REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

(CORAM: R. MWONGO, J)

CRIMINAL APPEAL NO. 40 OF 2017

JWM.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal against the judgment of Hon G. N. Opakasi (RM) delivered on 2nd October, 2017 in Engineer SRMCR S.O. No. 9 of 2017)

JUDGMENT

1. By a judgment delivered on 29th September 2017, the Appellant was convicted for incest contrary to **Section 20 (1)** of the **Sexual Offences Act**. He was sentenced to life imprisonment.

2. Dissatisfied, the Appellant has appealed against conviction and sentence. He challenges the trial court's judgment on three essential grounds:

a) That there was no proof of penetration.

b) That the case against him was fabricated following a family disagreement.

c) That the life sentence meted is based on wrong principles.

3. The appeal is opposed by the state. Both parties filed written submissions. The Respondents submissions cover the issues whether there was proof beyond reasonable doubt, and whether the sentence meted was appropriate.

4. This court's role is to re-evaluate the evidence and come to its own conclusions, not ignoring the findings of the trial court, and being careful to note that this court did not hear the witnesses and see their demeanor.

5. The background in terms of facts is as follows. The complainant, EWW as a nine year old standard four girl at [Particulars Withheld] Primary School. She underwent a *voir dire* examination and the court found her intelligent enough to understand the meaning of telling the truth, but not to take oath. She testified as PW1.

6. She testified that her mother left their home and left her and her siblings with their father, the Appellant. She said the Appellant slept with her smaller brother; then he called her elder sister; who told PW1 that her father slept with her; the next night he called her to sleep with him. She did. He removed her pant and took his thing for urinating (which she called "kanyunyu") and put it in her thing for urinating. He kept putting his thing in and out of her. She felt a lot of pain. Later, when she went to urinate she felt a lot of pain, and as she urinated she saw blood coming out. She applied milking gel and was dragging her legs. She told one WN, a neighbour, what had happened.

7. She testified that the Appellant slept with her, and did this for many days. Finally when her mother came back, WN told her. Her mother took her to hospital where she was examined. Later she was taken to the police station at Engineer. She identified the Appellant in the dock as the perpetrator.

8. In cross-examination, PW1 was consistent. She said her father had threatened to break them into pieces if they told anyone what had been happening. That was why they did not tell anyone at school what had happened. She denied that anyone had sent her to come out and accuse the Appellant of putting his thing in her thing for urinating.

9. PW2, MN, is the complainant's mother, and testified that on 5th February, 2017 she went to collect her youngest child from her husband at

the Appellant's home. They had quarreled and she had moved out of her matrimonial home leaving the children with the accused. Their marital relationship was off and on because he had been violent and brutal towards her.

10. She said that on the day she left, her eldest daughter L aged twelve, had visited a friend and slept out. As a result her husband had blamed her and they quarreled. She left home to avoid violence, and went to Maai Mahiu where she rented a house. Soon her eldest daughter called her and told that they were missing school because of having to stay at home to care of the youngest child. She had left at home a son, aged 16, daughters L and EWW aged 13 and 12 respectively, and A, the youngest.

11. When she got home and took her youngest child, she slept at a neigbour's house. The neigbour told her bad things were happening in her home. Whilst at her neighbour's house; the other children came. L came first and told her what her father had been doing: that he had defiled L several times; that he had also slept with EWW, pulling off her pant and had raped her.

12. On hearing these things she and a neighbour checked L and EWW's vaginas. They were dirty and both had yellowish discharge. She reported the matter to Kinangop Police Station and the girls were checked by a female police officer. They were then sent to Engineer District Hospital where the children were examined. The police at Kinangop gave her a note to take to Kipipiri Police Station where she was given a P3 form that she took to Engineer Hospital.

13. In cross-examination she confirmed that she only took away her daughters and left her son with the accused. When they got married she already had her oldest daughter. She believed the accused defiled her eldest daughter when she was in class 2. She confirmed she had separated from him many times. The children told her of their ordeals when they had reached Maai Mahiu. She denied falsely accusing the Appellant. She also denied that she told the accused that when she returns she would ensure he goes to prison.

14. Dr. Maingi Muchiri, PW3, of Engineer District Hospital on 8th February 2017, examined EWW who had been allegedly defiled several times by a person known to her. He found that her labia majora was tender; hymen was freshly broken; a high vaginal swab test revealed pus cells meaning there was infection; and that there had been forceful penile penetration. He produced a P3 Form.

15. In cross-examination he reiterated that his examination of EWW revealed forceful penetration and freshly broken hymen.

16. PW4, PC Hosea Odipo was the arresting officer. On 8th February, 2017 he received an arrest warrant for the accused from a woman called MNW. He advised the reporter to investigate the accused's whereabouts and come back and inform him. She called him on 9th February, 2017 and told him the accused was at [Particulars Withheld] Shopping Centre. He went there and found accused on a motor bike. He explained what he had come for and why, then arrested the accused.

17. In cross-examination PW4 confirmed that he was accompanied by Corporal Duncan Nganga during the arrest. They did not know the accused but enquired from members of the public.

18. The Investigating Officer PC Antonio Adhiambo testified as PW5. He said that he was at Kipipiri Police Station when he was called by the officer at the report office. He was told that a lady had reported that two of her daughters had been defiled between 2nd January and 5th February, 2017 when she returned home. The parents had separated and she left the children with the husband. According to the report, he accused called the girls to him at intervals in the pretense that they needed to help him look after the smallest child. He would then defile them.

19. He further testified that on 7th February, 2017 the mother brought the two girls to Kinangop Police Station. They were referred to Engineer Hospital and later to Kipipiri Police Station. He issued them with a P3 Form which was filled by a doctor. He recorded the children's statements. Later he requested the Administration Police Officer from Geta AP Post to arrest the accused. Thereafter the accused was arrested and PW5 picked the accused from Geta AP Post, and then charged him.

20. In cross-examination he stated that the first report was done at Engineer Police Station; that the offence occurred between 2nd January to 5th February 2017; that he interrogated the other children who confirmed that their father had been defiling them. That he did not take the accused to hospital because some time had passed by the time the matter was reported.

21. PW2 was recalled to provide the ages of the victims. She said EWW was born on 1st December, 2008. She produced her clinic card for marking. PW5 was also recalled. She produced the Clinic Card of EWW as an exhibit.

22. The accused gave unsworn evidence in his defence. He said that on 9th February, 2017 he woke up and took his son to school. He went back to his place of work as a boda boda rider. Two Administration Police Officers came to him, asked him his name and took him to the Chief saying MN and EWW had made a report at the office. When he arrived at the Chief's place he was arrested and put into the cells. Later he was transferred to Kipipiri Police Station. There the investigating officer told him that his wife had reported that he had defiled the children.

23. As earlier noted, the issues contested were on whether there was proof beyond reasonable doubt, in particular, the Appellant's allegation that there was no proof of penetration; and whether the sentence meted was apt.

Penetration and proof beyond reasonable doubt

24. The Appellant's argument on penetration is that there was no proof that it was he who defiled and penetrated EWW. He submits that the only evidence adduced against him was that of EWW and no one else purported to witness the assault. He referred to **PKW v Republic [2012] eKLR** where the court said that mere absence of a hymen in a girl is not proof of defilement as scientifically, some girls are born

without a hymen, that it is capable of tearing through use of tampons, masturbation, physical activity like horseback riding, cycling and gymnastics.

25. Further he stated that there was no proof of the date when penetration occurred; that the evidence of his wife (PW2) was contradictory as to where she slept on the day she came for her children. Thus, he argues the overall evidence was not properly considered in reaching the conclusion that he defiled EMM.

26. The trial magistrate in her judgment, referred to Section 20 (1) of the **Sexual Offences Act**. She stated that proof of incest required ascertaining that relationship between the accused and the complainant, and there was no dispute that he was the father. Secondly, that penetration did occur. On this, the trial magistrate detailed the sleeping arrangements in the home, and also that the evidence of EWW was clear that her father called her into his bed; he told her to move closer; he removed her pant; and that he put his thing for urinating into her thing for urinating; that she felt pain; that PW1's evidence was corroborated by the doctors evidence and the P3 Form.

27. The trial magistrate further noted that though the medical evidence could not point out the specific person who committed the offence, Section 124 of the Evidence Act provides that the evidence of a victim cannot lead to a conviction unless corroborated, provided that where such evidence is solely that the victim, the court shall convict if for reasons to be recorded, it is satisfied that the alleged victim is telling the truth. The trial magistrate found that EWW did not seem to her to be lying, that the accused had been left at home alone with the children; that the complainant was very hones; and that there was no inconsistency in her evidence.

28. With regard to the accused's submission in the lower court that the accused's wife had made the report to police out of malice because of their disagreements, the trial court found that there was no evidence of such malice.

29. I find that the trial magistrate ably handled the evidence and the law and that the finding of penetration by the Appellant was proved through the evidence of EWW and corroborated by the medical evidence.

30. In the case of **Dominic Kibet Mwaren v Republic [2013] eKLR** it was held:

> ***"The critical ingredients forming the offence of defilement case are: age of the complainant, proof of penetration and positive identification of the assailant."***

31. In cases of incest by a male person there must, additionally, be proof of the relationship between the accused and the complainant in that, the complainant is either the daughter, granddaughter, sister, mother, niece, aunt or grandmother of the accused.

32. With regard to proof of age, this was done sufficiently through P. Exhibit 3, the Child Health Card for EWW which shows she was born on 1st December, 2008. This was not an issue in dispute.

Sentence

33. The Appellant argues that the trial court gave the wrong sentence. He cited the cases of **Francis Karioko Muruatetu & Another v Republic [2017] eKLR** and **Wilson Kipchirchir Koskei v Republic [2014] eKLR**. In both case the principle was established that at the time of sentencing, a trial court must exercise its discretion. Further that such discretion extended to any law that provides for a mandatory sentence.

34. The Appellant further argues that in **Section 20 (1)** of the **Sexual Offences Act** the expression *"not less than"* has not been used in relation to the offence of incest involving a minor. Thus, that the court ought not to have imposed the high sentence of life imprisonment.

35. **Section 20 (1)** of the **Sexual Offences Act** provides:

> ***"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 added)

36. Clearly, the penalty provision allows for imposition of a life sentence. Whilst it is true that the trial court had to exercise its discretion, in the present case, the trial court clearly considered the mitigation tendered and recorded the fact. The trial magistrate then stated that the offence was very serious and that the accused had continued to deny the charge. She therefore exercised her discretion taking these factors into account.

37. In **PMM v Republic [2018] eKLR** the court held:

> ***"It must be pointed out, however, that the sentence imposed was not invalid since, clearly, life imprisonment is well within the scope of proper sentence for the offence of incest in relation, as in this case, to a child under eighteen years of age."***

In **MMM vs Republic [2017]** it was held:-

> ***"It is evident that irrespective of the age of a victim, a trial court can mete upon an accused a <u>minimum</u> sentence of <u>ten (10) years</u>. This essentially means that a trial court has the discretion of imposing more than ten (10) years and if circumstances so require, upto life imprisonment in a case where the victim is below (18) years of age.*** *(Emphasis added)*

38. I have carefully perused all the evidence. The Appellant appears to have engaged in defiling his two daughters on a regular basis. It has come to the court's knowledge that with regard to the elder daughter, L, a criminal trial was also conducted in which the accused was found guilty in Engineer S. O. 10 of 2017. There, he was also sentenced to life imprisonment. He has not appealed in that case.

39. The sentence meted by the learned trial Magistrate was entirely within her jurisdiction and she clearly exercised her discretion.

40. All in all, I am not inclined to review the sentence at this stage without the benefit of further mitigating circumstances being availed to court including a Probation Officer's report and a report from the prisons service. In addition, I think the Appellant should have filed an appeal in respect of S.O. No. 10 of 2017 so that the court would be considering the whole picture when dealing with the Appellant and the possibilities of his sentences.

41. In light of the foregoing, the conviction and sentence by the trial court are affirmed. It is directed that in the event that the Appellant should appeal in respect of S. O. No. 10 of 2017, this file shall be tied thereto and the judgment herein shall be simultaneously be taken into account.

Administrative directions

42. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Teams video/tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Executive Officer, Naivasha.

43. A printout of the parties' written consent, if any, to the delivery of this judgment shall be retained as part of the record of the Court.

44. Orders accordingly.

Dated and Delivered in Naivasha by teleconference this 29th Day of October 2020

R. MWONGO

JUDGE

Attendance list at video/teleconference:

1. Ms Maingi for the State

2. James Warogo Mugambi - present in Naivasha Maximum Prison

3. Court Assistant - Quinter Ogutu