REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CRIMINAL APPEAL NO. 82 OF 2017

PETER MOSIGISI ATANCHA.....APPELLANT

=VRS=

THE STATE.....RESPONDENT

(Being an Appeal from the Conviction and Sentence of Hon. N. Kahara

(RM) Keroka Law Courts dated 19th April 2017 in Keroka Principal Magistrate's Court Criminal Case No. 45 of 2016)

JUDGEMENT

The appellant was convicted and sentenced to life imprisonment for Incest contrary to Section 20 (1) of the Sexual Offences Act.

The particulars of the charge were that on 10th January 2016 in Masaba North Sub-county within Nyamira County he intentionally caused his penis to penetrate the vagina of VKM a child aged 12 years who was to his knowledge his daughter.

The appeal is premised on grounds that: -

> **"1. The Learned Trial Magistrate erred in law and fact in convicting the Appellant despite evidence not convincing.**
>
> **2. The Learned Trial Magistrate erred in law by finding that the Appellant was the one who defiled the victim despite the fact that there was no collaboration of evidence.**
>
> **3. The Learned Trial Magistrate erred in law and fact by convicting the Appellant when there was clear evidence as to when the Appellant was taken for medical examination.**
>
> **4. The Learned Trial Magistrate by accepting evidence of the Investigating Officer who was not in the case while the real Investigating Officer was within Kenya.**
>
> **5. The Learned Trial Magistrate did not take into consideration why the prosecution did not call the first eye witnesses.**
>
> **6. The Learned Trial Magistrate did not consider if there was connection between the foul smell and the Appellant.**
>
> **7. The Learned Trial Magistrate erred in law to shift the burden of proof to the Appellant.**
>
> **8. Alternatively the sentence imposed was manifestly harsh and excessive in the circumstances."**

The appeal was canvassed by way of written submissions. Counsel for the Appellant submitted that the appellant was framed by his wife because of marrying a second wife. He wondered why the prosecution did not call the complainant's brothers to testify. Counsel submitted that the appellant's medical examination was negative. He contended that the victim was not taken to Kisii Level 6 Hospital which implies that the evidence was tampered with. Counsel further stated that the appellant did not understand the language used in court and that there was no indication of the language the appellant used when making his statement. Counsel accused the trial magistrate of being casual for not making mention of the alternative charge in her defence.

On his part Counsel countered this by submitting that the charge against the appellant was proved beyond reasonable doubt.

The issues for determination in this appeal are: -

(i) Whether the appellant committed an act which caused penetration with the complainant.

(ii) Whether the complainant was to his knowledge his daughter.

As the first appellate court I have evaluated the evidence in the trial court so as to arrive at my own conclusion as to whether the appellant committed the offence. I have done so bearing in mind that I did not hear or see the witnesses testify **(see Okeno Vs. Republic [1972] EA 32).**

The complainant gave evidence on oath after a voire dire. She narrated how her father, the appellant sent her brothers to the shop and she followed them, they impressed upon her to go back to the house to wash a sufuria. It was when she took the sufuria she had cleaned to the house that the appellant who was lying on a sofa called her, removed her underpant and put her on his laps and then inserted his penis in her vagina. When he heard her mother come he ordered her to sit on another sofa. By this time, she was crying and could not disclose what he had done as he had threatened her. When she went outside she told her mother what he had done. There is evidence that the victim was taken to hospital on the same day. Upon examination it was confirmed that she had been defiled. Whereas there is no need for corroboration where offences such as these, in this case there was a lot of corroboration and the evidence against the appellant was watertight. The prosecution need not to have called the brothers of the victim as firstly and as I have stated there was no need for corroboration – **(see Section 124 of the Evidence Act)** and secondly because under **Section 143 of the Evidence Act** the prosecution does not require to call a particular number of witnesses to prove its case. The witnesses called by the prosecution were sufficient to prove the facts in issue. The defence the appellant could not withstand the test of such cogent evidence. The prosecution called a doctor who is an independent witness and who had no reason to lie against the appellant. His evidence corroborated the evidence of the child. The area Assistant Chief and the police officer who investigated this case confirmed that the matter was reported to them on the same day and that the child identified the appellant to them as the person who defiled her. I am therefore satisfied that it was proved beyond reasonable doubt that the appellant committed an act which caused penetration with the child.

The offence of incest is complete when it is proved that the victim was to the knowledge of the accused person his daughter. It is my finding that the appellant knew that the victim was his daughter. He was staying with her, her siblings and his wife their mother. In his defence he did not allege that she was not his daughter or that he did not know that she was. I am satisfied that he was properly convicted.

On the sentence, there is evidence that the complainant was 12 years old. The proviso to **Section 20 (1)** states: -

> ***"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."***

The sentence imposed by the trial magistrate was therefore what is prescribed by the law and given the circumstances of the offence, I am not persuaded that it is excessive. The same shall remain undisturbed. Accordingly this appeal is dismissed.

Signed, dated and delivered in Nyamira this 28th day of March 2019.

E. N. MAINA

JUDGE