REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.75 OF 2018

SKM.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal arising out of the conviction and sentence of Hon. E. Suter SRM delivered on 16th March 2018 in Makadara CM Cr. Case No. 26 of 2016)

JUDGMENT

The Appellant was charged with the offence of **incest** contrary to **Section 20(1)** of the **Sexual Offences Act.** The particulars of the offence were that on diverse dates between 7th February 2016 and 28th February 2016 at Mathare North area within Nairobi County, the Appellant intentionally caused his penis to penetrate the vagina of S M, a child aged nine (9) years, who is, to his knowledge, his daughter. In the alternative, the Appellant was charged with the offence of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act. The particulars of the offence were that on diverse dates between the 7th February 2016 and 28th February 2016 at Mathare North within Nairobi County, the Appellant intentionally touched the vagina of SM (herein referred to as the complainant), a child aged nine (9) years with his penis. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charges. After full trial, the Appellant was convicted as charged on the main charge and sentenced to life imprisonment.

In his petition of Appeal, the Appellant raised several grounds of appeal, challenging his conviction and sentence. He was aggrieved that his right to a fair trial as provided under the Constitution was infringed by the trial court since he was not provided with witnesses' statements prior to commencement of the trial. He faulted the trial magistrate for failing to find that penetration was not proved by the prosecution to the required standard of proof beyond any reasonable doubt. He took issue with the fact that the trial magistrate elected to proceed with the trial even while the Appellant was unwell. He was of the view that the trial court did not properly conduct the complainant's *voire dire* in accordance with the set guidelines.

During the hearing of the appeal, the Appellant presented to court written submissions in support of his appeal. He urged the court to allow his appeal. Ms. Sigei for the State opposed the appeal. She made oral submissions to the effect that the prosecution had established all the ingredients of the offence of incest against the Appellant to the required standard of proof beyond any reasonable doubt. The complainant was nine (9) years of age. She stated that her father defiled her on four different occasions. He warned her against telling anyone about the incidents. The Appellant was well known to the complainant. The identification was therefore not an issue of debate. With regard to the Appellant's age, Learned State Counsel submitted that her birth certificate was adduced into evidence. The same established that the complainant was a minor. The medical evidence presented before the trial court proved the ingredient of penetration. She averred that the relationship between the complainant and the Appellant was established. It was her view that the Appellant's defence was a mere denial. In the premises therefore, she urged this court to dismiss the Appellant's appeal.

The facts of the case according to the prosecution are as follows: The complainant was nine (9) years of age at the time of the alleged sexual assault. She stated that the Appellant defiled her on four consecutive Sundays while her mother was at work. He asked her to remove her clothes, lie on the bed and spread her legs. He then inserted his penis into her vagina. She stated that she felt pain in her vagina. He would cover her mouth to prevent her from screaming. After he was done, he instructed her to wipe herself using a piece of tissue paper. He afterwards bought her yoghurt and asked her not to tell anyone about the incident. She later informed her teacher about the sexual assault. The teacher in turn informed her mother. She stated that the Appellant was her father.

The said teacher, PW2 confirmed that the complainant was her student at [particulars withheld] Academy. She stated that on 25th February 2016, she was teaching the students on how the HIV virus is transmitted. She asked the students if any of them had ever been touched inappropriately on their private parts. Two students came forward. One of them was the complainant. She narrated to her how her father sexually assaulted her. He would afterwards instruct her to use a piece tissue paper to wipe herself. He also bought her yoghurt and warned her against telling anyone about the incidents. PW2 requested her to come with her mother to school. She told her mother what the complainant had told her.

A clinical officer from MSF (PW3) examined the complainant on 4th March 2016. She stated that her vaginal walls were hyperemic. She had no visible injuries on her vagina. Her hymen had a congenital abnormality. It was imperforated. She produced a medical report and a Post Rape Care form into evidence. Dr. Shako, PW5 examined the complainant on 8th March 2016. She noted that her labia minora was hyperemic and showed signs of injury. She had bruises on her vaginal entry that were healing. Her hymen was pink and centered, hence normal. She explained that PW1's hymen was imperforated. Nothing could go in or come out. The hymen could only be opened if a surgery was conducted. She however noted injuries on her external genitalia.

The case was investigated by Cpl. Leah Muthoni (PW4). The complainant narrated to her how her father sexually assaulted her. She interrogated the witnesses and took their statements. She accompanied the complainant to the police doctor for medical examination. She arrested the Appellant on 10th March 2016 at his house. He lived with the complainant and her mother. She stated that the complainant's mother was deceased. She had however recorded her statement before she died. PW3 produced the complainant's mother's statement in evidence.

The Appellant was put on his defence. He stated that on the 9th day of March 2016, he left his place of work at 10.40 p.m. and proceeded home. When he got to the house, he found his wife with a stranger in the house. He inquired from his wife who the strange man was. The man suddenly hit him and left. His wife and daughter (PW1) left and followed the said man. The next morning four police officers showed up at his house. He was arrested and taken to the police station. He was informed that he was being charged with the offences herein. He stated that there existed a land dispute between him and his wife. He asserted that he was framed by his wife who wanted to dispossess him of his land by having him imprisoned.

As the first appellate court, it is the duty of this court to subject the evidence adduced before the trial court to fresh scrutiny and re-evaluation, before reaching its own independent determination whether or not to uphold the conviction and sentence of the Appellant. In doing so, this court is required to bear in mind that it neither saw nor heard the witnesses as they testified and cannot therefore make any comments regarding the demeanour of the witnesses (See **David Agwata Achira -vs- Republic [2003] eKLR).** The issue for determination by this court is whether the prosecution adduced sufficient evidence to secure the conviction of the Appellant on the charge of **incest** contrary to **Section 20(1)** of the **Sexual Offences Act**.

This court has re-evaluated the facts of this case. For the prosecution to establish the charge of **incest** against the Appellant, it was required to establish the following: that the Appellant was related to the complainant, that there was penetration, and in the case where the complainant is a minor, the age of the complainant. **Section 22** of the **Sexual Offences Act** sets out the specific relationships that may be considered as constituting an offence of **incest**. **Section 22(1)** of the **Act** identifies a father as among the relationships where a sexual relationship is prohibited with a daughter. In the present appeal, the complainant stated that the Appellant was her father. The Appellant did not challenge this assertion. In his defence, he referred to the complainant as his daughter. The complainant's birth certificate adduced in evidence indicated that the Appellant is the complainant's father. It was therefore established that there existed a father-daughter relationship between the Appellant and the complainant.

With regards to the age of the complainant, PW1 testified that she was nine (9) years old at the time of the sexual assault. PW4 produced in evidence PW1's birth certificate which indicated that she was born on 15th October 2006. This court therefore holds that the prosecution did establish that the complainant was a child within the meaning of **Section 2(1)** of the **Children Act.**

With regards to penetration, **Section 2(1)** of the **Sexual Offences Act** defines the same as:

> ***"the partial or complete insertion of the genital organ of a person into the genital organs of another person."***

PW1 narrated to the court how the Appellant sexually assaulted her on various dates as stated in the charge sheet. He would lure her to the bedroom and ask her to remove her clothes. He would then order her to remove her clothes, lie on the bed and spread her legs. He afterwards inserted his penis into her vagina. This happened on four different Sundays. As fate would have it, the mother went to work on Sundays. When the Appellant was done, he would instruct her to wipe herself using a piece of tissue paper. He warned her against telling anyone. She told her teacher (PW2) about the sexual assault by the Appellant. PW2 informed her mother who then reported the matter to the police.

PW1 was examined by PW3 at Medicins Sans Frontieres (MSF) Clinic based at Mathare on 4th March 2016. On examination, she noted that PW1's vaginal walls were hyperemic. There were no visible physical injuries on her vagina. Her hymen was imperforated. She was also examined by Dr. Shako (PW5) on 8th March 2016. She noted that her labia minora was hyperemic and showed signs of injury. There were healing bruises along the entry point of her vagina. She stated that her hymen was imperforated, which meant that it could only be opened through surgery. The Appellant submitted that the medical evidence did not establish penetration. He argued that the same was contradictory. He averred that the complainant's hymen was found to be intact. For those reasons, he was of the view that the prosecution failed to prove the element of penetration.

This court notes that the complainant was examined about a week after the last alleged sexual assault occurred. The Post Rape Care form presented into evidence by PW3 indicated that the complainant showed signs of peri-labial penetration. The hyperemic vulva as well as the healing injuries along the entry point of her vagina point to the fact that there was partial penetration. The fact that the hymen was intact does not in itself imply that there was no penetration. As stated earlier in this judgement penetration encompasses partial or complete insertion of the genital organs of a person into genital organs of another person. In the case of **Erick Onyango Ondeng vs Republic [2014] eKLR**, the Court of Appeal addressed itself as follows:-

> ***"We agree with the first appellate Court that to establish defilement, it is not necessary that the hymen must be broken; even partial penetration of the female genital by male genital will suffice to constitute the offence. In TWEHANGANE ALFRED VS UGANDA [2003] UGCA the Uganda Court of Appeal expressed the same view as follows:***

"In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured."

The complainant narrated to the court how the Appellant, her father, sexually assaulted her. She stated that he inserted his penis into her vagina. After he ejaculated, he instructed her to wipe herself using a piece of tissue. This court is of the view that the evidence given by the complainant was sufficiently corroborated by the reddening of the vulva area and the healing injuries on her inner labial walls and at the entry point of the vagina. This is further guided by the Post Rape Care form which indicated upon examination of the complainant that there was peri-labial penetration. It is therefore clear that the evidence adduced clearly showed that the prosecution did indeed prove penetration. The complainant's testimony before court had a ring of truth in them. Even after she was recalled to adduce evidence, she indicated that it was her father, the Appellant, who had continuously sexually assaulted her. The proviso to **Section 124** of the **Evidence Act** clearly applies.

The Appellant's defence that his wife framed him does not hold water. The complainant's teacher, PW2 was the first person to learn about the sexual assault. She then informed the complainant's mother, who unfortunately died before she could adduce evidence before the trial court. The mother was therefore not aware that the Appellant was sexually assaulting their daughter. According to her statement presented by PW4, she took her daughter for medical examination after she was informed by PW2 that her daughter had been sexually assaulted. After the medical examination, she was advised to report the matter to the police since the examination indicated that her daughter had indeed been sexually assaulted. For the above reasons, this court finds that the prosecution established the Appellant's guilt on the charge of **incest** contrary to **Section 20(1)** of the **Sexual Offences Act** to the required standard of proof beyond any reasonable doubt.

The Appellant submitted that he was not provided with witnesses' statements prior to the commencement of the trial case. This court has perused the trial court's record. On 24th August 2016, the prosecution stated that they were ready to present evidence of two witnesses. The Appellant requested for witnesses' statements. He however stated that he had been furnished with PW1's statement in June. The court proceeded to hear the evidence of PW1 only. The Appellant was therefore not prejudiced. On 24th January 2017, the court gave an order that the Appellant be remanded at Muthaiga Police Station so as to be provided with witnesses' statements. On 26th January 2017, the Appellant confirmed to the court that he had been furnished with the witnesses' statements. Therefore the Appellant's claim that he was not provided with witnesses' statements is untrue. That ground of appeal must fail.

The Appellant also contended that the complainant's *voire dire* was not properly conducted. He averred that the trial magistrate failed to ask the complainant whether she understood the meaning and nature of an oath before allowing her to give sworn evidence. The conduct of a *voire dire* examination and its purpose was explained by the Court of Appeal in **Johnson Muiruri vs Republic [1983] KLR 445** as follows:

"Where, in any proceedings before any court, a child of tender years is called as a witness, the court is required to form an opinion, on a voire dire examination, whether the child understands the nature of an oath in which even his sworn evidence may be received if in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth. In the latter event, an accused person shall not be liable to be convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him.

It is important to set out the questions and answers when deciding whether a child of tender years understands the nature of an oath so that the appellate court is able to decide whether this important matter was rightly decided.

When dealing with the taking of an oath by a child of tender years, the inquiry as to the child's ability to understand the solemnity of the oath and the nature of it must be recorded, so that the course the court took is clearly understood.

A child ought only to be sworn and deemed properly sworn if the child understands and appreciates the solemnity of the occasion and the responsibility to tell the truth involved in the oath apart from the ordinary social duty to tell the truth.

The judge is under a duty to record the terms in which he was persuaded and satisfied that the child understood the nature of the oath. The failure to do so is fatal to conviction."

In the present appeal, the trial court's record shows that on 24th August 2016 the trial magistrate did conduct a *voire dire* examination and recorded the questions the Court asked PW1 and the answers thereto. The trial court then made a finding as follows:

"The child is intelligent and understands the nature of telling the truth and oath. Will give sworn evidence."

From a perusal of the court's record, the trial magistrate asked the complainant if she understood the social duty of telling the truth. She stated that she did. The trial magistrate then asked her if she went to church. She answered in the affirmative. The trial magistrate further asked her if she knew what a bible was, and if she would tell the truth in court. She answered in the affirmative. The trial magistrate ensured that the complainant understood the social duty of telling the truth, as well as the duty to tell the truth in court under oath. Although the complainant was not specifically asked whether she knew what an oath was, she stated she attended church and knew what the bible was and promised to tell the court the truth. The Court of Appeal in **Oloo S/o Gai vs Republic [1960] EA** 86 observed thus:

"Religious belief is fundamental to the understanding of an oath, and we think it to be inferred from the passage cited that the learned Judge was satisfied that the witness's religious belief was such as to enable her to appreciate the nature of the oath."

This court is satisfied that there was substantial compliance with regard to how the *voire dire* was conducted. The examination conducted by the trial magistrate indicated that the complainant understood the meaning of an oath. The same supported her finding that complainant was able to give sworn evidence.

For the above reasons, this court finds no merit with the appeal lodged by the Appellant against conviction. The appeal against conviction is dismissed. As regard sentence, this court holds that the sentence imposed on the Appellant is legal. The prosecution established to the required standard of proof that the complainant was a minor at the time of the sexual assault. Under the **Proviso** to **Section 20(1)** of the **Sexual Offences Act**, where it is established that the complainant is a minor, then the sentence that will be imposed for an accused found guilty of incest is life imprisonment. The Appellant was therefore correctly sentenced to serve life imprisonment. The appeal against sentence is similarly dismissed. It is so ordered.

DATED AT NAIROBI THIS 27TH DAY OF MARCH 2019

L. KIMARU

JUDGE