



IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 40 OF 2019

CORAM: D.S. MAJANJA J.

BETWEEN

SM APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. P. M. Wechuli, RM dated 18th February 2019 at the Magistrate's Court at Tigania in Sexual Offence Case No. 3 of 2016)

JUDGMENT

1. The appellant, **SM**, 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 an uncertain date in 2015 at [particulars withheld] Village, Thau Location in Tigania West District of Meru County, the appellant intentionally touched the vagina of LG, a child aged 10 years, with his penis 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. She recalled that one day when the appellant was drunk he came home and asked her brother, PW 2, to leave and go to his grandmother. The appellant then removed his clothes and her clothes. She stated that he did, "*bad manners*" to her. She told the court that the appellant sexually assaulted her twice. She further stated that on the first time the appellant sexually assaulted her, her brother, PW 2, was present but he did not respond to her when she called him. On the second time she was away. She told PW 2 and her aunt about the incident.
3. PW 2, also testified on oath, after a *voire dire*. He stated he was 15 years old and that the appellant was his father and PW 1, his sister. He recalled that the appellant came home drunk one day while he was playing with his sister and chased him away. He went to sleep at his grandmother's place. On the next day, PW 1 told him that what the appellant had done. He also told her grandmother what had taken place. He also went to inform the Assistant Chief, PW 5.
4. PW 5, recalled that on 1st August 2016 at about 7.00am, PW 2 came to see him and informed him what had happened between the appellant and PW 1. PW 1 was brought to him and she also narrated what the appellant had done. PW 5 arrested the appellant and took him to the police station. PW 4, the investigating officer, confirmed that the appellant was brought to the police station by PW 5. He issued the P3 medical form and the child was examined by PW 3, a clinical officer, who testified that since the clinical notes and the examination was carried out after one year, he could not tell whether the child was defiled.
5. In his sworn defence, the appellant denied the offence. He stated that he was arrested after he had beaten PW 1 when he found her still in school uniform when he came home in the morning.
6. 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. He complained that his defence was not considered including the fact that his wife was not called as a witness in the matter yet she is the one who took the complainant to hospital and with whom he was estranged. The respondent, on the other hand, supported the conviction on the basis that all the elements of the offence were proved.
7. 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]

8. The appellant was charged almost a year after the incident. This is the nature of the incest as it occurs within the family. The investigating officer in his evidence produced evidence of correspondence between the Police and Office of the Director of Public Prosecutions which showed that there was an attempted cover up by members of the family and the police were not sure of whether to proceed to prosecute the appellant. This is confirmed by the fact that the appellant's father became a hostile witness. The DPP nevertheless directed the appellant be prosecuted.

9. The testimony of PW 1 is clear and direct on the issue of penetration. The record reflects the fact that the child was traumatized by the incident and could not face the appellant. Her testimony was duly corroborated by PW 2 who recalled the day that the appellant chased him away and when thereafter PW 1 told him what happened. He also reported the matter to the PW 5 who was satisfied that both children were giving consistent version of the incident.

10. 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."

11. The trial magistrate was satisfied that the child was telling the truth and expressed the view that, "[I]t is clear that the accused was not able to impeach the minor's evidence. She stuck to her story on cross-examination to state that the accused defiled her." He added that, "The victim's behavior and reaction was synonymous with someone who went through some trauma and unpleasant event..... This proves that she was not making false allegations, she actually underwent the ordeal she described in her evidence. In short, she was truthful."

12. As I have stated, PW 1's testimony was fully corroborated. I also find that in the circumstances, the medical evidence was not necessary to prove penetration in light of the clear evidence of the appellant having committed the felonious act. Moreover, PW 1's medical examination took place almost a year after the incident. It is unlikely that that such an examination would have yielded any positive results of penetration.

13. Upon evaluation of all the evidence, I am satisfied that the prosecution proved its case beyond reasonable doubt. I therefore affirm the conviction.

14. Turning to the sentence, the maximum sentence for incest is life imprisonment and if the child is below the age of 11 years, the sentence is mandatory in line with **section 8(2)** of the *Act*. I am aware that the Court of Appeal in **Jared Koita Injiri v Republic KSM CA CRA No. 93 of 2014 [2019] eKLR** considered the Supreme Court decision in **Francis Karioko Muruatetu & Another vs Republic, SC Pet. No. 16 of 2015 [2017] eKLR** in reducing the sentence of the appellant who defiled a girl aged 9 when it observed as follows;

In this case the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by section 8 (1) of the Sexual Offences Act, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis.

Needless to say, pursuant to the Supreme Court decision in Francis Karioko Muruatetu & Another vs Republic (supra), we would set aside the sentence for life imposed and substitute it therefore with a sentence of 30 years from the date of sentence by the trial court."

15. In light of the aforesaid holding, I allow the appeal only to the extent that I quash the sentence of life imprisonment and substitute it with a sentence of **twenty-five (25) years' imprisonment** to run from the date of arraignment, that is, 4th 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.