** where the Court of Appeal stated:-

> **"The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided that it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.**

11. Similarly in the case of **Okeno vs Republic [1972] EA 32** where the Court of Appeal set out the duties of the appellate court as follows:-

> **"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs Republic (1957) EA 336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala vs R (1957) EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs Sunday Post [1958]EA 424."** This was also set out in the case of **Kiilu & Another vs Republic [2005] KLR 174.**

12. In line with the foregoing, this court in determining this appeal is to satisfy itself that the ingredients of the offence of incest of a child were proved beyond reasonable doubt.

13. The offence of incest is provided for under **Section 20(1) of the Sexual Offences Act** which provides:-

> **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.**

14. The key ingredients of the offence incest include:-

a) Knowledge that the person is a relative;

b) Penetration or indecent act.

15. **Section 22 of the Sexual Offences Act** provides:-

> **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.**

16. The complainant testified that the appellant was her papa and that they have always lived together. The appellant confirmed that he is the

complainant's stepfather and that they lived together. The mother of the minor, DW2 confirmed the same. Thus, the relationship is not denied by any of the parties and thus has been proven.

17. **Section 2 of the Sexual Offences Act** defines penetration as :-

> **…..the partial or complete insertion of the genital organs of a person into the genital organ of another person.**

18. Indecent act has been as:-

> **Indecent act means an unlawful intentional act which causes:-**
>
> **a) Any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration;**
>
> **b) Exposure or display of any pornographic material to any person against his or her will.**

Analysis of the Evidence

19. According to the victim PW5, the appellant held her two wrists with his hands and then he did bad manners to her. She pointed to where this occurred, which was between her legs and stated that the appellant used his thing to urinate. She further testified that the appellant did the bad manners to her five (5) times. Thereafter, PW5 told her mother about the incident but her mother beat her up. On re-examination, she testified that the appellant did not go to work on Saturdays and that although she could not recall the exact days he defiled her on days that he did not go to work.

20. Dr. William Muriuki testified as PW3 and stated that he had filed the P3 in respect of the minor. He stated that the minor sustained a broken hymen which was caused by forceful penetration. He produced the P3 Form and Post Rape Care (PRC) Form in evidence.

21. I have analysed PW5's evidence and hold that it is well corroborated by the medical evidence of PW3 which confirmed that there was penetration of the genital organs of PW5, I thus find that the prosecution proved the element of penetration.

22. The minor underwent age assessment and was found to be below ten(10) years. The report was produced in evidence. In my view, the report was sufficient proof of the age of the victim that she was below ten(10) years at the time of the offence.

Was the case proved beyond reasonable doubt?

23. The trial court observed that PW5's testimony did not require corroboration in light of the proviso of **Section 124 of the Evidence Act** which provides:-

> **Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall 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.**

24. The trial court further observed that the minor was genuine and credible in her testimony and that since she was picked from home, there was no possibility of being coached. It was further observed that the victim did not stand to benefit from making the allegations against her step-father as was shown by her demeanour. I have perused the proceedings of the trial court and I note that PW5's evidence was precise and consistent as to what transpired during the incident. Further, the minor's testimony remained consistent even on cross-examination. This court recognizes the fact that it did not have the advantage of seeing the minor testify and has no reason to doubt the trial court's observations. The law is clear that PW5's evidence does not require corroboration in light of **Section 124 of the Evidence Act** as the trial court correctly observed. Further, the medical evidence produced by PW3 shows that there was forceful penetration caused by a male organ.

25. The appellant alleged in his ground of appeal that the magistrate did not consider his defence. I have perused the judgment and note that the defence was considered in a summary form.

26. However, this court has the duty to evaluate the entire evidence including the defence of the appellant and to do what the trial court may have left out or not fully covered.

27. The appellant denied the offence and said that he was not at home on the material day because he had gone to work and normally leaves home around 4.00 am and returns at 9.00 pm each day. He said that the case was framed against him by his neighbours at the plot where he lived with the mother of the victim though he still had another home. He called the victim's mother, DW1 as his witness and she testified that the accused was her husband of seven (7) years and that it was a neighbour who telephoned the area Assistant Chief PW1 and reported that a child had been defiled. On cross-examination DW1 the mother of PW5 said that on the material day she was at work and would not have known what transpired at her home. She further stated that she was not aware of any grudges or differences with neighbours at the plot.

28. The defence of the accused is an alibi and based on grounds that the case was framed against him due to grudges. His witness DW1 denied that there were such grudges or differences between her family and the neighbours, but she intimated that there was a possibility that a neighbour who refused to go to court may have had a grudge against the appellant. She did not give the name of the said neighbour and after all, her statement on this issue was merely speculative. DW1 was not a useful defence witness in that she was not at home on the material day. A grudge must be identified with a person or person but neither the appellant nor DW1 gave any name of any neighbour who harboured

a grudge against the appellant. The allegation of neighbours having a grudge against the appellant or his family was merely a defence.

29. The evidence of the victim was clear and precise on what the appellant did to her on diverse dates between February 2018 and April 2019. She testified that the appellant had made it a habit to defile her when her mother was at work. She described what happened on the particular incident when the case was reported to the Assistant Chief that he held her two wrists together and inserted his thing to urinate in her private parts which she pointed out to the court.

30. The respondent who was the prosecutor in the trial court filed submissions that defended the appellant on grounds that the case was not properly investigated and that it was fatal for failure to call some of the witnesses and for failure to involve the mother of the victim. I have carefully analysed the evidence of the Assistant Chief PW1, the Human Rights Activist PW2, the Investigating Officer PW4 and the victim PW5. The witnesses explained the incident of taking the victim from her parent's home as an exercise of rescue from the sexual abuse that had gone on for quite sometime. PW5 told the court that she had informed her mother DW1 of the incident but the mother beat her up and warned the appellant to stop spoiling her child. The trial court found the evidence of the witnesses credible. In my view, there was no need of involving DW2 before rescuing the child because she had covered the appellant of the sexual abuse for about one(1) year. Her involvement would have defeated the purpose rescue plan. The Human Rights Activist was called by the Assistant Chief to provide advice on how the matter could be dealt with. All indications were that the child was in need of care and protection which led PW2 recommending that the court remands her in a Children's home pending the disposal of the case.

31. The proceedings show that the case in the trial court was prosecuted by several prosecution counsels including the one who prepared the submissions for this appeal. If the respondent honestly believed that the case was so hopeless, it would not have charged the appellant in the first place. If the respondent changed its mind in the course of the trial, it ought to have discontinued the case using its constitutional and statutory powers. It is surprising that these kind of submissions of blaming the investigating officer and the trial court are coming on appeal from the body that charged the appellant. One wonders why the respondent should blame itself for not fulfilling its mandate at this late stage instead of acting as empowered by the law at the initial stages of the trial.

32. In regard to failure to call the member of public who gave information to the Assistant Chief on the sexual abuse, I wish to consider the law and past court decisions on the issue. The same case applies to the failure to call one Grace and one Lillian who were involved in the case after the incident.

33. The appellant alleges that the trial magistrate did not consider the impact of the prosecution's failure to call key witnesses. The respondent in its submissions, stated that the members of the public who tipped the assistant chief ought to have been called by the prosecution to shed light on the matter. The respondent further stated that the evidence by the prosecution witnesses was based on hearsay.

34. The Court of Appeal in **Julius Kalewa Mutunga vs Republic Criminal Appeal No. 31 of 2005** held:-

> **"….As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive."**

35. In the East African Court of Appeal in **Bukenya & Others vs Uganda [1972] E.A 549,** the court held that:-

> **a) The prosecution must make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent;**
>
> **b) The court has the right, and the duty to call any person whose evidence appears essential to the just decision of the case;**
>
> **c) Where evidence called is barely adequate, the court may infer that the evidence of uncalled witness would have tended to be adverse to the prosecution.**

36. The foregoing notwithstanding, it is trite law that a conviction can be based on the testimony of a single witness, a position that was captured by the Court of Appeal of Uganda in **Okwang Peter vs Uganda Criminal Appeal No. 104 of 1999** where the court held:-

> **"Subject to certain well-known exceptions, it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness in respect to identification especially when it is known that the conditions favouring correct identification were difficult. In such circumstances what is needed is other evidence, whether it is circumstantial or direct, pointing to guilt, from which a Judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from possibility of error."**

37. PW1 who received the report from the unnamed member of public testified on how he was alerted of the incident. The victim testified on what happened to her and so did the investigating officer PW4 and PW2 the Human Rights Activist. In my view, these are the most important witnesses in this case. The failure to call the said member of public, Grace and Lilian does not affect the respondent's case in any way. After all it is the prosecution who decides who to call as witnesses. In my view, no miscarriage of justice was occasioned on the part of the respondent by omitting to call the said witnesses.

38. The respondent attacked the evidence of PW3, the doctor who examined the victim and filled the P3 Form as well as the Post Rape Form contending that the evidence was speculative. PW4 explained why he arrived at the conclusion that the victim's hymen was broken and thus his finding that there was penetration. In my considered view, the evidence of an expert can only be challenged by that of another expert or other experts. If the respondent did not believe in the evidence that it presented to the trial court, then why proceed with the trial? Another

expert or experts would have been availed by the appellant to examine the victim and their reports presented to the court at the trial. Was the respondent serious in its endeavour to challenge conviction as if its role had changed to that of the defence. Notably, the appellant did not file submissions to argue his appeal and seems to have left it to the respondent to articulate its defence and arguments that he made before the trial court. I found this attack on PW3's evidence to have no legal or factual basis.

39. The other attack was on the reference to PW5 as PW4 in the proceedings. I have perused the said proceedings and noted that in recording the numbers of witnesses, the court repeated PW4 twice which must have been an oversight. However, the record is crystal clear that PW4 was the investigating officer while the victim PW5 but inadvertently numbered as PW4. The proceedings are self-explanatory as to who was who in the order of witnesses.

40. The respondent stepped in the shoes of the defence by alleging that the accused was not present at home and therefore had no chance of committing the offence. This statement is unacceptable bearing in mind that the appellant was represented by an advocate during the trial who ought to have played his/her role in conducting the defence.

Conclusion

41. I have analysed the evidence on record including the defence of the appellant. I come to the conclusion that all the ingredients of the offence of incest were established. Consequently I find that the prosecution proved its case beyond reasonable doubt. In my considered view, the grounds of appeal have no merit.

42. In regard to the sentence of twenty(20) years imprisonment imposed by the trial court, I find it a bit on the higher side though still within the law. The pre-sentence report showed that the appellant was not remorseful which was accordingly noted by the trial magistrate. The victim was less than ten(10) years at the time of the offence and seems to have been traumatised to the extent that she did not want to stay with her mother or with the appellant after the sexual assaults. Neighbours described the appellant as a social misfit who did not deserve non-custodial sentence. The offence in my view is a serious one and the appellant ought to be given a deterrent sentence. However, the sentence of twenty (20) years imprisonment is in my view excessive considering that the appellant was a first offender.

43. Consequently, the conviction is hereby upheld and the appellant is hereby sentenced to serve ten (10) years imprisonment. The sentence of twenty (20) years imprisonment is hereby set aside.

44. The appeal is partly successful and is hereby allowed to the extent of the review of the sentence.

45. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 16TH DAY OF DECEMBER, 2021.

F. MUCHEMI

JUDGE

JUDGEMENT DELIVERED THROUGH VIDEOLINK THIS 16TH DAY OF DECEMBER, 2021.