REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO.41 OF 2018

DNC.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appellant **DNC** was charged with the offence of **incest contrary to section 20(1) of the Sexual Offences Act No.3 of 2006**. Particulars are that on the 12th day of August 2014 within Nakuru County, the appellant unlawfully and intentionally committed unlawful act by inserting his male genital organ namely penis into the female genital organ namely vagina of **AWN** a child aged 14 years who was to his knowledge step-daughter which caused penetration..

2. The appellant was also charged with an alternative count of **indecent act with a child contrary to section 11(1) of the Sexual Offences Act No.3 of 2006**. Particulars are that on the 12th day of August 2014 within Nakuru County, the appellant unlawfully and intentionally committed unlawfully committed an indecent act by touching private parts namely vagina of **AWN** a child aged 14 years which is in contravention of the said act.

3. The appellant denied both the main and alternative charge and the case proceeded for hearing with prosecution calling 4 witnesses; the appellant declined to offer his defence despite being given an opportunity to do so. The Court noted that there was no stay of proceedings from the High Court and proceeded to close defence case and set the matter for judgment. The trial magistrate found the appellant guilty of the main charge, convicted and sentenced him to life imprisonment. Being dissatisfied by the said determination, the appellant filed this appeal on the following grounds: -

i. The learned magistrate erred in law and fact in finding by failing to appreciate that the prosecution's case was not proved to the required standard of beyond no doubt.

ii. The learned magistrate erred in law and fact by failing to find that the medical evidence adduced was insufficient and could not provide corroboration to the charge or support a safe conviction.

iii. The learned magistrate erred in law and fact by failing to appreciate that the prosecution case was marred with contradictions and inconsistencies.

iv. The learned magistrate erred in law and fact by failing to find that the appellant was never placed on his defence as warranted by law.

v. The learned magistrate erred in law and fact by continuing with the trial to the end yet there was an application pending in the High Court.

APPELLANT'S CASE

4. The appellant adopted his grounds of appeal during the hearing and stated that the victim said that she was 16 years old while her mother said that she was 14 years old. He confirmed that the complainant was her step-daughter as she had been born when he married her mother.

5. The appellant submitted that he could not engage in sexual intercourse as he had sickness which made him unable to engage sexually. He showed Court treatment documents and said he had a growth on his abdomen and an operation was done while he was in prison. He said he disagreed with his wife over that ailment and the child was used to frame up charges against him. He urged this Court to look into the statement of the child's mother. He said the date of the incident and treatment are inconsistent. He denied having been left in the house with the child saying he could not be at Njoro and Free Area at the same time.

RESPONDENT'S CASE

6. The state counsel **Ms. Rita Rotich** submitted that in respect to allegation of grudge, PW1 and PW2 said there was no grudge and during cross examination, the appellant did not talk of a grudge; that he never talked of a grudge in his defence but instead of testifying he resorted to theatrics which led to him not testifying.

7. The state counsel further submitted that at no time during the proceedings did the appellant said he was unwell; that he never talked of suffering from a disease which affected him from performing sexual intercourse; that he has not availed any evidence of operation; that there is no medical operation to that effect.

8. The state counsel submitted that the prosecution availed 4 witnesses who adduced consistent evidence. On penetration, she submitted that the medical officer PW4 testified that he examined the minor and found indication of old torn hymen, whitish discharge, foul smelling vaginal discharge; she submitted that the incident occurred on 12th August and the minor was examined on 2nd September 2014. She submitted that the minor was examined after 3 weeks because when she reported to her mother, she had bitter disagreements with her and she run away from home; that when she reappeared she went to the police station on 30th August 2014 where they recorded statement and P3 form was issued on 1st September 2014 which was filled on 2nd September 2014.

9. On issue of going to Mombasa, the state counsel submitted that the appellant fled to Mombasa and Njoro to avoid arrest.

ANALYSIS AND DETERMINATION

10. 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 demeanor. 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.)"**

11. In view of the above, I have perused and considered evidence adduced before the trial Court. I have also considered appellant's grounds of appeal and submissions by state counsel. This being an offence of incest, besides the requirement to prove the three ingredients being age, penetration have to be proved beyond reasonable doubt the relationship between the accused and the victim has to be proved.

12. My perusal of the proceedings and exhibits show that the appellant was husband to the child's mother but she was not his biological child. This was confirmed by the testimony of the child's mother and the appellant himself who confirmed that the victim was his stepdaughter. There is therefore no doubt that victim/complainant was a step daughter to the appellant

13. On age, health card was produced to prove her age. The document was not challenged by the appellant in the lower court.

14. In respect to penetration, the doctor testified on examination, he found old torn hymen and presence whitish discharge from her vagina with foul smell. This was consistent with the child's evidence of forceful penetration into her genital organ by appellant's male genital organ. On the appellant's allegation that he had an ailment that rendered him unable to perform sexually, there is no mention of such ailment or production of medical report in respect to that in the trial court. There is therefore nothing to suggest that the appellant could not perform sexually.

15. There is no issue of identification as the appellant confirmed that the complainant was her step daughter.

16. Evidence adduced clearly rule out any doubt on identification. All ingredients of the offence of defilement were proved. I see no merit in appeal on conviction and dismiss accordingly.

17. In respect to sentence, I note that the trial magistrate imposed the minimum sentence provided by statute. The Supreme Court in the **Muruatetu** case however declared the mandatory nature of sentences unconstitutional as it takes away the discretion of the judicial officer.

18. In view of the above, I have considered circumstances of this case; I note that the child was 16 years and the fact that the appellant whom the child looked up to as a parent/stepfather took advantage of her and abused her. I note that the appellant on being given a chance to mitigate said he had nothing to say in mitigation.

19. FINAL ORDERS

1. Appeal on conviction is hereby dismissed.

2. Appeal on sentence is allowed.

3. Sentence reduced from life imprisonment to 15 years' imprisonment to run from the date of sentence by the trial court.

Judgment dated, signed and delivered via zoom at Nakuru This 12th day of November 2020

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RACHEL NGETICH

JUDGE

In the presence of:

Jeniffer - Court Assistant

Rita for State

Appellant in person