REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CRIMINAL APPEAL NO. 25 OF 2017

A N N.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal arising from conviction and sentence in Senior Resident

Magistrate's Court in criminal case no 11 of 2014 by Hon. E. Michieka

Snr Resident Magistrate delivered on 15th October 2015

JUDGEMENT

1 A N N "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 being that on the 25th and 26th day of September 2014 at [particulars withheld] area in Kiambu County within Central Region, he intentionally caused his penis to penetrate the vagina of **D N** a child aged 11 years old who was to his knowledge his daughter.

2 He pleaded not guilty and the case proceeded to full hearing with the prosecution calling four (4) witnesses. The appellant gave an unsworn statement of defence without calling any witness.

3 At the conclusion of the case the trial court found him guilty, convicted, and sentenced him to life imprisonment.

4 The appellant being aggrieved by the Judgment filed this appeal citing the following grounds:

(i) THAT the charge against him was not prove beyond reasonable doubt as held by the trial magistrate.

(ii) THAT the charge was defective in nature and the trial was a nullity as the same proceeded under a defective charge sheet.

(iii) THAT he was prejudiced and unable to defend myself properly due to the defectiveness of the charge.

(iv) THAT his conviction was manifestly unsafe as per the circumstances of the case

5 A summary of the case is that the complainant (PW1) is a daughter of the appellant. When she testified she said she was 12 years of age. It was her evidence that she and her siblings lived with both their parents. On 25th September 2014 while at home in [particulars withheld], her parents fought and her mother ran away. The appellant then chased away her younger brother R M who was then aged 10 years.

6 The appellant told her to cook food which she did and they ate, and went to sleep. The appellant came and asked her to go and sleep on his bed which she refused. In spite of his threats she did not go and she slept until morning in her bed. The following night while in a boxer he came to her bed. He removed her clothes and also removed his boxer. He then defiled her the whole night. The next morning she told their neighbour Baba Tasha what had happened. She was taken to hospital and a report was made to the police.

7 **PW 2 Esther Wairimu** a volunteer Children's officer took up the matter to ensure **PW1** was in safe hands. **PW3 Shadrack Ngatia** a clinical officer at Wangige Hospital examined **PW1** on 30th September 2014. He also examined the appellant whom he found to have H.I.V. and Syphillis. **PW1** tested negative for H.I.V. He produced the PRC form and P3 form for PW1 **(EXB 1&2).**

8 **PW4 Julius Kaimenyi** was the Investigating Officer. He was instructed by the O.C.S to go and get the appellant from Magana AP Camp. He went with Cpl Karimi and they brought the appellant to Kikuyu Police Station. He took PW1 and the appellant to Wangige health centre for tests and he was later charged.

9 He stated in his defence that on 25th September 2009 he was home with his wife and they prepared the children for school. He went to work but when he returned home at 5.30 pm he found his two youngest children alone as his wife was not there.

10 He took the children with him to the garage. Thirty minutes later a neighbour called and informed him that his wife had returned home drunk. He left for Thika to drop a client's vehicle and returned home at 10.30 pm. When he came home he had a quarrel with his wife. On 26th September 2014 at 5.30 pm when he returned home he found his children alone. He bought them food and went back to the garage.

11 Upon his return home he did not find the children. He slept and reported the matter at Magana police post. He was later accused of defiling his daughter which he denied. On 30th September 2014 when he went to pick the children he was locked up. In cross examination he said **PW1** is his daughter but she was coached by the mother to lie against him.

12 When the appeal came for hearing the appellant relied on his written submissions. He added that the reportee and **PW1's** mother did not testify. In his written submissions he said the court convicted him on a defective charge sheet which showed that he defiled **PW1** on the 25th and 26th September 2014. He further said that since he was found to have HIV and syphilis and PW1 was not infected then it was clear he never defiled her.

13 Relying on the case of **Woolmington vs The DPP 1935 AC 462** he submitted that the above submissions created a doubt on his guilt. He prayed to be set free.

14 Mr. Maatwa for the respondent opposed the appeal submitting that the conviction and sentence were lawful. That all the ingredients of the offence were proved by the witnesses who testified. He added that **PW1's** mother was not a witness.

15 In a rejoinder the appellant submitted that **PW1** was not infected and she had been coached. He added that on 26th September 2014 the children were not at the house. That they were in need of care and not that they were sexually assaulted.

16 This is a first appeal and I have a duty to re-evaluate and re-consider the evidence on record and come to my own independent conclusion. I should bear in mind that unlike the trial court I did not hear nor see the witnesses and should give an allowance for that. See **Okeno vs Republic 1972 EA. 32; Pandaya v Republic [1957] E.A. 336; Kariuki Karanja v Republic [1986[] KLR 190.**

17 Bearing the above principles in mind I have considered the evidence on record, grounds of appeal and the submissions. The appellant was charged and convicted of the offence of incest contrary to section 20(1) of the Sexual Offences Act. Section 20 of the Sexual Offences Act provides:

> (1) **Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years:**
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> **Provided that, if it is alleged in the information or charge and proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person.**
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> (2) **If any male person attempts to commit the offence specified in subsection (1), he is guilty of an offence of attempted incest and is liable upon conviction to a term of imprisonment of not less than ten years.**

18 There is no dispute that **PW1** is a daughter to the appellant and is within the prohibited degrees in terms of section 20 (1) of the Sexual Offences Act. **PW1** in her evidence testified that she was aged 12 years at the time of the alleged incident. The learned trial magistrate who saw the child confirmed that she was a minor. He therefore conducted a *voir dire* examination to satisfy himself of her ability to testify and whether she could testify under oath. The PCR Form and the P3 Form **(EXB 172)** also indicate her age as 11 years.

19 In the Ugandan case of **Francis Omuroni v Uganda, Court of Appeal Cr. Appeal No. 2 of 2000** it was held;

> **"In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by a birth certificate, the victim's parents or guardian and by observation and common sense…"**

The appellant being **PW1's** father knows her age and did not raise any issue about it. Based on the evidence adduced in court together with the documentary evidence I am satisfied that **PW1** was aged between 11 -12 years.

20 The next issue to determine is whether there was penetration of **PW1's** female genitalia namely her vagina. Upon her complaint, **PW1** was together with her siblings taken away from home by **PW2** to a place of safety. He was then taken to hospital for treatment and examination. **PW3** Shadrack Ngatia the Clinical officer confirmed that the child had been defiled. The P3 Form **(EXB2)** shows that **PW1's** hymen was missing; had pus cells and epithelial cells in her urine. There is therefore no doubt that she had been defiled.

21 Having found that **PW1** is the appellant's daughter; that she is a minor; and that she was defiled, the next issue for determination is who defiled her? The appellant raised an issue about the charge sheet, and the dates in it. It has the dates of 25th and 26th September 2014 as the dates when the offence took place.

22 **PW2 Esther Wairimu** who rescued the appellants' children said she took them away on 26th September 2014 at 8.00 pm from their home. The parents were not in. Her evidence in cross examination is that the defilement was a day before their rescue. **PW1** was a little girl then and may have confused the dates. The fact is that she was defiled in her mother's absence and before the rescue operation of 26th September 2014. It follows that the defilement was on 25th September 2014 which date appears in the charge sheet. I find no defect there.

23 **PW1** was the only witness who testified as to the identity of the person who defiled her. She reported the next morning to a neighbour who notified the police and the same day she and her siblings were rescued. **PW1** was very categorical that it is the appellant who did this to her. She explained what he had said to her the previous night amidst threats.

24 The appellant says his wife coached the child but there is no proof of that. The appellant never cross examined her on the element of having been coached by the mother. He did not mention it in his evidence either. He has only raised it in his appeal which I find to be an afterthought. **PW1's** mother and the neighbour who reported did not witness the incident and so are not witnesses.

25 The appellant's defence is that on 25th September 2014 night he was home with his wife even though they quarreled. He never also put this to PW1 in his cross examination. The crucial question is whether PW1's evidence can be relied on to sustain the conviction. Section 124 of the Evidence Act provides as follows:

> **"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him: Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.** "

26 The proviso to section 124 allows the court to convict on the sole evidence of a victim of a sexual offence if it is satisfied that the victim is truthful. The learned trial Magistrate at pg 6 lines 4-12 of the judgment said

> **"The accused alluded to the fact that the complainant may have been coached to give false evidence by her mother because of their differences. There was no evidence produced and though it was probable, it did not likely happen in this case because the complainant was consistent and direct in her testimony and I formed the opinion that she was telling the truth. I reject the argument by the accused that she may have been coached. Her evidence was detailed and consitstent even on cross examination I find that it was the accused who defiled her."**

27 The trial court believed PW1. It is that court that saw and heard her. In this case the evidence of PW1 was consistent that it is the appellant who defiled her. The medical evidence confirmed she had been defiled. There is absolutely no reason given that would make her lie against the appellant.

28 The appellant had also argued that he is HIV positive and **PW3** had confirmed that to be the position. Further that since **PW1** was found to be HIV negative he is not the one who defiled her. **PW3** found her to be HIV positive and to also have syphilis. The witness tested her only four (4) days after the incident. Even the P3 Form **(EXB2**) shows that for better results **PW1** had to be re-tested after two weeks. It was therefore too early to state with confidence that she was HIV negative. She had pus cells and epithelial cells all the same which confirmed that her vagina had been penetrated.

29 I therefore find the appellant's argument to lack medical support. After due consideration of the evidence and the grounds of appeal raised I find the appeal to be devoid of merit

30 Both the conviction and sentence are lawful and are upheld. The result is that the appeal is dismissed.

Orders accordingly.

Dated, signed and delivered this 3RD day of August 2018 in open court at Kiambu.

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HEDWIG I. ONG'UDI

JUDGE