REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL APPEAL NO. 52 OF 2017

BETWEEN

F O O...APPELLANT

AND

REPUBLIC...RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. C. N. Njalale, RM at Senior Resident Magistrates Court at Winam in Criminal Case No. 338 of 2016 dated 6th September 2017)

JUDGMENT

1. The appellant, **F O O**, was charged and convicted of the offence of incest contrary to **section 20(1)** of the ***Sexual Offences Act*** ("the ***Act***"). The particulars were that on 5th October 2015 at 9.00pm in Kisumu East District within Kisumu County, he caused his penis to penetrate the vagina of LA, a child aged 13 years who was to his knowledge his daughter. After full trial the court found the appellant guilty, convicted and sentenced him to serve life imprisonment.

2. The appellant appeals against conviction and sentence on several grounds set out in the petition of appeal dated 7th October 2017. He contended that the trial magistrate erred in finding that the charge had been proved beyond reasonable doubt even when there were glaring contradictions in the evidence tendered. He also faulted the trial court for ignoring his defence and failing to find that forensic evidence exonerated him. In his written submissions, he faulted the trial magistrate failing to carry out proper evaluation of the evidence on record before reaching the decision. He submitted that from the record it was evident that the complainant was pregnant and that DNA tests conducted showed that he was not the biological father of the child. According to him this piece of evidence absolved him of the charges.

3. On respondent's part, counsel for the State, Mr Muia, opposed the appeal and submitted that the testimony of prosecution witnesses was sufficient to prove the offence beyond reasonable doubt. In this regard, he conteded that the complainant the appellant's daughter and penetration had been proved.

4. The appellant did not contest the fact that the complainant (PW 1) was his step-daughter. The evidence before the trial court was that PW 1 together with the siblings were living with their father, the appellant, at the time material to this case. The appellant had separated with his wife, PW2. On 5th October 2015, at around 9:00pm while PW 1 and her younger sisters were asleep in one bed, the appellant came over covered the complainant's mouth with a piece of cloth and then proceeded to insert his penis into her vagina three times. PW 1 testified that the appellant threatened to kill her if she ever told anyone what had taken place.

5. The complainant's younger sister, PW 5, testified that on the material night while they all slept, she heard PW 1 crying that the appellant was hurting her but after sometime she stopped crying.

6. PW 2 testified that sometime in 2015 she and the appellant separated and she moved to a different house with the girls. Later in the month of September 2015 the girls moved back to their father's house and continued to live with him. That on the morning of 5th October 2015, when PW 1 came to visit her, she noticed that she looked sick but upon enquiring from her what was wrong, she said she was okay. On 10th October 2015, she was informed by the appellant's neighbour that she needed to go check on the PW 1 who looked unwell. PW 2 went to the appellant's house where she met PW 1 who opened up and told her what had taken place. She took PW 1 to the hospital and later reported the matter to the police. PW 6 produced a medical report of an examination carried out another doctor indicated that the hymen was broken and there was evidence of penetration.

7. The investigating officer, PW 3, testified that PW 2 made the report at Kondele Police Station on 5th October 2015. After the report was made she began her investigations and recorded witness statements. After conducting investigations, she established that the appellant had defiled the complainant and therefore she arrested him and arraigned him in court. In the course of investigations, it emerged that PW 1 was pregnant but upon a DNA test being conducted it emerged that the appellant was excluded as the biological father to the child.

8. The appellant denied the charge in his sworn defence. He testified that PW 2 had left him and he was staying alone with the children. On the material day, he was at Yala and he only returned on 6th October 2015. He claimed that he had been framed by PW 2.

9. At this point I wish to point out that under **section 20(1)** of the ***Act***, incest is proved by either penetration or indecent act hence penetration alone is not an essential ingredient of the offence. What distinguishes the offence of incest from defilement under **section 8(1)** of the ***Act*** or committing an indecent act with a child under **section 11(1)** of the ***Act*** is the relationship between the accused and the child.

10. As the appellant admitted that PW 1 was his step-daughter which in my view is one of the prohibited relationships under **section 22** of the ***Act***, the issue for determination is whether the prosecution proved penetration or an indecent act. *"Penetration"* under **section 2** of the ***Act*** means, *"the partial or complete insertion of the genital organs of a person into the genital organs of another person." "Indecent act"* means *"any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration"*

11. **Section 124** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)***, an accused person shall not be liable to be convicted on the basis of the evidence of the victim unless such evidence is corroborated. The proviso to that section makes an exception in sexual offences and allows the court to convict an accused where the trial court on the basis of the evidence of the victim without corroboration, if for reasons to be recorded,the court believes the child was saying the truth.

12. The trial magistrate found PW 1 competent to give sworn testimony after conducting a *voire dire* examination. She told the court that the appellant came to where they were sleeping with her sisters covered her mouth and proceeded to insert his penis in her vagina. Her answers were firm on what took place and she remained unshaken in cross-examination. The trial court, which had the opportunity to observe PW 1's demeanour, found that she was truthful and believed her and this is a finding that an appellate court should be slow to depart from unless there is a good reason.

13. The appellant has argued that he did not defile PW 1 and the DNA of the child born to her did not match his DNA. In light of the definition of penetration under **section 2** of the ***Act***, such penetration or indecent act need not result. As I stated, PW 1's testimony was sufficient to support the findings of penetration and the fact that PW 1 could have been defiled by someone else does not, of itself, exonerate the appellant.

14. In any case, PW 1's testimony was corroborated by the testimony of PW 2 and PW 5. PW 2 saw her in a state of distress after the incident and received the first report while PW 5 was in the same room with PW 1 on the night of the incident. The appellant's defence that PW 1 concocted the allegations based on her mother's advice and that he was away from home on the material day when considered alongside that evidence of PW 1, PW 2 and PW 5 fall by the wayside. Further, PW 3 testified that there was no grudge between PW 1 and the appellant as he is the one who used to provide for her and her sisters.

15. Before I conclude this aspect of the evidence, I note that PW 3 stated that the incident was reported at Kondele Police Station on 5th October 2015. I think this is an error and inconsistent with the other evidence. PW 2 was only able to report the defilement on 10th October 2015 after she had been informed on this fact by a neighbour and had interviewed PW 1 who opened up to her. This is confirmed by the P3 form issued which shows that the incident was reported on 10th October 2015 and the medical examination done on 13th October 2015. As regards the medical evidence, it could only be corroborative and was not necessarily dispositive of the fact of penetration in view of the time that had lapsed between the time of the incident and the date of examination.

16. The appellant was sentenced to life imprisonment. Under **section 20(1)** of the ***Sexual Offences Act***, an accused is liable to life imprisonment if the victim is under the age of 18 years. In ***MK v Republic*** **NRB CA Crim. App. No. 248 of 2014 [2015]eKLR**, the Court of Appeal held, following ***Opoya v Republic*** **[1967]EA 752**, that the meaning of the word *"liable to"* in **section 20(1)** of the ***Sexual Offences Act*** means that the sentence is the maximum and not mandatory hence the court misdirected itself. Since there was penetration, I would impose the minimum mandatory sentence commensurate with the defilement of a child aged 13 years under **section 8(3)** of the ***Sexual Offences Act*** which is 20 years' imprisonment.

17. The conviction is affirmed and the appeal is dismissed save that the sentence of life imprisonment is set aside and substituted with a sentence of 20 years' imprisonment.

DATED and DELIVERED at KISUMU this day 28th of February 2018

D.S. MAJANJA

JUDGE

Appellant in person.

Mr Muia, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.