REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CRIMINAL APPEAL NO.104 OF 2017

(Appeal Originating from Nyahururu CM's Court SOA No.2569/2014 by: Hon. V. Ochanda – R.M.)

J M M.................................APPELLANT

- V E R S U S -

REPUBLIC......................RESPONDENT

J U D G M E N T

J M M, the appellant, was charged and convicted on two counts of incest.

In Count 1, he was charged with offence of ***incest contrary to Section 21 as read with Section 20(1) of the Sexual Offences Act***.

The particulars of the charge are that on diverse dates between 1st and 30th day of September, 2014, at [particular withheld] Village, Laikipia County, unlawfully and intentionally caused his genital organ (penis) to penetrate the vagina of R.M. a girl aged 13 years who to his knowledge was his niece.

In the alternative, he faced a charge of committing an ***indecent act with a child contrary to Section 11(1) of the Sexual Offences Act*** in that on diverse dates between 1st and 30th September, 2014, unlawfully and intentionally caused his genital organ to come into contact with that of R.M., a child aged 13 years.

Count II: ***Incest contrary to Section 21 as read with section 20(1) of the Sexual Offences Act*** in that in the same period as in count 1, unlawfully and intentionally caused his genital organ to penetrate the vagina of **C.W.** a child aged 10 years, whom he knew to be his niece.

In the alternative, he faced a charge of ***committing an indecent act contrary to Section 11(1) of the Sexual Offences Act***.

Upon conviction, the appellant was sentenced to serve life imprisonment on each count and the sentences were ordered to run concurrently.

The appellant is aggrieved by the convictions and sentence. He filed this appeal on 27/5/2016 citing the following grounds:

(1) That the trial court erred by basing the conviction on evidence fraught with inconsistencies and discrepancies;

(2) That the prosecution did not call essential witnesses;

(3) That the court failed to consider the appellant's defence that the charges arise from grudges in the family;

(4) That there was no medical evidence against the appellant under Section 77(1) of the Evidence Act;

(5) That the court failed to comply with Section 169 of the Criminal Procedure Code;

(6) That the complainant's age were not proved;

(7) That the conviction went against the weight of the evidence.

The appellant urged the court to allow the appeal.

The appeal was opposed. Learned counsel for the State, **Ms. Rugut** submitted that PW1 & 2 positively identified the appellant as their

uncle; that their evidence corroborates each other; that it was further corroborated by the Doctor's evidence (PW4) who found injuries to their genitalia; that PW5 also knew the complainants to be nieces of the appellant. The counsel urged the court to dismiss the appeal.

Being the first appellate court, it is required to examine, evaluate and analyze all the evidence tendered in the lower court before making any determination.

The prosecution called a total of 6 witnesses in support of their case.

PW1 C.W. is a child aged 10 years who was living in the home of her grandparents with her sister **PW2 R.M**. In the same compound, their uncle, the appellant also lived and slept in a separate house and so did their grandparents. The two sisters used to share the same house. PW1 recalled that sometime in the month of September, 2014 their uncle knocked on their door, PW2 opened; that the appellant entered, he removed their clothes, removed his clothes and started to touch them; that the appellant threatened to kill them if they told anyone; that he put his thing for urinating into hers. She did not scream. Next day she went to school but PW2 did not go; that the sister (Kun) came for both her and PW2 and the matter was reported to Ol Moran Police Station.

PW2 recalled the night that their uncle, the appellant came home drunk, found them in bed, ordered them to open the door, then undressed them, removed his clothes and started to touch them and that he put his thing for urinating inside her thing for urinating and did it four times; that he had done the same to her 4 times before and threatened to kill her if she told anybody. She admitted that one S E had also defiled her 3 times before. This matter came to the fore when sister D L visited PW2 at home when she failed to go to school after the last encounter with the appellant and it was reported to Ol Moran Police Station and they were examined by a doctor.

PW3, Sister L B of [particular withheld]Catholic Parish went to visit PW2 after she heard that she was sick and could not come to school. By then, the nuns were keeping PW1 & 2's small brother who is HIV positive. On enquiring why PW2 did not go to school, PW2 claimed to have a headache and did not sleep well because her grandfather and uncle had chased her from the house; that S from [particular withheld] used to trick them to his motor cycle, take them to his house and defiles them. PW3 asked the grandfather of PW1 & PW2 if she could take the children and he agreed. On the way, PW1 & 2 disclosed to her that their uncle J M had also been defiling them; PW3 took the girls to the Health Centre and the treatment notes were given to the police. She went to report the offence and the children were issued with P3 forms.

Dr. Joseph Kamau (PW4) of Nyahururu County Hospital examined PW1 & 2 who had a history of defilement. In regard to PW1, PW4 found that she had no injuries but she had bruises on the right side of labia majora, the hymen was missing with a whitish discharge. He formed the opinion that there had been vaginal penetration of PW1.

As regards PW2, he found that she was aged 13 years, her hymen was broken and vagina was tender which was evidence of vaginal penetration. He produced the P3 form that he filled.

PW5 Peter Wachiuri Waweru, Assistant Chief of Ol Moran Location received a call from sister D who requested him to help trace a suspect of defilement. He arranged with police on how to arrest the appellant who is the complainant's uncle. He said there was another suspect mentioned and also arrested him.

PW6 Sgt. Lawrence Weru of Ol Moran Police Station received a report from a nun on 7/10/2014, that 2 minors had been repeatedly defiled by their uncle J M at G and one S; that accused was arrested on 28/10/2014 while S was arrested at [particular withheld] village; that the minors identified the suspects and they were charged.

In his unsworn defence, the appellant recalled the day of his arrest; that he does casual jobs which take him away from home for 2 weeks and returns; that he was told to open the door at 6.30 a.m. when he found 2 police officers and the chief. He was not told why he was being arrested. He was taken to [particular withheld] with E then they were charged.

The appellant faces a charge of incest under Section 20 of the Sexual Offences Act. The Section reads as follows:

> "***Section 20***
>
> ***(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."***

To found a conviction, under the above section, the prosecution has to prove:

> ***(1) The relationship between the victim and the accused falls under the category in section 20 Sexual Offences Act e.g. sister, mother, niece, grandmother e.t.c.***
>
> ***(2) That there was penetration/indecent act was committed on the victim;***
>
> ***(3) Identity of the perpetrator;***

(4) The age of the complainant.

PW1 & 2 were both minors. Both underwent *voire dire* examination in court. PW1's Immunization Card was produced in evidence which shows the date of birth as 1/2/2004. PW2's Health Card shows that she was born on 27/8/1999, meaning she was 15 years old as of September, 2014. PW1 told the court that she was 10 years having been born in 2004.

PW1 and 2 are orphans and were living with their grandparents. They recalled how they were defiled in turn. PW1 told the court that they were ordered to remove their clothes and that the appellant put his thing for urinating into hers. PW2 repeated the same narration. In fact, PW2's testimony was more detailed, that it did not happen once but that the appellant had defiled her four times there before so had another person by name Sammy who was also arrested and charged with the offence in another case. From PW1's testimony, it is also clear that she was defiled more than once, although she denied that the appellant had ever done it. At one time PW1 answered, "***he used to knock at our door……..you started after our mother died.***" The evidence of the complainants was corroborated by the findings of the Doctor (PW4) who found bruises on the labia majora and missing hymen of PW1. PW2's hymen was also missing and her vagina was tender which was evidence of vaginal penetration.

There is no doubt that both PW1 and 2 had taken part in a recent sexual activity.

PW1 & 2 identified the appellant as the perpetrator. The appellant, who is PW1 & 2's uncle lived with them in the same home and had his own house but used to come where the girls slept. PW5, the chief of the area confirmed that the appellant is PW1 & 2's uncle and their mother had died. The relationship of the appellant and the complainants falls under the category in Section 20(1). The complainants were the appellant's nieces.

Although the proceedings did not indicate whether there was light in the house where PW1 & 2 slept on that night. The evidence of PW1 and PW2 is that the appellant talked to them, told them to open, told them to undress and threatened them with death if they told anybody. The matter only came to the fore after the last incident when PW2 did not go to school and the nuns from their school went to check on her that the revelations were made by PW1 & 2. PW1 and PW2's evidence is that the appellant had defiled them severally, therefore, I am satisfied that he was properly identified as the perpetrator.

In his unsworn defence, the appellant did not address himself to the charges that he faced. He only talked about his arrest. The defence was a bare denial and the appellant's allegations that his defence was not considered by the trial court does not make any sense.

Whether the trial magistrate complied with Section 169 of the Criminal Procedure Code; the said section deals with what should be contained in a judgment which include, a summary of the evidence tendered in the trial court, points for determination, the decision on the said points and it must be dated and signed by the trial court. The trial court did comply with all those requirements and in any event, even if the trial court did not, this court being the first appellate court, is charged with the duty of examining all the evidence afresh and determining the issues that arise.

The appellant also complained that essential witnesses were not called. However, in his submissions the appellant never mentioned any person that should have been called and was not called.

The appellant also alluded to there having been disputes in the family but he did not tell the court who was involved.

After a careful review of all the evidence on record, this court is satisfied that PW1 & 2 were truthful witnesses who fell victim of their own uncle who repeatedly defiled them had it not been discovered by the sisters (nuns). PW1 and PW2 did not reveal their plight because of the threats to their lives made by the appellant. Their evidence was corroborated by medical evidence. There is no reason why the PW1 & 2 could frame their own uncle. I am satisfied that the trial court arrived at the correct finding. I confirm the conviction.

The trial court found the appellant guilty of incest but should have specified that it was under Section 20(1) of the Sexual Offences Act. Section 21 was not relevant because it relates to incest by females.

Upon conviction for the offence of incest under Section 20(1) where minors are victims, one is liable to life imprisonment. The sentence is therefore lawful and cannot be disturbed.

In the end, the appeal is dismissed in its entirety.

Dated, Signed and Delivered at *NYAHURURU* this *31st* day of *January*, 2018.

....

R.P.V. Wendoh

JUDGE

Present:

Ms. Rugut – for prosecution

Mr. Soi - court assistant

Present – appellant