**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MAKUENI**

**CRIMINAL APPEAL NO. 23 OF 2019**

**FKM.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(From the original judgment by Hon. E.M. Muiru (SRM) in Kilungu Senior Resident Magistrate's Court Sexual Offence Case No. 72 of 2018 delivered on 13th March, 2019).*

**JUDGMENT**

1. **FKM** the Appellant was charged with incest by male contrary to section 20(1) of the Sexual Offences Act No. 3 of 2006. The particulars were that the Appellant on the 9th day of November 2018 at [particulars withheld] village, Ilima location of Kilungu sub-county within Makueni county, being a male person caused his penis to penetrate the vagina of **MK** a girl child aged 11 years who was to his knowledge was his daughter.

2. He also faced an alternative count of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006. The particulars were that the Appellant on the 9th day of November 2018 at [particulars withheld] village, Ilima location, of Kilungu sub-county within Makueni county, intentionally touched the vagina of **MK** a child aged 11 years with his penis.

3. The Appellant denied the charge and the matter proceeded to hearing. The prosecution called three witnesses while the Appellant gave an unsworn statement without calling any witness. He was later convicted on the main count and sentenced to life imprisonment.

4. Being aggrieved by the judgment he filed this appeal raising seven (7) grounds. He later filed the following amended grounds:

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

b) **That,** the learned trial Magistrate erred in law and fact by failing to find that the voir dire conducted on Pw1 was not well conducted.

c) **That,** the sentence meted upon him was harsh and excessive.

d) **That,** the existed a grudge and the reason he was implicated with this offence.

e) **That,** the prosecution's case fell below the required standard in law of proof beyond reasonable doubt.

5. The complainant **MTK** aged 11 years was taken through a voir dire examination before being directed to give sworn evidence. She testified that the Appellant is her father. She lives with her aunt (Pw2) as her mother lives in Nairobi. She remembered having been sent by Pw2 to buy cooking oil at the shop. She met with the Appellant who told her to enter his house which she did. He removed her clothes and inserted his thing into her vagina. When he finished he told her to go and buy the oil.

6. On her way back she met him going to buy cigarettes. Reaching home Pw2 inquired on where she had been and she explained to her what had happened. The matter was reported to the headman and assistant chief and the Appellant was arrested at Katondoloni market. MTK was taken to Mutungu hospital. She identified her O.P cards (EXB1) and PRC form (EXB3).

7. In cross examination she said the Appellant had never done that to her before. She was in his house for about an hour. He had warned her to keep quiet about the whole thing.

8. **Pw2 ANK** who is MTK's aunt confirmed having sent MTK to the shops to buy oil on 9th November 2018 at about 5:00 pm. When the child returned she was crying. On being asked the reason for her crying she said the Appellant had defiled her. Pw2 reported to all the concerned in administration and he was arrested while the child was taken to the hospital after reporting to Kilome police station. They were referred to Mutungu hospital where both Pw1 and Appellant were examined. She produced MTK clinic card (EXB4).

9. In cross examination she said she saw semen on Pw1's skirt when she returned. She denied threatening the Appellant over land**. Pw3 EK** is the clinical officer who examined MTK The findings were a broken hymen and the child had contracted an STD. Defilement was therefore confirmed. He produced MTK's treatment notes PRC form and P3 form (EXB1, 3 and 5). He testified that the Appellant was also examined and his urine was found to have an infection which was transmitted to MTK His treatment note was produced as EXB2.

10. In his unsworn defence he denied the charge. He said on 9th November 2018 he went to work upto 1:00 p.m. Later while at his shamba Pw2 came and abused him saying he was ploughing her land. She threatened to show him even if he was planting maize. He decided to report to the village elder but missed him. When he went to get his phone which was charging the assistant chief arrived, arrested him and took him to Kyambeke. He saw Pw2 come with his child alleging he had defiled her.

11. The next day he was taken to Kilome then Mutungu hospital. He was surprised at the doctor's report that his child's hymen was perforated yet she lives with Pw2. That if indeed she had been injured she ought to have bled. He suspected that Pw2 paid Pw3 to frame him for something he never did.

12. The appeal was canvassed by way of written submissions. The Appellant submits that the elements of the offence of defilement were not proved. He listed the elements as age, penetration identification. He has submitted that MTK nowhere stated that he inserted his penis into her private parts. He has argued that a broken hymen *per se* is not sufficient proof of penetration. He further submits relying on the case of **Francis Muniu Kariuki Criminal Appeal No. 22 of 2016** that the incubation period for an STD could not have been a day. Further that a P3 for him should have been produced.

13. The Appellant faults the manner in which the voir dire examination was conducted. To him Pw1's evidence was not properly received.

14. He has submitted that the life imprisonment sentence meted out to him was harsh and excessive. He points out that there is a grudge between him and Pw2 hence the fabrication of this charge. He has also cited several authorities on the duty of this court as a first appellate court.

15. He contends that the prosecution failed to prove a case against him.

16. The Respondent opposed the appeal through learned counsel Mr. James Kihara who has submitted that the Appellant was well identified by MTK On the voir dire examination he submits that there is no set format for conducting and recording a voir dire examination.

17. Counsel submits that under section 124 of the Evidence Act the court can base its conviction on the sole evidence of the victim provided reasons are given. He supports the sentence meted out against the Appellant as being provided for by the law.

**Analysis and determination**

18. This being a first appeal, this court is guided by the principles set out in the case of **Okeno –vs- Republic 1972 E.A 32** where the Court of Appeal stated:

> ***"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya Vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (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 finding and conclusion; 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 Vs Sunday Post [1958] E.A 424."***

19. I have carefully considered the evidence on record, the grounds of appeal, both submissions and the law and find the main issue to be whether the case of incest was proved beyond reasonable doubt.

20. Section 20(1) of the Sexual Offences Act defines incest 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.*
>
> ***(2)*** *If any male person attempts to commit the offence specified in subsection (1), he is guilty of an offence of attempted incest and is liable upon conviction to a term of imprisonment of not less than ten years.*

**Penetration** is defined under section 2 of the Sexual Offences Act

"*The partial or complete insertion of the genital organs of a person into the genital organs of another person";*

21. From the definitions above, what needs to be proved in a case of incest is the following:

i. The relationship between the victim and the appellant.

ii. Whether the victim was a minor or adult

iii. Whether there was penetration or an indecent act.

**i. The relationship between the victim and the Appellant.**

22. The evidence of MTK, Pw2 the Appellant plus the clinic card (EXB4) confirms that the Appellant is the father of MTK

**ii. Whether the victim was a minor or adult**

23. It was the evidence of MTK that she was born on 3rd March 2008. Her clinic card (EXB4) also shows the date of birth to be as per MTK's testimony. This incident is said to have occurred on 9th November 2018. She was therefore 10 years plus eight months and six days then. She was therefore a minor, and even a child of tender years.

24. The Appellant in his submission has raised issue with the manner in which the voir dire examination was conducted in respect to Pw1 by the trial court. He contends that the child was just asked simple elementary questions which could not form the basis for her giving evidence on oath. Mr. Kihara for the Respondent has ably responded to this.

25. The record of appeal at page 5-6 shows what transpired before the trial court on 27th December 2018 before the minor testified. I reproduce the record here:

**27/12/2018**

Before – E. Muiru – SRM

Court Assistant – Mwendwa

Prosecutor – Wangia

Accused present

**Prosecutor:** I have two witnesses. I am ready.

**Accused:** I am ready.

**Voir dire examination of minor in Kiswahili**

**Court:** what is your name?

**Minor:** I am MK

**Court:** How old are you?

**Minor:** I am 10 years old. I was born on 3/3/2008.

**Court:** Do you go to school?

**Minor:** I go to [particulars withheld] primary school. I am in class 4. My class teacher is called teacher B.

**Court:** Where do you live?

**Minor:** I live in [particulars withheld] village.

**Court:** Do you know where you are today?

**Minor:** No I do not. I have come for a case.

**Court:** Do you go to church?

**Minor:** I go to Kyambeke the church of [particulars withheld]. We praise God, we sing and pray. We read the bible. I will tell the truth. I will not lie.

**Court:** Minor intelligent. Understands differences of telling the truth and lying. To give a sworn testimony.

**E.Muiru**

**Senior Resident Magistrate**

26. It is not denied that a voir dire examination was conducted. There is no formula or set of questions which the court should ask the minor before deciding on how the child should give his or her evidence. The questions have to be simple but relevant. The trial court also makes observations as the minor talks and takes all these into account before making a decision on how best she should give her evidence. After all the child who is taken through a voir dire examination is one of tender years and therefore complicated questions cannot be put to her/him.

27. The Appellant argues that because the voir dire examination was not properly conducted the conviction should be vitiated. I wish to state that vitiating the conviction for that reason alone is not automatic. There are cases where children of tender years have not been taken through voir dire examination, and the conviction founded on their evidence has not been automatically vitiated. The court has usually considered their evidence alongside any other evidence.

28. In the case of **Maripett Loonkomok –vs- Republic 2016) eKLR** the Court of Appeal held:

> "*It follows from a long line of decisions that voir dire examination on children of tender years must be conducted and that failure to do so does not per se vitiate the entire prosecution case. But the evidence taken without examination of a child of tender years to determine the child's intelligence or understanding of the nature of the oath cannot be used to convict an accused person. But it is equally true, as this court recently found that;*
>
> "*In appropriate cases where voir dire is not conducted, but there is sufficient independent evidence to support the charge … the court may still be able to uphold the conviction".*

29. Earlier the Court of Appeal had in the case of **Athumani Ali Mwinyi vs- Republic Criminal appeal No. 11 of 2015** stated thus:

> "*On the peculiar facts and circumstances of this case, it is our considered view that the trial was not vitiated by the failure to conduct voir dire examination. The complainant's evidence was congent, she was cross examined and medical evidence confirmed penetration. But of utmost significance is the admitted fact that the Appellant took the complainant and lived with her as his wife after paying dowry. So that even without the complainant's evidence the offence of defilement of a child was proved from the totality of both the prosecution and defence evidence especially the medical evidence which corroborated the fact of defilement."*

30. In the instant case I find that the learned trial Magistrate conducted the voir dire examination and made a finding based on the examination and her observation of the child. I find no reason to fault the trial court on that. M.T.K gave sworn evidence and she was cross examined by the Appellant.

**iii. Whether there was penetration or an indecent act.**

31. The Appellant has submitted that nowhere did MTK state that he inserted his penis into her private part. That the only words mentioned by MTK and Pw2 are that he did bad things (Pw2) and tabia mbaya (Pw1). It is true MTK said the person removed her clothes and placed her on the bed and began to do "tabia mbaya" to her. Later still in her evidence in chief she stated "by tabia mbaya I mean he inserted his thing in my private part (*minor places her hand between her legs*)".

In other words the Appellant is saying because the word "penis "was never mentioned then the minor was not defiled.

32. Section 2 of the Sexual Offences Act defines **"penetration**" as:

> "*The partial or complete insertion of the genital organs of a person into the genital organs of another person";*

Further the Court of Appeal in the case of **Sahali Omar –vs- Republic (2017) eKLR** held that:

> ***"penetration"*** *whether by use of fingers, penis or any other gadget is still penetration as provided for under the Sexual Offences Act".*

So whether it was a penis or something else that was placed in MTK's private parts the f act is that she complained of having been penetrated by something.

33. The Appellant faulted the trial court for relying on the medical report of a broken hymen and STD to convict him. He relied on the case

of **P.K.W –vs- Republic (Court of Appeal Nyeri) (2012) eKLR** where Maraga and Rawal JJA held that a broken hymen *per se* was not a confirmation of defilement. He also submits that an STD could not manifest within 24 hours.

34. The treatment notes and PRC form (EXB1 and 3) show that MTK was treated on 10th November 2018 while the incident occurred on 9th November 2018. When both MTK and Appellant were examined and their urine tested it was found that both had an STD infection. Further MTK's hymen was perforated.

35. Infact Pw3 found that the Appellant had transferred the infection to MTK. From the evidence of MTK and the medical evidence its very clear that the minor's vagina was penetrated whether partially or completely.

36. The Appellant vehemently denied the charge and blamed Pw2 for fabricating this on him because of land she wanted to take away from him. The complainant in this case is MTK while Pw2 is the Appellant's sister in-law. The Appellant did not question MTK if indeed she had been sent by Pw2 to say what she told the court. The minor had been sent to the shops to buy oil and she took too long to return. She returned home while in tears and she did not want to report the father because he had warned her telling her to remain quiet. She confirmed this to be the first time he was doing it to her.

37. Quick action was taken and he was apprehended the same evening. The incident took place during day time and MTK knew whom she was dealing with. She reported him to Pw2 among others the same day. The learned trial Magistrate who saw and observed the child found her to be a candid witness who weathered the Appellant's cross examination well. Her testimony was not shaken in cross examination. All in all I find no reason to fault the evidence of any of the witnesses.

38. Pw2 responded well and fast in protecting the rights of MTK There is no evidence that she acted the way she did because of any grudge against the Appellant. I am satisfied that the Appellant was well identified as the perpetrator of this offence.

39. The Appellant has submitted that the sentence was harsh and excessive as it is not pegged on age. That is not correct because under the proviso to section 20(1) of the Sexual Offences Act, when the victim is a minor which is the case here, the court may enhance the sentence from ten years to life imprisonment.

40. The learned trial Magistrate enhanced the sentence for the reason that the offence was serious since the Appellant harmed his own daughter whom he was supposed to protect. I agree with her that the Appellant betrayed MTK'S trust in him.

41. In enhancing the sentence the court may give any sentence above ten years upto life imprisonment depending on the circumstances. In his mitigation the Appellant told the court the following:

> "*I urge the court to look into both sides. I have four children school going and they depend on me"*

The record further shows he was a first offender.

42. Considering all that is on record plus the indefinite nature of a life sentence, I will set it aside and substitute it with a sentence of twenty five (25) years imprisonment from date of sentence by the lower court.

43. The result is that the appeal against conviction fails. The appeal against sentence succeeds to the extent stated at paragraph 42 of this judgment.

**Delivered, signed & dated this 13th day of November 2020, in open court at Makueni.**

**.....**

**H. I. Ong'udi**

**Judge**