REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

CRIMINAL APPEAL NO. 65 OF 2019

AMM.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(From the original conviction and sentence by Hon. J.D Karani (R.M) *in Makindu Senior Principal*

Magistrate's Court Criminal (S.O) Case No. 24 of 2018 delivered on 8th November, 2018).

JUDGMENT

1. AMM was charged with the offence of defilement contrary to section 8(1)(2) of the Sexual Offences Act No. 3 of 2006. The particulars being that the Appellant on diverse dates between the 3rd day of January 2018 and 5th day of January 2018 in Makindu sub-county within Makueni county intentionally caused his penis to penetrate the vagina of LMM a child aged 4 years.

2. He 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 2018. The particulars wee that the Appellant on the diverse dates between the 3rd day of January 2018 and 5th day of January in Makindu sub-county within Makueni county intentionally touched the vagina of LMM a child aged 4 years with his penis.

3. He denied the charges and the matter proceeded to full hearing with the prosecution calling four (4) witnesses. The Appellant gave an unsworn statement of defence and called one witness. Later the learned trial Magistrate found him guilty and convicted him on the principal count. He sentenced him to life imprisonment.

4. Being aggrieved by the judgment he filed this appeal through Mwangangi & associates advocates raising the following grounds:

a. That, the learned Magistrate erred in both law and fact when she convicted the Appellant against the weight of evidence.

b. That, the learned Magistrate erred in both law an fact when she found that the prosecution had proved the case beyond reasonable doubt.

c. That, the learned Magistrate erred in both law and fact when she failed to consider material inconsistencies in evidence tendered by prosecution's witnesses.

d. That, the learned Magistrate erred in both law and fact when she failed to find that both the documentary and oral evidence tendered in court was vague, inaccurate and to some extent contradictory.

e. That, the learned Magistrate erred in both law and fact when she failed to consider mitigation by the Appellant.

f. That, the sentence itself is too harsh and excessive in the circumstances of the case.

5. The complainant (LMM) aged five years was taken through a voire dire examination. Th court directed that she gives unsworn evidence. The Appellant is a paternal uncle to LMM It was her evidence that she was at her grandmother's when the appellant removed her pant and inserted his penis in her genitals. It was painful.

6. She informed her grandmother who wiped her and told her she was going to take the Appellant to the police. He promised to buy her a doughnut if she did not tell anyone. Her mother (Pw1) had gone to the market when this was being done to her. LMM had been sent for ugali

by the appellant from her grandmother. Its after she took him the ugali that he did this to her. This was not the first time he was doing this to her.

7. LMM's mother testified as **Pw1 RNM**. It was her evidence that on 4th January 2018 she was at Kaunguni market upto 2:00 pm when she turned home. In the evening LMM told her she was having pain in her private parts. Later at 7:00 pm her elder daughter returned home from school, and bathed LMM At 8:00 pm LMM started crying complaining of pain in her genitals. Its then that she decided to check her. She saw blisters, some reddening and pus was oozing out of her vagina.

8. She then had a personal conversation with LMM and that's when she told her what the Appellant had done to her. That her grandmother heard her screaming and she reported to her. She immediately called the assistant and reported to him. The next day she went to Makindu general hospital where EXB1&2 were filled. She availed the child's birth notification (EXB3). She reported the matter to the police and the Appellant was later arrested.

9. In cross examination, she said LMM told her this incident occurred on 3rd January 2018 when she had gone to the market. She did not see any blood from the child's vagina.

10. Pw4 Dr. Esther Musyoka produced the P3 form EXB2 on behalf of Dr. Mbui with the court's permission. She also produced the PRC form (EXB1). The findings in the P3 were as follows:

- Hyperencal labia minora
- Vaginal lacerations
- Pv discharge
- Her hymen was broken

11. In cross examination she said LMM's sexual organ had injuries. She confirmed that injuries can be visible after five days. She added that bathing could not stop a discharge from the vagina.

12. Pw3 No.77357 Sgt Caroline Kibiwott received the report of defilement on 6th January 2018. LMM told her she had been defiled by her uncle who is the Appellant. The mother (Pw1) was away at the market when this happened. She recorded statements and later re-arrested the Appellant from the D.O's office Makindu. She produced the child's birth notification (EXB3).

13. In cross examination she said LMM's grandmother who is the Appellant's mother refused to record a statement. She confirmed that the child was defiled on 3rd January 2018.

14. The Appellant in his unsworn defence denied the charge saying he was not present on 3rd January 2018 as he had been employed by Dw2 Kimeu Nzukuveni. He worked at a hardware in Makindu. Further that on 31st December 2017 he had quarreled with Pw1's man friend (Peter Kituka) who had come asking him about Pw1. The reason for the quarrel was that Peter Kithika used to pass through his compound to Pw1's home.

15. Dw2 Kimeu Nzukuveni said the Appellant was working in his butchery selling meat and tea. He said he had employed the Appellant on 1st January 2018 and on 3rd January 2018 he was on duty. In cross examination he said the Appellant would report at 6:00 am and leave at 9:00 pm. Otherwise he would be on duty throughout on the days he worked.

16. The appeal was canvassed by way of written submissions. The Appellant filed his own submissions since Mr. Mwangangi had ceased acting for him due to want of instructions.

17. It is the Appellant's submission that the evidence by the prosecution was not sufficiently corroborated. Secondly that the evidence on the alleged incident is so uncertain. That the charge sheet was also not clear on the date of incident. That the evidence of LMM, Pw1 and Pw3 is so inconsistent on this issue. He points out that Pw1 said LMM told her she was dragged from the farm and taken to Appellant's house, whereas LMM said she was defiled when she had taken ugali to the Appellant.

18. He also submits that his defence was ignored by the learned trial Magistrate. He wondered how the child had persevered the pains until evening when she allegedly told the mother (Pw1).

19. The Respondent opposed the appeal through learned counsel M/s Eunice Gitau. She submits that the ingredients of age, penetration and identity of the perpetrator were all proved. That age was proved by the mother (Pw1) who said LMM was born on 9th January 2013.

20. A birth notification card was produced and same to a P3 form which indicates the age of LMM. On penetration she submits that the same was proved through the evidence of L.M.M and pw2 and corroborated by that of the medical reports. It's her further submission that LMM identified the Appellant well as he is her paternal uncle.

21. Counsel submits that the alibi defence was only raised during the defence hearing. Further that his alibi only relates to 3rd January 2018 yet the charge sheet talks of 3rd – 5th January 2018. She contends that from Dw2's evidence, it is not clear where the Appellant was after 3rd January 2018. Still on the alibi she relies on the case of **Bernard Odongo Okutu –vs- Republic (2018) eKLR quoting Republic –vs- Sukha Singh S/o Wazir Singh & others (1939)6 EACA 145**, where it was stated:

"If a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because firstly, if he does not bring it forward until months afterwards, there's naturally a doubt as to whether he has not been preparing it in the interval, and secondly, if he brings it forward at the earliest possible moment, it will give prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness proceedings will be stopped."

22. She argues that even if Appellant was unrepresented, and his alibi was genuine he would have raised it early enough. Counsel refers to the case of **Karanja –vs- Republic (1983) eKLR** where the Court of Appeal held thus:

"We do not accept that the Appellant's story amounted to an alibi on the facts of this case, but in any event it is a material factor that when charged initially the Appellant did not put forward this story, but contented himself with little more than a denial. Nevertheless, we agree with the observations of the Court of Appeal for Eastern Africa in R –vs- Ahmed Bin Abdul Hafid (1934) 1 EACA 76, and with those of the former Court of criminal Appeal in R –vs- little boy, (1934)2 KB 413, that in a proper case the court may,, in testing a defence of alibi and in weighing it with all the other evidence, to see if the accused person's guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence, or his alibi, if it amounts thereto at an early stage in the case and so that it can be tested by those responsible for the investigation and prevent any suggestion of afterthought."

23. On material inconsistencies inaccuracy and ambiguity she submits that there was none. She relies on the case of **Richard Munene –vs- Republic (2018) eKLR** to support her argument that for inconsistencies etc to affect an outcome they must be material. She contends that the witnesses presented proved all the facts and there was no need to call LMM's grandmother who had refused to record a statement. She cited section 143 of the Evidence Act to support this argument.

24. Counsel urges the court to uphold the Appellant's conviction and sentence.

25. This being a first appeal the court has a duty to re-analyse and re-evaluate the evidence on record and come to its own conclusion bearing in mind that it did not see nor hear the witnesses. The Court of Appeal in **David Njuguna Wairimu –vs- Republic (2010) eKLR** stated that:

"That the duty of the 1st appellate court is to analyze and re-evaluate evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the circumstances of the case come to the same conclusions as those of the lower court. It may rehash those conclusions as those of the lower court. We do not think that there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision."

26. In a much earlier decision the same court had similarly held in **Okeno –vs- Republic (1972) E.A 32** that:

"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."

27. Having considered the evidence on record, the grounds of appeal, both submissions and the law I find the following to be issues for determination:

i. Whether the particulars in the charge sheet were clear.

ii. Whether age was proved.

iii. Whether there was proof of penetration.

iv. Whether the Appellant was identified as the perpetrator.

v. Whether the sentence was harsh and excessive.

Issue no. (i) Whether the particulars in the charge sheet were clear.

28. The Appellant has submitted that the diverse dates indicated in the charge sheet are confusing as the witnesses referred to different dates. The charge sheet shows that the incident occurred between the dates on 3rd and 5th January 2018. I find nothing confusing about this.

Issue no. (ii) Whether age was proved.

29. Pw1 who is the child's mother testified that LMM was born on 9th January 2013. A birth certificate notification slip serial no.

532129(EXB3) was produced by the Pw3 (the investigating Officer). It confirmed that date indicated by the mother. The child was therefore aged five years at the time of commission of the offence.

Issue (iii) Whether there was proof of penetration.

30. Penetration is defined under the Sexual Offences Act as:

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

> Pw2 shyly explained to the court what her uncle did to her when she took ugali to him in his house. She said he removed her pant, placed her on his bed and put his penis in her private parts. She immediately reported to her grandmother who had sent her.

31. Her grandmother is the Appellant's mother. She reported to her grandmother in whose custody she was since her mother (Pw1) had gone to the market.

32. Though she gave unsworn evidence she was cross examined on the same by the Appellant. She explained to the court what was done to her. After complaints by LMM, her mother (Pw1) checked the child and saw blisters and reddening in her vagina. She also saw some pus coming out. Its then that she inquired from her what had happened and she explained.

33. Upon this discovery Pw1 called the assistant chief who advised her to go to hospital and she went the next day. The PRC (EXB1) shows the child attended hospital on 6th January 2018. It therefore means the incident reported occurred on 5th January 2018.

34. The medical evidence by pw4 (Dr. Musyoki Esther) confirms that the child's vagina had injuries and there was a discharge coming from therein. The evidence of Pw1, LMM and Pw4 all confirmed that the child had been penetrated. It was not the first time it was being done to her according to her evidence. There was therefore proof of penetration.

Issue no. (iv) Whether the Appellant was identified as the perpetrator.

35. The Appellant is a brother to L.M.M's late father. He confirmed that in his defence. It is therefore not in dispute that she knows him well. She first reported this incident to her grandmother whom Pw1 had left her with. That night she also informed her mother (Pw1). The grandmother being the Appellant's mother did nothing.

36. In his defence which was supported by that of Dw2 (his former employer) the Appellant was away in Makindu working from 1st to 3rd of January 2018. He said Pw1 fabricated this on him because he had stopped her lover from using a route through his homestead to go and visit her. The record however shows that he never cross examined Pw1 on this inorder for her to accept or deny the same.

37. Secondly, the Appellant and his witness (Dw2) said he was in Makindu from 1st and 3rd January 2018. They do not say where he was on 4th and 5th January 2018. LMM was seen at the hospital on 6th January 2018, a day after the incident took place. The report to the police was also on 6th January 2018 when the incident had occurred the previous day. The charge sheet shows the incident took place on diverse dates between 3rd and 5th January 2018. The Appellant was actually placed at the scene and he never said where he was after he left Dw2's place on 3rd January 2018 having taken 8 days off. Date of incident was therefore 5th January 2018.

38. Besides what he said about Pw1 being upset with him he did not raise any issue to show that what Pw1, LMM and Pw3 stated to the court was a lie. The learned trial Magistrate very well considered the Appellant's alibi defence *vis a vis* the prosecution evidence and rightly found that it did not displace the prosecution evidence at all. All in all I find nothing in this appeal to warrant my interference with the conviction herein.

Issue no. (iv) Whether the sentence was harsh and excessive.

39. Besides raising this as a ground of appeal, the Appellant did not submit on it. He was sentenced to life imprisonment. The complainant herein is a niece to the Appellant. Section 20(1) and (2) of the Sexual Offences Act provides this:

> **20(1)** Any male person who commits an indecent act or an a ct 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. **20(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.

40. It is clear that the Appellant ought to have been charged with incest contrary to section 20(10 of the Sexual Offences Act. The sentence is the same for incest. Its therefore important that this be corrected under section 382 Criminal Procedure Code. I therefore quash the conviction for defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act 2006 and substitute it with a conviction for incest contrary to section 20(1) of the Sexual Offences Act.

41. Life imprisonment is not a definite sentence. This court however takes into account the interests of the complainant who looked upto the Appellant as a father figure and was let down. I do set aside the life sentence and substitute it with a sentence of (30) years imprisonment. Otherwise besides the sentence the appeal stands dismissed.

Orders accordingly.

Delivered, signed & dated this 11th day of November 2020, in open court at Makueni.

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H. I. Ong'udi

Judge