REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT VOI

CRIMINAL APPEAL NO 50 OF 2016

M K.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case Number 16 of 2015

in the Senior Resident Magistrate's Court at Wundanyi delivered

by Hon K. I. Orenge (SRM) on 17th November 2015)

JUDGMENT

INTRODUCTION

1. The Appellant herein, M K, was tried and convicted by Hon K.I. Orenge, Senior Resident Magistrate for the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act No 3 of 2006. He had also been charged with the alternative offence of committing an indecent act with a child contrary to Section 11(1) of the said Act. The Learned Trial Magistrate ultimately sentenced him to serve ten (10) years for the offence of incest contrary to Section 20(1) of the said Act.

2. The particulars of the charges were as follows:-

> **"On diverse dates between 26th November 2014 and 2nd of January 2015 at** [particulars withheld] **within Taita Taveta County, intentionally and unlawfully caused his penis to penetrate the vagina of E C a child aged 14 years."**
>
> **ALTERNATIVE CHARGE**
>
> **"On diverse dates between 26th November 2014 and 2nd of January 2015 at** [particulars withheld] **within Taita Taveta Countyintentionally and unlawfully touched the vagina of E C a child aged 14 years with his penis."**

3. On 29th May 2014, the Prosecutor applied to amend the Charge Sheet to indicate that the Complainant, E C (hereinafter referred to as "PW 1") was the Appellant's step daughter with a view to sustaining a charge of committing incest. The particulars of the said Charge were as follows:-

"On diverse dates between 26th November 2014 and 2nd of January 2015 at [particulars withheld] **within Taita Taveta County, intentionally and unlawfully caused your penis to penetrate the vagina of E C a girl aged 16 years who to your knowledge your daughter."**

4. Being dissatisfied with the said judgment, on 19thSeptember 2016, the Appellant filed a Notice of Motion application seeking leave to file his appeal out of time. The said application was allowed and the Petition of Appeal deemed to have been duly filed and served. His Grounds of Appeal were as follows:-

1. **THAT the learned trial magistrate erred both in law and facts by failing to consider that the prosecution had failed to discharge the burden of proof beyond reasonable doubts** (sic) **c/sec 109 and 110 of the evidence act**(sic)**.**

2. **THAT the learned trial magistrate erred in law and facts by failing to consider that there was no urgent reason to link him to the alleged offence in question.**

3. **THAT the learned trial magistrate erred in both law and facts by failing to consider that the prosecution evidence** (sic) **was contradicting and inconsistent c/s 163 (1) (c) of the evidence act** (sic).

4. **THAT the trial learned magistrate** (sic) **erred in law and facts by convicting him on unapproved charge** (sic).

5. **THAT the learned trial magistrate erred in both law and facts by failing to adequately consider his defence which was firm and unshaken to create doubt on the prosecution case.**

5. On 8th March 2017, this court directed the Appellant to file his Written Submissions. Instead of doing so, on 22ndMarch 2017, he filed the said Written Submissions along with fresh Grounds of Appeal. The Amended Grounds of Appeal were as follows:-

1. **THAT the learned hon. trial magistrate erred in law and fact in convicting and sentencing him without humbly considering that the really** (sic) **date of incident was not proved beyond reasonable doubt.**

2. **THAT the learned hon. trial magistrate erred in law and fact in convicting and sentencing him without humbly considering that the alleged medical evidence failed to prove this case.**

3. THAT the learned hon. trial magistrate erred in law and fact in convicting and sentencing without considering that there was an existing grudge between him and the prosecution witnesses.

4. **THAT the learned hon. trial magistrate erred in law and fact in not considering his defence evidence which he gave under oath and that it created reasonable doubt whereby the benefit of doubt ought to have been given to him.**

6. The State was to file its Written Submissions by 13th April 2017. However, when the matter came up in court on the same date, counsel for the State indicated that the State had opted not to file its Written Submissions becauseit was conceding to the Appeal herein.

7. It pointed out that Section 124 of the Evidence Act Cap 80(Laws of Kenya) envisaged a situation where the evidence of a sole witness had no loopholes. It submitted that although the Complainant E C (hereinafter referred to as "PW 1") who was aged 16 years testified that she would wake up and find the Appellant wiping himself, she never mentioned that there was any sexual intercourse between her and the Appellant herein or the dates when these alleged incidents happened. It added that despite the fact that the P3 Form had indicated that her hymen was torn, that did not substantiate that it was the Appellant who had caused it to get torn.

8. It was therefore its submission that no ingredients under the offence of incest contrary to Section 20(1) of the Sexual Offences Act were proven in the case herein.

LEGAL ANAYSIS

9. Despite the State conceding to the Appeal herein, this court found it prudent to consider if the reasons it gave for conceding to the appeal were fair and reasonable. Appreciably, an appellate court should consider the facts of a case even where the State has conceded to an appeal to establish if such a concession should be granted.

10. In the case of **Mwanguo Gwede Mwarua vs Republic [2015] eKLR,**the Court of Appeal made a similar observation when it stated as follows:-

> **"The concession notwithstanding, it is still our duty as a second appellate Court to consider the issues of law raised by the respondent as grounds for conceding the appeal in order to determine whether the said concession is merited."(*See NORMAN AMBICH MIERO & ANOTHER VS REPUBLIC, CR.APP.NO.279 OF 2005 (NYERI)).*"**

11. This court therefore carefully perused the proceedings of the Trial Court and noted that the Learned Trial Magistrate did not conduct a *voire dire* examination of PW 1 despite her having been a minor. However, this court noted that she was seventeen (17) years at the time she was adducing her evidence and consequently, she must have known the meaning of taking an oath even without being asked if she knew what the same entailed. The Learned Trial Magistrate thus acted correctly when he allowed her to adduce evidence on oath.

12. The Proviso to Section 124 of the Evidence Act stipulates 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."**

13. The aforesaid Proviso contemplates that where it is the victim's word against that of the offender, a trial court may believe the evidence of a victim witness if he or she is satisfied that such victim is telling the truth and record reasons for believing such evidence. This is because sexual offences often times occur when and where no third parties are likely to witness the offences.

14. It is therefore imperative that the evidence of such single witness be put under a magnifying glass to confirm its authenticity as it has the potential of having an accused person convicted and imprisoned for many years behind bars. It is for the said reason that this court critically analysed the evidence that was adduced by PW 1 herein.

15. Her evidence was that the Appellant was her step-father and that her mother who moved to Taveta after she had differences with him. She said that she would stay with him during her school holidays and would cook for him. Her testimony was that she would sleep soundly and that on three (3) occasions, she woke up to find herself naked with the Appellant wiping his penis with bedsheets.

16. The offence of incest connotes that there must be either some penetration or commission of an indecent act by the offender to the victim. Section 2 of the Sexual Offences Act defines an indecent act as an act that involves the touching of any part of the victim's body with any part of the offender's body but does not include penetration or exposure or display of pornographic material to any person against his or her will.

17. It is true as the State submitted that PW 1 did not adduce any evidence to demonstrate there was evidence that there was any sexual intercourse. In fact, she did not say that the Appellant had defiled her on those three (3) occasions. She merely stated that she would wake up and find him wiping his penis

with bedsheets.

18. If one was to believe PW 1 that she would wake up and find herself naked and the Appellant wiping himself with a bedsheet as she had contended, this still did not prove the offence of defilement, indecent act or incest. This is because there was a possibility that he could also have been performing the sexual act on himself which did not require any contact between him and PW 1 or exposure to her. It must be pointed out that this assumption of performing of sexual act was purely theoretical and was suggestive that that is what the Appellant did.

19. This court therefore found itself in agreement with the State that the ingredients of the offence of incest, defilement or committing an indecent act with a child were absent in the case herein.

20. Going further, while the Clinical Officer Restitutah Mghoi (hereinafter referred to as "PW 2") confirmed that PW 1's hymen was torn, there was no evidence that linked the Appellant to the tearing of the said hymen. This is notwithstanding the evidence of A S (hereinafter referred to as "PW 5") had stated that PW 1 had informed her that the Appellant used to defile her. Indeed, PW 1 did not appear to have responded to her question of why she had not reported the defilement earlier making this court question why PW 1 never found it necessary to report the three (3) incidents earlier.

21. This court was also puzzled by PW 1's assertions that she used to live with the Appellant during school holidays. It was difficult to envisage why she would go to his house during school holidays to stay with him when he had had differences with her motherinstead of going home to stay with her mother.

22. In fact there was no plausible explanation to show why PW 1 stayed with the Appellant after his mother died as she had contended or stay with him after her grandmother died as had been averred by No 88391 PC D M (hereinafter referred to as "PW 3").

23. Be that as it may, it emerged that the Appellant and PW 1 used to live in the same house as she had stated. Indeed, PW 3 had testified that she was staying with the Appellant herein at the time of his arrest. The Appellant admitted as much in his sworn evidence. The only point of departure in his evidence was that he used to stay with her in the same house after the death of his mother who had employed her to take care of the farm but that he had caught her with one of the boys.

24. Evidently, this was a case of one person against the other. After weighing the Appellant's and PW 1's evidence, this court formed the opinion that there were more questions than answers that emanated from PW 1's unproven assertions. This court formed the opinion that there was more than met the eye because the circumstances under which PW 1 was living in the Appellant's home were hazy. Clearly, at sixteen (16) years of age, PW 1 was under no obligation to stay with the Appellant after his mother died or after her mother and the Appellant separated due to differences between them or after her grandmother died.

25. Appreciably, this is a court of evidence. It is mandated to determine cases based on the evidence that is placed before it. The Appellant was under no obligation to assist the Prosecution in proving its case as he had a constitutional right to remain silent during trial and leave the Prosecution to prove its case to the required standard, which was, proof beyond reasonable doubt.

26. Accordingly, having considered and weighed the evidence on record, the Appellant's WrittenSubmissions and the reasons the State relied upon to concede to the Appeal, it was the view of this court that there were certain gaps in PW 1'sevidence that persuaded it to find that the Prosecution had not proved its case against the Appellant beyond reasonable doubt. It found and held that the Learned Trial Magistrate erred when he convicted and sentenced the Appellant based on the evidence herein as no known offence was proven to have occurred.

DISPOSITION

27. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was lodged on 19th September 2016 was successful and there was merit in the State conceding to the said

Appeal. The same is hereby allowed.

28. This court hereby quashes the conviction and sets aside the sentence that was meted upon the Appellant by the Trial Court as it would be clearly unsafe to confirm the same. The court hereby orders that the Appellant be set free forthwith unless held or detained for any other lawful reason.

29. It is so ordered.

DATED and **DELIVERED** at **VOI** this **20th** day of **April** 2017

J. KAMAU

JUDGE

In the presence of:-

M K - Appellant

Miss Anyumba - for State

Josephat Mavu– Court Clerk