REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL APPEAL NO. 25 OF 2017

M S ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Sentence in Kyuso Principal Magistrate's Court Criminal Case (S.O.) No. 8 of 2016 by John Aringo R M on 08/05/17)

J U D G M E N T

1. **M S,** the Appellant, was charged with the offence of **Incest** contrary to **Section 20(1)** of the **Sexual Offences Act No. 3 of 2006.** Particulars of the offence were that on the **14th** day of **March, 2016** at [**particulars withheld] Sub-Location Tseikuru Sub-County** within **Kitui County** intentionally caused his penis to penetrate the vagina of **K S** a girl child aged **17 years.**

2. In the alternative, he was charged with the offence of **Committing an Indecent Act with a Child** contrary to **Section 11(1)** of the **Sexual Offences Act No. 3 of 2006.** Particulars of the offence were that on the **14th** day of **March, 2016** at [**particulars withheld] Sub-Location Tseikuru Sub-County** within **Kitui County** intentionally caused his penis to touch the vagina of **K S** a girl child aged **17 years.**

3. Facts of the case were that on the **14th** day of **March, 2016,** at about **11.30 a.m.,** PW1, **K S** was on their farm picking cowpeas when the Appellant her grandfather asked her to go to a nearby bush so that he could tell her something. She went and the Appellant asked her "to give him". When she enquired what he meant, he wrestled her. She fell down and he removed her underpants, lowered his pants to his knees, penetrated her genitalia with his and sexually molested her. On seeing her father, **S,** he released her. Subsequently she was taken to **Tseikuru Hospital** for treatment. The case was reported to PW4 **No. 100882 PC Delphine Wangeci** who investigated the case and caused the Appellant to be charged.

4. When put on his defence, the Appellant stated that he was arrested and jointly charged with another. Following a Court order they were tried separately and the other person was convicted. He state that he disagreed with the father of the Complainant over a property.

5. The learned trial Magistrate considered evidence adduced and reached a finding that the relationship between the Appellant and the Accused was not stated in the main count. Therefore he found the Appellant culpable of the alternative count convicted him and sentenced him to **life imprisonment.**

6. Aggrieved by the conviction and sentence, the Appellant appealed on grounds that the learned trial Magistrate erred in law and facts by:

- Relying on the Antenatal Care Card instead of a Birth Certificate to prove the age of the Complainant.
- Basing conviction on identification yet the Complainant was already pregnant having engaged in sex previously.
- Failing to consider that he was arraigned in Court more than 24 hours after his arrest.
- Failing to consider his alibi defence.
- Imposing a sentence for the offence of incest instead of the alternative charge.

7. The Appellant canvassed the Appeal by way of written submissions. The State through learned State Counsel **Mr. Mamba** opposed the Appeal. He submitted orally that the act was committed in broad daylight therefore the case was proved beyond any reasonable doubt.

8. This being the first Appellate Court, I am duty bound to re-evaluate and re-consider all evidence adduced at trial afresh bearing in mind

that I had no opportunity of seeing or hearing witnesses who testified. I must therefore come to my own conclusion with that in mind. **(See Okeno vs. Republic (1973) EA 32).**

9. The learned trial Magistrate has been faulted for relying on an anti-natal card for purposes of proving the age of the Complainant. It is stated in the charge sheet that the victim herein was 16 years old. To prove the case the Prosecution adduced in evidence a child health care card which had evidence of the date of birth of the victim, the **27th** day of **September, 1998.** In the case of **Mwalongo Chichoro Mwajembe vs. Republic Msa Criminal Appeal No. 24 of 2015 (UR)** it was held:

> ***"….the question of proof of age has finally been settled by recent decisions of this Court to the effect that it can be proved by documentary evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. It has even been held in a long line of decisions from the High Court that age can also be proved by observation and common sense. See*** *Denis Kinywa-Vs- Republic, Criminal Appeal No.19 of 2014* ***and*** *Omar Uche -Vs- Republic, Criminal Appeal No.11 of 2015****. We doubt if the courts are possessed of the requisite expertise to assess age by merely observing the victim since in a criminal trial the threshold is beyond any reasonable doubt. This form of proof is a direct influence by the decision of the Court of Appeal of Uganda in*** *Francis Omuroni -Vs- Uganda, Criminal Appeal No. 2 of 2000****. We think that what ought to be stressed is that whatever the nature of evidence presented in proof of the victim's age, it has to be credible and reliable…"***

From the foregoing, evidence adduced of the age of the victim was credible and reliable. At the time of the stated act the Complainant was 17½ years old, hence a child.

10. The Appellant faults the Court for failing to consider that he was arraigned in Court contrary to law, after more than 24 hours. The Appellant was arrested on Thursday, the **9th** day of **June, 2016** and arraigned in Court on Monday, the **13th June, 2016.** No explanation was given therefore contrary to what is required by the law **(See Article 49(1)(f) of the Constitution).** This was in violation of the Constitution which however does not entitle the Appellant to an acquittal. He can only claim for damages **(See Julius Kamau Mbugua vs. Republic (2010) eKLR).**

11. The Appellant was well known to the Complainant being her grandfather. PW2 **S M,** her father found them in the bush. PW1 told the Court that the Appellant used his genitalia to touch hers five (5) times. He abandoned the act on seeing PW2. She was examined by a Clinical Officer **Eunice Kieme,** she had no bruises on her genitalia although the hymen was already broken and she was already pregnant.

12. The learned Magistrate has been faulted for not considering the Appellant's alibi defence. This is a suggestion that he could not have been where the offence was committed as he was at some other place. His defence was silent on the allegation of an alibi. Therefore the Prosecution had no duty of disapproving it. The Court having found that the Appellant committed an indecent act as he used part of his body (penis) to touch the genitalia organ of the Complainant convicted him and sentenced him to life imprisonment. It has been held that an Appellate Court can and will only interfere with sentence imposed unless it is manifestly excessive in the circumstances of the case or if the trial Court overlooked some material factor or acted on wrong principle **(See Bernard Kimani Gacheru vs. Republic Criminal Appeal No. 188 of 2000).**

13. The charge was contrary to **Section 11(1)** of the **Sexual Offences Act** that provides thus:

> ***"(1) Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years."***

Considering circumstances of this case the sentence imposed calls for the interference. Therefore I affirm the conviction but set aside the sentence imposed and substitute it with a sentence of **ten (10) years imprisonment** to take effect from the date of conviction.

14. It is so ordered.

Dated, Signed and Delivered at Kitui this 29th day of August, 2018.

L. N. MUTENDE

JUDGE