REPUBLIC OF KENYA

IN THE HIGH COURT AT KIAMBU

CRIMINAL APPEAL NO. 10 OF 2018

BETWEEN

B K N ..... APPELLANT

AND

REPUBLIC …..... RESPONDENT

(Being an appeal against the original conviction and sentence dated 14th February 2013 in Criminal Case No. 5338 of 2013 at Thika Chief Magistrates Court before Hon. G.Onsarigo, RM)

JUDGMENT

1. The appellant, **B K N**, was charged, convicted and sentenced to life imprisonment after being found guilty of the offence of incest contrary to **section 20 (1)** of the ***Sexual Offences Act***. The particulars of the offence were that on diverse dates between 1st September and 25th September 2013 in Ruiru within Kiambu District, he intentionally and unlawfully caused his penis to penetrate the vagina of RW a child aged 7 years who was to his knowledge, his daughter.

2. The appellant was also convicted of escaping from lawful custody contrary to **section 123** as read with **section 36** of the ***Penal Code (Chapter 63 of the Laws of Kenya)***. It was alleged that on 30th September 2013 at Ruiru Police Station in Kiambu County being in lawful custody of No. 80814 Cpl. Lucy Kashumpa and No. 41427, PC James Kahandi of Ruiru Police station, escaped from the said custody.

3. The appellant attacked the conviction and sentence based on the memorandum of grounds of appeal. He contested that the prosecution did not prove the offence beyond reasonable doubt. He emphasized that the medical evidence was insufficient to support the conviction. He contended that a DNA test was not done to confirm this incident and that the doctor who examined the child was not called as a witness. He also submitted that the Clinical Officer who testified gave inconsistent evidence.

4. The respondent supported the conviction and sentence. Its position was that the prosecution proved all the elements of the offence of defilement. Counsel for the respondent submitted that the testimony of the child was clear and was not challenged and corroboration was not necessary.

5. At this point I wish to point out that under **section 20(1)** of the ***Sexual Offences Act***, incest is proved by either penetration or indecent act hence penetration was 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 at with a child under **section 11(1)** of the ***Act*** is the relationship between the accused and the child.

6. In this case, the appellant in his testimony admitted that the child was his daughter. 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"*

7. After a *voire dire*, the child (PW 1) testified that on 25th September 2013 after supper and when they had gone to sleep in the same bedroom with her brother, the appellant came into the room took her to his bedroom. She told the court that he had taken off his clothes. In the morning, the appellant woke her up and let her go to school. He threatened to kill her if she told anyone what happened. When the child was cross-examined by the appellant, this is what she stated.

> *You had inserted your penis in my vagina on several occasions. You used to beat me and also inserted your penis ……. I did not tell anyone in the plot that you used to insert your penis in me* ……

8. The child's testimony from the record particularly the cross-examination on two separate days, I have a doubt that PW 1 was subjected to penetration many times. Under the proviso to **section 124** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)*** her testimony was sufficient to support a conviction, if the trial magistrate believed, for reasons to be recorded, that the child was stating the truth. The trial magistrate came to conclusion that PW 1's testimony was cogent and consistent in face of intense cross-examination by the appellant not once but twice. I have no reason to depart from this finding.

9. But if any corroboration were required, it is to be found in the testimony of PW 2 and PW 3. PW 2 was the clinical officer who examined PW 1 and filled the P3 form on 26th September 2012, a day after the incident. PW 2 actually examined PW 1 and noted that the child had suffered blunt injuries consistent with whipping on the back. The vagina had a foul smell and a white discharge and was inflamed and the hymen was absent. In cross-examination, she stated that the inflammation indicated that the wound was fresh. All these observations were consistent with penetration.

10. PW 3, was the teacher, who had seen PW 1 in a distressed state. She testified that in early September 2013, she had noted that PW 1 used to sleep in class and was not attentive. She later asked PW 1 what the problem was and she told her the appellant used to beat her, he would bathe her and touch her private parts and that he would sleep with her. When PW 1 was unable to complete her homework and PW 3 wanted to cane her, PW 1 told her that she was in pain because the appellant had sexually assaulted her. She reported the incident to the school administration on 26th September 2017 and then took the PW 1 for examination and treatment. After examination, PW 3 called the appellant to pick the child from school and it is then he was arrested. In cross-examination, PW 3 confirmed that she was concerned that PW 1 was not attentive in class and that is why she proceeded to inquire what was happening to her.

11. The investigating officer, PW 5, told the court that after the incident was reported by PW 3 at the police station, she interrogated PW 1 and she confirmed that the appellant had sexually assaulted her the previous night. PW 5 recorded witness statements and arrested the appellant when he had gone to pick PW 1 from school.

12. The corroborative evidence it consistent. Likewise, when cross-examined, PW 1 told the court how she informed PW 3 of the incident. It inconceivable that PW 1 would accuse the appellant and inform PW 3, who was an independent witness, and PW 5, of this fact in order to frame him and be part of a conspiracy with her mother. The prosecution case was strong and corroborated PW 1's testimony hence the appellant's defence of a grudge between and his wife was properly dismissed. What emerged from PW 1's testimony is that the acts of penetration took place several times prior to 25th September 2013.

13. Having considered the evidence as a whole, I find the conviction well founded and it is affirmed. The maximum penalty for the offence of incest is life imprisonment. The child was aged under 11 years and given the relationship between PW 1 and the appellant the sentence was warranted. It is affirmed.

14. The testimony of PW 5 is clear that the appellant escaped from custody on 30th September 2013 and was only re-arrested on 8th October 2013. This evidence was not contested. The conviction and sentence on Count II is upheld.

15. The appeal is dismissed.

DATED and DELIVERED at KIAMBU this 13th day of February 2018.

D.S. MAJANJA

JUDGE

Appellant in person.

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