REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 42 OF 2015

S K …….....…….…. APPELLANT

VERSUS

REPUBLIC …….....……..…….. RESPONDENT

(From Original Conviction and Sentence in

Criminal Case No. 25 of 2013 of the

Chief Magistrate's Court at Malindi – J.N. Wandia, RM)

JUDGEMENT

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 of the offence are that the appellant on 19.10.2012 at [particulars withheld] in Magarini District within Kilifi County being a male person, intentionally and unlawfully caused his penis to penetrate the vagina of S.S., a female juvenile who was to his knowledge his biological daughter aged nine years old.

The appellant also faced an alternative count of committing an indecent act with a child contrary to section 11 (1) of the Sexual Offences Act. The trial court convicted the appellant on the main count of incest and sentenced him to life imprisonment. The grounds of appeal as amended are: -

1. The trial court erred in law and fact by admitting the evidence of an intermediary without considering that the same was bad in law.

2. The charge of incest was made up and the medical evidence is doubtful.

3. The prosecution failed to call vital witnesses thereby leading to a miscarriage of justice.

4. The trial court failed to note that the word **"liable"** is not mandatory and therefore the life imprisonment sentence is not safe.

5. The prosecution did not prove its case beyond reasonable doubt.

6. The trial court did not consider the appellant's reliable defence.

The appellant submit that the complainant testified through an intermediary. The record of the trial court

does not show which language was used to get the evidence. The name of the intermediary is not given. It is not possible to know who the intermediary was and that prejudiced the appellant. The appellant relies on the case of **NJERU KATHIARI AND ANOTHER V REPUBLIC (2007) eKLR**. In that case the court observed as follows: -

> **The failure by the trial court to keep record of at least the name of an interpreter and the nature of an interpretation was a serious defect in the trial and must render the conviction the appellant unsafe and unsustainable.**

It is further submitted that PW2 who was himself a child was purportedly asked by her grandmother to talk to the complainant. The grandmother was better placed to talk to the child. The grandmother was not called to testify and support the allegation. She was a crucial witness. Further, two other witnesses namely P and T who were playing with the complainant were not called to testify. These were crucial witnesses for the prosecution. The court cannot act on mere allegation unless there is evidence to prove the same. PW2 was not at the scene. The prosecution had a duty to prove the case beyond reasonable doubt. Section 144 of the Criminal Procedure Code on witnesses is quite clear. The absence of the crucial witnesses indicate that the case was not proved to the required standard.

The appellant further submit that the medical evidence does not incriminate the appellant. The complainant was taken to hospital after thirteen days. The doctor relied on treatment notes and the maker of those notes was not called to testify. Although it was alleged that the complainant's hymen was broken, the type of weapon used to break the hymen is not indicated. The case was based on mere speculation. If the complainant was penetrated, then it was not by the appellant. Further, the appellant maintains that it is not mandatory for one to be sentenced to life imprisonment. The appellant's defence was reasonable and raised doubt on the prosecution evidence but was not considered.

The State opposed the appeal. It is submitted that the appellant is the father of the child and was positively identified. Medical evidence proved that the child was defiled. The appellant's evidence was considered. Section 15 of the Children's Act states that a child shall be protected from sexual exploitation and use in prostitution, inducement or coercion to engage in any sexual activity and exposure to obscene materials

This being a first appeal, the court is supposed to evaluate the evidence afresh and make its own finding. PW1 was the complainant. She started giving unsworn evidence but in the process, became afraid and the trial court allowed her to testify through an intermediary. She informed the court that she used to live at [particulars withheld] but was now living at a children's home in Malindi. She was a class one pupil. The appellant is her father. On 19.10.2012 the appellant gave her Kshs.20/= to go and buy cigarette. She brought the cigarette and the appellant took her to a room. The appellant then defiled her on top of a brown and blue box. The incident did not take long. The box was used as a make shift bed. The appellant came out the room first. He told her not to scream and held her mouth with is hand. She felt pain. She later told P's mother. Before she was called by the appellant she was playing with P and T. She was later taken to hospital and then to the police station. It was her evidence that the appellant was in a posho mill grinding maize when he called her. He then switched off the posho mill.

PW2 G N K is a sister to the appellant. She was 17 years old and a class eight pupil. On 19.10.2012 at about 5.00 pm she came from school and her grandmother told her to ask the complainant what was wrong with her. Her grandmother told her that she had heard rumours that the complainant had been defiled by her father. She talked to the complainant who narrated what happened to her. The complainant told her that she was taken to a room that was meant for renting and then defiled. There was no bed in the room. The complainant's mother had separated with the appellant. She also informed her sister C. A family meeting was held but she did not attend. She was later called to record her statement at **Adu** police station.

PW3 P.C. DICKSON NYARAMBEE MOMANYI was attached to Adu police station. On 26.10.2012 he was at [particulars withheld] when he heard rumors that a child had been defiled by her father and the family had decided to not to take her to the hospital. He went to the homestead and met the child's

grandfather K T. He asked him about the incident and he confirmed that there was such incident. The child was called and he talked to her. He asked the grandfather to take the child to hospital and then take her to police station. The child was taken to Adu police dispensary and later to the police station by her uncle called D K. PW3 investigated the case and visited the scene. He recovered the box that was used as make shit bed. The carton was in room No. 2 on the plot. The complainant told her that they used the carton as a bed. He was saw the posho mill at the compound. He recorded witness statement and caused the appellant to be charged with the offence. The appellant disappeared from home from October until January when he was arrested at [particulars withheld].

PW4 IBRAHIM ABDULAHI is a clinical officer who was based at the Malindi sub-county hospital. On 2.11.2012 he filled the P3 form for the complainant. He saw the initial treatment notes from Adu dispensary. Vaginal examination found that her hymen was broken. Her age was assessed to be 9 years old. He concluded that there was vaginal penetration on the child.

In his unsworn evidence, the appellant testified that on 4.9.2012 he was working at [particulars withheld] at around 12.00 pm. Police officers arrested him and he was taken to Adu police station. He was then taken to Marereni police station. He was then charged in court. He denied committing the offence.

The accused maintains that the evidence of the intermediary is bad in law. The record of the trial court shows that the complainant started testifying and became hesitant. The record indicate that the complainant looked afraid. The prosecution requested to have an intermediary appointed so as to enable the complainant testify. The trial magistrate allowed that request. The appellant also was in agreement. The record shows that the intermediary was the complainant's guardian but his or her name is not indicated. The intermediary relayed the answers from the complainant to the court. The record of the trial court is clear and flows. The appellant was given an opportunity to cross examine the complainant. The complainant's answers are clear and were relayed to the court through the intermediary.

Section 2 of the children's Act no 8 of 2001 defines a guardian as:-

> **"In relation to a child includes any person who in the opinion of the court has charge or control of the child."**

Section 2 of the sexual offences Act defines **"intermediary"** as:-

> **"intermediary" means a person authorized by a court, on account of his or her expertise or experience, to give evidence on behalf of a vulnerable witness and may include a parent, relative, psychologist, counselor, guardian, children's officer or social worker"**

Section 31 of the sexual offences Act deals with vulnerable witness. Such witness can be vulnerable due to age, race, language or trauma. Wherever the court feels that a witness is vulnerable, it can allow the witness to testify through an intermediary (S. 31 (4) (b)): Section 31 (7) of the sexual offences act states as follows: -

> **"If a court directs that a vulnerable witness be allowed to give evidence through an intermediary, such intermediary may-**
>
> **a) Convey the general purport of any question to the relevant witness;**
>
> **b) Inform the court at any time that the witness is fatigued or stressed; and**
>
> **c) Request the court for a recess.**

Section 31 (10) of the sexual offences Act provides that a court shall **not convict an accused person charged with an offence under that Act solely on the uncorroborated evidence of an intermediary.** Section 31 (5) provides for appointment of an intermediary.

The record shows that an intermediary was appointed. The name was not given. The appellant contends that the evidence of the intermediary is not lawful. I have read the record of the trial court. It is true that the name of the intermediary was not given. The intermediary simply relayed the questions asked by the prosecutor and the appellant to the complainant and then relayed the answers from the complainant to the court. Even if the name of the intermediary is not stated, I do find that there was no miscarriage of justice. The trial court was in a difficult situation as the complainant was hesitant to testify against her father. It was the complainant who was giving the answers and not the intermediary. The law has put enough protective measures in relation to evidence adduced through the aide of an intermediary. The failure to indicate the name of the intermediary is not fatal. The appellant saw the intermediary in court. The intermediary did not testify on his own but simply conveyed the complainant's evidence.

The next grounds of appeal are that the charge was made up, the medical evidence is doubtful and vital witnesses were not called. In essence therefore the case was not proved beyond reasonable doubt. The evidence of PW1 is that the appellant is her father. The incident took place at around 3:00pm as per pw1. She was taken inside a room which had no bed. There was a box that was used as a bed. Pw1 testified in detail how the incident occurred. She was told not to scream or look at the appellant. Her mouth was held by the appellant's hand. The appellant took his male organ and inserted into her vagina. She felt pain.

The evidence shows that pw1 was playing with two other children, P and T. These are pw1's cousins. It is true that they were not called to testify. The two children did not witness the incident. They could have just confirmed that they played with pw1 on the material day at 3:00pm. The fact that they did not testify cannot be held that their evidence would have negatively impacted on the prosecution case. The same applies to the grandmother who talked to PW2. Although she did not testify, her absence as a prosecution witness is not fatal. The grandmother seems to be the appellant's mother. She could have opted not to testify in a case involving family members. Indeed, the investigating officer found that the family had decided not to take the matter to court.

It is submitted that the medical officer relied on the treatment notes. The maker of the treatment notes did not testify. PW4 testified that he examined pw1 and then filled the P3 form. Lab tests were done. PW1's hymen was broken. The appellant contends that the type of weapon that was used to break the hymen is not given. The medical practitioners cannot speculate on the object used to break the hymen. That evidence has to be considered in line with the other evidence.

There is the evidence of PW2. She was 16 years old. She talked to the complainant, PW1 told her that she was defiled by her father. **"Babangu alinifanya kitendo kibaya."** PW2 knew that pw1's mother had separated with the appellant.

The defence evidence dwelt with the way the appellant was arrested on 4th November 2012. It does not raise doubt on the prosecution case. The incident took place during the day and pw1 knew the appellant. PW1's age was assessed by Dr. Ang'a on 29/10/2012. She was about nine years old. The requirement under section 31(10) that the evidence of an intermediary must be corroborated was fulfilled. There is the evidence of the investigating officer. He took the initiative of visiting the scenes. He saw the carton box used as a bed in room number 2. The box was laid flat in the room.

The record shows that the charge sheet was amended to read incest instead of defilement. The appellant had indicated that he wanted pw1 to be recalled. The trial court indicated that the appellant was going to be given an opportunity to further cross examine pw1. That did not happen. On 19/1/2015 the appellant informed the trial court that he was not going to start the matter afresh and he did not need to re- cross examine the complainant. There was therefore no miscarriage of justice.

Given the evidence on record, I do find that the prosecution proved its case beyond reasonable doubt. It is the appellant who defiled the complainant. It is further established that pw1 is the appellant's daughter. The offence of incest was proved beyond reasonable doubt.

The last issue relates to the sentence. The appellant submit that life sentence is not mandatory. Section 20(1) of the sexual offence Act states 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 as 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."

The sexual offences Act provides in some situations the minimum sentences to be imposed by the court. Section 8 (2) of the sexual offences Act provides that a person who defiles a child who is under eleven years old **shall upon conviction be sentenced to imprisonment for life**. It is clear therefore under that section that the sentence to be imposed is life imprisonment. Section 8 (3) provides that if the victim of defilement is between the age of twelve and fifteen years, the convict shall be **"liable"** to imprisonment of **NOT LESS** than twenty years. The same wording is used under section 8(4) which provides for liability of not less than fifteen years imprisonment where the victim of defilement is between sixteen and eighteen years old.

The punishment for rape within the view of a family member under section 7 of the sexual offences Act is **not less than ten years**. Similarly, attempted defilement under section 9 carries a sentence **of not less than ten years' imprisonment**.

Section 204 of the penal code provides that anyone convicted of murder **"shall be sentenced to death"**. The effect of that provision is that the death penalty is prescribed as the minimum sentence. However, at times trial courts have imposed a lesser sentence than the death penalty. Section 205 of the penal code states as follows: -

Any person who commits the felony of manslaughter is <u>liable</u> to imprisonment for life. The interpretation given to the above section is that life imprisonment is the maximum sentence for the offence of manslaughter. The same interpretation can be imported to section 20 of the sexual offences Act where the proviso to the section states as follows: -

"Provided that, if it is alleged in the information or charge and proved that the female person is under the age of eighteen years, <u>the accused person shall be liable to imprisonment for life</u> and shall be immaterial that the act which causes penetration or indecent act was obtained with consent of the female person."

The effect of the above section is that the convict of the offence of incest involving a child under the age of eighteen years old shall be liable to life imprisonment for life. Section 205 of the penal code uses the word **"is liable"** while section 20 of the sexual offences Act uses the word **"shall be liable."** The question to be asked is this, why didn't the law provide that anyone convicted of incest with a child under the age of eighteen years shall be sentenced to life imprisonment or shall be sentenced to a term not less than life imprisonment. Why was the word "liable used." My view is that the word liable waters down the effect of the word shall under section 20 of the sexual offences Act.

The Black's law dictionary defines the word **"liable"** as: -

1. Responsible or answerable in law, legally obligated

2. (of a person) subject to or likely to incur (a fine, penalty, etc.)

If one is liable for the offence of manslaughter, he can be sentenced to a term less than life imprisonment. Whenever the word liable is used, then the discretion of the court is opened up. The trial court can use the sentence the convict is liable to suffer under that specific section of the law as the maximum sentence. It is not mandatory that the sentence under section 20 of the sexual offences Act for

incest involving a child under the age of 18 years old is only life imprisonment.

However, when sentencing a convict under that section, trial courts should have regard to the sentences provided under the sexual offences Act in general and section 8 of the Act in particular. Defilement of a child under the age of 11 years old attracts life imprisonment. It cannot then be held that it is better for one to commit incest than defile a non-relative so that one can be **"liable to life imprisonment"** instead of being directly sentenced to life imprisonment under section 8(2). If the incest involves a child less than 11 years, then life imprisonment would be the ideal sentence even if the wording of section 20 of the sexual offences Act gives discretion to the court by using the word **"liable"**. If the victim of incest is between the age of sixteen and eighteen years, a sentence of not less than fifteen years' imprisonment would be ideal instead of life imprisonment.

The recent case involved a child aged nine (9) years old. The appellant cannot benefit from the wording of section 20 of the Sexual Offences Act and get a prison term of a number of years. The appellant betrayed his fatherhood and should suffer in the same manner a convict of defilement would suffer under section 8(2) of the sexual offence Act. I do find that the life imprisonment sentence is the most ideal in the circumstances of this case.

In the end, the appeal on both conviction and sentence fails. The appeal lacks merit and is hereby disallowed.

Dated, signed and delivered in Malindi this 22nd day of March, 2017.

S.J. CHITEMBWE

JUDGE