THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL APPEAL NO. 21 OF 2018

MW.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the original conviction and sentence in Criminal Case No. 680 of 2016 in the Senior Resident Magistrate's Court at Loitokitok by SRM Hon. Okuche in the judgement delivered on 12th day of May, 2017)

CORAM: Hon. Justice R. Nyakundi – J

Mr. Meroka for the state

The Appellant in person

JUDGEMENT

Issues: Incest; reasonable doubt; contradictions and disparities; voire dire; appellate court jurisdiction to interfere with sentence of the trial court.

Background

The Appellant herein was charged with the offence of incest contrary to section 20(1) of the Sexual Offences Act, No.3 of 2006. The particulars of the offence allege that the Appellant penetrated the vagina of FMM a girl under the age of eighteen on the 5th of March 2017. This offence happened at Loitokitok sub-county within Kajiado County. Alternatively, the accused was charged with an offence of Indecent Act with a child contrary to section 11(1) of the Sexual Offences Act. The particulars of the offence are that the Appellant intentionally and unlawfully caused his penis to make contact with the vagina of the complainant, a minor aged 14 years.

The Appellant denied having committed the offences levelled against him hence his full trial was conducted after which he was found guilty of incest. He was then convicted and sentenced to life imprisonment. Having been dissatisfied by the lower court's judgment, he appealed to this court against both conviction and sentence on the basis of several grounds encapsulated in his memorandum of appeal.

Grounds of Appeal

The grounds are that the prosecution did not prove the offence of incest beyond reasonable doubt, that penetration was not proved, that the trial court failed to comply with the provisions of section 124 of the Evidence Act, Cap 80 laws of Kenya as read with section 19 of the Oaths and Statutory Declarations Act. That the trial court failed to consider that the prosecution case was marred with irreconcilable contradictions. That the prosecution failed to prove that the Appellant was the complainant's father and lastly, that the sentence was manifestly harsh and excessive.

Facts at Trial

A brief review of the evidence at the trial court is as follows: PW1, the complainant testified that she was 14 years of age having been born in 2003. She stated that the accused is her father. She stated that the Appellant asked her if he could have sex with her. He left and came back wrapping himself with a lesso. He grabbed the complainant and forcefully removed her pant. He then removed his leso and forcefully have sex with her. She wailed and members of the public came. Lights were on during the ordeal. Upon hearing people approaching, the Appellant left her bed and ran to his room. PW1 told the court that when she raised alarm, he held her hands and scratched her on the face. The neighbors broke the door, the Appellant came out armed with a knife. The same was produced before the trial court.

PW1 averred that as the Appellant was running away, he fell down and that is when the members of the public managed to catch him and

arrest him. They proceeded to hand him over to the police. The following day, the complainant was accompanied to the hospital where she was examined and treated by Jackson Lamps (PW5) a Clinical Officer at Loitoktoki County Hospital. On examination, she was found to have bruises on the neck and the hymen was missing, the breakage of hymen was recent and there were lean cuts. He therefore concluded that there was evidence of sexual penetration. He filled and signed the P3 form which was produced in court and marked as exhibit 4. The minor was also subjected to age assessment which was estimated to be 14 years. The age assessment form was also produced before the trial court and marked as Exhibit 5.

The investigating officer, PC George Nthiga confirmed the complainant's testimony that the Appellant was brought by members of the public to the police station on the allegations of defiling his daughter. He visited the Appellant's home where he found that the door was broken, he also found PW1's panty and later charged the Appellant with incest. PW2 stated while he was asleep, he heard PW1 wailing and calling while the accused was blocking her mouth. That is when the members of the public came and broke the door. Further that the Appellant got out of their room naked, ran to his room and dressed. The rest of his testimony is identical to that of PW1.

PW3, Jane Nduku, a neighbor to Appellant testified on the material date and time, she heard the Complainant wailing, she went to check through the window and saw the Appellant forcefully having sexual intercourse with the Complainant. The complainant was crying. She raised alarm after which members of the public came later and arrested the Appellant.

Having considered the evidence on record, the Hon. Trial Magistrate found the prosecution to have established a prima facie case against the accused. Thus, he had a case to answer and he was therefore placed on his defense in compliance with the provisions of section 211 of the Criminal Procedure Code which was explained to him. DW1, the Appellant did not have anything to say in his defence.

Submissions

The Appellant filed submissions on the 17th of October, 2018 in support of his Appeal through Prof. Hassan Nandwa of Ali and Company Advocates. The Respondents opposed the Appeal by way of submissions filed on 5th of October, 2018 by Mr. Meroka. The Counsel for the Appellant argued that the prosecution failed to prove its case beyond reasonable doubt as the relationship between the complainant and the accused was not proved. Further that the act of penetration was also not proved. His argument is that in the Complainant's narrative, she never mentioned that the Appellant penetrated her vagina with his penis and that sex does not necessarily involve penetration.

Further, Counsel contends that the Learned Magistrate misdirected himself in failing to comply with section 124 of the Evidence Act Cap 80 laws of Kenya as read with section 19 of the Oaths and Statutory Declarations Act. The contention is that the voire dire was badly conducted in PW2. In his view, the minor ought to have given unsworn evidence. Counsel cited the Case of ***Kivevelo Mboloi v Republic (2013) eKLR*** in support of his contention. It was therefore argued that in this case, voire dire did not ascertain whether PW1 and PW2 were children who understood the meaning, nature and purpose of oath. According to Counsel, his argument is based on the fact that nowhere PW1 and PW2 were asked whether they understood the nature or solemnity of the oath. It was submitted that the said evidence was not well received as the procedure of receiving it was poorly conducted.

The Counsel for Appellant also contended that the prosecution case was marred with irreconcilable contradictions. It was pointed that the evidence of PW1 suggested that the Appellant came to their room having wrapped himself with a leso and therefore he left this trousers in his room whereas PW2 stated that the Appellant came out of their room naked while on the other hand PW3 and PW4 stated that they saw the Appellant ran away to his room naked while holding a trouser. In the Counsel's view, the contradiction gives the impression that PW3 and PW4 never saw the Appellant at all because the trouser was left in his room not in the room of PW1 and PW2.

Counsel also contended that the sentence passed by the Hon. Trial magistrate was manifestly excessive. He brought to the attention of this court that the Appellant was a first offender, a middle-aged man who was 35 years at that time and the bread winner for his family. Counsel took the view that the sentence of life imprisonment is very harsh and probably the trial Court wrongly and erroneously believed that section 20(1) of the sexual offences is crafted in mandatory terms.

The instant appeal was opposed by the Learned Counsel for the State, Mr. Meroka who submitted that the victim was a daughter to the Appellant. It indicated that she was the eldest daughter in the family and she was in their ancestral homestead alongside her brother PW2. It is further the state submission that the rescue was done by neighbors PW3 and PW4. In his view, this attest to the consanquinty between the appellant and the victim.

On penetration, Counsel states that the victim gave a graphic account of all that transpired before, during and after the commission. He resorted to page 9 of the proceedings where it was stated as follows:

> ***"He asked me whether I will have sex with him……. the accused went to his room; he then came to our room. He had wrapped himself with a lesso. He sat on our bed. I was putting on a skirt. He grabbed me by force and removed my pant…. He forcefully had sex with me. I wailed and members of public came."***

He further averred that the above was corroborated by the evidence of PW2 who heard screams as well as PW3 who busted him on top of his daughter. He also referred to the medical evidence produced by Dr. Jackson Lempus who examined the minor and observed that she was defiled. On the age of the victim, the State resorted to the age assessment form which estimated the minor's age at 14 years.

Issues for Determination

1. **Whether the prosecution proved its case beyond reasonable doubt?**

2. **Whether there were material and irreconcilable contradictions in the prosecution case.**

3. Whether the voire dire evidence was not properly received by the Hon. Trial Magistrate.

4. Whether the sentence imposed by the Hon. Magistrate was harsh and excessive.

Findings, Analysis and Determination

In view of the grounds of appeal delineated above this court is enjoined to follow the principle established in ***Okeno v Republic*** **[1972] EA 32** where the Court of Appeal held that the first appellate court is enjoined to conduct an independent evaluation of all the evidence and reach its own independent conclusion taking into account that it neither heard nor saw the witnesses testify.

1. Whether the prosecution proved its case beyond reasonable doubt.

The offence of incest is encapsulated in terms of section **Section 20(1)** of the sexual Offences Act. The said Act states as follows:

> ***"(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."***

In view of the instant case which involves a minor victim, the ingredients for the offence of Incest are: *proof of the minority age of the victim, knowledge by the Appellant/accused that the victim is his relative* and *the evidence of penetration on the victim's genitalia or indecent act.* in terms of section 2 of the Act, ***Penetration*** means "*the partial"* or complete insertion *of the genital organs* of a person into the genital *organs, of another*. In terms of the same section, ***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."

In light of the foregoing provision, it is clear that the sentence for incest is grounded upon the age of the complainant. If the complainant is an adult, that is over eighteen years old, the court has discretion to mete a sentence of imprisonment of any length not being less than ten years. If the complainant is under eighteen years of age the court has discretion to mete a sentence of up to life imprisonment.

The minority age of the complainant is not in dispute herein. Neither did the Counsel for the Appellant challenged the evidence tendered by the prosecution in respect of the minor's age at the time the offence was committed. As regards penetration, the evidence of PW1, the complainant is that the appellant forced her to have sexual intercourse with her. PW3, claims to have heard the minor wailing and ran to their home. She then peeped through the window and saw the Appellant having penetrative sexual intercourse with PW1. PW5, the clinical officer who examined the minor found that she had bruises on her neck and the hymen was missing. He also made the conclusion that the breakage of the hymen was recent since there were lean cuts. He also opined that this shows evidence of penetration. This evidence corroborated the evidence of PW1 and PW3 that the Appellant caused a penetrative sexual act on the minor. I hold the view that contrary to the Learned Counsel for the Appellant's view that penetration was not conclusively proof, the evidence on record is very clear that the minor was indeed penetrated.

On whether the Appellant was positively identified as the perpetrator of the alleged offence, the Complainant testified that it was the Appellant who sexually violated her. Therefore, since the Appellant is someone well known to the complainant, this was a matter of recognition. The effect of recognition as opposed to the identification of a stranger is that it drastically reduces the possibility of mistaken identity. The PW1 is that the Appellant called PW2 and instructed him to go and sleep in his (appellant's) room. He left and came later and sat on complainant's bed. He then asked the minor if he could have sex with her. He got out of the house once again and later came back wrapping himself in a lesso. He forcefully grabbed her and removed her pant. Exhibit MFI-P1 is the pant which was produced as evidence in the trial court of his case. PW2 saw the Appellant blocking the complainant's mouth so that she could not scream or call for help. He then removed the lesso, and coercively had sex with her. Despite the struggles PW1 had with the appellant she raised an alarm by wailing which caught the attention of PW2 and PW3 who witnessed the sexual ordeal as well as other members of the public.

According to the Complainant PW1 and PW2, the Appellant ran to his room when he when he heard people approaching is house. It was her testimony as well as that of PW2 and PW3 that the accused came out armed with a knife to scare away the members of the public. The knife was produced as exhibit before the trial court and marked as MFI-P2. He then managed to escape and ran away. He fell down and he also dropped the knife, after which the members of the public arrested him and his hands were tied. The said knife was produced before court and marked as exhibit MFI-P2. This account shows that the Appellant was arrested soon after the unfortunate ordeal. The fact that the Appellant got armed in a bid to try and escape and even managed to escaped at some point only goes to show that he knew he had committed a despicable act. It is therefore clear that the Appellant was positively identified as the perpetrator of the heinous act. The recognition evidence tendered by the prosecution witnesses before the learned trial magistrate was free from error or mistake. On this finding see the principles in Anjononi & others V Republic 1976-801klr1566.

The Counsel for the Appellant also contended that the prosecution did not prove that the Appellant was the father of the complainant within the prohibited relationship. The complainant testified that she is a daughter to the appellant, a testimony which was not displaced by the Appellant's defense. However, the appellant did not give any basis for his suspicion that he is not related by blood with the complainant. The cogency of PWI evidence was also corroborated with all other prosecution witnesses who prior to this fateful day knew of the father/ daughter relationship. I therefore find that the two were persons within the prohibited degree of consaquinty.

In light of the foregoing, this court is unable to agree with Counsel for the Appellant's contention that the prosecution failed to prove its case beyond reasonable doubt on this ground of familial relationship. To achieve this end, the probative value is not dependent on DNA evidence. The evidence tendered by the prosecution before the trial court supports and suffices to establish the offence of incest.

2. Whether there were material and irreconcilable contradictions in the prosecution case.

The law as regards the issues of contradictions and discrepancies is very crystal clear. It is trite law that inconsistencies unless satisfactorily explained would usually but not necessarily result in the evidence of a witness being rejected. ***(See Uganda vs Rutaro {1976} HCB; Uganda vs George W. Yiga {1979} HCB 217).*** In trying to shade light as to why there might be minor discrepancies between two witnesses testifying on the same case, the High Court of Kenya in ***Philip Nzaka Watu v Republic (2016) CR APP 29 OF 2015***, had this to say:

> ***"The first question in this appeal is whether the prosecution case was riddled with contradictions and inconsistencies of the magnitude that would make the conviction of the appellant unsafe. It cannot be gainsaid that to found a conviction in a criminal case, where the trial court has to be satisfied of the accused person's guilt beyond reasonable doubt, the prosecution evidence must be cogent, credible and trustworthy. Evidence that is obviously self-contradictory in material particulars or which is a mere amalgam of inconsistent versions of the same event, differing fundamentally from one purported eyewitness to another, cannot give the assurance that a court needs to be satisfied beyond reasonable doubt.***
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> ***However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed, as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question."***

Again the court, in ***Joseph Maina Mwangi versus Republic Criminal Appeal No. 73 of 1993,*** held, *inter alia,* that: -

> ***"In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies, must be guided by the wording of section 382 of the criminal procedure code viz whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentences"***

I'm also guided by the Court of Appeal decision in ***Erick Onyango Odeng' v. Republic [2014] eKLR*** citing with approval the Uganda Court of Appeal case of ***Twehangane Alfred v. Uganda Criminal Appeal No. 139 of 2001, [2003] UGCA, 6*** in which it was held as follows:

> ***"With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution case."***

The role of an appellate court in the circumstances as spelt out in numerous cases is to assume the role of the trial court, reconcile these and then determine whether they were prejudicial to the appellant and therefore fatal to the prosecution case or were inconsequential to the appellant's conviction and sentence. See the case of ***Josiah Afuna Angulu versus Republic, Nakuru CR Appeal No.277 of 2006 (UR) and Charles Kiplang'at Ngeno versus Republic Nakuru CR. Appeal No.77 of 2009 (UR).***

It is also important at this point to examine the nature and meaning of the word contradiction. I'm persuaded by the definition rendered by the Court of Appeal of Nigeria in the case of ***David Ojeabuo vs Federal Republic of Nigeria {2014} LPELR-22555(CA), Adamu JA; Ngolika JA; Orji-Abadua JA; & Abiru JA.*** Where the court stated as follows:-

> ***"Now, contradiction means lack of agreement between two related facts. Evidence contradicts another piece of evidence when it says the opposite of what the other piece of evidence has stated and not where there are mere discrepancies in details between them. Two pieces of evidence contradict one another when they are inconsistent on material facts while a discrepancy occurs where a piece of evidence stops short of, or contains a little more than what the other piece of evidence says or contains."***

In light of the above decisions I now endeavor to make a determination on the above issue. The main contradiction is as regards whether when the Appellant was holding a lesso or trousers when left the complainant's room going to his room. The record on the evidence of PW1 says the accused was wrapping himself with a lesso. Upon leaving the complainant's room, PW2 says the Appellant was naked and PW3 says he was holding his trousers. This contradiction does not vitiate the fact that when the Appellant heard the members of the public approaching, he rushed from the complainant's room to his room after which he was armed with a knife so as to try and escape getting arrested by the members of the public. In view of the above testimonies and the cases I have cited above, I find that the discrepancies and contradictions which I admit their existence in this case are not prejudicial to the Appellant's case and therefore not fatal to the prosecution case.

3. Whether the voire dire evidence was not properly received by the Hon. Trial Magistrate.

The Learned counsel for the Appellant's contention on this limb is that the Learned Magistrate misdirected himself in failing to comply with section 124 of the Evidence Act Cap, 80 Laws of Kenya, as read with section 19 of the Oaths and Statutory Declarations Act. It is indicated that the voire dire examination was not properly conducted. The purpose of the voire-dire examination is to ascertain whether the witness understands the meaning, nature and purpose of the oath as well as whether the minor is endowed with sufficient intelligence to give evidence before the court.

In the instant case, the record shows that voire dire examination was conducted and the court found that the minors were capable of giving credible evidence. I have gone through the evidence tendered by PW1 and PW2, and observed that the two were very consistent in their testimonies and they spelt out what transpired on the material date clearly. If for a moment the appellant thinks indeed the voire dire was not

properly made, there is still ample evidence which points to him as the perpetrator of the sexual abuse. Again the prosecution provided sufficient details of how the offence was committed. It is trite that an offence like defilement can be established by evidence tendered directly proving it or by evidential facts from which a reasonable tribunal properly constituted can draw the inference of guilty against the accused. In my view, the Appellant case was proved by beyond reasonable doubt with both direct and circumstantial evidence.

4. Whether the sentence imposed by the Hon. Magistrate was harsh and excessive.

In respect of this limb, it must be noted that the sentences provided in terms of section 20(1) of the Sexual Offences Act are not mandatory minimum sentences. The Court of Appeal decision in **M K v Republic [2015] eKLR** clearly pronounced itself on this matter as follows:

> ***"17. In the instant case, the appellant was charged with an offence under Section 20 (1) of the Sexual Offences Act. This Section provides for a minimum term of 10 years' imprisonment. However, the proviso to Section 20(1) stipulates that if the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life. The learned judge of the High Court interpreted this proviso to mean that a mandatory minimum sentence for life is provided for in the proviso if the female victim is under the age of eighteen years. The legal question for our consideration and determination is whether this interpretation is correct; does the proviso provide for a minimum term of life imprisonment?***
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> ***18. The first observation to note is that the phrase "not less than" has not been used in the proviso to Section 20 (1) of the Sexual Offences Act. The inference is that the proviso does not create a minimum sentence. The phraseology and wording in the proviso is that the accused shall be liable to imprisonment for life.***
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> ***19. What does "shall be liable" mean in law? The Court of Appeal for East Africa in the case of Opoya -v- Uganda (1967) EA 752 had an opportunity to clarify and explain the words "shall be liable on conviction to suffer death". The Court held that in construction of penal laws, the words "shall be liable on conviction to suffer death" provide a maximum sentence only; and the courts have discretion to impose sentences of death or of imprisonment. The Court cited with approval the dicta in James -v- Young 27 Ch. D. at p.655 where North J. said:***
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> ***"But when the words are not 'shall be forfeited' but 'shall be liable to be forfeited' it seems to me that what was intended was not that there should be an absolute forfeiture, but a liability to forfeiture, which might or might not be enforced".***
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> ***We consider such to be the correct approach to the construction of the words "shall be liable on conviction to suffer death: especially when contrasted with the words of s.184 which are "shall be sentenced to death".***
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> ***20. On our part, we contrast the wordings in Section 8 (2) of the Sexual Offences Act with the proviso in Section 20 (1) of the said Act. The contrast will shed light as to whether the sentence in the proviso to Section 20 (1) is minimum and mandatory or otherwise. Section 8 (2) provides that 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 proviso in Section 20 (1) provides that the accused shall be liable to imprisonment for life.***
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> ***21. Guided by the decision in Opoya -v- Uganda (1967) EA 752 and the persuasive dicta of North J. in James -v- Young 27 Ch. D. at p.655; we are satisfied that the sentence stipulated in the proviso to Section 20 (1) of the Sexual Offences Act is not a minimum mandatory sentence of life imprisonment. The proviso simply states that the trial court has discretion to mete out a maximum term of life imprisonment. Read in conjunction with the general provision in Section 20 (1) we hereby state that the correct interpretation of the proviso in Section 20 (1) is that a person convicted of incest when the female victim is under the age of eighteen years is liable to a term of imprisonment between 10 years and life imprisonment.***

In light of the foregoing case as well as the new jurisprudential developments which came about by the Supreme Court of Kenya decision in **Francis Muruatetu & Another vs Republic, Petition No. 15 & 16 of 2017 (Consolidated)** which declared mandatory nature of death and life imprisonment sentences unconstitutional. These sections were found to be in violation of the right to fair trial since they diminish the discretion of the court to consider mitigating and aggravating circumstances of each individual case. The Supreme Court therefore allowed all offenders who were sentenced in terms of mandatory death and life imprisonment to file petitions to the high court for resentencing. What the Supreme Court did was to allow all these offenders to offer their mitigation and therefore allow the high court to consider the same and be able to mete appropriate sentences which are proportional to the circumstances of each individual case.

In the instant case, the lower court sentence of imprisonment for life was meted in 2017 after the decision in ***Muruatetu Case.*** The Learned Magistrate seems to have been considered the Appellant's mitigation. What is not clear is whether the Learned magistrate was aware of the recent jurisprudential development brought by the decision in **Muruatetu Case.**

In the premises, the instant appeal fails for lack of merit**.** It is hereby dismissed. The Conviction is hereby affirmed. However, to avoid assumptions, this court orders that this matter be remitted back to the Hon. Magistrate Court for sentencing where a fresh mitigation is to made, considered and an appropriate sentence be pronounced against the appellant. For avoidance of doubt by this order we are not saying that the initial sentence of life imprisonment was wrong in principle. All in all, the conviction of the appellant by the learned trial magistrate was just and safe in its entirety. I respectively remand the issue on sentence and have it placed before the chief magistrate court for consideration as to whether it's a fit case to disturb the life imprisonment sentence under the new dispensation. To this end the Deputy Registrar do serve a copy of this judgment upon the chief magistrate Kajiado for compliance on a priority basis.

Dated and delivered at Kajiado in the open court this 9TH day of August 2019.

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R. NYAKUNDI

JUDGE