REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 180 OF 2014

WK .....APPELLANT

VERSUS

REPUBLIC.....STATE

(Being an appeal from the Judgment of Honourable J. M. Nthuku - Senior Resident Magistrate, delivered on 7th August, 2014 in Nakuru Chief Magistrate's Court Criminal Case No. 817 of 2012)

JUDGMENT

1. The Appellant herein, WK, was presented before the Nakuru Chief Magistrate's Court in Criminal Case No. 817 of 2012 charged with a single count of incest contrary to section 20(1) of the Sexual Offences Act. The particulars as charged were that on the 4th day of March, 2012 in Njoro District within Rift Valley Province, the Appellant is alleged to have unlawfully and intentionally caused penetration of his genital organ (penis) with the genital organ (vagina) of MW, a child aged 11 years, knowing her to be her daughter.

2. He also faced an alternative count of indecent act with a child contrary to section 11(1) of the Sexual Offences Act based on the same facts.

3. The Appellant pleaded not guilty and a fully-fledged trial ensued.

4. At the trial, the Prosecution called five witnesses. The Complainant, MW testified as PW3. She said that she was thirteen (13) years old at the time of the trial. She testified that on 04/03/2012, she was at home in Mau Narok. Her mother was away from home. Her aunt, PW, was at home as well. MW testified that her father (Appellant) called her and put her on the bed. He removed her clothes and did "tabia mbaya" to her. He covered her face with his hands to prevent her from screaming.

5. MW testified that it was not the first time this had happened to her – and that she bled and felt a lot of pain. On this occasion, however, she informed her aunt, PW. PW testified as PW4. She confirmed MW's narrative. On receiving the news, PW testified that she took the Complainant to Mau Police Station where they reported the incident. Later on she took her to the Mau Health Center, and eventually to the Provincial General Hospital. PW testified by the time she was taking MW to the Police Station, her urine and stool were "flowing freely" meaning she had urinary and stool incontinence at the time.

6. The doctor who examined MW at the PGH, Justin Ngondi confirmed that MW had incontinence at the time of examination. That was on 21/06/2012. He found a broken hymen, inflammation of the vagina and a gaping of anal orifice. He concluded that MW had been defiled. He estimated that she was about ten years old. A formal age assessment which was produced in Court placed her age at approximately twelve years old. The P3 Form and the Post-Rape Care Form were also produced as evidence.

7. The Investigating Officer testified as the final witness and confirmed the details of the reporting and the arrest of the Appellant. The mother confirmed the approximate age of the Complainant and the relationship with the father.

8. In his defence, the Appellant claimed that it is her marital differences with his wife which led her to frame him for the offence. He protested his innocence.

9. The Learned Trial Magistrate considered the evidence and concluded that all the necessary elements for the offence of incest had been proved beyond reasonable doubt. She proceeded to convict the Appellant and sentenced him to life imprisonment.

10. In his Written Grounds of Appeal and what he calls Supplementary Grounds of Appeal, the Appellant has raised four complaints which, however, seem to merge and flow into each other. Paraphrased, they are:

a. That section 200(3) of the Criminal Procedure Code was not complied with.

b. That the Learned Trial Magistrate failed to appreciate that the charges were a frame-up because of the domestic quarrels between the Appellant and his wife.

c. That the Learned Trial Magistrate was wrong to convict on fabricated evidence.

d. That the Learned Trial Magistrate was wrong to ignore the Appellant's defence.

11. This being the first appeal, this court has the duty to re-evaluate the all the evidence given at trial and come to its own independent conclusions. This Court is not to merely confirm or disconfirm particular hypothesis made by the Trial Court. Even then, this Court must be acutely aware that it never saw nor heard the witnesses as they testified and, therefore, it must make an allowance for that. See ***Okeno v R [1972] EA 32*** and ***Kariuki Karanja v R [1986] KLR 190***.

12. The trial in the Court below was straight-forward. The Complainant gave forthright and compelling testimony. The testimony remained unshaken in cross-examination. The Learned Trial Magistrate who heard and saw the witness believed her to be telling the truth. She also believed PW4, the aunt, to whom the Complainant first complained against the defilement. PW4 promptly reported to the Police.

13. The circumstances in which the reporting took place completely take out any possibility that this was a story that was contrived by the Complainant and her mother as the Appellant claims. It would not have been possible to stage the horrific injuries suffered by the Complainant and which were recorded in the PRC form. The doctor's evidence was largely corroborative of the Complainant's account.

14. The Prosecution was required to establish four elements beyond reasonable doubt:

a. Degree of prohibited consanguinity: in this case, the alleged relationship was father-daughter relationship;

b. Penetration as defined in the Sexual Offences Act;

c. That it was the Appellant who caused the penetration; and

d. Age of the Complainant.

15. The father-daughter relationship was not an issue in the trial. Indeed, the Appellant stipulated as much in his defence. While in his appeal he obliquely argues that the age of the Complainant was not proved, that can be summarily dealt with: four pieces of evidence establish that the age of the Complainant was below eighteen: the age assessment report; the P3 Form; and the oral testimonies of the Complainant and her mother.

16. The only real questions in the trial was whether there was penetration and whether it was caused by the Appellant. In my view, the evidence was quite strong and it permitted little doubt that the Appellant committed the act as alleged by MW. MW gave very straightforward testimony. It was clear and it was uncontroverted. It was supported by the testimony of PW4. The medical evidence also supported it. There is absolutely no reason to doubt the evidence adduced.

17. What about the defence theory that all the evidence was fabricated in aid of his wife's desire to "fix" him? In short, that theory is too fantastical and implausible as to have no inherent possibility that it could be true. It raises no reasonable doubts at all to displace the compelling evidence in favour of the Prosecution case. In short, there was ample evidence to convict.

18. There was a complaint about procedure that the Appellant had raised: that section 200(3) of the Criminal Procedure Code was not complied with. I have carefully read the Trial Court record. The complaint does not lie. The trial had begun before Honourable G.M. Mutiso. He was, however, transferred out of the Station and the matter take over by the Honourable Judicaster Nthuku who presided over the case to the end. When Hon. Nthuku took over, she read to the Appellant his informational rights under section 200(3) on 13/06/2013. The Appellant insisted that the case should start *de novo*. The Learned Magistrate ordered as much. The case started afresh and all witnesses were called afresh. No complaint can arise from that procedure.

19. On sentence, in a recent decision, in ***Dismas Wafula Kilwake v R [2018] eKLR***, the Court of Appeal sitting in Kisumu had the following to say about the mandatory minimum sentences prescribed in the Sexual Offences Act:

> *In principle, we are persuaded that there is no rational reason why the reasoning of the Supreme Court [in **Francis Karioko Muruatetu & Another v. Republic, SC Pet. No. 16 of 2015**], which holds that the mandatory death sentence is unconstitutional for depriving the courts discretion to impose an appropriate sentence depending on the circumstances of each case, should not apply to the provisions of the Sexual Offences Act, which do exactly the same thing.*
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> *Being so persuaded, we hold that the provisions of section 8 of the sexual Offences Act must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing.*

The Sentencing Policy Guidelines require the court, in sentencing an offender to a non-custodial sentence to take into account both aggravating and mitigating factors. The aggravating factors include use of a weapon to frighten or injure the victim, use of violence, the number of victims involved in the offence, the physical and psychological effect of the offence on the victim, whether the offence was committed by an individual or a gang, and the previous convictions of the offender. Among the mitigating factors are provocation, offer of restitution, the age of the offender, the level of harm or damage inflicted, the role played by the offender in the commission of the offence and whether the offender is remorseful.

20. This progressive decisional law now requires Courts to pay attention to individual aspects of the case while sentencing even for convictions under the Sexual Offences Act which have prescribed minimum sentences. Where there are compelling reasons to depart from the prescribed minimum, which is treated as indicative of the sentence to be imposed, the Court can impose a different sentence.

21. In the present case, the Appellant offered mitigation in the Trial Court. He told the Court to "look" at his life in sentencing. The Court was also informed that the Appellant was a first offender. The Court remarked that the actions by the Appellant were "beastly and they should be condemned in the strongest terms possible." What the Learned Trial Magistrate was referring to was probably the strong aggravating factors in this case. They include the following:

a. The Complainant had been left in the care of the father since the mother was not present;

b. The very tender age of the Complainant;

c. The available evidence that the abuse and defilement had happened many times before;

d. The available evidence that the Appellant had badly injured the Complainant (with a hot panga) as a warning for her not to disclose his criminality;

e. The fact that the Complainant had suffered serious medical and possibly life-long complications as a result of the sexual assault – including urinary and stool incontinence.

22. Looking at all these factors, one can only conclude that the imposed sentence of life imprisonment is eminently warranted in the present circumstances.

23. The upshot is that the appeal herein is without any merit. It is hereby dismissed in its entirety.

24. Orders accordingly.

Dated and delivered at Nakuru this 7th August, 2019

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JOEL NGUGI

JUDGE