REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL 333 OF 2013

N J M……...……..APPELLANT

VERSUS

REPUBLIC……..……RESPONDENT

(An appeal arising out of the judgment and sentence of L. Simiyu Ag.SRM in Criminal Case No. 155 of 2013 delivered on 15th May 2013 at the Chief Magistrate's Court at Machakos

JUDGMENT

N J M, (hereinafter "the Appellant"), was convicted of the offence of incest by male contrary to Section 20(1) of the Sexual Offences Act, and sentenced to life imprisonment. The particulars of the offence were that on 8th February 2013 at [particulars withheld] Location in Machakos District within Eastern Province, he intentionally and unlawfully caused his penis to penetrate the vagina of M N a child aged 8 years who to his knowledge is his daughter.

The Appellant was aggrieved by the judgment of the trial magistrate, and preferred this appeal in Petition of Appeal filed in Court on 18th November 2013 and amended and supplementary grounds dated 27th November 2015. The grounds of appeal are as follows:

1. THAT the burden of proof was not discharged.

2. THAT his conviction was manifestly unsafe and a nullity as the trial proceeded on defective charge sheet in that there was variance of evidence between the particulars of the charge sheet and PW 1's testimony in relation to the commission of the alleged offence on 8/2/13.

3. THAT the provisions of section 214 of the CPC ought to have been complied with soon after the testimony of PW 2 and PW 1 in view of their revelation that there was no act of penetration to M N on 8/2/13 as charged.

4. THAT the learned trial magistrate made an error in both law and facts by appreciating that this was a case of circumstantial evidence hence failed to apply the principle of law applicable in cases of this nature.

5. THAT the learned trial magistrate made an error in both law and facts and misdirected himself by failing to make inquiry at the close of the prosecution case as to why the appellant opted to cross-examine prosecution witnesses or to give an explanation about the predicaments in his sworn defence statement.

The Appellant also availed written submissions on the appeal dated 27th November 2016, wherein it was urged that the prosecution failed to discharge the burden of proof in that although the victim child claimed to have been defiled on several occasions, it is on record that she could not recall the events of 8/2/2013. Further, that according to medical evidence, it is on record that the rape did not happen on that day because it did not show a freshly torn hymen. Therefore, that the evidence brought forward by the prosecution in support of their case was at variance with the particulars of the charge sheet and ought to have been amended in compliance with Section 214 of the Criminal Procedure Code.

It was also contended by the Appellant that this was a case of circumstantial evidence as there was no eye witness to the commission of the offence charged, and that the trial magistrate failed to bear in mind that there should be no co-existing circumstances that can weaken the prosecution's case. Further that in the instant case the doctors evidence to the effect that the report did not show freshly torn hymen was a co-existing circumstance, and a doubt created by the evidence brought forward by the prosecution. Reliance was in this regard placed on the cases of **Woolmington vs The DPP, (1935) AC 462, Muchene vs Rep, (2002) 2 KLR 367** and **Dhalay vs Rep, (1995-1998) I EA. 29**

Ms. Mogi Lillian the learned Prosecution counsel, filed submission dated 21st November 2016 in opposition to the appeal. It was submitted therein that the issues for determination in respect of this Appeal are whether the prosecution had proved that there was defilement, whether the offence of defilement against the complainant was committed by the Appellant, and the relationship between the Appellant and the complainant.

On the first issue of defilement, it was urged that the testimony of PW3 was that though she could not recall the date of 8/2/2013 which is not extra ordinary in view of the minor's age, the Appellant ordered her not to go to school and later summoned her to the house, locked the door, removed the organ he urinates through, threw her down and inserted his penis into her vagina. It was PW3's further testimony that the Appellant had defiled her on other many occasions and that during the defilements he had threatened PW1 with death if she reported.

Further, that the said evidence of PW3 was corroborated by the evidence of the P3 form which showed that the genital examination on PW3 revealed a perforated hymen, which supported the evidence that the Appellant had defiled the minor on the very same morning. According to the prosecution, the medical evidence that the hymen was not freshly torn further confirms the evidence of the minor that the offence was repeated.

It was submitted on the second issue, that PW3 testified that it is the Appellant, who was her father who had defiled her, and the offence took place during day time hence she was able to see and identify him during the commission of the offence. On the issue of the relationship between the Appellant and the complainant, it was submitted that there was sufficient evidence from PW2, PW3, PW4 and PW5 that the Appellant is the biological father of the complainant, a fact that was not denied by the Appellant hence making the charge of incest the appropriate charge.

Lastly, the prosecution submitted that although the issue of age of the complainant is not a factor in the offences of incest, the age of the minor is a key guideline for a trial court to consider in passing its sentence. In this case, the prosecution exhibit 3 clearly indicated the age of the complainant as 8 years, hence making a life sentence in the circumstance the correct sentence as issued by the trial court.

As this is a first appeal, I am required to conduct a fresh evaluation of all the evidence and come to an independent conclusion as to whether or not to uphold the conviction and sentence. This task must have regard to the fact that I never saw or heard the witnesses testify (see **Okeno v Republic [1973] EA 32**).

A brief summary of the evidence adduced before the trial court is as follows. The prosecution called five witnesses during the trial, PW1 was Dr. Fredrick Okinyi of Machakos Level 5 Hospital who produced a P3 form filled by Dr Mutunga with whom he had worked with one year, and which showed that the complainant had a perforated hymen, although not freshly torn.

J K K (PW2), P M N (PW4), T N M (PW5), and PC O G (PW6) who were a neighbor to the Appellant; a village elder; the Chief of Lukenya; and the Investigating Officer respectively, all testified as to the report they received about the defilement of the complainant, and their actions in monitoring the complainant, the arrest of the Appellant and recording of statements in this regard. PW6 also produced an age assessment report of the complainant as an exhibit.

The complainant, M N, who was PW3, testified after a *voire dire* examination as to the events of February 2013 when she was at home alone with the Appellant who was her father, and how he called her to his house, put her on his bed, removed her and his clothes, and inserted his penis into her vagina.

The trial court found that the prosecution had established a *prima facie* and put the Appellant on his defence. The Appellant gave sworn testimony and did not call any witnesses. He chose not to give any comment or explanation as to the offence.

I have considered the grounds of appeal, submissions and evidence given in the trial court, and find that the grounds of appeal raises two issues. These are firstly, whether the charge pursuant to which the Appellant was convicted was defective; and secondly, whether the Appellant's conviction for the offence of incest was based on sufficient and satisfactory evidence.

On the first issue, the Appellant claimed that the charge sheet was defective as the particulars indicated that the defilement occurred on 8th February 2013, yet the complainant testified that she could not recall what happened on that date. Therefore, that the charge sheet ought to have been amended under section 214 of the Criminal Procedure Code. The first question as to whether a charge is defective is to be examined in light of the requirements of the law as regards the framing of charges as stated in section 134 of the Criminal Procedure Code which provides as follows:

> **"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."**

In addition it was held in **Sigilani vs Republic, (2004) 2 KLR, 480** that:

> ***"The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence."***

However the evidence of PW2, PW4 and PW5 established that the Appellant was indeed found with the complainant on 8th February 2013, and the complainant corroborated this fact when she testified that the said witnesses did come to their house on the day the Appellant defiled her. In addition this particular argument by the Appellant is adequately addressed by section 214(2) of the Criminal Procedure Code which provides as follows:

> **"(2) Variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for the variance if it is proved that the proceedings were in fact instituted within the time (if any) limited by law for the institution thereof."**

The said omission by PW3 in her testimony as to the date of the offence is therefore not material, and it is not necessary to amend the charge on account of a contestation by the Appellant as to the dates when the offence was committed.

On the second issue, section 20(1) of the Sexual Offences provides for the offence of incest by male as follows:

(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:

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.

PW2, PW3 and PW4 all testified that the Appellant is the biological father of the complainant (PW3), which fact was admitted by the Appellant in his testimony. The age of PW1 was also proved by PW6 who produced an age assessment report by the Medical Superintendent of Machakos General Hospital as the Prosecution's exhibit 3, which showed that PW3 was 8 years of age as at 12th February 2013.

PW 3 gave testimony as to penetration by the Appellant. PW1 in this regard testified as follows in the trial Court on 23rd April 2013:

"I cannot recall the 8/2/13 but I recall I went to police station. I had woken up at home. It was a school day but my father ordered me not to go to school. My mother had gone to [particulars withheld] earlier to wash clothes. My father summoned me to the house and locked me in. We have only one house. We were only two at home, myself and my father. When he locked the door he removed his organ the one he urinates through and threw me down and lay on me. I had no underpants. I only wore the school uniform. He had locked the door. He inserted his penis into my vagina. Lay on the floor of the house. He made me lie on clothes. I did not cry out. My father had promised to buy me bread and an avocado if I persevered the pain. We stayed in the house up to about 10.00 a.m. My father gave me porridge to take. Mbiti came to our house. Mbiti came and arrested my father. With Mbiti we were inside the house. We came to Machakos. We proceeded to the police station. I was later taken to hospital. I was taken to hospital by a strange woman. Mbiti and N J M remained at the police station. I was examined and treated at hospital. I cannot recall how many times I visited the hospital. My father had defiled me on other many occasions. More than two other times. I reported to J who is our neighbour and Sunday school teacher. J is in court (PW2 pointed out)."

In addition, there was corroborative medical evidence provided by PW 1, who stated that the medical records being the P3 form indicated that the complainant's hymen was perforated. The fact that PW1 testified that the hymen was not freshly torn did not preclude defilement on the material day being 8th February 2013 as argued by the Appellant, and was only evidence that the complainant had also been previously defiled.

Lastly, on the appeal against 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 complainant herein was aged 8 years, and the maximum sentence of life imprisonment therefore applies in the circumstances. The sentence of life imprisonment was therefore lawful.

I have perused the trial record and note that the Appellant was a first offender, however given the tender years of the complainant and the fact that the Appellant occupied a position of trust in relation to the child which he abused, he deserves a deterrent sentence. I am in this regard also mindful that the sentence of defilement of a child below the age of eleven years is life imprisonment under section 8(2) of the Sexual Offences Act.,

I accordingly uphold the conviction of the Appellant by the trial Court for the offence of incest contrary to Section 20(1) of the Sexual Offences Act. I also confirm the sentence imposed upon him of life imprisonment for this conviction, and the additional orders given by the trial Court as regards the protection and custody of the complainant and her siblings.

Orders accordingly.

DATED AND SIGNED AT MACHAKOS THIS 28TH DAY OF APRIL 2017.

P. NYAMWEYA

JUDGE