REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL APPEAL NO. 79 OF 2018

(From Original Conviction and Sentence in Criminal Case No. 114 of 2014

by the Senior Principal Magistrate's Court at Vihiga)

KS.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The appellant was convicted by Hon. Grace Mmasi, Acting Senior Resident Magistrate, of incest contrary to Section 20(1) of the Sexual Offences Act No. 3 of 2006. There is nothing in the record before me to indicate the sentence that the court imposed on the appellant upon conviction, but he alleges in his petition of appeal that he was sentenced to ten years imprisonment. The particulars of the charge against the appellant were that on the 30th day of January 2014 in Vihiga County he intentionally and unlawfully had penetration by his genital organ namely penis into genital organ namely vagina of SO, a girl aged 9 years who was to his knowledge his niece.

2. He had also faced an alternative charge of committing an indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act No. 3 of 2006. The particulars of the alternative charge were that on the same date and the same place stated in the main count, he had intentionally touched the vagina of the subject child with his penis.

3. The appellant pleaded not guilty to the charges before the trial court, and the primary court conducted a full trial. The prosecution called six (6) witnesses.

4. SO, the complainant, testified as PW1. She gave sworn testimony. She identified the appellant as her uncle. She explained that on the material day the appellant sent away the other children and thereafter sexually assaulted her. He stripped her naked and inserted his penis into her vagina. She screamed, and several people came to her rescue. The appellant ran away. She was taken to the village elder and onwards to the police. She was later taken to the hospital. PW2, INK, said that she witnessed as the appellant defiled PW1. She heard her cries or screams, she went to the kitchen where the screams emanated from and peeped through a window as the door was closed. She saw the appellant on top of PW1. His trousers were unzipped and pulled down halfway, while PW1's dress was raised. She averred that the appellant was defiling PW1. She then ran to call a neighbour for help, who came and took PW1 to the village elder, the police and hospital. MM (PW3) was the mother of the appellant and the grandmother of PW1. It was to her that PW2 and the neighbour, John Musera made the report of what had transpired between the appellant and PW1. She ran home, found PW1, questioned her and she said the appellant had penetrated her vagina. She examined PW1's vagina, and established that she was bleeding from there. She made reports to the relevant local security apparatus.

5. John Musera testified as PW4. He was the neighbour to whom PW2 reported, and who ran to the scene to assist PW1. PW1 informed them of the assault. He witnessed the appellant ran away from the scene. Loy Agwona (PW5) was the clinical officer who attended to the PW1 and prepared the Police Form 3 which was put in evidence. She stated that she was brought in by PW3. She had allegedly been defiled the same day by her uncle. She was the one who gave her history to the witness. Her vulva and both labias were said to be swollen and lacerated, the hymen broken and healed. She concluded that there had been penetration and that she had been defiled severally. Corporal William Juma Khakina Lydia testified as PW6, who was the police officer who received the report and investigated the matter. He testified that PW1 was escorted to the station by PW3 and an assistant chief. The report made was that the child had been defiled by his uncle. He escorted the child to hospital the same day.

6. The appellant was put on his defence. He gave an unsworn statement and did not call any witnesses. He denied the offence, and explained how he had spent his time on the material day. He said he was with PW1 at the time alleged but what transpired between them was that he questioned her over where she had spent the previous night and ordered her to go back there. Later in the evening he was arrested on

allegations that he had defiled her.

7. After reviewing the evidence, the trial court convicted him of the main charge, and sentenced him as stated in paragraph 1 of their judgment. The court also found that the alternative charge had not been proved and proceeded to acquit him of it.

8. Being dissatisfied with the conviction and sentence the appellant appealed to this court and raised several grounds of appeal. He averred that the trial court did not consider that the medical evidence did not incriminate him. The evidence by the state witnesses was circumstantial, coincidental and invalid, there were contradictions, among others.

9. Being the first appellate court, I have re-evaluated all the evidence on record. I have drawn my own conclusions, whilst bearing in mind the fact that I did not have the benefit of observing the witnesses as they testified. The Court of Appeal's decision in the case of ***Okeno vs. Republic*** **(1972) EA 32** has consistently been cited on this issue. In its pertinent part, the decision is to the effect that: -

> *"An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrates' findings can be supported. In doing so it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."*

10. The appeal was canvassed on 20th June, 2019. The appellant relied on written submissions that he placed before the court, while Mr. Ng'etich, Senior Prosecution Counsel, made oral submissions. The appellant's written submissions dwelt only on contradictions and inconsistencies in the testimonies. Mr. Ng'etich submitted that if there were any inconsistencies then the same were minor and did not affect the overall picture.

11. I have read through the record of the trial court. The testimonies of the witnesses were fairly straightforward. PW1 spoke clearly of what befell her in the hands of the appellant. She positively identified him as the perpetrator. The events happened during broad daylight. PW2 said she saw the sexual assault as it happened. PW3 and PW4 were brought to the scene by PW2 shortly thereafter, and found both the appellant and PW1 at the scene, and took the steps that they described. PW1 was taken to hospital the same day and was seen by PW5. The inconsistencies that the appellant points at are minor and I agree with the state that they did not dent the prosecution's case.

12. I am not persuaded that the appellant has made out a case for me to quash the conviction and to set aside the sentence imposed.

13. One other thing. The appellant had been charged initially with defilement contrary to section 8(1) of the Sexual Offences Act, as read with section 8(2). Somewhere along the way the charge was amended to substitute it for incest. The provisions in section 8 state as follows:

> *"8. Defilement (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.*
>
> *(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life."*

The provisions in section 20 state:

> *"20. Incest by male persons*
>
> *(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."*

14. It will be noted that the victim of the offence was aged nine years at the material time. The offence created under section 8(1)(2) prescribes a mandatory sentence of life imprisonment should the accused person be found guilty. The offence created under section 20(1) provides for a minimum of ten years upon conviction. That would suggest that the same is lesser to the offence created under section 8(2). The complainant was a minor. The facts pleaded in the charge and the evidence presented disclosed defilement, and the state could and had properly charged the appellant with defilement of a minor of nine years. One would wonder what would inform the substitution of the proper more serious charge with the fairly minor charge. Perhaps, it was geared at saving the appellant from the mandatory penalty in section 8(2).

15. There is a proviso to section 20(1) of the Sexual Offences Act. That proviso is intended to avoid abuse of the incest charge to protect defilers. Although the minimum penalty for incest is ten years' imprisonment, that only applies where the victims are adults. For where the victims are minors the maximum penalty is life imprisonment, according to the proviso. The trial court, it appears, did not consider the proviso while sentencing the appellant, or the proviso, perhaps, escaped its attention. For avoidance of doubt the proviso to section 20(1) says:

> *"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."

16. As stated above, the minor victim of the offence the subject of the proceedings was nine years of age at the time. A proper charge for defilement in her case should have been brought under section 8(1)(2) of the Sexual Offences Act. Upon conviction of the appellant under that charge, the appellant should have been sentenced to life in prison as required by section 8(2). All is not lost. The court found that there had been penetration of the vagina of the minor by the penis of the appellant. Whereas that amounted to incest under section 20, it was also defilement under section 8. The penalty available for defilement with respect to nine years old victims is mandatory life under section 8(2) while under the proviso to section 20(1) there is discretion to consider a penalty of up to life imprisonment. I do not understand why there should be that distinction or discrimination. To me defilement of a minor of nine remains defilement whether charged under section 20 of the Sexual Offences Act or not. The penalty for it should be that prescribed in section 8(2). The trial court ought to have taken these matters into account when it was sentencing the appellant. That facilitated the appellant to get away with murder as it were. The appellant walked away with a slap on his wrist for defilement of a minor of a nine-year of age.

17. Taking everything into account, I hereby come to the conclusion that the appeal herein has no merit. I shall accordingly uphold the conviction. The sentence imposed did not accord with the law, and I shall set it aside and substitute it with that imposed by section 8(2) of the Sexual Offences Act for minor victims of nine years, life imprisonment. The conviction is confirmed but the sentenced is enhanced to life imprisonment. The appellant has a right to appeal this judgment at the Court of Appeal.

18. The final thing. The trial court acquitted the appellant of the alternative count, on grounds that the same had not been proved. The trial court was not obliged to consider the alternative charge at all once it had found that the main count had been proved. The alternative charge is to be considered only where the main count fails. The trial court has to consider, in the circumstances, whether, the main charge having failed, it could convict on the basis of the alternative charge.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 26th DAY OF July 2019

W MUSYOKA

JUDGE