REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CORAM: D.S. MAJANJA J.

CRIMINAL APPEAL NO. 105 OF 2016

BETWEEN

AAO.................................. APPELLANT

AND

REPUBLIC...................RESPONDENT

(Being an appeal against the original conviction and sentence of Hon. E. Kigen, RM dated 14th September 2016 at the Magistrates Court at Eldoret in Criminal Case No. 6146 of 2014)

JUDGMENT

1. The appellant was charged, convicted and sentenced to life imprisonment for the offence of incest contrary to **section 20(1)** of the ***Sexual Offences Act*** ("the ***Act***"). The particulars of the offence were that on 12th September, 2014 within Uasin Gishu County, being a father, he intentionally and unlawfully caused his penis to penetrate into the vagina of ZA, a girl aged 10 years, who was to his knowledge his daughter.

2. The appellant now appeals against conviction and sentence on the basis of his petition of appeal, grounds of appeal, amended grounds of appeal and written submissions. In summary, he contends that the prosecution failed to prove the offence against him beyond reasonable doubt, that the medical evidence did not prove penetration and that his defence was rejection without a good reason. The respondent submitted that the prosecution proved all the elements of the offence of incest beyond reasonable doubt.

3. The duty of this court, being a first appellate court, is to subject the evidence on record to a fresh review and scrutiny and come to its own conclusions all the time bearing in mind that it did not see the witnesses testify as to form its own opinion on their demeanour (see ***Okeno v Republic*** **[1972] EA 32**). In order to proceed with this task, I will set out a summary of the evidence as it emerged before the trial court.

4. After a voire dire, PW 1, gave unsworn testimony. She recalled that on the material night while her mother was away, the appellant, who was her father, left his bed and came to where she was and took her to his bed. She stated that, *"He removed my clothes and alifanya tabia mbaya."* She further recalled that he removed his trouser and proceeded to penetrate her vagina causing her to feel pain. After the appellant left in the morning, she went to report the incident to a neighbour.

5. On the same day, 13th September 2014, at about 8 O'clock, PW 5 recalled that she was outside the house when a lady came to see her to inform her that a child was in pain. She told the lady to bring the child. When the child was brought, it was PW 1 who narrated the ordeal with the father. She appeared to be in pain and was taken to the hospital together with a volunteer Children Officer (PW 3). On the next day, PW 5 took the child to report the incident at Kapsoya Police Post where they were received by PW.6, the Investigating Officer who issued the P.3 Form.

6. The doctor who filled the P.3 Form, PW 7, confirmed that the child was taken to hospital on 13th September 2014. When she examined her on 15th September, 2014 the child had a swelling on the vulva. The High Vaginal swab was unremarkable on examination. She confirmed that there was penetration.

7. When put on his defence, the appellant made an unsworn statement in which he denied committing the offence. He stated that on the material morning, he left PW 1 and her sister PW 3 at home and went to work. In the evening when he was back home, the child was talking to someone but she then disappeared. He was later arrested.

8. The appellant was charged with the offence of incest under **section 20(1)** of ***the Sexual Offences Act, 2006*** which states 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:*
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> *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.* [Emphasis mine]

9. From the definition, the prosecution may either prove an indecent act or an act of penetration by a person who is within the prohibited relationships. An *"indecent act"* under **section 2(1)** of the ***Act*** is defined as an unlawful intentional act which causes, *"(a) any contact between any part of the body of a person with genital organs, breasts or buttocks of another, but does not include an act that causes penetration."* While *"Penetration"* under **section 2** of the ***Act*** means, *"the partial or complete insertion of the genital organs of a person into the genital organs of another person."*

10. There was no dispute that the appellant was the father of the child. He admitted as much hence the issue is whether he committed the act of penetration. PW 1 gave clear evidence on how the appellant committed an act of penetration. When she was initially called to testify, the record shows that she was traumatized. Her testimony was corroborated by the medical evidence of PW 7 which confirmed that she was subjected to penetration. Although sister, PW 2 was in the same house, she did not witness the incident but confirmed that PW 7 was the only adult male in that house. The appellant's defence did not dent the prosecution case as it was a mere denial and nothing arose from it that would indicate the child was lying or intended to frame him.

11. The age of the child was proved by the testimony of her mother, PW 4 and supported by the Clinic Card which showed that PW 1 was born on 10th July 2005. She was therefore aged 9 years old. Although the minimum sentence under **section 20(1)** of the ***Act*** is 10 years' imprisonment and the maximum is life imprisonment. Since the child was aged 9 years old, I am satisfied that sentence of life imprisonment was appropriate taking into account the equivalent sentence imposed under **section 8(1)** of the ***Act*** where the defilement of a child aged 11 years and below attracts a mandatory life sentence.

12. In his grounds of appeal, the appellant complained that his fundamental rights under **Article 50(2)(k)** of the Constitution, which provide that every accused had a right to a fair trial which includes the right to adduce and challenge evidence. I have carefully read the record and its shows that on 22nd June 2015, the appellant confirmed that he had been supplied with witness statement. The court ordered that he be furnished with the P3 form and he never raised the issue again. He was ready to proceed with the hearing at subsequent hearing and was able to cross-examine all the witnesses. I do not find any merit in this ground.

13. I affirm the conviction and sentence and dismiss the appeal.

DATED and DELIVERED at ELDORET this 23rd day of APRIL 2019.

D.S. MAJANJA

JUDGE

Appellant in person.

Ms Mokua, Prosecution Counsel, instructed by the Director of Public Prosecutions for the respondent.