REPUBLIC OF KENYA

IN THE HIGH COURT

AT KIAMBU

CRIMINAL APPEAL NO. 39 OF 2018

GMM.....APPELLANT

-VERSUS-

REPUBLIC .....RESPONDENT

(From original conviction and sentence in criminal case number 1277 of 2016 in the Chief Magistrate at Kiambu Hon. Dr. J. Oseko on the 15th December 2016)

JUDGMENT

1. The Appellant was charged and convicted for the offence of attempted incest Contrary to **Section 20(2)** of the Sexual Offences Act No.3 of 2006, with an alternative charge of Indecent Act to a child contrary to **Section 11(1)** of the said Act.

He was convicted for the offence of attempted incest and sentenced to serve life imprisonment on the 15th December 2016.

2. The appellant appeals against both the conviction and the sentence.

As the first appeal court, my duty is to re-consider and re-evaluate the evidence adduced before the trial court and come up with my own conclusion as to whether the evidence was sufficient to sustain a conviction **Okeno –vs- R (1972) EA 32.**

3. The offence of incest is stated in **Section 20(1)** of the sexual Offences Act as

> **(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, provided that if it is alleged in the information or charge 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.**

4. Under **Section 20(2),** if the offence **is an attempt to commit the offence of Incest**, upon conviction the offender is liable to imprisonment for not less than ten years.

5. The ingredients for the said offence – Incest and attempted incest – are

1. Knowledge that the person is a relative

2. Penetration or Indecent Act

There is a difference in defilement of a child under **Section 8(1) of the Sexual Offences Act**, and **Section 20(2)** that being the relationship of the offender to the child victim.

6. **Penetration** is defined under **Section 2 of the Act**. It means "*the partial"* or complete insertion *of the genital organs* of a person into the genital *organs, of another*.

Indecent act means "any contact between any part of the body of a person with the genital organs, breast or buttocks of another but does not include an act that causes penetration."

7. I have considered the evidence before the trial court.

The victim SWM was a child aged 5 years (hereinafter referred to as the victim).

The appellant was accused of intentionally attempting to touch the vagina of the victim with his penis whom he knew was his niece. The offence was alleged to have been committed on the 29th May 2016 at Kahawa West, Nairobi County.

8. **PW1** was the class teacher of the victim. Her evidence was that on the next day while in class she noticed that the victim could not sit properly and could not control urine. Upon questioning and enticing the child with Kshs.150/=, the victim said that it was "Baba Eva" who took her to his bed and started touching her vagina and put his penis to her vagina. Upon examination, the class teacher found the victim's vagina was swollen.

9. **PW2** was the victim. The court took her through a *voire dire* examination. The court was satisfied of her intelligence and ability to testify. She gave unsworn evidence. Pointing at the appellant, who was at the dock, the child testified that he was a bad man and he was called Baba Eva. She testified that while playing with other children the appellant took her to his house, removed her pants, placed her on the bed and touched her vagina and placed his penis therein, that she felt pain and cried but the appellant covered her mouth and later let her go out but at her home she did not tell anybody of the incident.

10. **PW3** the victim's mother's evidence was that on the material day the appellant went to visit them at her house in the neighbourhood. She testified that the appellant requested that he takes the victim to buy snacks at the shop and she agreed. It was her evidence that after two hours the victim came home alone.

She testified that the appellant was her cousin, and they lived in the same neighbourhood.

11. **PW5** was Dr. Warda Hassan. He examined the victim at the Kiambu Hospital on 30th May 2016, one day after the incident. He observed bruises and lacerations on the right labia majora, concluding that the victim had been sexually assaulted. He produced the P3 Form as PExt 2, and the Post Care form – PExt 3.

12. In his sworn defence the appellant who stated to have been a teacher denied committing the offence but blamed his cousin Alex PW3 – father of the victim who was using the allegation to fix him so as to find favour in the family.

13. **Section 22(2**) of the Act defines a "niece" as the child of a person's/brother or sister – which is also applicable to a nephew.

The appellant did not deny that the victim was his niece in his defence nor did he answer to any of the accusations labelled against him. His defence was one of victimization by his cousin (PW3) over money and family favours. No evidence to support the assertion was offered.

14. The essential elements for the offence of incest is an **intentional indecent act**, **with knowledge that the person is a relative – Section 20(2) of the Act**.

In **Criminal Appeal No.80 of 2017 at Kisii GMB -vs- Republic (2018) e KLR,** the court held that in an offence of incest, penetration is not a necessary ingredient but an indecent act as defined under the Act must be proved.

15. **Issues for determination**

(1) Whether the Appellant was a relative to the victim.

(2) Whether there was an attempted intentional indecent act or penetration of the victim's genitalia by the appellant.

(3) The age of the victim.

The father of the victim (PW3) testified that he was a cousin of the appellant a fact confirmed by the appellant in his defence. That being so, the victim was thus a niece to the appellant. Her age was certified to be 5 years by her Birth certificate. Issues No. 1 and 3 and thus settled.

16. The victim testified on how the appellant removed his penis and inserted it into her vagina. She called him a bad man and positively identified him as the assailant, and pointed at him at the dock. She knew him.

The expression "*bad man*," "*Bad manners*" are ordinarily used by young children who do not have better expressions of people who do bad things to them and especially sexual assaults and conducts by either touching their genitalia or private parts like breasts or buttocks. Such expressions should therefore be so understood while discussing sexual offences to minors.

The said "bad manners" were confirmed by medical examination. The Doctor (**PW5**) upon examination of the victim's genitalia observed presence of bruises and lacerations thereon. This in my view is consistent with the definition of Indecent Act under the Act.

17. In his written submissions, the appellant faults the trial court for failure to conduct a *voire dire* examination to the victim and lack of corroboration of the victim's evidence. This is not so because the record of proceedings is clear that the trial magistrate took the child through a *voire dire* examination and was satisfied that

> "**She is very intelligent**. ***She is audible and sufficiently intelligent for her evidence to be taken. She is not shy and is bold. She goes to Sunday school and understands the difference between good and bad and does not understand the meaning of oath. She will therefore give an unsworn statement."***

18. However, the method for such *voire dire* examination was not strictly followed. It should ordinarily be a question and answer dialogue. The questions ought to be recorded. What I see are the answers only. However, failure by the trial court to record the questions put to the child cannot invalidate the otherwise valid findings and the judgment.

In similar circumstances in **Shaban Mutua Kiptui -vs- R (2017) e KLR** the court held that such omission should not invalidate a valid judgment.

19. The **Court of Appeal in Johnson Muiruri –vs- R (1983) KLR 447** was however emphatic that the proper procedure ought to be followed when children are tendered as witnesses.

It rendered

> "**that 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 and not to be forced to make assumptions."**

The above was held and reinstated in numerous Court of Appeal decisions within and without Kenyan jurisdiction among them **Kibangeny Arap Kolil (1959) EA 92, Gabriel s/o Maholi -vs- Republic (1960) EA 159, Republic -vs-Lal Khan (1981) 73, Court of Appeal of England in Regina -vs- Campell (Times, December 10, 1982)** among others.

20. In our very own **Court of Appeal** sitting in **Mombasa (Makhandia, Ouko & M'inoti JJA) in Maripett Loon Komok -vs- Republic (2016) e KLR,** the court dealing with a girl not more than 10 years old and citing **Section 19** of the **Oaths and Statutory Declarations Act** in the matter of reception and admissibility of evidence of a child of tender years, rendered that such evidence of the minor may be received but not on oath if such minor does not understand the nature of an oath, and if in the court's opinion the child is possessed of sufficient intelligence to justify the reception of the evidence so long as that evidence though not on oath is taken down in writing, it amounts to a deposition under **Section 233 of the Criminal Procedure Code.**

21. Further, the Honourable judges citing **James Mwangi Muriithi –vs- Republic and Johnson Muiruri -vs- Republic (1983) e KLR 447 (Supra)** rendered that today courts accept both the question and answer format and recording of the child's answers only, and further went ahead to state that what is constant is that, whatever format the court adopts it must be on record and that by dint of **Sections 208 and 203** of the Criminal Procedure Code, the law allows cross- examination of a witness who does not give evidence on oath.

22. In this instant appeal, the trial magistrate opted the question and answer method and recorded the child's answers only. Going by the Court of Appeal holdings above, that mode is acceptable.

The trial magistrate recorded her reasons as to the intelligence of the child and went ahead to receive the minor's her evidence but not on oath.

I am therefore satisfied that the child's evidence was properly taken and the failure by the trial magistrate to record the questions put to the child should not invalidate a valid judgment.

23. Proviso to **Section 124 of the Evidence Act** allows a court to convict on an uncorroborated evidence of a sexual offence victim if the court is convinced of the truthfulness and credibility of the complainant's evidence.

The trial court in her judgment stated that although the victim's evidence required corroboration to support a conviction, there was ample corroborative evidence by the medical evidence and her class teacher. To that end I uphold the trial magistrate's findings that the child's(victim's) evidence was adequately corroborated and even if that was not so, proviso to **Section 124 Evidence Act** comes to play, and would have been adequate to convict on the child's evidence so long as the trial magistrate believed in the truth and credibility of her evidence.

24. I am satisfied that upon the totality of the evidence, the prosecution proved the case against the appellant as charged, under the provisions of **Section 20(2)** of the Sexual Offences Act.

25. The trial magistrate convicted the appellant for the offence as stated in the charge sheet **Section 20(2)** of the Sexual Offences Act.

However, sentence was based on **Seciton 20(1)** of the said Act. The charge sheet was never amended. The prosecution called evidence to prove the charge under Section 20(2) and the appellant defended the charge under said Section.

The sentence upon conviction under Section 20(2) of the Act is a minimum imprisonment of ten years.

It is obvious that the trial magistrate sentenced the appellant under **Section 20(1)** which is life imprisonment.

Citing **Prof. Njugu J in Nakuru Criminal Appeal No. 314 of 2015 M E M -vs- Republic (2018) e KLR**

He rendered that

> **"it is not possible to say that a court can rely on Section 179 of the Criminal Procedure Code to convict under Section 20(1) Sexual Offences Act an accused person who has been charged with an offence under Section 20(2) Sexual Offences Act, the former is not a lesser and minor cognate offence of the former."**

The Learned Judge set aside the conviction under Section 20(1) and substituted it with a conviction under Section 20(2) of the Act.

I have considered the appellants mitigation. He was remorseful.

The sentence provided under Section 20(2) of the Sexual Offences Act is a minimum of ten years imprisonment.

For the foregoing and in conclusion make the following orders:

1. The appellants conviction under Section 20(1) of the Sexual Offences Act is quashed and substituted with a conviction under Section 20(2) of the Sexual Offences Act.

2. The sentence of life imprisonment is set aside and is substituted with one of ten years imprisonment.

3. The substituted sentence shall run from the date of the commission of the offence being the 29th May 2016.

Dated and signed at Nakuru this 27th Day of March 2019.

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J.N. MULWA

JUDGE

Dated, signed and delivered at Kiambu this 10th Day of April 2019.

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C. MEOLI

JUDGE