REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL APPEAL NO. 44 OF 2018

BMN.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(Being an Appeal from Original Conviction and Sentence in **Migwani Senior Resident Magistrate's Court Criminal Case No. 59 of 2016** by **Hon. G. W. Kirugumi (SRM)** on **22/08/17)***

J U D G M E N T

1. **BMN,** the Appellant, was charged with the offence of **Incest** contrary to **Section 20(1)** of the **Sexual Offences Act No. 3 of 2006.** Particulars of the offence were that on the **19th** day of **June, 2016** at **[particulars withheld] Village, Wikivuvwa Sub-Location, Wensyei Location** of **Migwani Sub-County** within **Kitui County** intentionally and unlawfully caused his male genital organ namely penis to penetrate female genital organ namely vagina of **NM** a child aged **14 years, five days,** knowing her to be his daughter.

2. In the alternative he was charged with the offence of **Committing an Indecent Act with a Child** contrary to **Section 11(1)** of the **Sexual Offences Act No. 3 of 2006.** Particulars of the offence were that on the **19th** day of **June, 2016** at **[particulars withheld] Village, Wikivuvwa Sub-Location, Wensyei Location** of **Migwani Sub-County** within **Kitui County** intentionally and unlawfully caused his male genital organ namely penis to cause the contact with female genital organ namely vagina of **NM** a child aged **14 years, five days.**

3. He was tried at the first instance, convicted and sentenced to **twenty (20) years imprisonment.**

4. Aggrieved, he appeals on grounds that: The learned trial Magistrate relied upon **Section 68(5)** of the **Evidence Act** which was erroneous; crucial witnesses did not testify; investigations performed were shoddy; the charge was duplex; and the defence that was plausible was rejected.

5. Facts of the case were that on the **19th** day of **June, 2016** the Complainant was at home when her father, the Appellant assigned her some duties. She did the chores and on completing he asked her to prepare succotash. As she took the pot that was in the sitting room, the Appellant lifted her and took her to a bed that she shared with her sister. He proceeded to violate her sexually. Having been offended, she left a note for her mother with her sister and went to her grandmother's place. Subsequently, the matter was reported to the police. She underwent medical examination. Investigations were carried out that culminated into the arrest of the Appellant who was subsequently charged.

6. Upon being put on his defence, the Appellant stated that his wife was engaged in extra marital affairs since **2010.** As a result, their relationship became sour. Therefore, he married another wife. In **2015** they disagreed. Her relatives intervened, but he proceeded to buy land for his other wife. The wife's family had debts that he assisted to settle. Ultimately he was framed up because of the disagreement that they had.

7. The Appeal was canvassed by way of written submissions.

8. It was urged by the Appellant that the trial Court did not subject the minor to *voire dire* examination to determine if she was seized of sufficient integrity and capable of telling the truth which left the trial irregular and a nullity. In this regard he cited the case of **Onsemon vs. Republic (1985) KLR** where the Court held that:

> ***"... where a witness appears to be a child of tender years, the Court should inquire whether the child was capable of understanding the nature of oath and whether he is possessed of sufficient intelligence of justifying the reception though not on oath."***

9. That PW2 brought up allegation because of the domestic differences that they had. That the Complainant must have been convinced to

frame him up.

10. Further, that an eye witness alleged to have heard the victim cry was not called to testify; investigations carried out were shoddy and the defence put up that the Appellant had married another wife was disregarded.

11. The State opposed the Appeal. It was urged that the State did not rely on any safaricom data, crucial witnesses testified and the charge sheet was read to the Appellant in a language that he understood.

12. This being a first Appellate Court, I am duty bound to re-evaluate the evidence that was adduced before the trial Court and come to my own conclusion bearing in mind that I never saw or heard the witnesses who testified. **(See Okeno vs. Republic (1972) EA 32).**

13. It is alleged that the Magistrate relied on a safaricom data print out contrary to the law yet no such evidence was adduced.

14. A charge is said to be duplex when two (2) separate offences are framed in the same charge. In the case of **Cherere s/o Gakuli vs. Republic (1955) EA 478** the Court of Appeal stated that:

> ***"Where two (2) or more offences are charged to the alternative in one Count, the Count is bard for duplicity … The defect is not merely formal but substantial. When an accused is so charged, it cannot be said that he is not prejudiced because he does not know exactly with what he is charged and if he is convicted he does not know exactly of what he has been convicted."***

15. **Section 20(1)** of the **Sexual Offences Act** provides thus:

> ***"(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 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."***

Looking at the particulars of the offence as framed, the ingredients of the offence of incest are captured. In any event the submissions are silent on the alleged duplicity.

16. This being a case of incest the Prosecution was duty bound to prove:

(i) The act of penetration/indecency.

(ii) The relationship between the victim and perpetrator of the act.

(iii) The age (for purposes of sentencing).

17. PW5 **Dr. Christopher Wahinya** the Medical Superintendent, **Migwani Sub-District Hospital** filled a P3 form in respect of the victim. Her hymen was torn and she had a vaginal discharge which made him opine that there was vaginal penetration. This was evidence that confirmed the fact of the Complainant having engaged in penetrative sex.

18. It was the Prosecution's case that the perpetrator of the act of penetration was the Appellant. PW1, the Complainant stated that when the act was committed she had remained at home with the Appellant. Therefore, there was no eye-witness to the act of penetration. She alluded to the fact that the Appellant having removed all her clothes, lay on her and thrust his genital organs into hers and on completing the sexual episode he released her, as he threatened to kill her if she divulged the information to anyone and went to shower.

19. In his defence the Appellant denied having engaged in coitus with the Complainant. His argument was that he had disagreed with the victim's mother. On cross examining the Complainant the allegation of trumped-up charges was not suggested to her. DW2 **Francis Njuki** testified to the fact of the Appellant having called him on the **11th June, 2016** and having gone to show him land that he had purchased. Thereafter, he learnt of his arrest. DW3 **Justus Kivunzi Mulyungi** also testified to the events of **11th June, 2016.** He stated that on the material date **Musyoka** (Appellant) his younger wife and uncle went to his home at **Ngomeni** with the intention of fencing his land in the area. He learnt of his arrest thereafter.

20. These two (2) witnesses had nothing to state about what transpired on the fateful date **(19th June, 2016).**

21. The trial Magistrate had the opportunity of observing the Complainant's demeanor and believed her based on the evidence that she tendered.

22. The trial Court had been faulted for not appreciating that crucial witnesses were not called. **Section 143** of the **Evidence Act** provides thus:

> ***"No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any***

fact."

23. In the case of **Keter vs. Republic (2007) 1 EA 135** the Court stated that:

> ***"The prosecution is not obliged to call a superfluity of witnesses but only such witnesses who are sufficient to establish the charge beyond any reasonable doubt."***

24. The Complainant testified that the act of penetration took place while they were inside the bedroom. Other witnesses may not have testified to that fact therefore failure to call them was not fatal to the Prosecution's case.

25. The Appellant submitted at length on the issue of failure to conduct *voire dire* examination against the Complainant. Evidence was adduced of a Birth Certificate. It was demonstrated that the Complainant was born on the **14th June, 2002** therefore on the fateful date she was 14 years old.

26. The purpose of *voire dire* examination is to establish if a child of tender age is possessed of intelligence to understand the nature of oath, to tell the difference between lying and telling the truth and generally to prepare the child to testify as to the truth of the matter in issue.

27. In the case of **Johnson Muiruri vs. Republic (1983) KLR 445** it was stated thus:

> ***"We once again wish to draw the attention of our courts as to the proper procedure to be followed when children are tendered as witnesses. In Peter Kiriga Kiune, Criminal Appeal No. 77 of 1982 (unreported) we said:-***
>
> ***"When in any proceeding before any court, a child of tender years is called as a witness, the court is required to form an opinion, on voire dire examination, whether the child understands the nature of an oath in which event his sworn evidence may be received. If the court is so satisfied, his unsworn 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 (section 19, Oaths and Statutory Declarations Act Cap 15). The Evidence Act (section 124, Cap 80). 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 be forced to make assumptions."***

28. In the case of **Kipkering vs. Republic (1959) EA 92** it was held that:

> ***"There is no definition in the Oaths and Statutory Declarations Ordinance of the expression "child of tender years" for the purpose of S. 19. But we take it to mean, in the absence of special circumstances, any child of an age, or apparent age of under fourteen years."***

29.It was proved and not disputed that the child herein was fourteen (14) years old. Therefore, it was not necessary to conduct *voire dire* examination.

30. The relationship between the Appellant and the Complainant is not in dispute, therefore, it was within his knowledge that the Complainant was his daughter.

31. With respect to sentence imposed. I find the trial Court having exercised its discretion in accordance with the law.

32. Therefore, the Appeal is devoid of merit and is accordingly dismissed in its entirety.

33. It is so ordered.

Dated, Signed and **Delivered** at **Kitui** this **26th** day of **July, 2019.**

L. N. MUTENDE

JUDGE