REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

HIGH COURT CRIMINAL APPEAL NO. 17 OF 2017

BETWEEN:

M G.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an Appeal from the Judgment of Hon. E. N. Nderitu SPM at SPM's Court Voi. CR. Case No.604 of 2015 delivered on 19th October 2016)

J U D G M E N T

1. The Court has before it an Appeal against conviction and sentence. The Appeal is brought against the Judgment of Hon E. N. Nderitu SPM delivered at the SPM's Court in Voi on 19th October 2016. On that day the Appellant M G was convicted of two counts, namely (1) incest contrary to ***Section 20(1***) of the ***Sexual Offences Act No 3 of 2006*** and (2) Defilement within the view of a child contrary to ***Section 7*** of the ***Sexual Offences Act No 3 of 2006.***

2. The Petition of Appeal was filed on 20th March 2017. On 26th April 2017 he was granted leave to appeal out of time by Hon J. Kamau J. On the face of the Petition it appears that it was prepared around 11th November 2016. The Grounds of Appeal attached to the Petition are:

> *"*(1) That the learned trial magistrate erred in law and fact by finding that the medical report adduced was sustained enough for the conviction.
>
> (2) That the trial magistrate erred in law and fact by not considering the importance of the investigation officer on his sentencing.
>
> (3) That the trial magistrate erred in law and fact by finding that PW1 was a key witness in this case.
>
> (4) That the honourable magistrate erred in law and fact by not considering my defence submission as the truth of the case.
>
> (5) That I now beg this honourable court to issue me with a case proceedings with regards to the process of my appeal."

3. The Appellant was directed to file his written submissions. As part of his written submissions he presented his amended grounds of Appeal. They are:

> "(1) That the trial magistrate erred in law and fact in convicting and sentencing me without considering the trial was a mistrial and a nullity
>
> (2) That the trial magistrate erred in law and fact in convicting and sentencing me without considering that no genuine certified copy of a birth certificate or copy of age assessment report was produced as an exhibit to prove the exact age of the complainant (PW1) at the time of the commission of the offence.
>
> (3) That the learned trial magistrate erred in law and fact in convicting and sentencing me without considering that the identification was not proved beyond reasonable doubt.
>
> (4) That the learned trial magistrate erred in law and fact in convicting and sentencing me without considering that the prosecution violated article 50(2)(j) of the new constitution.

(5) That the learned trial magistrate erred in law and facts by failing to consider that the second count or charge was defective.

(6) That the learned trial magistrate erred in law and facts in convicting and sentencing me without considering my defence evidence.".

The Appellant is asking for his conviction to be quashed.

4. In his Supporting Affidavit the Appellant sets out that he was arrested, charged, tried and convicted of the offence of incest contrary to ***Section 20 and Section 7*** of the ***Sexual Offences Act No 3 of 2006*** and sentenced to serve a term of 20 years and 10 years respectively. He states that he amended his grounds of appeal on receipt of the certified proceedings. He puts forward the 6 Amended Grounds of Appeal set out above.

5. The Appellant argues that the trial was a nullity because he was not able to cross-examine his 10 year old granddaughter (PW-2). Although the record of proceedings shows that the PW-2 was not cross-examined, it also shows that PW-2 did not give evidence on oath. After holding a voire dire examination the Learned Trial Magistrate decided to take the unsworn testimony of PW-2. The Appellant says he should have been given an opportunity to test the credibility of the child. However, the Child did not give evidence on oath and he was free to make such submissions as he wished as to the weight to be given to her evidence.

6. The Appellant states that the birth certificate produced was not genuine nor original. However, the memorandum of exhibits shows that an original birth certificate was produced. In any event the birth certificate states that the Complainant was 14 years old. At the time of the offence she was still at school. The Prosecution charged the Appellant on the basis that the Complainant was 16. At the time of the Hearing, the complainant was 16. At no time did the Appellant challenge the fact of the minority of the Complainant. In the circumstances, his arguments relating to the validity of the birth certificate were not raised during the trial and are now raised being supported by an argument that pre-supposes that the Appellant has specialist knowledge in the inner workings of the Registry of Births and Deaths.

7. The Appellant then goes on to allege that the Birth Certificate produced is a forgery. It should be noted that when the Appellant cross-examined the complainant, he did not put to her that she was not a minor at the time of the attack. The Appellant cites the authority of ***Fappytom Mutuku Ngui vs Republic CA No 2961 of 2010*** in particular the following quote; "*I am aware our case law requires that the age of the victim (child) to be conclusively proved before any conviction can arise from an offence under the Sexual Offence Act, the courts are strict about the requirement because the penalty once found guilty is dependent on the age of the victim.*" In fact in this case the penalty is dependent on the age of the victim as well as her relationship with the perpetrator. The Appellant also argues that the Trial Magistrate failed to interrogate the birth certificate when the Complainant had given evidence that she was 14 years old.

8. The Third ground relates to identification. The Appellant is arguing that PW1 and PW2 could not have successfully identified him as the assailant because the assailant entered into their bedroom at night when it was dark. It was said/alleged that PW2 also wanted to scream but did not, because she knew the person who entered the room. The Appellant seems to be saying that in view of the darkness they could not have known who entered the room. However, that challenge does not address the evidence that the perpetrator spoke to them and even threatened to kill them. The Appellant relies on authorities that deal with different circumstances, cases of identifying as opposed to a case where the witness state they recognised the perpetrator because he was known to them.

9. The Appellant claims he did not have a fair trial because the materials and evidence against him was not disclosed to him. However, the record shows that on two separate occasions the Learned Trial Magistrate directed that witness statements be provided to the Appellant. The record does not show him complaining that he had not received the statements. In the circumstances of this case, it is surprising that if they had not been provided, the Appellant said nothing. (It seems that this complaint is now a mere afterthought on which to support an appeal.)

10. The Appellant then relies on the assertion that the second count as drafted was defective. It is argued that the count is not drafted as set out in ***Section 7 Sexual Offences Act***. He says that the complainant was of sound mind and not insane. ***Section 7*** of the ***Sexual Offences Act No 3 of 2006*** provides "*A person who intentionally commits rape or an indecent act with another within the view of a family member, a child or person with mental disability is guilty of an offence and liable on conviction to imprisonment for a term which shall not be less than 10 years*." The Appellant's interpretation of that Section is that the Complainant (not the witness) must be suffering from a mental disability and in this case she was not. That interpretation is clearly incorrect looking at the clear words of the Section. However, the Applicants own interpretation would not assist him because she was a child and the Section refers to a child. Further when the charge was amended and explained to the Appellant he asked for PW-1 to be recalled so that he could cross-examine her. There was no suggestion then that he did not understand the particulars of the Charge or evidence against him.

11. Supplementary to the Ground the Appellant argues that the particulars of offence were drafted in such a way as to keep the Appellant in the dark as to what crime he was alleged to have committed. He argues that the defect was so grave as to render the trial a nullity. The Second Charge as it appears on the Charge Sheet was stated as; " DEFILEMENT WITHIN THE VIEW OF A CHILD CONTRARY TO SECTION 7 OF THE SEXUAL OFFENCES ACT NO 3 OF 2006". The Particulars were M G: On unknown dates between the months of February 2015 and July 2015 within Taita Taveta County, intentionally caused your penis to penetrate the vagina of M.M. a girl aged 16 years in the presence of K.M. a girl aged 10 years who is your granddaughter". Neither the grounds of appeal nor the written submissions explain why those particulars are not sufficient. The fact that the Appellant's defence comprised an alibi suggesting he was not in [particulars] Village at the time demonstrates that he understood fully the import of the allegations against him.

12. The Respondent's Written Submissions, on behalf of the State were filed on 6th December 2017. The Appellant then filed further Submissions on 25th January 2018. Those Submissions raise several points. Firstly that the Appellant was charged under ***Section 20*** of the ***Sexual Offences Act*** with an alternative charge under ***Section 11(1)*** namely an indecent act with a child. He was found guilty of the first more serious charge. The Second Court was under Section 7. The Submissions for State make clear that for that Count the Complainant was PW2 who was corroborated by PW1.

13. In relation to the complaint that the Appellant was not provided with Witness Statements, the Respondents' Submissions assert that the

Appellant was provided with Statements. On the first occasion on 10th August 2015 the Court ordered that the Accused be provided with Statements. When the matter came before Court on 10th September 2015 they had not been provided and the matter was adjourned. On 7th October 2015 the Appellant confirmed that he was ready to proceed. He did not raise the issue that he now raises. It was therefore reasonable for the trial Court to infer that he had received the witness statements or was ready to proceed without them and the complaint now is a mere afterthought **(See High Court Criminal Appeal 145 of 2103 at Kakamega).**

14. On the issue of whether the Second Count was defective. The Respondent submits that it was not and sets out Section 7 of the Sexual Offences Act " A person who intentionally commits rape or indecent assault with a family member....." The evidence of PW-2 was not on oath but it was clear. She described what she saw. Her grandfather undressing her sister and himself and then raping his sister. She described it in the terms that a child of her age could understand. The Appellant had no opportunity to examine her. Her evidence was corroborated by the evidence of PW1 and PW3 as to what she was told. The Appellant had the opportunity to cross-examine all three witnesses. In the course of his cross-examination he did not challenge what the witness said she saw.

15. On the issue of the identification evidence the Respondent relies on the Authority of ***Choge vs Republic (1985) KLR 1*** where the Court of Appeal held that evidence of voice identification is receivable and admissible. In this case, the recognition and identification was not a single fleeting incident but (on the evidence of the Complainants) repeated on several occasions when the modus operandi was the same. The Appellant does not address that in his challenge. The Appellant does then revert to the Authority of ***Maina vs Republic*** and ***Henry Maurinyo vs Republic*** suggesting that he was framed and the assertion that women and girls generally, are likely to lie to obtain a conviction.

16. The Appellant makes no reference thereto but the definitive evidence on the identity of the assailants was the DNA test. The DNA test proved conclusively that the Appellant was the father of the Complainant's child J M.

17. On the issue of age, the Respondent submits that the Learned Trial Magistrate heard the evidence of several witnesses on the age of the child. There was also other corroborating evidence namely that the child was still at school and therefore her age was common knowledge to her school and by implication to the Chief. The Appellant did not raise a defence that his victim was not a minor during the trial. Raising it at this stage can only be seen as an attempt at deflecting the findings of the trial Court. In any event it is clear from the record that although the birth certificate which states the Complainant was born in 2001 would make her 14 years old at the time of the offence, she was consistently referred to during the proceedings as being 16 years of age. That means that the Appellant was given the benefit of the doubt. The Learned Trial Magistrate held that the exact age of the victim did not matter provided that it was established that she was under 18. The Learned Trial Magistrate found that was so.

18. It is a widely accepted and followed principle that on an Appeal the Court hearing the first appeal must re-evaluate the evidence afresh and come to its own conclusions on the findings of the Court below. This Court has considered the evidence, the proceedings and the arguments presented by way of submissions.

19. The Respondent's Submissions also challenge the position put forward that the sentence is harsh. In relation to each charge the sentence is provided by law. Under ***Section 20*** and ***Section 7*** of the ***Sexual Offences Act,*** the minimum term for that offence is a term of not less than 10 years. In mitigation, the Appellant argued that he had children and he was diabetic. He also said his wife was sick. However, his wife gave evidence for the prosecution and from the evidence presented before the Court she was well enough to be able to travel away from home on several occasions.

20. The aggravating factors of this case must also be taken into account. This is a case where the Appellant did not plead guilty. That meant two Children were put through the trial process and made to re-live and repeat what they experienced. In addition, there is the fact that he was the only male father figure that these children knew. He abused their trust and caused them to be frightened and depressed and contemplating suicide in the case of PW-1.

21. Even after the birth of his victim's child he continued to deny the offence, forcing them to go through a further intervention by way of DNA testing.

22. The question then arises of whether this Court should interfere with that sentence? An appeal Court should only interfere with a sentence where:

1. The sentence was imposed against legal principle;

2. Relevant factors were not considered;

3. Irrelevant factors were considered;

4. The sentence is manifestly excessive in the circumstances of the case.

A Court should not interfere with a sentence simply for the reason that it may have imposed a different sentence **(Kennedy Indiema Omuse v R)**

23. The Appellant has not established any of the above grounds.

24. For the reasons set out above, the Appeal is dismissed.

Order accordingly,

FARAH S. M. AMIN

JUDGE

SIGNED DATED AND DELIVERED ON THIS the 24th day of July 2018.

In The Presence of:

Court Assistant: Josephat Mavu

Appellant: (In Person)

Respondent: (Ms Anyumba)