REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 10 OF 2018

MMW.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against conviction and sentence in Nakuru CM S.O No.330 OF 2018

delivered by Y.I.KHATAMBI SRM on 18th January 2019)

JUDGMENT

1. The appellant was charged with the offence of incest **contrary to 20(1) of the Sexual Offences Act No. 2006**. Particulars are that on the 7th day of April 2018 at [particulars withheld] area in Nakuru North Sub County, within Nakuru County the accused caused his male genital organ namely penis to penetrate the female genital organs of S.M.W a girl aged 12 years who was to his knowledge his sister. He was also charged with alternative count of **committing an indecent act contrary to section 11 (1) of the sexual offences Act**. Particulars are that on the above date he unlawfully and intentionally indecently assaulted S.M.W a girl aged 12 years by touching her private pats namely vagina.

2. The appellant denied both the main and alternative charge. The case proceeded for hearing with prosecution availing 6 witnesses and the appellant in his defence gave unsworn statement. The appellant was found guilty of the main charge, convicted and sentenced to life imprisonment. Being aggrieved by both conviction and sentence, the appellant filed this appeal on the following grounds:-

i. That the learned trial magistrate erred in law and fact when she convicted and sentenced the appellant without giving him an opportunity to mitigate;

ii. That the learned trial magistrate erred in law and in facts by convicting the appellant yet the prosecution did not prove penetration;

iii. That the learned trial magistrate erred in law and in facts by convicting the appellant and the prosecution evidence was contradictory and inconsistence; and

iv. That the learned trial magistrate erred in law and facts by failing to consider the appellant's defence which was plausible and not rebutted by the prosecution.

APPELLANT'S SUBMISSION.

3. On ground one, the appellant submits the trial magistrate erred by imposing a severe sentence and denied the appellant an opportunity to mitigate. The trial magistrate failed to give the appellant an opportunity to state his mitigation before Court and this prejudiced him, the appellate court should give the appellant an opportunity to mitigate.

4. He further submits he was convicted and sentenced of the offence of indecent act with a child and sentence to life imprisonment a sentence that he submits to be too harsh. The trial court has the discretion to sentence, and she erred by imposing the maximum sentence provided under the law.

5. On ground two, the appellant submits penetration was not proved by the prosecution. He states that no medical evidence was tendered to corroborate the act of penetration. PW4 testified not to have examined the complainant while PW3 testified to have examined the complainant and noted no body injuries, no bruises and a torn hymen. A torn hymen is not conclusive evidence of penetration as the same can be caused by other factors and relied on the case of **David Muingirwa Vs Republic (2017) eKLR** that it would be a wrong principle to

hold and affirm that defilement had occurred from the fact alone of a broken hymen.

6. On ground three, the prosecution case was marred with inconsistences and contradictions. The appellant submits that for the prosecution to secure a conviction, they should prove their case beyond any reasonable doubt. The prosecution did not prove their case; PW1 did not mention about the knife and the stick that PW5 mentioned that the appellant used to beat the complainant. Further PW1 testified she was not able to scream as her mouth was covered with clothes. The evidence of PW1, PW3, PW4 and PW5 did not corroborate. Issue of time as per the evidence adduced in Court raises a lot of doubt, PW3 in the record of appeal page 12 line 8 states the offence took place seven days before filling the P3 form while PRC was filled 5 days after the incidence yet it is stated that the incidence was reported 30 days after it occurred.

7. On ground four, the trial magistrate erred by failing to consider the appellant's unsworn defence. The appellant submits that trial magistrate did not take into account the appellant's unsworn defence and did not give reasons as to why the same was not considered. The appellant raised the issue that he was framed for the offence after on several occasions he asked his mother about his father. The appellant raised a plausible defence which the prosecution did not respond to or seek time to.

8. The appellant prays that his appeal be allowed, the conviction be quashed, sentence be set aside and he be set at liberty unless otherwise lawfully held.

ANALYSIS AND DETERMINATION

9. This being the first appellate court. I am expected to subject the entire evidence adduced before the trial court to fresh evaluation and analysis. This I do while bearing in mind that I never had the opportunity to hear the witnesses and observe their demenour. The principles that apply in the first appellate court are set out in the case of **Okeno Vs Republic [1972] EA 32** where it was stated as follows:-

> **"The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala v. Republic [1957] EA 570.) 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, (See Peters v. Sunday Post, [1958] EA 424.)"**

10. In view of the above I have perused the lower court proceedings and considered submissions herein. This being a case of incest, besides prove of ingredients of defilement, it is important to prove relationship between the appellant and the complainant. From evidence adduced, the complainant and her sibling…and her mother testified that appellant is a brother to the complainant. This was confirmed by the appellant who in his defence stated that there was no grudge between him and his sister. Relationship between appellant and complainant is not therefore an issue. Having found the above I now wish to consider the following: -

i. Whether ingredients for the offence of defilement were proved beyond reasonable doubt.

ii. Whether the sentence imposed was harsh and excessive.

(i) Whether ingredients for the offence of defilement were proved beyond reasonable doubt.

11. For offence of defilement, three ingredients have to be proved being age, penetration and identification. In respect to age **Dr. Silvia Wambui Gikonyo** examined the complained and found that she was approximately 14 years old at the time of the incident she produced age assessment report in Court as exhibit. Age was therefore proved beyond reasonable doubt.

12. On penetration, the complainant testified that the appellant who is her brother forced their sibling's PW2 and PW5 to another room and forced her to her mother's bed locked the door and forcefully defiled her. The two to siblings heard the complainant cry in the room. Their evidence was corroborated by evidence adduced by **Dr. Wangeci Namis Rosyers** PW3 who examined the complainant and noted a torn hymen. Penetration was proved beyond reasonable doubt.

13. Identification is not an issue as I have found above that the appellant is a brother to the complainant. The incident also occurred at 1p.m. The complainant, her sibling's PW2 and PW3 saw their brother the appellant herein.

(ii) Whether the sentence imposed was harsh and excessive

14. There is no doubt that the Court imposed minimum sentence provided by statute which is life imprisonment. The Supreme Court however in the case of **Muruatetu** declared mandatory nature of sentences unconstitutional for taking away discretion of the judicial officer to impose sentence as per circumstances of each case.

15. In view of the above, I have considered circumstances of this case, the age of the child; record show that the appellant was a first offender and that he pleaded for leniency. I have considered the circumstances of this case and in view of the above Supreme Court decision, I am inclined to reduce the sentence to 15 years' imprisonment.

1. FINAL ORDERS

1. Appeal on conviction is hereby dismissed.

2. Appeal on sentence is allowed. The sentence of life imprisonment is set aside and replaced with 15 years' imprisonment.

3. Sentence to start from the day the appellant was sentenced in the lower court.

Judgment dated, signed and delivered via zoom at Nakuru This 19th day of November, 2020

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RACHEL NGETICH

JUDGE

In the presence of:

Jeniffer - Court Assistant

Ms. Rita Rotich for State

Appellant Present.