REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CORAM: A.K NDUNG'U J

CRIMINAL APPEAL NO 55 OF 2019

JMG.....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Appeal from the original conviction and sentence of Hon. R.M Oanda– PM dated 12th July 2019 at the Principal Magistrate's Court at Kilgoris in Criminal Case No. 1180 of 2016)

JUDGEMENT

Introduction

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 Act')***, the particulars being that on the 3rd day of September 2016 in Nyamache Sub-County within Kisii County, he caused his penis to penetrate the vagina of LM who was to his knowledge his niece. The appellant denied the charge and the prosecution marshaled 5 witnesses to prove the case against the appellant.

2. After an elaborate trial, the learned trial magistrate found the appellant guilty as charged, convicted him and sentenced him to 15 years imprisonment.

3. The appellant dissatisfied with the judgment has lodged this instant appeal challenging the conviction and sentence. The grounds raised in his memorandum of appeal can be summarized into three: first, the appellant challenges the weight of the prosecution case and contends that the prosecution failed to prove its case beyond reasonable doubt; secondly that his defence was not considered by the trial court; and finally that the sentence meted was excessive.

4. The appellant filled written submissions. He submitted that the trial court failed to adhere to the provisions of **section 124 of the Evidence Act** and called into aid the case of **JMM v Republic High Court Criminal Appeal No 253 of 2012 at Nyeri** where the court held that;

> *"Neither CW nor SWK nor indeed any other witness including medical evidence supported that theory and it was difficult to say that the complainant was truthful and therefore believable even in the absence of any other evidence. In our view the two courts below did not apply the proviso to section 124 of the Evidence Act…"*

The appellant argued that the prosecution case was not proved to the required standard, beyond reasonable doubt.

5. The appeal was opposed by the prosecution who argued that the appellant was rightly convicted of the offence. He submitted that the appellant was found with the complainant who was aged 14 years and medical evidence confirmed penetration. He submitted that the appellant was sentenced for 15 years which is lenient in view of the maximum sentence which is life imprisonment.

6. This being a first appellate court I am enjoined in law to make an evaluation of the evidence and to make my independent findings. I am mindful that I never saw neither heard the witnesses and I give due allowance in that regard (***Okeno –Vs- Republic [1972]EA 32***). In order to proceed with this task I will outline the evidence presented before the trial court.

The Prosecution case

7. LR (Pw1) testified that on 3rd September 2016, the appellant who is her uncle called her to his house. She testified that the appellant then closed the door and asked her to remove her clothes but she refused. The appellant then started caressing her and took her to his bedroom

whereupon he removed her inner wear and had sex with her. She was taken to Nyamache Hospital and a P3 form filled.

8. HNM (Pw2) was the complainant's mother. She testified that on the material day she had gone to farm and was later informed that the appellant locked himself in his house in the company of Pw1. She testified that the complainant disappeared from the 3rd September 2016 and was found with the appellant at his *kinyozi* on 5th September 2016. She testified that Pw1 told her that the appellant forced her to have sex with him and was taken to Nyamache hospital. JMN (Pw3) recalled that received a call on 5th September 2016 about the whereabouts of Pw1. She testified that she found Pw1 with the appellant at his *kinyozi*.

9. Dr. Ogola Manyalla (Pw4) the doctor who examined Pw1 at Nyamache Hospital testified that Pw1 looked ragged and anxious. He testified that both her thighs were red and had a discharge from her private parts. He observed that the hymen was not present. He told court that Pw1 had no tears on the labia but had light lacerations on the inner part of the vagina. He concluded that there was evidence of forceful penetration. FM (Pw5) was the investigating officer. She testified that on 6th September 2016 she received information that the appellant was arrested and was at [*particulars withheld*] AP post. She took Pw1 for interrogation and discovered that Pw1 had been called by the appellant to his house and he asked her for sex. When Pw1 refused his advances, the appellant pushed her down, removed her panty and had sex with her. She was then taken to hospital where the P3 Form and PRC forms were filled.

The Defence Case

10. The appellant gave unsworn testimony and recalled that he was arrested on 5th September 2018. DOA (Dw2) told court that she has a shop next the appellant's *kinyozi*. She recalled that on 3rd September 2016 she saw the appellant. The accused was arrested the following day on allegations that he had sex with Pw1 who had disappeared for 10 days.

Issues, Analysis and Determination

11. The first issue for consideration is whether the prosecution proved its case to the required standard. The appellant was charged with the offence on incest under **section 20 of the Act**. **Section 20(1) of the 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."***

12. The court of Appeal in **Mk v Republic [2018] eKLR** while discussing the offence of incest under **section 20(1) of the Act** held that the elements of the offence of incest are as follows;

> ***"[14] This means that to prove the charge, the following elements had to be established: First, that there was an indecent act or penetration committed on a female person; secondly, that the female person was under the age of 18 years; and thirdly, that the indecent act or penetration was caused by the father of the female person."***

13. The relationship of Pw1 and the appellant was undisputed. The prosecution established that Pw1 was the appellant's niece. Pw2 who was the mother of Pw1 testified that the appellant was his brother in law. It was Pw1's testimony that the appellant was his uncle. The appellant also admitted in his testimony that Pw1 was his niece.

14. On proof of penetration the prosecution relied on the evidence of Pw1 who was the only direct witness. Pw1 gave clear testimony that the accused;

> *"…asked me to enter into the house. He closed the door and asked me to remove my clothes. I refused at first. He didn't want to hear that. He started to caress me and took me to his bedroom. He removed my inner wear and had sex with me. He used his penis and penetrated me. I cried and he refused to open the door."*

15. The appellant has challenge the finding by the trial court arguing that the court failed to consider provision of **Section 124** of the **Evidence Act**. **Section 124** of the **Evidence Act** provides that;

> ***"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.***
>
> ***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".***

16. The Court of appeal in **Sahali Omar v Republic [2017] eKLR** held that;

"The appellant contends that in order to be reliable, their testimony had to be corroborated. It is a well established rule of law that the unsworn testimony of a child of tender years must be corroborated. However, where a child of tender years gives sworn testimony or is affirmed, corroboration is unnecessary. (See Patrick Kathurima v. R (supra) and Johnson Muiruri v. Republic, (1983) KLR 445 and also John Otieno Oloo v. Republic [2009] eKLR).

In addition, the proviso to section 124 of the Evidence Act affords an exception to this general rule in cases of sexual assault where the child in question is not only the sole witness but also the alleged victim. So that as far as PW1 was concerned, even though neither PWs 2, 3, 4 or even 5 (the medical practitioner) could directly support her testimony, the court could nonetheless rely on it provided it recorded its reasons. In this case, the trial court is seen to have addressed itself thus:

"…The complainant did not mention anyone else. The offences were committed during the day. The accused was well known to PW1, PW2, PW3 and PW4."

The appellant has not taken any issue with the reasons recorded by the trial court."

17. In our instant case, PW 1 gave sworn testimony as held in **Patrick Kathurima –vs- Republic** (above) and **Johnson Muiruri –vs- Republic [1983] KLR 445** and also **John Otieno Oloo –vs- Republic [2009] eKLR,** where the testimony of a child of tender years is sworn, corroboration is unnecessary.

18. That notwithstanding, in this case, the evidence of PW 1 is corroborated by PW 2 (the mother) and PW 4(the medical officer who examined the child).

19. The facts of this case can be differentiated from the facts in ***JMM V Republic case (supra)*** cited by the appellant. In that case the Court of appeal found the evidence relied on to convict the accused was largely incomprehensible. In this instant case the contrary was established. Pw1 gave clear testimony as to how the appellant committed the offence as I have outlined in paragraph 11. The evidence of Pw1 was consistent and was unshaken on cross examination and corroborated with the testimony of Pw2 and Pw4.

20. The appellant's defence which was a mere denial could not stand a chance against the case established by the prosecution.

21. I shall now turn to the issue of sentence. The proviso of ***section 20(1) of the Act*** informs the sentence to be meted out. the proviso provides 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.'*

22. The Court of Appeal in **M K v Republic [2015] eKLR** clearly pronounced itself on the issue of sentence under ***section 20 (1)*** *of the* ***Act***:

"17. In the instant case, the appellant was charged with an offence under Section 20 (1) of the Sexual Offences Act. This Section provides for a minimum term of 10 years imprisonment. However, the proviso to Section 20(1) stipulates that if the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life.

……..

…..we are satisfied that the sentence stipulated in the proviso to Section 20 (1) of the Sexual Offences Act is not a minimum mandatory sentence of life imprisonment. The proviso simply states that the trial court has discretion to mete out a maximum term of life imprisonment. Read in conjunction with the general provision in Section 20 (1) we hereby state that the correct interpretation of the proviso in Section 20 (1) is that a person convicted of incest when the female victim is under the age of eighteen years is liable to a term of imprisonment between 10 years and life imprisonment."

23. The prosecution having proved that the child was 14 years I do not find the sentence meted out by the trial court to be excessive. The appellant was given an opportunity to mitigate before the trial court who considered his mitigation. Having considered the nature of the offence, I uphold the trial court finding on sentence.

24. The upshot is that the appeal herein lacks merit and is hereby dismissed. The conviction and sentence of the lower court are upheld.

Dated, Signed and **Delivered** at **KISII** this **26th day** of **February, 2020.**

A. K. NDUNG'U

JUDGE

Mr. Otieno, Senior Prosecution Counsel, instructed by Office of Director of Prosecutions.

Mr. Gichana holding brief Ondade, Advocate for Appellant.