REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CRIMINAL APPEAL NO 63 OF 2016

S M M……………APPELLANT

VERSUS

REPUBLIC…….RESPONDENT

***(*An appeal against the original conviction and sentence of Hon N.S. Lutta SPM, delivered on 21st June 2016 in Criminal Case No. 496 of 2015 in the Senior Principal Magistrate's Court at Mariakani)**

JUDGMENT

The Appeal

1. The Appellant was charged with four counts in the trial Court as follows. He was charged with two counts of defilement of a child contrary to Section 8(1) as read together with Section 8(2) of the Sexual Offences Act No. 3 of 2006, and also contrary to Section 8(1) as read together with Section 8(3) of the Sexual Offences Act No. 3 of 2006. He was also charged with two counts of incest by male contrary to section 20 (1) of the Sexual Offences Act. The Appellant was in addition charged with two alternative charges of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act 2006.

2. The particulars of count I were that the Appellant on diverse dates between 25th August, 2015 and 30th August, 2015 at [Particulars Withheld] village in Rabai sub county within Kilifi County of the Coast Region, being a male person, caused his penis to penetrate the vagina of F.S. a child aged 9 years.

3. The particulars of count II were that the Appellant on diverse dates between 25th August, 2015 and 30th August, 2015 at [Particulars Withheld] village in Rabai sub county within Kilifi County of the Coast Region, being a male person, intentionally caused his penis to penetrate the vagina of H.S., a female person who was to his knowledge his daughter.

4. The particulars of count III were that the Appellant on diverse dates between 25th August, 2015 and 30th August, 2015 at [Particulars Withheld] village in Rabai sub county within Kilifi County of the Coast Region being a male person, caused his penis to penetrate the vagina of H.S. a child aged 12 years.

5. The particulars of count IV were that the Appellant on diverse dates between 25th August, 2015 and 30th August, 2015 at [Particulars Withheld] village in Rabai sub county within Kilifi County of the Coast Region, being a male person, intentionally caused his penis to penetrate the vagina of F.S., a female person who was to his knowledge his daughter.

6. The particulars of the alternative charges were that the Appellant on diverse dates between 25th August, 2015 and 30th August, 2015 at [Particulars Withheld] village in Rabai sub county within Kilifi County of the Coast Region intentionally touched the vagina of F.S. a child aged 9 years and the vagina of H.S. a child aged 12 years, with his penis.

7. The Appellant pleaded not guilty to all the counts, and was after full trial, convicted on all the four main counts, and sentenced to life imprisonment for count I; 10 years imprisonment for count II; 20 years imprisonment for count III, and 10 years imprisonment for count IV . All the sentences were to run concurrently.

8. The Appellant is aggrieved by the judgment of the trial magistrate and has preferred this appeal against the conviction and sentence. The Appellant's grounds of appeal as stated in his Petition of Appeal and Amended Grounds of Appeal that he filed in Court are as follows:

> a. That the trial magistrate erred in law and fact by finding for the Appellant's conviction and sentence without considering that the same was unsafe, as the charge of defilement was not proved beyond reasonable doubt as required by law.

b. That the trial magistrate erred in law and fact by finding for the Appellant's conviction and sentence without considering that the Prosecution's case was fabricated by the complainants' mother.

c. That the trial magistrate erred in law and fact in finding for the Appellant's conviction and sentence without considering that the Prosecution's case was not properly investigated.

d. That the trial magistrate erred in law and fact by finding for the Appellant's conviction and sentence without considering that the members of the public who alleged to have participated in the Appellant's arrest never testified to clear the doubt on the arrest.

e. That the learned trial magistrate erred in law and fact by finding for the Appellant's conviction and sentence without considering the Appellant's defence which had created doubt to the Prosecution's case.

9. The appeal proceeded for hearing on 17th July, 2017, and the Appellant submitted that he would wholly rely on written submissions that he had availed to the Court. The Prosecution counsel made oral submissions.

10. The Appellant argued that the Prosecution failed to produce a birth certificate which is the conclusive proof of age of the two minor complainants, who the charge sheet stated were aged 7 and 9 years. That in the circumstances, the prosecution failed to establish the ages of the two complainant's namely PW1 and PW2 which is the cornerstone of an offence such as this. To support his argument, the Appellant relied on **Kaingu Elias Kamongo v. Republic, Malindi Criminal Appeal No. 504 of 2010**.

11. Further, that the trial court relied on unreliable evidence since PW4's evidence was based on false allegation, the Appellant cited **Okethi Okale v. Republic [1965] E.A 555** and **Republic vs Ndungu Kimani [1975] KLR** for the position that a court ought to make a conviction only on the weight of the evidence on record. He took issue with the fact that the medical evidence showed that spermatozoa were not found in the girls' vagina yet it was stated that they girls were being defiled often, contrary to the provisions of section 36 of the Sexual Offences Act.

12. The Appellant contended that the evidence of PW1 and PW2 was marred with contradictions, and could therefore not hold water. Further, that the contradictions were as regards the time the complainants alleged they were defiled and the fact that they never told anyone about it until their aunt found out.

13. Reliance was also placed on section 144 as read with section 150 of the Evidence Act for the submissions that some people who were mentioned by the witnesses, particularly the grandmother the complainants testified they lived with and the mob that manhandled the Appellant were not brought as witnesses. Reliance was placed on the decision in **Bukenya vs Uganda (1972)** for this position that the said failure was an indication that the charge was fabricated.

14. Lastly, the Appellant stated that the he raised a defence of alibi which was adequate to vindicate him, as he had testified that his wife was annoyed with him when she called and another woman picked his phone, but the trial magistrate convicted him contrary to the provision of section 212 of the Criminal Procedure Code.

15. In response thereto, Mrs. Ogweno, the learned prosecution counsel, submitted that that the medical evidence adduced by PW4 confirmed that there was penetration as he found lacerations and swelling on their vaginas. That the said was corroborated by PW5 who stated that in his investigations it was revealed that the complainants were sharing a bed with the complainant when the defilement occurred, and the complainants were his daughters. In addition that the conviction for incest and the sentences that were imposed on the Appellant were also lawful.

16. My duty as the first Appellate court is to re-evaluate the evidence and draw independent conclusions as held in **Okeno v Republic (1972) E.A. 32**. However, I am alive to the fact that I did not have the advantages enjoyed by the trial court of seeing and hearing the witnesses, as was observed in **Soki vs Republic (2004) 2 KLR 21** and **Kimeu vs Republic (2003) 1 KLR 756.**

The Evidence

1. A brief summary of the evidence adduced before the trial court is as follows. The prosecution called four witnesses. F R (PW1) and H M (PW2) were minors and the complainants, and they testified after *voire dire* examinations. PW1 testified that the Appellant was her father and used to sleep on her and insert his thing in her. That she was then taken away from their home by one R for treatment.PW 2 also testified that the Appellant who was her father used to have sex with her, and at one time held her by the neck. Further, that she tried to scream but no one could hear. She further testified that one R took them away from home and she was taken to hospital.

2. R N (PW3) who is an aunt to PW1 and PW2, stated that on 30th June 2015 she received a call from her sister, who was the mother of PW1 and PW2, who requested her to collect the said children who were then staying with their father. That when she went to collect the children, they appeared unwell, and PW3 took them for treatment at Kokotoni. Further, that the children informed her that the Appellant used to defile them. She stated that the two were aged 8 and 10 years old respectively. PW3 testified that she then informed the village elder and reported the matter to the police who arrested the Appellant. She also obtained P3 forms and took the children for treatment.

3. APC Juma Marijani (PW4) stated that the complainants in the company of PW3 went to Kokotoni Police Post on 18th September, 2015, and reported that the two children had been defiled by their father. He then issued them with a P3 form which was filled and confirmed that the children had been defiled, and he then took the suspect to Rabai Police Station. PW4 stated that the suspect was the Appellant.

4. Barrington Edward Charo (PW 5), a Clinical Officer based at Mariakani Sub-County Hospital, testified that he examined PW1 and PW2 on 19th September, 2015. Further, that his examination revealed that PW2 had lacerations and swelling on her vagina, and that her hymen was absent. He concluded that she had been defiled and filled and signed a P3 form. Further, that an age assessment was also done on PW2 which established that she was 12 years of age. PW5 produced the said P3 form and age assessment report as the Prosecution's Exhibits 1 and 3.

5. PW5 further testified that he also examined PW1 and found that she had lacerations on her vagina and her hymen was absent. A vaginal swab was done but no spermatozoa was found. Further, that an age assessment of PW1 was also done. He produced a P3 Form and age assessment report in respect of PW1 as the Prosecution's Exhibits 2 and 4.

6. Inspector Julius (PW6), who is the Deputy Officer in charge of Station at Rabai Police Station, was the Prosecution's last witness. He stated that on 20th September 2015, while at the station with his colleague, one PC. Wangeci, PW1 and PW2 were brought to the station by their aunt, who made a report of the children's defilement by their father. He then issued them with P3 forms which were filled, and which revealed that PW1 and PW2 had been defiled. Upon investigation, he learnt that PW1 and PW2's mother had separated with their father, and that they lived with the father with whom they shared a bed. He then caused a DNA test to be conducted, and produced the DNA report and Exhibit memo in the trial Court as the Prosecution's Exhibits 5 and 6.

7. The trial court found that the Appellant had a case to answer and complied with section 211 of the Criminal Procedure Code in this respect. The Appellant gave unsworn testimony and did not call any witnesses. He testified that that PW1 and PW2's aunt came to collect them, and that their mother thereafter called him, and a woman picked the call which annoyed the said mother. Further, that when the children were not returned as promised, he went to collect them, and that that is when he was framed for defiling the girls. He was then taken to the police station and charged. He further stated that once the complainant's mother asked for financial assistance and he declined, and she then planned to fix him.

The Determination

17. I have considered the arguments made by the Appellant and the Prosecution, as well as the evidence before the trial court. I find that the appeal raises one main issue for determination. This is whether the Appellant was convicted for the offences of defilement and incest on the basis of sufficient and satisfactory evidence.

18. However, upon perusal of the charge sheet, the Court noted that there was a defect of multiplicity of charges, as the Appellant was charged with the offences of defilement and incest based on the same set of facts. Multiplicity in a charge sheet arises from the charging of a single criminal act or offence as multiple separate counts, and raises the risk of violating the double jeopardy principle against receiving multiple sentences for a single offence, that is enshrined in Article 50 (2) (o) of the Constitution.

19. Multiplicity can be corrected by amendment of the charge without necessarily dismissing the case. The error or mistake in the charge is also one that can be cured on appeal under section 382 of the Criminal Procedure Code, where it is shown that no prejudice has been occasioned by the multiplicity of charges. Therefore, in order to determine the effect of the multiplicity, I will need to first address the main issue as to whether the prosecution proved that the Appellant committed the offence of defilement and/or incest beyond reasonable doubt.

20. Defilement is defined in section 8(1) of the Sexual Offences Act as follows:

> **"A person who commits an act which causes penetration with a child is guilty of an offence termed defilement"."**

Section 2 of the Sexual Offences Act provides that penetration entails the partial or complete insertion of the genital organs of a person into the genital organs of another person. The ingredients of defilement were further highlighted in **Charles Wamukoya Karani Vs. Republic, Criminal Appeal No. 72 of 2013** as follows**:**

> **"The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."**

21.The offence of incest on the other hand as provided under section 20(1) of the Sexual Offences Act is as follows:

> **"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:**
>
> **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."**

22. In order to prove incest under section 20(1) of the Sexual Offences Act, it is not necessary to prove penetration, and an indecent act will suffice. The prosecution may thus prove either penetration or an indecent act to obtain a conviction. An indecent act is defined in section 2 of the said Act as an unlawful intentional act which causes—

> **(a) any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration;**

(b) exposure or display of any pornographic material to any person against his or her will;

23. The relevant evidence adduced in the trial Court as to defilement and incest was that of the complainants, PW1 and PW2, who testified that the Appellant, was their father. PW1 testified that the Appellant used to insert his thing in her, while PW2 testified that he used to have sex with her. The testimony by PW2 was consistent upon cross-examination, and there is no reason for this Court to doubt her credibility.

24 The DNA report produced by PW6 as the Prosecutions Exhibit 5 also concluded that there were 99.99% chances that the Appellant was the biological father of PW1 and PW2. Lastly, the Appellant did not deny that he was the complainants' father, and also admitted to having stayed with the complainants before they were taken away by their aunt, and he brought no evidence to show that he was not with the complainant's when the alleged offences occurred.

25. The evidence adduced in the trial Court therefore pointed to the appropriate offence being that of incest, and not defilement, as the consanguine relationship between the Appellant and complainant was proved, in addition to the element of penetration with PW1 and an indecent act with PW2. Therefore, even though the charge sheet is found to be defective on account of multiplicity of charges, the same is curable under the provisions of section 382 of the Criminal Procedure Code by allowing the correct charge which is that of incest to stand, and dismissing the additional charges.

26. Lastly, on the sentence, the minimum sentence for the offence of incest is 10 years imprisonment, while the maximum sentence is life imprisonment where the victim is aged below eighteen years. The age assessments produced by PW5 as the Prosecution's Exhibits 3 and 4 showed that PW1 aged 8 years, and PW2 12 years. The maximum sentence of life imprisonment therefore applied in the circumstances. The sentences of 10 years imprisonment for the convictions of incest in count 11 and count IV were therefore lawful.

27. I accordingly uphold the conviction of the Appellant by the trial Court for count II of the offence of incest contrary to Section 20(1) of the Sexual Offences Act, and Count IV of the offence of incest contrary to Section 20(1) of the Sexual Offences Act. I also affirm the sentences imposed upon him of 10 years imprisonment for the conviction for Count I, and of 10 years imprisonment for the conviction for Count IV. The two sentences shall run concurrently from the date of conviction by the trial Court.

28. I however quash the conviction of the Appellant for count I of the offence of defilement contrary to section 8 (1) as read together with section 8 (2) of the Sexual Offences Act, and the conviction for count III of the offence of defilement contrary to section 8 (1) as read together with section 8 (3) of the Sexual Offences Act. I consequently also set aside the sentence of life imprisonment imposed upon the Appellant for the conviction for count I, and the sentence of 15 years imprisonment imposed upon him for the conviction for count III.

29. It is so ordered.

DATED AND SIGNED THIS 26TH DAY OF SEPTEMBER 2018

P. NYAMWEYA

JUDGE

DELIVERED AT MOMBASA THIS THIS 19TH DAY OF OCTOBER 2018

D. O. CHEPKWONY

JUDGE