REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 19 OF 2017

N K N.....APPELLANT

VERSUS

REPUBLIC.....STATE

(Being an Appeal from the Judgment of the Chief Magistrate's Court

at Nakuru Hon. R. Amwayi – Resident Magistrate delivered

on the 13th February, 2017 in A/CR Case No. 87 of 2016*)*

JUDGMENT

1. The Appellant, N K N, was charged before the Molo Chief Magistrate's Court with a single count of incest contrary to section 20(1) of the Sexual Offences Act. It was alleged that the Appellant had, on 09/01/2016 in Kuresoi South District within Nakuru County being a male person, caused his penis to penetrate the vagina of J C who was, to his knowledge, his daughter.

2. The Appellant faced an alternative count: committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act. The particulars were that the Appellant was accused of unlawfully and intentionally touching the vagina of J C with his penis on 09/01/2016 in Kureso South District within Nakuru County.

3. A full trial ensued after the Appellant pleaded not guilty to the charges. After five Prosecution witnesses testified, the Learned Trial Magistrate put the Appellant on his defence. He elected to give a sworn statement but called no witnesses. At the conclusion of the trial, the Learned Trial Magistrate convicted the Appellant and sentenced him to life imprisonment. This appeal is the Appellant's next step in his quest for justice.

4. 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. The duty of this Court is not to merely confirm or disconfirm particular hypothesis made by the Trial Court. Even as it re-evaluates the evidence afresh, this Court is reminded to be acutely aware that it never saw nor heard the witnesses as they testified and, therefore, it must make an allowance for that. This is especially crucial when it comes to evaluating the credibility of witnesses. See ***Okeno v R [1972] EA 32*** and ***Kariuki Karanja v R [1986] KLR.***

5. The evidence from the trial was as follows.

6. On 09/01/2016, the Appellant called out to his wife, W N, from within the homestead. W N, who testified as PW2 was not around the homestead since she had gone to the river to wash clothes. Instead, it was her sister-in-law, J N, who heard the Appellant's call. She answered. The Appellant instructed her to tell the Complainant to find the Appellant's phone and take to him in the forest where he was reportedly working from that day. J N gave the message to C, another of the Appellant's daughters.

7. The Complainant is thirteen years old. She testified that she received the instructions from C. She found the phone inside the Appellant's pockets in clothes in the house. She took it to the forest as instructed. When she got there, her father, the Appellant had other ideas: he immediately attacked her, removed her clothes, forced her on to the ground and forcibly had sex with her in both her vagina and anus. In the process, the Appellant beat her forehead to ensure submission. The Complainant also sustained bruises on her neck and thighs. These were, reportedly, from the thorns on the grounds where the Complainant was forcibly forced to lie.

8. The Complainant testified that she screamed but they were too deep into the forest for anyone to hear her. After the first time the Appellant testified her, she tried to run away. The Appellant threw a panga at her and it hit her waist thwarting her escape attempt. The

Appellant allegedly dragged her back to the scene and proceeded to defile her two more times – all the while threatening that he would kill her if she ever uttered a word about the incident.

9. After the incident, the Complainant testified that she dressed up at the command of the Appellant and then she headed home. She ended up by the road crying. That is where her mother, PW2, found her. Upon inquiry, the Complainant opened up to what had happened. The mother immediately took her to the hospital, then to the Police.

10. Meanwhile, the mother had raised alarm and word reached the *Nyumba Kumi* elder, Philip Kipkorir Boit, through a call from a neighbor – a Mr. Lucas. On getting the news, Mr. Boit, who testified as PW3 testified about receiving the news and rushing to the Appellant's home only to find the Complainant crying. He instructed the mother to take the Complainant to the hospital. He then mobilized a group of about twelve people to go to the forest to look for the Appellant. They found him there, arrested him and took him to the Kuresoi Police Station.

11. When PW2 took the Complainant to the Police Station, they met PC Francis Wako who referred them to the hospital and gave them a P3 Form for filling. He also took the Complainant to the hospital later for age assessment. He produced the age assessment report as Exhibit 2.

12. At the Olenguruone Sub-County Hospital where the Complainant was taken on 09/01/2016 for examination, they met Dr. Stanley Koech. Dr. Koech testified as PW5. When he examined the Complainant, he found some bruises on her neck, arms, thighs, and legs. Her clothes were torn and stained with blood. So were her panties. On examination of the genital organs, the doctor found lacerations on the labia minora and a torn hymen. He also found blood and a whitish discharge. At the lab, the doctor testified that they saw blood, a few pus cells and spermatozoa. He filled the P3 form containing his conclusion that the Complainant had been defiled about two hours earlier.

13. When put on his defence, the Appellant gave a sworn testament in which he said he had gone to the forest to work but while there he realized that he did not have his phone. He said that he then called his wife to take the phone to him. By his narrative, his wife, PW2, took the phone to him and then he went to the shopping centre to charge the phone. He says that it is only when he was went back to the forest to continue working when he met the village elder and his group who arrested him and claimed that he had defiled his daughter. The Appellant insisted that he was framed up by his wife because, he claimed, she was pregnant as a result of an extra-marital affair.

14. The Learned Trial Magistrate concluded that it had been proved beyond any doubt that the Complainant was a minor who was related to the Appellant as father-daughter; and that the evidence available was conclusive that the Complainant had been defiled. On the last element, whether it was the Appellant who had defiled the Complainant, the Learned Trial Court concluded as follows:

> *Finally, I am to determine if indeed, the Accused Person committed the offence of incest. It is the evidence of the Complainant that the [Appellant] had sexual intercourse with her. He while having sex with her told her that she wanted her to get pregnant like her mother (sic). It is true that the [Appellant's] wife was pregnant at that time as the Appellant in his defence testified to this. The Complainant after the incident told her mother and Police that it was the [Appellant] who had defiled her.*
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> *The [Appellant] in his defence stated that he never committed the alleged offence and that the same had been instigated by his wife whom he reprimanded for having had an affair and gotten pregnant….The defence by the [Appellant] that he was being implicated does not hold any water as there is no evidence that his wife was instigating the case….At her age, I find that the Complainant knew her father very well and if any other person was the one who defiled her then she would have stated so……..[The Complainant] remained coherent and consistent and was unshaken. I find her to be a truthful witness and the defence by the [Appellant] has not in any way shaken the prosecution evidence*.

15. On appeal, the Appellant focused on three main grounds. I will address each after stating the arguments made.

16. First, the Appellant argues that the Learned Trial Magistrate was wrong to convict on the evidence since there was no conclusive evidence on the age of the Complainant. The Appellant's argument was that sexual offences are a strict offence where age is a critical ingredient hence the need to interrogate evidence of age scrupulously. This argument does not take the Appellant too far. His quibbles with the age assessment report because it states that the Complainant was 13-14 years old. He thinks this is not good enough. It actually is. There is no requirement for mathematical precision in establishing the actual age of the Complainant in the offence charged. The critical ingredient of the offence is that the victim should be less than eighteen years old: here, there was no question that the Complainant was less than eighteen. The Age Assessment Report is normally conclusive proof of age. In this case, it is complemented by the testimonies of PW3 (the Complainant) as well as her mother (PW2). It is further complemented by the evidence of the doctor and the P3 Form.

17. The Appellant's second argument is that the Learned Trial Magistrate failed to faithfully consider his defence. I have now looked at the entire record of the trial including the Appellant's sworn statement and the judgment. This complain does not hold up. As reproduced above, the Learned Trial Magistrate considered all the evidence presented at the trial. She simply did not believe the Appellant's version of events. Given the overwhelming and consistent evidence presented by Prosecution witnesses, the Learned Trial Magistrate was entitled to make a finding that the Prosecution witnesses were truthful and that the Prosecution narrative was the believable version of what happened on 09/01/2016. She was, further, entitled to find that the Appellant's defence had no inherent possibility that it was plausibly true.

18. Finally, the Appellant complains that the charges were defective because they omitted the words "intentionally and unlawfully". The Court of Appeal has long answered this specific ground of appeal in **JMA vs Republic [2009] KLR 671**. In that case, the High Court had quashed a conviction on the main charge of defilement and found the appellant guilty on the alternative charge, for reasons that the charge was fatally defective for bearing the same omission. In reversing the High Court's decision, the Court of Appeal held *inter alia* that:

> *"This was a case in which the superior court should have invoked the provisions of Section 382 of the Criminal Procedure Code to cure the irregularity which on the facts and circumstances of this matter was minor."*

19. The same applies here. The omission was not substantive or prejudicial. The critical test is whether the Appellant had sufficient notice of

the charges facing him. There is no question that he did here.

20. In her judgment, the Learned Trial Magistrate correctly identified the four ingredients the Prosecution was required to prove beyond reasonable doubt:

a) That the Complainant was a child (less than eighteen years old);

b) That the Complainant was related to the Appellant by blood (as a daughter in this case);

c) That there was penetration of the Complainant's genital organs (as defined in section 2 of the Sexual Offences Act); and

d) That the penetration was caused by the Appellant.

21. As pointed out above, the Learned Trial Magistrate found that each of the four elements were proved. After scouring through the evidence, I concur that each of the elements were proved beyond reasonable doubts by the evidence presented at trial.

22. I have dealt with the issue of age when responding to the Appellant's first ground of appeal above. The relationship of the Complainant and the Appellant was also established through oral evidence by the Complainant; PW1 (the Appellant's sister in law); and PW2 (the Complainant's mother and Appellant's wife). On this score, even the Appellant's own testimony aligned with those of the Prosecution witnesses.

23. The issue of penetration was also not seriously contested: the medical evidence was unimpeached that the Complainant had been defiled. The Complainant gave clear and unchallenged evidence of the defilement. Her mother also testified to doing a physical examination and finding blood and bruises on the Complainant's genital organs.

24. Finally, as analyzed above, it is my finding that there was sufficient evidence to link the Appellant with the defilement. The testimonies of PW1 and the Complainant are quite consistent about what happened on that day. The Complainant's mother found the Complainant crying by the road immediately after the incident and she opened up about what had happened. The immediacy of the report and its consistency coupled with the demeanour of the Complainant at the witness dock which was noted by the Learned Trial Magistrate all put the issue beyond reasonable doubt that it is the Appellant who, indeed, violently defiled his daughter. I have already held that his defence is so implausible as to have no inherent possibility that it could be true.

25. **The upshot is that the appeal against conviction has no merit and it is hereby dismissed. The same goes for the appeal against sentence. The minimum and only sentence for the offence charged is life imprisonment. It is what the Learned Trial Magistrate imposed**.

26. Orders accordingly.

Dated and delivered at Nakuru, this 21st day of June, 2018.

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(PROF) J. NGUGI

JUDGE