REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CRIMINAL APPEAL NO. 12 OF 2015

E S.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the conviction and sentence in original Sirisia PMCR 610/2014

delivered on 23.1.2015 by K. MUKABI Resident Magistrate)

JUDGMENT

The appellant E S 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 charge were that on the 13th day of May, 2014 in Musakasa Sub-location, Bumula District within Bungoma county intentionally and un lawfully caused penetration by inserting his male genital organ namely penis into the female genital organ namely vagina of I N M a girl aged 10 years whom he knew to be his niece by birth.

He was found guilty of the charge and was sentenced to life imprisonment.

The evidence before the trail court was that on 13/5/2014 at 1 pm PW1 Y N M was at home at her grandmother's place at [particulars withheld] village, Mukwa Division seated by the door with her younger cousin called "S" when the appellant -her uncle -came and told her together with her cousin to go to eat ugali at his place. The appellant was alone in the house. They were served food and after eating the appellant took pw1 to the bedroom made her lie on the floor over a sack then removed his clothes and removed pw1s pant, brought her skirt up, removed his trousers then slept on top of pw1, removed his penis and inserted it into her vagina. She felt pain but he restrained her from screaming by threatening to cut her with a panga.

The complainant testified that blood oozed from her private parts. the appellant warned her not to tell anyone. S did not know anything about the incident. She took her stained pant home and washed it. She did not tell her grandmother when she came back. After a few days while they were heading to the farm the complainant was feeling pain in the back and she informed her grandmother who checked her private parts after telling her what had happened. She was then taken to Bungoma hospital. E the appellant disappeared. They reported the matter to Malakisi police station on 8/6/2014. E was later arrested when he stole in another village.

Pw2 M W N testified that she was a student at [particulars withheld] primary and by that time she was in class 8. That she lived with her Mother M M Pw1's grandnmother. That on 13/5/2014 she went to school in the morning and came back to the house at 1pm for lunch but did not find pw1 and S her niece and nephew respectively. When she called for them she heard a child crying. She went outside and saw that it was the complainant and she was coming from the appellant's house. She went to E house and heard him telling pw1 that he will beat her if she told anyone what had happened. That she left for school. On 7/6/2014 they went to the farm to plough and pw1 was looking frail. That pw1 told her that her back was aching after being in E house. She reported to her mother who upon interrogating the complainant took her to Bungoma.

Pw3 M M M testified that on 13/5/2014 she had gone to Sirisia law courts to attend on an inquest of T W and she had left pw1 and S at home. That she also left the appellant their uncle at home as well. On coming back at 6pm she found pw1 not in a good condition upon inquiry there was no response. Pw1 was very docile and was not doing anything. That on 7/6/2014 pw1 accompanied her to the farm but she was not her usual self. She asked her what was wrong and she told pw3 that she had been defiled by the appellant. Later M step-mother to pw1 came over who also stated that pw1 was with E. That she examined pw1 in her private parts and saw discharge and her private parts were open. That she took her to Bungoma hospital the same day on 7/6/2014. On 8/6/2014 pw3 took pw1 to Malakisi police station where they were issued with a p3 form. That the appellant disappeared from home upto 11/6/2014. That pw3 reported the matter to the village elders on 11/6/20154 and the village elder fetched the appellant from his hideout and took him to Malakisi police station.

Pw3 went on to testify that the appellant is her step son whereas pw1's mother is her daughter. During cross examination she refuted any allegations by the appellant that the he was reported to the police because of a bad blood relationship between them.

Pw4 Quintone Malaba a clinical officer testified that on 9/6/2014 he examined pw1 who came with a history of being defiled on 13/5/2014. That pw1 had initially been treated on 7/6/2014. That there were no injuries observed save that the hymen was perforated but there was no discharge from the vagina. The examination was 1 month after the incidence. That he took urine sample which had epithelia cells but HIV test turned negative. That he arrived to the conclusion that defilement happened. He assessed pw1 to be 10 years.

Pw5 No. 55661 Cpl. Maurice Kawa from Malakisi police station testified that on 8/6/2-014 he was at work when pw1 was brought by her grandmother pw3 and they reported that on 13/5/2014 pw3 had left to attend to court and left pw1 and another child home. That after court pw3 went home and found the children. That however on 7/6/2014 while in the company of pw1 at the farm pw3 noticed that pw1 was sick as she could not work. On enquiry pw1 informed pw3 that on 13/5/2014 the appellant took her to his house served them food and later took her to his bedroom and had sexual intercourse with her. That the appellant threatened pw1 not to narrate the incidence to anyone. On 11/6/2014 the appellant was brought by the village elder and other members of the public. That he had been roughed up by the public. He knew the appellant prior to that time as he had investigated him on the death of his father.

In his unsworn evidence the appellant testified that he was 29 years at that time and lived in [particulars withheld] and is a farmer. That pw1 is his niece. That on 13/5/2014 he went home in the evening after his usual business. That he passed by his mother's home to access his house. That it was about 6pm.That since he was hungry he went to fetch for a meal and then returned back at 7.45 pm and slept.

That he was brought to court by his step mother pw3. That they have been having squabbles over land. That his mother separated with his father in 1992 and his father had passed on the past year. That in 2009 he married and settled in the land owned by his father. That his step mother took offence with that and even uprooted crops that he had planted there. That he was arrested because of these squabbles .That this case is based puteli on land dispute at home.

It is upon the above evidence that the appellant was found guilty, convicted and sentenced to life imprisonment. Having been dissatisfied with the judgment of the trial court the appellant has appealed to this court on grounds that he pleaded not guilty to the charge, that his rights were violated, that the allegations made were full of contradictions and the magistrate erred in relying on that evidence and that the trial magistrate put in extraneous factors into consideration in the decision making.

In his written submission in court the appellant submitted that he was not medically examined to ascertain whether he was the one who defiled pw1. That medical examination indicated that there was no discharge noted but that the hymen was perforated and to this the appellant submitted that there are many factors that can contribute to that. That the prosecution evidence was full of contradictions. He also put in additional grounds which I will consider in my judgment.

Mrs. Njeru for the state opposed the appeal. Prosecution counsel submitted that the evidence of the complainant showed that the complainant was a daughter of the appellant's sister; and therefore related; that the age of the appellant was proved by both the complainant and age assessment report produced to be 10 years. Counsel submitted that there was proof of penetration and that the fact that DNA was not done is not fatal as the issue was not to determine paternity. Finally counsel submitted that the appellant was seen with the complainant in the house, and therefore complainant positively identified him and his defence was considered by the trial magistrate.

The issue for determination in this case is whether the offence of incest as against the appellant was proved beyond reasonable doubt.

This is a first appeal. As was stated in **Okeno v Republic [1972] EA 32** and **Chemagong v Republic [1984] 1KLR 611**, the duty of a first appellate court is to submit the evidence to a fresh and exhaustive examination before reaching its own decision on the evidence. It is only after weighing the conflicting evidence and drawing its own conclusion that the court can reach a decision on whether the trial court's findings were correct or erroneous. In analyzing the evidence it should be noted that the appellate court, unlike the trial court, did not have the advantage of hearing or seeing the witnesses testify. On top of these, the guiding principle is that a finding of fact made by the trial court shall not be interfered with unless it was based on no evidence or on a misapprehension of the evidence or the trial court acted on wrong principles.

The appellant was charged with the offence of incest contrary to section 20(1) of the Sexual Offences Act. It provides:

> *Incest by male persons*
>
> *(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.*
>
> *(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.*
>
> *(3) Upon conviction in any court of any male person for an offence under this section, or of an attempt to commit such an offence, it within shall be the power of the court to issue orders referred to as "section 114 orders" under the Children's Act1 (Cap. 141) and in addition divest the offender of all authority over such female, remove the offender from such guardianship and in such case to appoint any person or persons to be the guardian or guardians of any such female during her minority or less period.*

For the prosecution to establish an offence of incest they must produce evidence to prove "*relationship, within the meaning of the law and penetration"*

Section 22 of the Sexual Offences Act sets the test of specific relationships which may be considered for an offence of incest. **Section 22 (1) and (2)** provides:-

> *"(1) In cases of the offence of incest, brother and sister includes half brother, half sister and adoptive brother and adoptive sister and a father includes a half father and an uncle of the first degree and a mother includes a half mother and an aunt of the first degree whether through lawful wedlock or not.*
>
> *(2) In this Act—*
>
> *(a) "uncle" means the brother of a person's parent and "aunt" has a corresponding meaning;*
>
> *(b) "nephew" means the child of a person's brother or sister and "niece" has a corresponding meaning;*
>
> *(c) "half-brother" means a brother who shares only one parent with another;*
>
> *(d) "half-sister" means a sister who shares only one parent with another; and*
>
> *(e) "adoptive brother" means a brother who is related to another through adoption and "adoptive sister" has a corresponding meaning."*

The complainant in her evidence testified that the Appellant was her uncle, whereas Pw2 testified that the Appellant was her brother and pw3 testified that the appellant was her step son. In his defence the appellant did not dispute the relationship at all. He infact testified that pw3 was his step mother. Since pw3 is the complainant's' grandmother it made the appellant automatically her uncle. The Appellant's relationship and that of the complainant fell within the specifically limited relationship under **Section 20 (1) and 22 (1) (2) of the Sexual Offences Act.**

With regard to penetration it is the evidence of pw1 that the appellant upon calling her and her younger cousin S to eat later led her to his bedroom removed his clothes and hers and lied on top of her and had sexual intercourse. Pw1 testified that she felt pain but could not scream since she was restrained. Pw2 testified to the effect that when she came back from school for lunch she did not find the complainant at home and she called out she heard cries and when she went to look outside she found pw1 coming out of the appellants house. She as well heard the appellant threatening pw1 not to tell anyone anything. Pw3 testified that when she left for Sirisia law courts to attend to an inquest that day she left pw1, her cousin and the appellant home. Medical evidence showed that the hymen was perforated. All these evidence point to the automatic conclusion that it was the Appellant who defiled the complainant. This coupled with the fact that he fled away immediately after the incidence only pointed to a guilty conscious.

The appellant submitted that the prosecution case was full of contradictions. I have carefully analyzed the evidence and I find no contradiction at all. Pw1's evidence was effectively corroborated all the witnesses. The evidence flowed and there was no inconsistency of any kind if at all.

I am satisfied that the ingredients of incest being relationship and penetration have been sufficiently established. I am equally satisfied that the age of the victim was 10 years as is per the medical evidence adduced in court. And such the appellant was rightly convicted and I dismiss the appeal on conviction.

In sentence the appellant was sentenced to serve life imprisonment. A proper reading of section 20 (1) does not provide for minimum sentence of life imprisonment. Infact it states *"liable"* to life imprisonment. The phrase **"shall be liable to imprisonment for life"**does not, however, connote a mandatory sentence but rather a maximum sentence. In the case of **Daniel Kyalo Muema vs Republic [2009] eKLR,** the Court of Appeal observed as follows:-

> *"The last observation we want to make is that the phrase as used in Penal statutes was judicially construed by the predecessor of this Court in Opoya vs. Uganda [1967] EA 752 where the Court said at page 754 paragraph B:*
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> *"It seems to us beyond argument the words "shall be liable to" do not in their ordinary meaning require the imposition of the stated penalty but merely express the stated penalty which may be imposed at the discretion of the court. In other words they are not mandatory but provide a maximum sentence only and while the liability existed the court might not see fit to impose it".*

It appears the learned trial magistrate was under the impression that the provision provided for minimum sentence. It does not. In this case the offender was a first offender although the offence is serious. I therefore set aside the sentence of life imprisonment and substitute thereof a sentence of ten (10) years imprisonment from the date of sentence on 23th January, 2015.

Signed, Dated, and Delivered at Bungoma this 26th day of September 2018.

S.N RIECHI

JUDGE