REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CORAM: R. MWONGO, J

CRIMINAL APPEAL NO. 4 OF 2017

CKI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the judgment of Hon E. Kimilu SRM

delivered on 23rd January, 2017 in Naivasha CMCR No S.O. 12 of 2016)

JUDGMENT

1. The appellant was charged with incest contrary to **section 20 (1)** of the **Sexual Offences Act**. The particulars of the charges were that on the night of 4th and 5th February, 2016 in Naivasha Sub-County within Nakuru County, he intentionally and unlawfully caused his genital organ namely penis to penetrate the genital organ namely vagina of JWW a girl aged 7 years, whom to his knowledge was his biological his step-daughter.

2. After a hearing in the lower court, he was convicted and sentenced to serve imprisonment for life on 23-1-2017

3. In his appeal, the appellant raises four issues:

a. That the age of the complainant was not proved

b. That penetration was not proved

c. That the trial court did not take appellant's defence into account

d. That his sentence was excessive and he was not given opportunity to mitigate

4. This court's role in a first appeal is to re-evaluate the all the evidence given at trial and come to its own independent conclusions. This Court is not to merely confirm or disconfirm particular hypothesis made by the Trial Court. Even then, this Court must be acutely aware that it never saw nor heard the witnesses as they testified and, therefore, it must make an allowance for that. See ***Okeno v R [1972] EA 32*** and ***Kariuki Karanja v R [1986] KLR 19***

Age of Complainant

5. At commencement of the hearing, the proceedings are stated to have been taken in camera. The reasons are however not given, but can be implied from their nature, and the fact that a voire dire proceeding was held. In that proceeding, the victim stated her age as ten years, and that she was in class 2. The trial magistrate concluded after the voire dire that:

> ***"I am satisfied the child is a competent witness but shall give unsworn testimony"***

6. In his oral evidence, the Clinical Officer, PW1 Mesa Silvester, did not say anything about the age of the complainant. He however stated that the victim was examined in the hospital in a special room for children, accompanied by her mother. However, in the P3 form produced as PExb 1 by the Clinical Officer, he indicated the estimated age of the person examined as 10 years.

7. PW4 PC Bonface Aboke produced an age assessment certificate for the victim as P Exb 2. The document entitled "Medical Certificate of Age" is signed by Dr Njuguna of the Dental Clinic under the Medical Officer, Naivasha District Hospital on 5/4/2016. The victim was certified to be 8 years old based on a dental examination.

8. Taking all of the above evidence together, there is no doubt that the victim is a child aged below ten years. For purposes of section 20(1) of the Sexual Offences Act, if it is proved that the incest was with a female person under the age of eighteen years, the accused is liable for life imprisonment.

9. As the age of the victim was 8 years, the appropriate sentence was life imprisonment. This ground of appeal does not lie.

Proof of penetration

10. The appellant argued that the evidence of PW1 and PW2 did not state the date and time the child was defiled; and that the medical report was filled on 2/3/2016 when the offence is alleged to have been committed on 4/2/2016.

11. The appellant cited the case of **Kabale v Uganda (1999) 1 EA 148** where it was held:

> ***"In order to prove the commission of the offence of defilement, it has to be established that there had been penetration of the sex organ of the victim by the sex organ of the assailant and the victim was below the age of eighteen years old"***

12. The evidence of the child was that when her mother was unwell admitted in hospital, her father, the appellant asked her to sleep on his bed. At night he removed her pantie and lay on top of her, and did bad manners on her. She clearly stated that:

> ***"He inserted his part used for urinating on my part used for urinating…..I felt a lot of pain on my part used for urinating"***

Later, she told her neighbour what had happened. The neighbour told the teacher PW3 Susan Wangui Njihia, who took her to hospital.

13. In a case of defilement of a small child who is in the sole care of her father, it would not be expected that there would be eyewitness testimony concerning an incident like this that happened in the night. Nevertheless, when the Clinical Officer, PW1, examined the child, he concluded in his report P3 Form that there had been penile penetration and vaginal injuries were about one month old. He noted inflamed vaginal wall and swollen outer genitalia. The PRC form also showed that the hymen was broken, and vaginal walls were inflamed.

14. Whilst it is true that the exact date of defilement is unknown, there is no rule of law or practice that requires the time or date of penetration as essential to proof of the offence. In law, all that is required to be established is that there had been penetration of the sex organ of the victim by the sex organ of the assailant, as stated in the **Kabale case (supra)**.

15. The medical examinations are sufficient to support the holding that penile penetration occurred at or around the time indicated by the victim. In the absence of any other evidence implicating another person, that evidence holds as against the accused. This ground of appeal also fails

Whether Trial court failed to take defendant's Defence into account

16. The appellant submitted that his defence was not taken into account by the trial court. I have perused the judgment carefully. The trial magistrate in her judgment at lines 9-16 dealt fully with the defendant's defence. She found that the defendant had not disputed the fact that he spent the night with the victim, or that his wife was away in hospital. She found the prosecution case compelling, and convicted the accused thereon.

17. Nothing further need be said about this ground, except that the trial court did in fact take the accused's story into account before reaching judgment. This ground also fails.

Failure to take Mitigation and Wrong Sentence

18. The complaint here was that the trial court misunderstood the principles of sentencing; that the court ought to have sentenced the appellant to a term of not less than ten years' imprisonment given that **section 20(1) Sexual Offences Act** provides for such a term for incest. Further, the appellant invokes in his aid the case of **Francis Karioko Muruatetu & Another v Republic [2017] eKLR** to urge against the award of mandatory sentences; and that Article 50 (1)(2) of the Constitution gives the accused gives the accused the right to the benefit of the least severe of the prescribed punishments.

19. The appellant is mistaken on the sentence prescribed for incest. Under the proviso to **Section 20(1) Sexual Offences Act**, if it is alleged in the information or charge and proved that the female person defiled is under 18 years *"the accused person shall be liable to imprisonment for life…."*

20. The victim here was 8 years old. The offence was incest. The trial court was entitled to mete the life sentence. The only question is whether the circumstances disclose that the trial court took into account mitigation in exercising discretion to sentence.

21. The **Muruatetu case** did not deal with a sexual offence or life imprisonment. However, the reasoning applied there was that mandatory sentences are unconstitutional to the extent that they do not give the accused an opportunity to be heard on the sentence.

22. In the recent case of **Dismus Wafula Kilwake v Republic [2018] eKLR**, the Court of Appeal extended the reasoning in the Muruatetu case to mandatory minimum sentences imposed by the Sexual Offences Act. That Court stated:

> ***"In principle, we are persuaded that there is no rational reason why the reasoning of the Supreme Court [****in* ***Francis Karioko Muruatetu & Another v. Republic, SC Pet. No. 16 of 2015], which holds that the mandatory death sentence is unconstitutional for depriving the courts discretion to impose an appropriate sentence depending on the circumstances of each case, should not apply to the provisions of the Sexual Offences Act, which do exactly the same thing.***
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> ***Being so persuaded, we hold that the provisions of section 8 of the sexual Offences Act must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing.***
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> ***The Sentencing Policy Guidelines require the court, in sentencing an offender to a non-custodial sentence to take into account both aggravating and mitigating factors. The aggravating factors include use of a weapon to frighten or injure the victim, use of violence, the number of victims involved in the offence, the physical and psychological effect of the offence on the victim, whether the offence was committed by an individual or a gang, and the previous convictions of the offender. Among the mitigating factors are provocation, offer of restitution, the age of the offender, the level of harm or damage inflicted, the role played by the offender in the commission of the offence and whether the offender is remorseful."***

23. The appellant complained that mitigation was not considered. I have carefully perused the proceedings as to mitigation. The prosecution stated that the accused was a first offender with no records. The accused stated that his mother depended on him and he prayed for a non-custodial sentence. The trial magistrate said:

> ***"I have evaluated the nature of the offence as well as all issues raised, accused is sentenced to serve life imprisonment".***

24. It appears to me that the trial court considered not only the nature of the offence, but also all other issues raised. Although the trial court did not expressly say so the nature of the offence included the aggravating circumstance of abuse of trust and authority by the accused, and the absence of remorse and the fact that the accused was a first offender.

25. The trial court thus appears to have been alive to the mitigation and did take it into account. I therefore do not see any basis for interfering with the trial court's sentence.

26. Accordingly, the appeal is dismissed in its entirety and the trial court's conviction and sentence are upheld.

27. Orders accordingly.

Dated and Delivered at Naivasha this 20th Day of February, 2020

RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. Ms Maingi for the State

2. Christopher Kiiru Isaac - Appellant present in person

3. Court Clerk - Quinter Ogutu