REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCRA NO. 102 OF 2019

BMK ....APPELLANT

VERSUS

REPUBLIC ....RESPONDENT

(Being an appeal from the Judgment of Hon. C.A Mayamba (PM) in Kilungu Principal Magistrate's Court Criminal Case No. 10 of 2018 delivered on 17th May, 2018).

JUDGMENT

1. **BMK** the Appellant herein was charged with two counts of incest contrary to section 20(1) of the Sexual Offences Act. The two offences are said to have been committed on an unknown date in May 2017 and on 20th November 2017. The victim in both instances is his daughter (**WNM**)

2. He also faced two alternative counts of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act. The victim is the same Appellant's daughter. It is not clear from the judgment whether the Appellant was convicted on the two main counts.

3. Upon conviction he was sentenced to fifteen (15) years imprisonment. He filed this appeal against the judgment raising the following grounds:

a) **That,** the trial Magistrate erred in law and fact by failing to find that the elements of the offence (*penetration*) was not conclusively proved to warrant a conviction.

b) **That,** the learned trial Magistrate erred in law and fact in relying on the evidence of Pw1 whose integrity was questionable.

c) **That,** the learned trial Magistrate erred in law and fact in failing to find that the charge against the Appellant was bad for duplicity.

d) **That,** the trial Magistrate erred in law and fact by failing to find that the *voir dire* was badly conducted in the present case in violation of law.

4. The prosecution case was premised on the evidence of four (4) witnesses. The Appellant gave a sworn defence and called two (2) witnesses.

5. The complainant (WNM) testified as Pw1. She said she was aged 16 years and the Appellant was her father. She testified that one Thursday morning in May 2017 the Appellant grabbed her and locked her in a granary as he waited for the other children to go to school. Thereafter he opened the granary and took her to his bedroom. Their mother was not around. He removed his clothes after she removed her pant. He tried to insert his penis in her vagina but it did not work.

6. On 20th November 2017 the Appellant called her inside the house to show her something. When she went he locked the door and dragged her to his bed and removed her pant only. He removed his trouser and pant and inserted his penis inside of her. This time he was able to penetrate her. He warned her against telling anyone what had happened.

7. Again on 10th January 2018 at 9:00 pm he came from the market and found Pw1 with other children. He told her she must sleep with him. He gave her his phone to hold as he went to get some lighting. She placed the phone down and ran to her aunt WK and reported to her but the aunt did nothing. She even reported to her mother whenever she came but she too did nothing.

8. Seeing that she was not getting any help she went to Kee police post herself on 31st January 2018 and reported. She was taken to Mutungu hospital.

9. Pw2 **JNM** is Pw1's mother. She confirmed that the Appellant (*her husband*) chased her away from home in May 2017. She returned in June 2017 when Pw1 reported to her the defilement by her father. She said she did not do anything due to the violence of the Appellant. She however said Pw1 was a liar and she cannot trust her.

10. Pw3 **Eric Kasiamani** the clinical officer who examined Pw1 found her hymen to have been broken and was of the opinion that she had been defiled. She produced the P3 and PRC forms as EXB2 and 3 respectively.

11. Pw4 **No. 54416 P.C Ndirangu Githua** was the investigating officer. He explained the report given to him by Pw1. He even visited the home and was shown the granary.

12. The Appellant in his sworn defence said he did not remember the dates but he knew he was arrested at around 9:00 pm. He denied the charge of defilement. He denied being home on 20th November 2017, 10th January 2018 9:00 pm and 28th November 2018.

13. Dw2 **TMK** a sister to the Appellant said Pw1 was never defiled in May 2017 as she never confessed to her. In cross examination she said on 20th November 2017 she was home and even saw the Appellant. That Pw1 was sent to the market and never returned.

14. Dw3 **Patrick Nzioka** did not say anything meaningful before the court. Dw4 **FMK** said Pw1 was always out of school and goes places. He stated that the Appellant was a very good man.

15. The appeal was canvassed by way of written submissions.

16. The Appellant argues that the elements of the offence of defilement were not conclusively proved to warrant a conviction. He submits that penetration was not proved. He contrasted the evidence in the treatment notes and the P3 form, which he says is contradictory. To him a broken hymen is not sufficient proof of penetration and this was not conclusively proved. He relied on the case of **Omari Ismael Mazzha vs R (2017 eKLR;** to support this.

17. He also dismissed Pw1 as an incredible witness. He referred to an answer she gave in cross examination by him saying.

> ***"I promised to give you what you do to my mother."***
>
> Further that her own mother (Pw2) said she is a liar. His witnesses also referred to her as such.

18. The Appellant criticized the manner in which the *voir dire* examination was conducted. He was not satisfied with the kind of questions the witness was asked by the trial court. He referred to the cases of **Joseph Opando –vs- R Criminal Appeal No. 91 of 1999; Patrick Wamuyu Wanjiru –vs- R Criminal Appeal No. 6 of 2009.** Further referring to section 135 (1) Criminal Procedure Code he said the charge sheet was defective as he ought to have been charged with one count and not two counts.

19. Learned counsel Mrs. Monica Owenga for the State opposed the appeal. On duplicity of the charges she submits that the counts relate to different occurrences. She contends that the *voir dire* was not even necessary as Pw1 was above ten (10) years of age.

20. On Pw1's incredibility counsel submits that there was nothing on record to discredit Pw1. The case was therefore proved beyond reasonable doubt. She did not find anything unlawful about the sentence.

Analysis and determination

21. The duty of the first appellate court is to re-analyse and reconsider the evidence tendered before the trial court with a view of arriving at its own conclusion. See **Okeno –vs- R 1972 C.A 32. In Kiilu & Anor –vs- R (2005) 1 KLR174** the Court of appeal stated thus:

> ***"1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the Appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions.***
>
> ***2. 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 findings and conclusions; it must make its own findings and draw its own 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."***

22. The same was reiterated in the case of **David Njuguna Wairimu –vs- R (2010) eKLR** where the Court of Appeal stated:

> ***"The duty of the first appellate court is to analyze 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 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 decision."***

23. I have considered the evidence on record, the grounds of appeal both submissions, authorities and the law. I find the following to be the issues falling for determination.

i. Whether the charge sheet was defective for duplicity.

ii. The credibility of Pw1 and issue of *voir dire* examination.

iii. Whether the offence of incest was committed against Pw1.

iv. Sentence.

Issue no. (i) Whether the charge sheet was defective for duplicity.

24. The Appellant was charged with two counts of incest with two alternative counts of indecent act with a child. The Appellant claims that there was duplicity of charges. A charge is duplex where in one charge there is more than one offence. Section 134 of the Criminal Procedure Code provides: -

> ***"Every charge or information shall contain and shall be sufficient if it contains, a statement of the specific offences or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.***

25. In the case of **Sigilani –vs- R (2004) 2 KLR 480** it was held that:

> ***"The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence".***

26. I have read through the charge sheet herein and find that there is no duplicity therein. The charge and particulars are specific and only refer to one offence in one count. The problem I find in the charge sheet is one of multiplicity of charges. Multiplicity in a charge sheet arises from charging of a single criminal act or offence as multiple separate counts. This may result in violation of the right of an accused person under Article 50(2) (o) of the constitution.

27. As was stated by Nyamweya J. in the case of **K.N vs-R (2018) Mombasa High Court Criminal Appeal No. 67 of 2016 eKLR**

> ***"Multiplicity can be corrected by amendment of the charge without necessarily dismissing the case. The error or mistake in the charge is also one that can be cured on appeal under section 382 of the Criminal Procedure Code where it is shown that no prejudice has been occasioned by the multiplicity of charges."***

28. I now move to address the multiplicity. The offence of incest is provided for under section 20(1) of the Sexual Offences Act which states as follows: -

> ***"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.***

From this section, the prosecution may prove incest by either showing that an indecent act was perpetrated against the victim or there was penetration. Proof of penetration is therefore not mandatory.

29. An indecent act is defined under section 2 of the Sexual Offence Act as

> ***"indecent act"*** *means an unlawful intentional act which cause*
>
> *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;*

30. I do find that since the offence of incest comprises of either penetration or indecent act there was no need for loading the charge sheet with the alternative counts of indecent acts., after the main counts of defilement.

31. The offences charged in counts 1 and 2 though similar were allegedly committed on different dates. The particulars were very specific. I find no defect in them and the Appellant was in no way prejudiced by the same. The correct charge sheet should have only contained the two

main counts of incest.

32. I have also noted that the learned trial Magistrate did not indicate which of the two counts he convicted the Appellant of. He also just passed one sentence which confirms that he only convicted on one count. What then happened to the other count?

Issue no.(ii) The credibility of Pw1 and issue of *voir dire* examination.

33. The charge shows that Pw1 was aged 16 years. Pw1 and Pw2 gave similar evidence on that. None of them gave the date of birth of Pw1 and neither was any single document produced to confirm her age. If indeed she was 16 years old, then she was not a child of tender years for her to be subjected to a *voir dire* examination. The Appellant claims that the said examination was not conducted in a proper way and did not achieve its purpose. I will not delve into that because it was not relevant in the circumstances of this case.

34. The Appellant has also discredited Pw1 as a witness. The reason he gives is that him, his witnesses and Pw2 who knew her better knew her as a liar. In his cross examination of Pw1 and in his own sworn defence, the Appellant never stated anything about Pw1 being an untruthful witness. Secondly his wife (Pw2) confirmed to the court that Pw1 had reported to her about the defilement. She also said she did not report the matter because of the violence of the Appellant. After explaining everything else she added that Pw1 is a liar and she cannot trust her.

35. As parents of Pw1 the Appellant and Pw2 should have told the court what made them distrust Pw1. What had she done to them? They never explained. Pw1 was under no obligation to report to Dw4 what was happening to her. She said she reported to Dw2 who did nothing same to her mother (Pw2). Pw2 admitted having been given the report.

36. The Appellant did not clearly give the trial court any reason as to why Pw1 would frame him. This court has not found any reason to make it discredit Pw1.

Issue no. (iii) Whether the offence of incest was committed against Pw1.

37. There is no dispute that the Appellant is the father of Pw1. Pw1 was very clear and specific in her evidence on what the Appellant did to her on the two occasions and what led her to go and personally report to the police. The reason was that she was not being assisted by her mother (Pw2) and her aunt (Dw2). The Appellant says the treatment notes and the evidence by Pw3 in the P3 form don’t agree.

38. It is true the treatment notes (EXB1) indicate that Pw1’s hymen was intact. Pw3 said he examined Pw1 and found her hymen to be broken. This was done on 2nd February 2018 when the child was said to have been defiled on 20th November 2017. The Sexual Offences Act under section 2 defines penetration as

> “**penetration**” *means the partial or complete insertion of the genital organs of a person into the genital organs of another person.”*

39. Pw1 stated that in May 2017 the Appellant tried but was unable to penetrate her. However, in November, 2017 he managed to do

so. If indeed she was lying there is nothing that would have stopped her from saying he had fully penetrated her on both occasions. In any event the offence of incest does not require *“penetration”* as the only proof. The law states that even an indecent act alone is sufficient to prove incest.

40. It is also not lost to this court’s mind that Pw1 in her evidence said the Appellant always did these things to her after sending away her mother. He never rebutted this. Infact in his defence he states:

> “*My daughter stays with the mother. The mother was always at home”*.

Even his beloved wife confirmed he had chased her away in May 2017 and she only returned in June 2017, for Pw1 to report these things to her.

41. My finding is that the offence of incest was proved against the Appellant. Pw1 was a minor even if age was not proved. That’s why the trial Magistrate took her through a *voir dire* examination though it was not necessary. Its him who saw her in court and he was satisfied she was below 18 years of age.

Issue (iv) Sentence

42. The sentence provided for under section 20(1) Sexual Offences Act is upto life imprisonment. The Appellant was sentenced to 15 years’ imprisonment. I am sure he has picked up his lessons here and there. I will reduce his sentence to 12 years’ imprisonment.

43. The upshot is that:

> ***a) The Appellant is convicted on both counts 1 and 2.***
>
> ***b) He is sentenced to twelve (12) years imprisonment on each count***

c) Sentences to run concurrently from the date of conviction and sentence.

Orders accordingly.

Delivered, signed & dated this 25th day of June 2020, in open court at Makueni.

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H. I. Ong'udi

Judge