REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO.72 OF 2014

P M.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in criminal case No. 1006 of 2012 of the Principal Magistrate's Court at Nkubu by Hon. C.N Ndubi – Principal Magistrate)

JUDGMENT

The appellant, **P M**, was convicted for the offence of incest contrary to section 20(1) of the Sexual Offences Act No. 3 of 2006.

The particulars of the offence were that on unknown date in the year 2011, at [Particulars withheld] East sub location in Imenti Central District of Meru County, caused his penis to penetrate the vagina of **W G M** a female who was to his knowledge, his daughter.

The appellant was sentenced to life imprisonment. He now appeals against both conviction and sentence.

The appellant was in person. He raised the following grounds of appeal:

1.That the learned trial magistrate erred in law and in fact by convicting him where the ingredients of the offence of incest were not proved.

2. That the learned trial magistrate erred in law and in fact by failing to appreciate that the prosecution evidence was riddled with contradictions.

3. That the sentence was manifestly harsh.

The state opposed the appeal through Mr. Odhiambo, the learned counsel.

The facts of the prosecution case briefly were as follows:

The appellant was staying with the appellant and another younger girl. These two were his daughters. He had separated with his wife and it would appear for a long period, for the complainant could not remember her name. One night the appellant defiled the complainant under threats. On the same night she went and reported to her aunt and on the following morning to the chief. The two took no action and it would appear that only divine intervention made this matter to get to the court. The appellant was arrested and prosecuted. It was the conviction and the sentence that emanated from the prosecution that gave rise to this appeal.

When the appellant was placed on his defence, he opted to exercise his constitutional right of keeping mum. This is provided for under Article 50(2)(i) of the Constitution which states:

> ***Every accused person has the right to a fair trial, which***
>
> ***includes the right—***
>
> ***...***
>
> ***(i) to remain silent, and not to testify during the proceedings;***

This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **OKENO vs. REPUBLIC [1972] EA 32.**

For an offence of incest to be established, two ingredients must be proved beyond reasonable doubts namely; (1) that there was penetration into or by the genitalia of the person accused and (2) that there was knowledge that the victim was a close blood relative as provided for under section 22(1) of the Sexual Offences Act.

In an attempt to find if there was sufficient evidence against the appellant, I will also make a finding whether the offence of incest was proved against him or not.

In her evidence **W G M** narrated how the appellant whom she said was her father defiled her. She testified that he returned home and went to the bed she shared with her younger sibling. He asked her younger sibling to go and sleep on his bed. When she(**W G M)** followed her sibling to her father's bed, the appellant went for her while armed with a club and a machete and threatened her if she was to raise any alarm. He undressed her and proceeded to defile her. After he was through with the defilement she told him that she wanted to go and answer a call of nature. When she went out she ran to her aunt's house where she reported her ordeal.

Her aunt(P.W3), grandmother and the area chief appear to have hatched a conspiracy of silence. It is clear that P.W3 was very cagey in her evidence.

It was by sheer luck, nay not luck but by divine intervention that Pastor **Stanley Muriuki** (P.W2) stumbled on the complainant and thereafter the matter was reported to the police. The complainant was given a temporary home. The appellant went and reported that she was missing.

The medical evidence by **Dr. Kihomba James** (P.W4) was that when he examined the complainant, he found that her hymen was perforated an indication of penetration. This medical evidence corroborated the contention of the complainant that she had been defiled.

According to the complainant the culprit was her father, the appellant. This is the only direct evidence that link him to the offence. The proviso to section 124 of the Evidence Act provide as follows:

> ***Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.***

I find that the learned trial magistrate had ample evidence at her disposal to believe the complainant that it was the appellant who defiled her. There was also evidence that the appellant was the complainant's father.

The proviso to section 20(1) of the Sexual Offences Act prescribes the sentence as follows:

Provided that, if it is alleged in the information or charge and proved that thefemale 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 sentence that is prescribed is the maximum and not the minimum. Though the appellant does not deserve any mercy, I am persuaded to tamper justice with mercy though unmerited. I therefore reduce the sentence to 25 years imprisonment. To that extent does the appeal succeed.

DATED at **MERU** this **26**th day of **April, 2017**

KIARIE WAWERU KIARIE

JUDGE