REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 308 OF 2013

M W K...APPELLANT

VERSUS

REPUBLIC ....STATE

(Appeal from the Ruling of the Chief Magistrate's Court at Nyahururu Hon. D. K. Mikoyan –Ag. Senior Principal Magistrate delivered on the 1st October, 2013 in CMCR Case No. 1159 of 2012)

JUDGMENT

The appellant **MWK**, has filed this appeal challenging his conviction and sentence by the learned Principal Magistrate sitting at Nyahururu Law Courts.

The appellant had been arraigned before the trial court on 10/7/2012 facing a charge of **INCEST BY A MALE PERSON CONTRARY TO SECTION 20(1) OF THE SEXUAL OFFENCES ACT, 2006**. The particulars of the chare were that

> ***"On the 29th June, 2012 and 2nd July 2012 in Nyandarua County willfully and unlawfully caused his penis to penetrate the vagina of RWG a girl aged 10 years old who his knowledge is his niece"***

The appellant also faced an alternative charge **of INDECENT ACT WITH A CHILD CONTRARY TO SECTION 11(1) OF THE SEXUAL OFFENCES ACT, 2006**.

The appellant entered a plea of **'Not Guilty'** to both charges. His trial commenced before the lower court on 29/10/2012. The prosecution led by **INSPECTOR MUGAMBI** called a total of four (4) witnesses in support of their case.

PW3 RW the complainant was a ten (10) year old child. She told the court that the appellant was her paternal uncle. On 29/3/2012 **PW3** was on her way to school when the appellant accosted her and pulled her into a nearby thicket. He told the child to lie down and remove her panty. The appellant then lay on top of her and lowered his own trouser to the knees. He then proceeded to defile the child. After the incident the appellant released the child but warned her not to report to anyone.

PW1 AWK is the complainant's mother. She told the court that on 3/7/2012 she noticed her daughter walking with a limping gait. When **PW1** questioned the child, she told her that the thorn had pierced her foot. Later on **PW1** came into the house and found that the complainant had removed her underpants and

was examining her private parts. Again **PW1** questioned her. The child informed her mother that the appellant had defiled her whilst on her way to school. **PW1** reported the matter to her in-laws and then to the assistant chief. She took the child to hospital where she was examined and treated.

Police launched investigations into the matter after which the appellant was arrested and charged.

At the close of the prosecution case the appellant was found to have a case to answer and was placed onto his defence. The appellant gave an unsworn defence in which he denied having defiled the complainant. On 1/10/2013 the learned trial magistrate delivered his judgment in which he convicted the appellant of the offence of Incest and thereafter sentenced him to life imprisonment. Being aggrieved by both his conviction and sentence the appellant filed this appeal.

Being a first appeal this court is obliged to examine the evidence a fresh and draw its own conclusions on the same (see **AJODE Vs REPUBLIC [2004] KLR 83**). Similarly in **MWANGI Vs REPUBLIC [2004] 1 KLR 28** the court held that

> ***"1. An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to have the appellate courts own decision on the evidence.***
>
> ***2. The first appellate court must itself weigh the conflicting evidence and draw its own conclusions"***

The appellant in this case was charged with the offence of Incest by Male Contrary to Section 20(1) of the Sexual Offences Act. Section 20(1) provides as follows

> ***"20(1) Any male person who commits and indecent act or an act which caused penetration with a female person who is to his knowledge his daughter, grand-daughter, 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….."***

Therefore in order to prove the offence of incest it must be shown that the victim was within the prohibited range of kinship with the appellant. In this case the child told the court that the appellant was her uncle. Indeed throughout her evidence the child refers to the appellant as **'uncle'. PW7** the child's mother also told the court that the accused M was her brother in law. Indeed **PW1** under cross-examination stated that

> ***"I raised accused since I was married in that home"***

Thus the evidence shows that the appellant was a paternal uncle to the complainant, a fact which appellant does not challenge or deny.

Having proved the existence of this relationship the prosecution must proved the following

- The fact of penetration
- Identification of the perpetrator
- Age of the victim

The complainant **'R W'** told the court that on the material day the appellant accosted her while she was on her way to school. He then pulled her into a nearby thicket where he proceeded to defile her. The complainant further told the court that this was not the first time the appellant had defiled her.

In her testimony at page 14 line 4 **PW3** stated

> ***"Then he came on top of me. I cannot recall what clothes he was wearing. He removed his long trouser and pant just past his knees. He came up on my chest as I was down and suddenly I felt***

pain on the left shoulder and nowhere else. Then he left it there, asked me to go to school. I felt penetration on my belly.

NB: Minor touches top of her dress over female genitalia"

The complainant has given a graphic account in her own words of what occurred. She demonstrated to the court by touching where she felt the pain. This was a young child who probably lacked adequate vocabulary to describe the sexual act. It is unlikely the child would have fabricated this evidence.

PW1 the child's mother told the court that on 3/7/2012 at 8.00pm she stepped out of the kitchen leaving the complainant inside. Upon her return **PW1** saw that the child had removed her panty and was examining her private parts. This was certainly unusual behavior which led **PW1** to enquire from her child what the problem was. **PW3** then revealed to her mother that her uncle had defiled her whilst on her way to school.

PW2 PETER NGINYO was a clinical officer at Olkalau District Hospital. He told the court that he examined the complainant on 9/7/2012 **PW2** noted old tears in her hymen. He concluded that the child had been involved in sexual activity. The witness filled and signed the P3 form which he produced in court as an exhibit **P. exb 1.**

This evidence corroborated the testimony of **PW3** that she was defiled, **PW2** explained that since the complainant had bathed and changed her clothes after the incident, no specimens could be taken.

It must be noted that the complainant testified that the same man had defiled her severally. She however gave specific evidence regarding the incident which occurred on 29/6/2012 as she was going to school. The child was examined on 9/7/2012 about 2 or so weeks after the defilement. Obviously any bruises or lacerations would have by then healed and the tears in her hymen could not be fresh.

The complainant was a young child. She stood to gain nothing by claiming to have been defiled if in fact no such incident had occurred. The child remained unshaken under cross-examination. The action of the child in removing her pant and examining her private parts is telling. It is an indication that some issue involving that part of her anatomy was disturbing her. The presence of old vaginal tears as noted by **PW2** is proof that penetration had occurred. From the evidence I am satisfied that the complainant was indeed defiled.

On the question of identification the child identified the appellant as the man who defiled her. The incident occurred in broad daylight whilst the complainant was walking to school. The appellant led the child into a nearby thicket, then he lay on top of her and defiled her. All this must have taken some period of time. The child was at all times in close proximity with the appellant. I find that she had ample time and opportunity to see him well.

The complainant told the court that the appellant was her uncle and was a man well known to her. **PW1** the child's mother confirms that the appellant was her brother-in-law and **PW1** further confirms that the appellant lived in the same home with the family. The complainant therefore was well able to recognize the appellant. This could be why she did not resist when he stopped her on her way to school. Evidence of recognition has been held to be **'more satisfactory, more assuring and more reliable than identification of a stranger'** because it depends upon the personal knowledge of the assailants in some form or other **(see ANJONONI & OTHERS Vs REPUBLIC (1980) KLR, 59)**. The appellant was a relative whom the child personally knew very well. There was in my view no possibility of mistaken identity.

PW1 told the court that when the child revealed the incident to her, the child named the appellant as the one who had defiled her. **PW1** state at page 15 line 15

"When I asked her (the complainant) she kept quiet. Then she told me M defiled her while going to school. M is my brother in law (pointing to the accused)….."

At no time did the child allege that a person other than **'M'** had defiled her. She was unwavering in her identification of the appellant as her assailant.

In his written submissions the appellant suggests that the child had been coached. However when this question was put to the complainant under cross-examination she declared at page 14 line 27

> ***"Nobody told me to implicate M. Mum didn't beat me".***

In his defence the appellant claimed that the charges were fabricated against him over a disagreement he had with **PW1** over her mistreatment of his parents. This defence is clearly an afterthought as the appellant did not raise this issue of a grudge when he was given an opportunity to cross examine this witness. Further even if **PW1** and appellant had disagreed, I fail to see how the complainant a mere child would be involved in their differences. I therefore reject this defence.

On the whole I am satisfied that there has been a clear positive and reliable identification of the appellant by the child as the man who defiled her.

The appellant was charged with the offence of Incest by Male. In this case the question of the age of the victim would become relevant as Section 20(1) of the Sexual Offences Act contains the following provisions

> ***"Provided that, if it is alleged in the information or charge and provided 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"***

Based on this provision the age of the victim in a charge of Incest becomes relevant as it will affect the nature of sentence to be handed down upon conviction.

In this case the charge sheet gives the age of the child as 10 years. In her evidence the complainant herself gave her age as ten (10) years. **PW1** the complainant's mother in her evidence stated

> **"R (complainant) is aged 10 years and in class 3"**

PW1 produced as an exhibit the child's Immunization Card, **P. exb 2** which gave her date of birth as 7th August, 2002. Having been born in August 2002, the child was just shy of her tenth birthday June, 2012, when this incident occurred. Certainly the complainant was well below the 18 years age limit provided in Section 20(1) of the Sexual Offences Act.

Based on my own analysis of the evidence adduced during the trial I am satisfied that the charge of Incest was proved beyond reasonable doubt. The appellant's conviction by the trial court was sound and I do hereby uphold that conviction.

After listening to mitigation the learned trial magistrate sentenced the appellant to serve life imprisonment. This is the mandatory sentence provided for by Section 20(1) in cases where the victim of incest is below 18 years of age. The sentence imposed was therefore lawful and I confirm that sentence. This appeal therefore fails in its entirety and the same is hereby dismissed.

Dated and delivered in Nakuru this 24th day of April 2017.

Appellant in person

Mr. Motende for DPP

Maureen A. Odero

Judge