REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CRIMINAL APPEAL NO. 13 OF 2018

PKW.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal against conviction and sentence of Senior Principal Magistrate Nakuru Hon. V.W Wakumile dated 24 day of January 2018)

JUDGMENT

1. The Appellant PKM was charged and convicted for the offence of **Incest Contrary to Section 10(1) of the Sexual Offences Act No. 3 of 2006**, against one JN, then aged 16 years on diverse dated between 8th December 2015 and 23rd October 2016 in Nyandarua County. On the 24th November 2018 he was sentenced to suffer imprisonment for a term of (20) twenty years.

2. This appeal is against both the conviction and sentence by an Amended Petition of Appeal filed on the 5th March 2019.

It raises three grounds that:

(1) The charge sheet was defective as it contained more than one specific offence thus was bad in law for duplicity.

(2) That age of the complainant was not proved.

(3) That provisions of Sections 211 and 198(1) (2) of the Criminal Procedure Code.

3. On the 5th March 2019 when the appeal came up for hearing before me, the Appellant relied on his written submissions were filed on the 5th March 2019.

4. I have considered the trial courts proceedings as well as the judgment.

It is my duty as the first appellate court to comb though the evidence adduced, and re-examine it to satisfy myself that the findings and conclusion reached are based on the evidence, and upon the law and principles in respect thereof – **Okeno –vs Republic (1972) EA 32** and **Jjospeh Ndungu Kagiri –vs- Republic (2016) e KLR.**

That I have done.

5. **Defective charge sheet**

There is an alternative charge **Sexual Assault Contrary to Section 5(1) (a) (1) (2) of the said Act**, particulars being that the appellant during the same period (see charge sheet above) within the same area he intentionally and unlawfully inserted his finger to penetrate the vagina of the child aged 16 years.

There was also a further alternative charge of committing an Indecent Act with a child contrary to Section 11(1) of the Act, where the appellant was accused of intentionally and unlawfully touching the vagina of a child aged 16 years, JN with his penis.

6. The appellant's submission is that the above charge sheet and alternative charges are defective for duplicity.

7. **The charge sheet** is dated 18th November 2016 it reads as follows:

""Incest contrary to section 20(1) of the Sexual Offences Act No. 3 of 2006.

Particulars of offence is stated as follows:

"PKM. On diverse days between 23rd October 2016 in Mirangine Sub-County within Nyandarua County unlawfully and intentionally penetrated the buttocks/anus/vagina of JN with his penis who to his knowledge was his daughter."

8. **Section 134 of the Criminal Procedure Code** provides that;

"Every charge or information shall contain and shall be sufficient if it contains a statement of the specific offence of offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."

9. Further **Section 135 of the Criminal Procedure Code** provides

(1) whether felonies or misdemeanors may be charged together in the same charge or information of the offences charged are founded on the same facts or for or are part of series of offences of the same or similar character.

10. The offences with which the appellant was charged – in the main and in the alternative charges are all, in my view, related and similar forming a series of offences of the same character.

11. In the main charge, and the alternative charges, the offences stated thereon, are all Sexual Offences being Incest against the complainant who is a daughter to the appellant – wherein he unlawfully and intentionally inserted his penis to the vagina of the complainant thus penetrating her in the alternative charges, the appellant was accused of using his finger to penetrate same daughter and touching the vagina of the said complaisant.

12. As such, and pursuant to **Section 134 and 135** of **the Criminal Procedure Code** (stated above), all the acts form a series of similar offences. I am satisfied that the particulars of the offences are clearly stated, and give reasonable particulars.

I find no prejudice of injustice that the appellant may have been caused. There is no apparent or any chance of confusion as to what the appellant was charged with.

- I find no merit in that ground of appeal – See **Rabecca Mwikali Nabutola & 2 Others –vs- Republic (2016) e KLR** –where such issues were ably discussed.

13. **Age of the Minor victim (PW1)**

The appellant is the biological father of the complainant, his daughter. He no doubt knows when the complainant was born and her age. All throughout the proceedings, the appellant did not deny that the complainant was his daughter.

Nevertheless, proof of age in a sexual offence is crucial as it determines the decree of sentence, upon conviction, ought to be imposed upon the offender – **Criminal Appeal No. 102 of 2016 Eliud Waweru Wambui – vs- Republic (2019) e KLR.**

14. The importance of proving the age in a defilement case cannot be gainsaid.

The mother of the complainant (PW2) did not produce any documentary evidence on the age nor did the complainant herself (PW1). She (complainant) testified that she was born in the year 2000, was in form 2 at [Particulars Withheld] Secondary school. The court upon examination of the complainant not indicated whether on a *voire dire* examination was satisfied that she was intelligent enough to testify on oath. The mother of the complainant (PW2) testified that the complainant was her 8th born child.

15. The appellant in cross examination of both PW1 and PW2 did not challenge the stated age of 16 years of the daughter.

I have looked at the medical records produced by PW 4 the Clinical officer, J.M. Kariuki County Hospital Olkalou. Her age is stated at 16 years.

It is trite that age can proved in many ways, not just by production of a birth certificate or even a clinic card –

The class in which a child is at may provide a good indicator of the age – **Joseph Kieti Seet –vs– Republic (2014) e KLR –** including commons sense and observation.

I therefore come to a finding that the appellant's complaint in respect of the victim's age is baseless. It is dismissed.

16. Provisions of **Section 198 and 211 of the Criminal Procedure Code** (CPC)

Section 198 Criminal Procedure Code provides that whenever evidence is adduced in a language not understood by the accused and he is in court, it shall be interpreted to him in a language he understands.

The trial court proceedings show that evidence was taken in "English/Kiswahili." In cross examination of prosecution witnesses, the appellant who was not represented by an advocate cross examined the witnesses, and in his defence he adduced unsworn statement of defence.

17. The language of the magistrate's court is both English and Kiswahili. I have also seen that the plea was taken in Kiswahili? English.

Further, where appellant appeared before me for the hearing of this appeal, he ably argued his appeal and submitted in very fluent spoken Kiswahili.

18. I am unable to agree to the appellant's submission that the trial magistrate failed to comply with Section 198 of the Criminal Procedure Code.

It is a principle of law that it is not enough to state a fact, but also to prove.

19. **Section 211 Criminal Procedure Code** requires that once the court finds that the accused has a case to answer, the court shall explain once against the substance of the charge and his right to give evidence on oath from the witness box and if he does so, shall be liable to cross examination or to make an unsworn statement, in which case no cross-examination would be made and also to state whether he would call witnesses.

20. The above is a procedure which ordinarily no court would omit or fail to state. It is upon such explanations that the accused decides which mode he prefers to tender his defence.

In the instance matter, the appellant chose to offer unsworn stamen of defence.

It is however not stated that the provisions – Section 211 – was stated to the accused.

I have stated above that ordinarily, that requirement is complied.

Should failure to state compliance on the record then invalidate an otherwise valid findings and judgment?

21. The Court of Appeal in Rebecca Mwikali Nabutola case (Supra), rendered that the explanations under Section 211 ought not be duplicated in the proceedings. It would not have followed that the accused opted to give unsworn defence if the explanation was not given.

Also in **Criminal Appeal No. 42 of 2015 Stanley Kiprono Cheuriyot –vs- Republic (2016) e KLR** in the same situation, the court found no merit in the assertion.

20. I further do not find any prejudice or miscarriage of justice as the accused did tender his unsworn statement of defence, upon which the judgment was made.

23. In its totality, upon careful thought and consideration, I come to the conclusion that the appeal has no merit and must be dismissed.

It is so dismissed and the conviction and sentence upheld.

Dated, delivered and signed at Nakuru this 27th Day of June 2019.

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J.N. MULWA

JUDGE