REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CRIMINAL APPEAL NO. 2 OF 2015

JK .....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal case No.1146 of 2014 of the Chief Magistrate's Court at Embu)

JUDGMENT

The appellant was charged with the offence of incest Contrary to section 20(1) of the Sexual Offences Act No.3 of 2006. The particulars of the offence are that the appellant on the 16th day of April 2014 at [particulars withheld] village Nginda Location within Embu County, intentionally and unlawfully being a male person caused his genital organ (penis) to penetrate he genital organ (vagina) of EKK aged 12 years a female person who was to his knowledge his daughter.

The trial court convicted the appellant and sentenced him to serve forty (40) years imprisonment. The grounds of appeal are:-

1. That the learned Magistrate erred in law and fact in conclude that the appellant had committed an act of incest without corroborating evidence.

2. That the learned Magistrate erred in Law and fact in relying wholly on the evidence of the minor without undertaking an intelligent examination so as to test the veracity of the complainant evidence to tell the truth who is a minor.

3. That the learned Magistrate erred in Law and fact in relying on doctor evidence whereas there was no evidence of discharge of spermatozoa related to the appellant.

4. That the learned Magistrate erred in Law in meting out unreasonable sentence.

5. The learned magistrate erred in Law and gravely misdirected himself in convicting the appellant against the weight of evidence and totally disregarding the law.

Mr. Momanyi appeared for the appellant. Counsel submit that the particulars of the offence do not support the charge. The appellant was not the biological father of the complainant. The appellant did not cross examine any witness as he did not under what was happening. he was not told that he was entitled to cross examine the witnesses and he opted not to. Due to the seriousness of the offence, the trial court ought to have informed the appellant of his right to cross examine the witnesses. The trial was not fair as envisaged by Article 50 of the Constitution. This led to substantial injustice and at the very least the appellant is entitled to a retrial.

It is further submitted that the trial court made up its mind from the beginning that the appellant was guilty. The judgment went a long way to justify that conviction. There was no evidence that the appellant tried to issue resolved at home yet the trial Court made such observation in its judgement. The incident occurred on16th April, 2014 and was reported inJuly,2014. There was no explanation on the delay. This made the trial Court not to be impartial as it is the Court which came up with an explanation on the delay.

Counsel further maintains that the prosecution evidence is full of contradictions and is also full of gaps. There is doubt as to whether the appellant committed the offence. Even the medical evidence is not helpful. The case was not proved beyond reasonable doubt. PW4 dismissed the allegation. The incident is alledged to have occurred on 16.4.2014 at 8.30pm. At this time PW2, mother to PW1, had returned home from work. If the defilement had occurred at that time, PWQ2 would have known. PW6 testified that pW1's hymen was broken. He did not indicate whether the hymen had been broken recently. A broken hymen is not proof of defilement. Counsel relies on the case of **P.K.W –Vs- REPUBLIC [2012] eKLR**..

Counsel contends that evidence was adduced to the effect that PW2's relationship with the appellant prior to the incident was not good. This was a good reason for pW2 to use her daughter to frame the appellant. PW1 testified that thee were domestic differences. It is questionable why the appellant was arrested on 25th July, 2014 yet the appellant presented himself to the Police earlier. He did not ran away from his home. Counsel submit that the minimum sentence is 20 years. The 40 years imprisonment is excessive.

Miss Nandwa appearing for the state opposed the appeal. Counsel submit that the particulars in the charge support the offence. PW2 lived with the appellant for a period of six (6) years though he was not the biological father. PW1 knew the appellant as her father. Under Section 22 of the Sexual Offences Act, the appellant was the half father to PW1. PW2 was the appellant's wife since 2008. The appellant was given a fair hearing by the trial Court. He was given a chance to cross examine the witnesses. The appellant was able to tender his defence. He understand the charges he was facing. Section7 of the Penal Code stands that ignorance of the law does not afford any excuse for an Act or Omission which constitute an offence.

Counsel further submit that the complainant's age was proved. She was born on 7.2.2002. A birth certificate was produced. Penetration was also proved. The evidence proves that there was penetration and the broken hymen is to the only evidence that proved penetrations. The doctor confirmed that there was vaginal penetration PW1 was defiled more than once. There was no need for a spermatozoa test. The trial Court believed the evidence of PW1. The evidence of PW1 alone proves that she was defiled. PW2 notified the appellant's parents who attempted to resolve the issue with the appellant. DW3 confirmed that he had been informed of the incident. The appellant was arrested on 25th July and was arraigned in court on 26th July, 2014. There was no violation of his constitutional rights.

This is a first appeal. The Court is required to re-evaluate the evidence afresh and make its own conclusion. PW1 was the complainant. She testified under oath. On 16.4.2014 at around 8.00pm she was asleep with her 4 years old brother. Her mother had not arrived home. The appellant pointed a torch on her, held her hands and led her to the sitting room. He undressed her and laid her on a sofa bed and defiled her. The sexual activity took about two minutes and she was released to go and sleep. The appellant used to have sex with her. At one time he had six wither on good Friday. It is her evidence that the appellant had sex with her several times. Her mother was working at a tea factory and used to arrive home at 9.00pm.

The following morning she informed her cousin, NN so that she could inform her mother (N mother).Her mother was informed about the matter. When PW2 returned from her work place, she asked PW1 whether what she had heard was true. The matter was reported at the Manyatta Police station. They were referred to Embu Provincial hospital. She told the Court that she was twelve (12) years old.

PW2 PMK is PW1's 1 mother. She was working at a KTDA Tea Factory. PW1 is her daughter but the appellant is not the biological father. They had lived with the appellant since 3rd May 2008. PW1 was born on 7.2.20002. They formalized their marriage with the appellant in church.

On 18.2.2014, a good Friday, a wife to her brother in law, MW (N mother) visited her while escorting her M asked PW2 whether she was aware that PW1 had been defiled. She called PW1 and asked her to reveal what was going on with the appellant. PW1 told her that the appellant used to show her pornographic pictures on his phone and also used to have sex with her. PW2 went to report to her in laws. She informed her father in law.

It is PW2's further evidence that on 29.4.2014 her parents in law visited them. The appellant denied committing the offence. He then told her to take PW1 and seek refuge elsewhere. PW1 was taken to hospital by her grandmother. She left the appellant. While living together she would reach home at between 8.30 and 9.00pm. PW1 was studying at a boarding school in Chuka. The appellant had a good relationship with PW1. He is the biological father to the boy who was four years old.

PW3 NWK is PW2's mother and grandmother to PW1. It is her evidence that PW2's relationship with the appellant was not smooth. On 17.4.2014 PW2 informed her that PW1 had been defiled. PW1 was taken to her she took PW1 to Manyatta Police station. They were refereed to hospital and a P3 form was filled. The appellant had no problems with PW1.

PW4 MWK is a sister in law to the appellant. She is a wife to the appellant's brother. On 17.4.2014 at about 6.00pm her daughter, NN who was 11 years old told her that PW1 had sent her to tell her something. The following day she called PW2 and asked her to inquire what PW1 and N wanted to tell her. It is her evidence that she had restrained NN from telling her what she had been sent by PW1 because her father in law was around.

PW5 NN, 11 years old testified under oath. On 17.4.2014 she told her mother (PW4) that PW1 had told her that the appellant used to tell PW1 to undress. PW1 had told her that the appellant used to defile her at night.

PW6 DR. ERNEST KIMANI NGA'NGA was stationed at Embu Provincial General Hospital. He filled a P3 form on 6.5.2014. He had examined PW1 on 19.4.2014 when he filled the Post rape case form. PW1 told him, that she had been defiled several time by her father. The final incident has occurred on 16.4.2014. His vaginal examination showed that PW1's hymen was not intact. No discharge was noted on her private parts. He concluded that there was vaginal penetration.

PW7 P.C. TIMOTHY NDIWA was stationed at Manyatta Police station. He took over the investigations on 13.10.2014 from his colleague who was attending a course at Kiganjo. The appellant was arrested and charged with the offence.

The appellant gave sworn evidence. He told the Court that he was 37 years old and was a stage attendant with Neno Sacco. PW1 is his daughter although he is not the biological father. PW2 is his wife. He started hearing about the incident on 20.4.2014 after church. His parents also inquired about the matter. He told them that it was not true. He told PW2 to summon PW1. PW2 told him that PW1 had been taken to hospital by PW3. PW2 told him that PW1 had not suffered any harm. They continued to live together until 22.7.2014 when Police officers from Manyatta called him to the station. He went to the station on 25.7.2014 he had gone home late. He used to report on duty at 5.45a.m and close at 8.00pm. he denied showing PW1 pornographic pictures. He had disagreement with PW2 and they separated. They had

reconciled.

DW 2 ENM is the appellant's brother. He told the court that he had nothing to say. **DW3 MK** is the appellant's son. It is his evidence that PW 2 went to his home and told them about PW1. He told her to talk over the matter with the appellant. He was told the offence had occurred sometimes back.

The issue for determination is whether PW1 was defiled by the appellant. PW1's age was established. A birth certificate was produced. PW1 was born on 7.2.2002. PW1 was 12 years old.

According to PW1, the appellant used to have sex with her several times. They had sex on a good Friday. She took time to inform her mother. She confided to her cousin (PW5) who informed her mother (PW5). PW6 examined PW1 and concluded that she had been penetrated. The appellant's evidence is that he did not commit the offence. On 16.4.2014 he went home at 4.30pm, and then proceed to a club where he stayed with his friends.

Counsel for the appellant contends that the appellant did not comprehend what was happening in court. He did not cross examine the witnesses. During his defence, the appellant told the court that he was aware of the charges. He opted to give sworn evidence. The appellant was working at a transport Sacco and was a stage attendant. He is not illiterate. The plea was taken in Kiembu language. The proceedings were done in Kiswahili. The appellant works at a Sacco state and does not claim not to understand Kiswahili. He told the Court that he was aware of his charges. He testified in Kiswahili. I am satisfied that the trial was fair.

There is the issue of the appellant's relationship with PW1. He is not the biological father of PW1. Section 22 of the Sexual Offences Act gives the test of certain relationship. The appellant testified that PW1 was his daughter. He has been living with her from the time she was six (6) years old. PW1 knows the appellant as her father. The appellant was married to PW1's mother. It is therefore clear that the appellant could not have slept with PW2 and at the same time have sex with the complainant. The appellant and PW2 had a child together. Their child is a step brother to PW1. The offence of incest is meant to stop sexual intercourse between people who are closely related either by blood or through marriage or even through adoption. I do find that the appellant was a father to PW1 and he falls within the category of people who could not have had sex with PW1.,

The prosecution evidence on the Sexual Act is that of PW1. PW1 was categorical that the appellant used to have sex with her. The evidence of PW2 and PW3 as well as that of PW1 is that there was no bad blood between pW1 and the appellant. The two had a cordial relationship. Why would PW1 make such allegations. Counsel for the appellant contend that pW2 decided to use her daughter to frame the appellant. It is contended that pW2's relationship with the appellant was bad. In his defence the appellant testified that he had initially separated with PW2 but she had returned.

I do not find that PW1 was used by her mother to frame the appellant. PW2 and the appellant were living together. The allegation of PW1 are confirmed by the medical examination. It is clear from the medical examination that PW1 was defiled. It is not the issue the missing hymen but the totality of the evidence of PW6 to the effect that PW1 had been penetrated.

The appellant further contends that the incident occurred on 16.4.2014 and he was arrested on 25.7.2014. The P3 form shows that the incident was reported to the Police on 19.4.2014 and was given OB reference No.12. the P3 form was filled on 6.5.2014. According to PW2, the appellant's parents visited them on 29.4.2016 to discuss the matter. PW3 testified that she visited Manyatta Police earlier and reported the case. She went to the station once again on10/7/2014. The fact that the appellant was arrested after a period of about three months from the date of the incident does not mean that the incident did not occur. It is the appellant's evidence that they were living together with PW2 until when the Police summoned him. A decision to prosecute him was made. PW1 had already been seen by the doctor way back on19.4.2014.

I do find that PW1's evidence is believable. Being a minor, she toyed with the idea of revealing the sexual encounter with her father and found her cousin to be the best person to confide to. This was not a one off incident. There is no reason as to why PW1 would implicate the appellant. The evidence of PW1 does prove that indeed PW1 was defiled. I do find that the conviction is proper. The appellant defiled PW1 while knowing very well that she was his wife's daughter.

On the issue of sentence, under Section 20(1) of the Sexual Offences Act, if the victim is above 18 years, the minimum sentence is ten(10) years imprisonment. Under section 20(1) if the victim is below the age of 18 years, the accused is liable to imprisonment for life. The essence for this provision is that life imprisonment is not mandatory. The trial Court imposed a 40 years imprisonment. Under Section 8(1)(3), a person who defiles a child aged between twelve and fifteen years is liable to imprisonment to a term of not less than twenty (20) years. In this situation, there is no relationship between the accused and the victim.

Under Section 20(1) of the Sexual Offences Act, the minimum sentence for incest with an adult is 10 years imprisonment. It can be argued that anyone convicted of incest with a minor below 18 years old should not benefit for a sentence lesser than the minimum, of ten (10) years. It would be illogical for the Court to use the window provided under the provision in section 20(1) and sentence an accused person who has been convicted of the offence of incest with a child to a period below ten (10) ears yet incest with an adult carries a minimum sentence of ten (10) years. Regard should also be made to Section 8(3) which gives a minimum sentence of twenty (20) years for defilement of a child aged between 12 and 15 years.

Given the circumstances of the case, I do find that the 40 years imprisonment is excessive. I do set aside that sentence and replace with twenty (20) years imprisonment.

In the end, the appeal for conviction is disallowed. The 40 years imprisonment sentence is set aside and replaced with twenty (20) years imprisonment.

Dated and Signed at Marsabit this …… day of July 2018

S. CHITEMBWE

JUDGE

Dated, Signed and Delivered at Embu 25th this day of July, 2018

F. MUCHEMI

JUDGE