REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 83 OF 2014

J M K…….…….....APPELLANT

VERSUS

REPUBLIC……..RESPONDENT

(Appeal from original conviction and sentence in the Nyeri Chief Magistrates Court Criminal Case No. 4 of 2012 (Hon. W.Juma, Chief Magistrate) on 4th June, 2014)

JUDGMENT

The appellant was charged and convicted of the offence of incest by male contrary to section 20 of the Sexual Offences Act No. 3 of 2006 the particulars being that on the diverse dates between the month of May and October, 2011 in Nyeri district within central province, the appellant intentionally and unlawfully did an act by causing his penis to penetrate the vagina of RWM a girl aged 14 having knowledge that she was his daughter.

He also faced an alternative count of an indecent act with a child contrary to section 11 (1) of the Sexual Offences Act No. 3 of 2006. He was, however, convicted of the main count and sentenced to life imprisonment. Being dissatisfied with the conviction and the sentence the appellant appealed to this court; if I can summarise the grounds upon which he appealed, they are as follows:

1. The learned magistrate erred in law and in fact by convicting the appellant when the age of the complainant was not proved;

2. The learned magistrate erred in law and in fact in convicting the appellant based on the prosecution evidence fraught with doubts and inconsistencies;

3. The learned magistrate erred in law and in fact in convicting the appellant when the prosecution failed to call crucial witnesses;

4. The learned magistrate erred in law and in fact in convicting the appellant when penetration, which is a necessary ingredient in the offence of incest, was not proved; and,

5. The learned magistrate erred in law and in fact in disregarding the appellant's defence.

In support of these grounds, the appellant filed relatively lengthy handwritten submissions which he entirely relied upon when this appeal came up for hearing. The state, on the other hand, opposed the appeal and contented that the offence against the appellant was proved beyond reasonable doubt. In this regard, counsel reiterated the evidence of the complainant which according to her, was corroborated by the evidence of the doctor that the complainant had been defiled. She, however, acknowledged that the

age of the complainant had not proved but she urged this court to call for such evidence apparently in exercise of its powers under **section 358** of the **Criminal Procedure Code**.

The background of the prosecution case was that the appellant had separated from his wife who left him with four children the eldest of whom was the complainant. Soon after the wife left, the appellant turned on his daughter and persistently assaulted her sexually until such a time that she took refuge at a children's home where she was guaranteed care and protection. An officer from the home, **Hope Mureithi (PW2)** attested to the fact that indeed the home took in the complainant upon receiving information from Nyeri Provincial Hospital that the complainant had been defiled.

The complainant's complaint came to light when her teacher, **Winnie Mbogori Nganga (PW4)** established that she was in possession of drugs which she intended to take and commit suicide. Her teacher did not establish why the complainant wanted to commit suicide but all the same she took her to hospital the following day. Her evidence was not clear as to whether the complainant was treated of any ailment.

Police constable **Bokaya Barako (PW5),** the investigations officer on the other hand testified that he received the complaint against the appellant from the children officer. In the course of his investigations, he established that indeed the complainant was the appellant's daughter and that they lived together with the other children in his house in Nyeri. Apart from establishing that the appellant lived with his children including the complainant in the same house, the investigations did not reveal anything else. The rest of his testimony was made up of what other witnesses told him.

The appellant, on the other hand, denied having committed the offences with which he was charged; he gave a sworn testimony and admitted that indeed the complainant was his daughter. It was his case that the charges against him were fabricated.

Section 20(1) of the **Sexual Offences Act** under which the appellant was charged and subsequently convicted states as follows:

> ***20. (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.***

The evidence that the complainant was the appellant's daughter was not in dispute and therefore the element of consanguinity between the appellant and the complainant, which is necessary under this provision to prove this offence, was established beyond reasonable doubt. As far as I can gather from the evidence all that was in contention was first, whether the appellant committed an act that causes penetration to his daughter and second, whether his daughter was under 18 years old at the time she is alleged to have been sexually assaulted.

The only direct evidence on the first question was from the complainant herself. According to her, the latter started defiling her on the night following the day her mother left him. She was quite explicit on how the appellant assaulted her for the very first time. He demanded that she undresses and lie on his bed; he in turn removed his own shorts and proceeded to insert his penis into her vagina and for the next two hours, he persistently defiled her. After this assault, he warned her not to tell anybody or else he would kill her.

The sexual assaults turned out to be appellant's daily habit and this trend continued until such time that the complainant decided to take her own life perhaps because of the trauma she had been subjected to; she

bought assorted drugs to execute this mission. Fortunately, one of her schoolmates picked the drugs and took them to their teacher when she accidentally dropped them at school. When this teacher, whom she named as Mrs. Andrew Winnie, asked her about the drugs she told her that she was no longer interested in staying at home because the appellant was doing "the bad thing" to her. Her teacher took her to hospital for treatment and later to the Nyeri police station where she was issued with a P3 form.

There was no evidence of the complainant having been treated of a sexual assault or any sort of injury but **Dr Naomi Sitati (PW3)** who presented her P3 form in court testified that the complainant was examined two weeks after the assault. According to that form, the complaint to the police was made on 7th November, 2011 but the P3 form was filled much later, on 15th February, 2012 by Dr Ann Kabuthi on whose behalf **Dr Sitati (PW3)** produced it.

According to the testimony of **Dr Sitati (PW3)**, the complainant was found to be in a general fair condition at the time she was examined. As far as her genitals were concerned, this is what she said:

> ***"On genitalia everything was normal, there was no discharge, blood or any sign of infection from the genitalia on examination. On specimens high vaginal swab no organisms or spermatozoas(sic) were seen."***

On the face it therefore, there is no suggestion from the testimony of the Dr Sitati that the complainant was sexually assaulted as alleged; however, the doctor's findings in the P3 form show that the complainant's hymen was broken.

I found this inconsistency between the information in the P3 form and the doctor's testimony to be too obvious to ignore; in my humble view it goes to the root of the charge against the appellant because it is an offence that presupposes "penetration" of the genital organs of the complainant. If the evidence as to whether there was penetration is contradictory, to the extent that the court is left to speculate which of the versions available it should follow, then there is no basis to conclude that this offence has been proved beyond reasonable doubt.

Again, the date of examination which appears on the P3 form as 15th February, 2015 appears to contradict the prosecution case that the latest period the offence must have been committed was the end of October, 2011. If the doctor's evidence that the complainant was examined two weeks after the sexual assault, it is logical to conclude that, in the absence of any other evidence on whether the complainant was examined at any other time apart from the date shown in the P3 form, the offence must have been committed between May, 2011 and early February, 2012. But this cannot be the case because the appellant was no longer in the custody of the appellant from November, 2011.

I am minded that the doctor who testified is not the same doctor who examined the complainant and completed her P3 form. But even then, there is a more serious question of whether this doctor should have testified in the first place. I note at the outset that no basis whatsoever was ever laid for Dr Naomi Sitati to testify instead of Dr Ann Kabuthi who examined and filled the complainant's P3 form. As a matter of fact, the prosecution did not make any application for Dr Sitati to testify on behalf of Dr Kambuthi. The court received Dr Sitati's testimony in apparent disregard of **section 63(1)** of the Evidence Act, cap 80 which requires that oral evidence must be direct evidence; direct evidence is explained in **section 63 (2)** to mean that, with regard to opinion, which I suppose was what the doctor's testimony was all about, the opinion or the grounds upon which that opinion is held must be given by the person who holds that opinion or who holds the opinion on those grounds.

Where for one reason or another Dr Kabuthi could not testify as to her findings and opinion, the testimony of Dr Sitati ought have been preceded by a successful application for her to testify because either Dr Kabuthi had become incapable of giving evidence or her attendance could not be procured, or otherwise her attendance could not be procured without an amount of delay or expense which in the circumstances of the case appeared to the trial court to be unreasonable.

While I note that the appellant did not object to Dr Sitati's testimony I also note that he was

unrepresented; in these circumstances, it was incumbent upon the trial court to be vigilant and protect not only the integrity of the criminal process but also the appellant's right to a fair trial. Failure by the court to take this initiative no doubt prejudiced the appellant since he was obviously unduly denied the opportunity to cross-examine Dr Kabuthi on her opinion; the failure also threw the prosecution case into disarray when Dr Sitati's testimony openly contradicted Dr Kabuthi's opinion.

Aside from Dr Sitati's competency to testify, it may well be that Dr Kabuthi, having examined the complainant may probably have given a more consistent testimony; however, it is not for the trial court to speculate on the nature of the evidence that a witness whom the prosecution chooses not to call would have given. The court's honourable task in determination of whether an accused person is guilty or not is restricted to the evaluation of the evidence with which it has been presented. In any event, where there is any failure on the part of the prosecution witness or witnesses that leads to a reasonable doubt whether a particular fact has been proved, such failure cannot be visited upon an accused person; he instead benefits from the doubt that has been thereby created.

The other issue that the learned magistrate considered but came to what I think was a mistaken conclusion is the question of proof of the age of the complainant. As noted earlier, the proviso to **section 20(1)** under which the appellant was charged, is express that for an offence to be committed the victim must below 18 years old. Age is therefore an ingredient of this offence and therefore like any other ingredient which must be proved, the age of the victim must also be proved beyond reasonable doubt.

The learned magistrate found as a fact that the complainant's age was not proved; in her own words, the learned magistrate stated as follows:

> ***The child's age is not given and that is something to fault the police for. On the P3 form the estimated age is 14 years. The complainant verbally said that she was 14 and this is the age the police decided to go by…Proof of age is by birth certificate or clinic card but in the instant case the court is satisfied with the estimate age by the doctor of 14 years which is below 18. What is more important is the biological relationship between father and daughter.***

The complainant's age was not proved and I suppose it is for this reason that the learned magistrate faulted the police. Although she proceeded to say that there was an estimate of the age by the doctor, there was no such estimate because the only estimate of age is that appearing on the P3 form.

It is apparent from the learned magistrate's statement, that she appeared to dismiss the need for proof of age in an offence under **section 20 (1)** of the Act and instead placed more weight on the relationship between the complainant and the appellant. With due respect to the learned magistrate, under the proviso to **section 20(1) of the Act**, proof of age is as much important as the consanguinity between the complainant and the appellant. As a matter of law, it is the age of the victim that determines the sentence to be imposed; it is ideal to reproduce it her for better understanding:

> ***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.***

It is apparent that the sentence is much severe if the complainant is a minor and this in itself calls for concrete proof of age; the learned magistrate herself noted such proof can only be provided by a birth certificate or some card. It has been held elsewhere that proof of age beyond reasonable doubt must be some documentary proof. (See the Court of Appeal decisions in **Criminal Appeal No. 504 of 2010, Kaingu Elias Kasomo versus Republic and Alfayo Gombe Okello versus Republic (2010) eKLR)**

The learned counsel for the state acknowledged that indeed age was not proved and asked the court to invoke its powers in exercise of its appellate jurisdiction and call for evidence on the victim's age. I would ordinarily take that course in appropriate circumstances and more particularly where age is the only outstanding issue. This is not the case with the appellant's case; his grievances, which for reasons I

have given are legitimate, go beyond the question of age alone. I am therefore hesitant to take the course proposed by the learned counsel for the state.

Suffice it to say that I need not belabour the point that in the absence of proof of age there was no legal basis to convict the appellant under the proviso to **section 20(1)** of the Act. The conviction was unsafe.

For this and other reasons I have outlined in this judgment, I am bound to conclude that the appellant's appeal has merits and I hereby allow it. His conviction is quashed and sentence set aside. He set at liberty unless he is lawfully held.

Signed, dated and delivered in open court this 26th April, 2017

Ngaah Jairus

JUDGE