



IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO.162 OF 2019

CORAM: D.S. MAJANJA J.

BETWEEN

HMN.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. P. M. Wechuli, RM

dated 23rd August 2018 at the Magistrate’s Court at Tigania

in Sexual Offence Case No. 23 of 2018)

JUDGMENT

1. The appellant, **HMN**, was charged and convicted of the offence of incest contrary to **section 20(1)** of the *Sexual Offences Act* (“the *Act*”). The particulars of the charge were that on 15th August 2017 at [particulars withheld] Village, Kianjai Sub-location Kianjai Location in Tigania West District of Meru County, the appellant, being a male person, caused his penis to penetrate the vagina of BK, a female person who was to his knowledge his daughter.

2. The evidence against the appellant before the trial court was as follows. The child, PW 1, testified on oath after a voire dire. She testified that the appellant was her father and that she was 13 years old. She narrated what took place on the material day as follows:

On 15th August 2017 I recall I washing clothes at home. My father came and entered the house. He called me. I went and he told me to connect the battery. I did so. He held me and threw me on the bed. He removed my clothes. The inner cloths were a biker and panty. He removed his trouser. He removed his thing which he uses to urinate and placed inside mine which I use to urinate. I felt pain inside me. When he finished he told me to leave and continue with my work. It was 2 pm. At that time there was nobody at home. It was only me and the accused. I feared since he was harsh.

3. After her ordeal, she took a shower and proceed to the market to inform her mother. Her mother, PW 2, recalled PW 1 came to see her at the market crying and informed her that the appellant had sexually assaulted her. She took PW 1 to the hospital and reported the incident to the police. She also produced the immunization card for PW 1 which showed that she was born on 7th November 2003.

4. The Assistant Chief, PW 3, recalled that on 17th August 2017, he executed an arrest warrant against the appellant. The Clinical Officer, PW 4, filled the P3 medical form and Post Rape Care (PRC) form after examining PW 1 on 16th August 2017. He confirmed that PW 1 was seen at the hospital on 15th August 2017 at about 2.00pm. Her labia minora was inflamed and the hymen broken. The examination of the vaginal swab showed spermatozoa and gram cells. He concluded that there was penetration.

5. The investigating officer, PW 5, confirmed that she received a report of the incident on 15th August 2017 from PW 2. She issued a P3 form and escorted PW 1 to the hospital for examination. She recorded statements and completed investigations.

6. When put on his defence, the appellant gave sworn testimony. He denied the charges against him. He stated that he came home on the material day at about 5.00pm. He prepared food and slept. On the following morning, he went to work and was arrested. He stated the charges were the result of a gudge against him.

7. The appellant’s appeal is grounded on the amended supplementary grounds of appeal and written submissions dated 21st July 2020. The

main argument was that the prosecution did not prove its case beyond reasonable doubt.

8. The offence of incest under **section 20** of the **Act** is proved by either an indecent act or by penetration of a person who is related to the child. **Section 20(1)** of the **Act** provides as follows:

20. (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 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. [Emphasis mine]

9. As I have outlined above, the testimony of PW 1 is clear and direct on the issue of penetration. It was sufficient to support a conviction in light of the *proviso* to **section 124** of the **Evidence Act (Chapter 80 of the Laws of Kenya)** states that:

Provided that where in criminal cases 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 for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

10. The trial magistrate was satisfied that the child was telling the truth and expressed the view that PW 1’s testimony was consistent and was not impeached on cross-examination and that having observed the child giving her testimony, he was convinced she was telling the truth.

11. I further find that PW 1’s testimony was fully corroborated by the fact that when she went to report her ordeal to her mother, PW 2, she was in a state of distress and the medical evidence taken soon after the incident was consistent with an act of penetration. When viewed alongside the appellant’s defence, it withers away. All this evidence shows that the prosecution proved that the appellant committed the felonious act.

12. The maximum sentence for incest is life imprisonment but the appellant was sentenced 20 years’ imprisonment in line with **section 8(3)** of the **Act** where the age of the child is between 12 and 14 years old. The Court of Appeal has since declared the mandatory minimum sentence unconstitutional in several cases among them; **BW v Republic KSM CA Criminal Appeal No. 313 of 2010 [2019] eKLR**, **Christopher Ochieng v Republic KSM CA Criminal Appeal No. 202 of 2011 [2018] eKLR** and in **Jared Koita Injiri v Republic, KSM CA Criminal Appeal No. 93 of 2014**. Based on those decisions, I quash the sentence of 20 years’ imprisonment and substitute the same with a term of 15 years’ imprisonment.

13. I allow the appeal only to the extent that I quash the sentence of 20 years’ imprisonment and substitute it with a sentence of **fifteen (15) years’ imprisonment** to run from the date of arraignment, that is, 18th August 2016. The conviction is affirmed.

SIGNED AT NAIROBI

D. S. MAJANJA

JUDGE

DATED and DELIVERED at NAIROBI this 20th day of AUGUST 2020.

A. MABEYA

JUDGE

Appellant in person.

Mr Maina, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.