REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

CRIMINAL APPEAL NO 5 OF 2016

P M M……………..………………….. APPELLANT

VERSUS

REPUBLIC………………………….RESPONDENT

(**From original conviction and sentence in Criminal Case Number 344 of 2014 in the Senior Principal Magistrate's Court at Wundanyi delivered by Hon G.M. Gitonga (RM) on 27thNovember 2015)**

JUDGMENT

INTRODUCTION

1. The Appellant herein, P M M, was tried and convicted by Honourable G.M. Gitonga (RM) for the offence of incest contrary to Section 20 (1) of the Sexual Offences Act No 3 of 2006. He was sentenced to serve life imprisonment. He was also charged with the offence of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act.

2. The particulars of the main charge were as follows :-

> **"On the 17thday of September 2014 at [particulars withheld] in Mwachabo Location within Taita Taveta County, unlawfully and intentionally caused his penis to penetrate the vagina of A K M a child aged 5 years who is to his best knowledge his daughter."**
>
> **ALTERNATIVE CHARGE**
>
> **"On the 17th day of September 2014 at [particulars withheld] in Mwachabo Location within Taita Taveta County, unlawfully and intentionally touched the vagina of A K M a child aged 5 years with his Penis (sic)."**

3. Being dissatisfied with the said Judgment, on 10th February 2016,the Appellant filed a Notice of Motion application seeking leave to file an appeal out of time. The said application was allowed and the Petition of Appeal deemed to have been duly filed and served. The Grounds of Appeal were as follows:-

> **1. THAT the magistrate erred in both law and fact in holding that the appellant person had committed the offence yet no evidence was adduced to support the offence at all.**
>
> **2. THAT the magistrate erred in both law and fact in holding that there was overwhelming evidence adduced in court to support the case yet the entire evidence was contradictory.**

3. THAT the magistrate erred in both law and fact in sentencing the accused person to serve a sentence of life imprisonment on a charge sheet that was defective.

4. THAT the magistrate erred in both law and fact in holding that evidence adduced in court was corroborative yet the entire evidence was contradictory.

5. THAT the magistrate erred in both law and fact in holding the evidence that adduced in court was corrugated (sic) **by the doctor's evidence yet the medical report produced in court as an exhibit did not reveal anything connecting or linking the appellant to the offence committed.**

6. The magistrate erred in both law and fact in not considering the fact that the prosecution hardly allowed his defence witness to testify in his defence.

4. On 16th November 2016, this court directed the Appellant to file his Written Submissions. Instead of doing so, on 20th December 2016, he filed his Written Submissions together with Amended Grounds of Appeal. The Amended Grounds of Appeal were as follows:-

1. THAT the learned trial magistrate erred in law and fact in that according to the evidence adduced in this case, there was a need of a thorough investigation.

2. THAT the honourable trial magistrate erred in law and fact by upholding the evidence of PW 1 which was merely fabrication and unbelievable in his sentencing (sic)**.**

3. THAT the learned trial magistrate erred in law and fact by failing to appreciate PW 1's antecedents and alleged bad blood between PW 1 and the appellant.

4. THAT the honourable trial magistrate erred in law and fact by believing the alleged medical report relating to the missing of the hymen.

5. THAT the honourable magistrate erred in law and fact by failing to appreciate the appellant's personal and social circumstances in his sentencing.

6. THAT the learned trial magistrate erred in law and fact by not considering the appellant's defence submission as the truth in this case.

5. The State filed its Written Submissions dated 15th February 2017 **(sic)**on14th February 2017. When this court asked the Appellant if he wished to respond to the State's Submissions, he responded he did not wish to do so.

6. When the matter came up on 15th February 2017, both the Appellant and counsel for the State informed the court that they would not highlight their respective Written Submissions but that they would rely on the same in their entirety. The Judgment herein is therefore based on the said Written Submissions.

LEGAL ANALYSIS

7. Being the first appellate court, this court is under a duty to re-examine the evidence that was adduced in the lower court as was held by the Court of Appeal in the case of **Odhiambo vs Republic Cr. App No. 280 of 2004 (2005) 1 KLR** where it was stated that:-

"**On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour".**

8. It did appear from the respective parties' Written Submissions that the only issue that had been placed before this court for its determination was whether or not the Prosecution had proved its case beyond reasonable doubt.

9. The court therefore dealt with all the Amended Grounds of Appeal together as they were related.

I. PROOF OF THE PROSECUTION'S CASE

10. The Appellant was emphatic that he was framed by A G M (hereinafter referred to as "PW 1") as there was bad blood between them. He contended that No 88391 PC David Masinde (hereinafter referred to as "PW 4") did not state if he visited PW 1's house or give the distance from the school to his home or from PW 1's home to his home or indicate how far they were from other neighbours.

11. He reiterated what he had stated in his sworn evidence and tore into the evidence of C M (hereinafter referred to as "PW 2") and the Complainant herein, A K M (hereinafter referred to as "PW 3"), who he said had been taught to lie by their mother.

12. On its part, the State submitted that PW 1, PW 2, PW 3 and PW 4 all confirmed that the Appellant was PW 3's father, a fact it said, he did not disclaim. It further stated that he was the one who had PW 3's Birth Certificate but that notwithstanding, an Age Assessment was conducted and the results showed that PW 1 was aged six (6) years at the time of the incident herein.

13. It was its argument that although there were no witnesses who saw the Appellant defile PW 3 and that she adduced unsworn evidence, she was able to identify the Appellant as his defiler. It pointed out that there was no reason why she would have fabricated the charges against the Appellant who was her father and that in any event, the Appellant never raised the issue of an existing grudge between him and PW 1.

14. It was categorical that PW 3's evidence was corroborated by PW 2 who confirmed that on the material date, 17th September 2014, he slept in the kitchen of the Appellant's house while PW 3 and the Appellant shared a room which meant that the offence could only have been committed by the Appellant. It also contended that PW 1 did in fact confirm that PW 3 did not sleep in her house on the material date.

15. It added that although PW 2 was not able to see what was going on in the room the Appellant and PW 3 slept in on that material date, PW 4 visited the Appellant's home and noted that the kitchen was in a different house from where the Appellant slept.

16. It was its further submission that despite Section 20 (1) of the Sexual Offences Act providing that a person who had been convicted of incest was liable to life imprisonment, it did not mean that that was a mandatory sentence. It conceded that the sentence that was meted upon the Appellant by the Learned Trial Magistrate was excessive in the circumstances and urged this court to uphold the conviction but reduce the sentence to thirty (30) years imprisonment.

17. This court carefully perused the proceedings and noted that the Learned Trial Magistrate conducted elaborate *voire dire* examinations for PW 2 and PW 3. It was therefore satisfied that he applied his mind correctly before concluding that PW 2 and PW 3 could adduce sworn and unsworn evidence respectively.

18. PW 1 testified that she was the Appellant's neighbour and that when his wife was imprisoned for selling alcohol, she left her to take care of her two (2) children, PW 3 and one E M. She said that the Appellant also had another child called G M.

19. She stated that at the time of the Appellant's wife arrest, PW 3 was living separately from the Appellant. She averred that on 17th September 2014, PW 3 did not return home from school together with E M and her daughter M S. On enquiring from them where PW 3 was, they told her that she had gone to visit the Appellant herein.

20. She said that she went to school the following morning to establish if PW 3 had gone to school and

asked to speak to her. She said that when PW 3 came, she noted that she was withdrawn and unhappy. She enquired from her what had happened and she explained that the Appellant had removed her pants and inserted his penis into her vagina and that he washed her in the morning and took her to school. It was her further evidence that PW 3 told her that the Appellant threatened her that he would leave her to be taken by elephants and then went back to the house and continued defiling her.

21. Her further evidence was that PW 3's teacher was present when PW 3 was narrating what had happened to her and that he was the one who advised her to take her to Mwatate Hospital, which she did whereafter the Appellant herein was arrested.

22. During her Cross-examination, PW 1 stated that she was a neighbour to PW 3's mother and although she did not have PW 3's Birth Certificate, she knew that she was born in May 2009. She admitted that she never saw the Appellant defiling PW 3 and that it was PW 3 who told her of the defilement.

23. PW 2 confirmed that his parents did not live together. He averred that PW 3 never used to stay with them but she stayed with Aunt A as their mother was in jail. He said that PW 3only came to visit them on 17th September 2014. He said that he found PW 3 at home after he came home from school.

24. He said that the Appellant cooked food and they ate after which he slept in the kitchen. His evidence was that he told PW 3 not to sleep with the Appellant in the bedroom but she refused. He further testified that PW 3 did not tell him anything about the defilement. On being Cross-examined, he stated that he never saw the Appellant defiling PW 3 and that when she came, he did not see him doing anything to her.

25. In her unsworn statement, PW 3 stated that she was with the Appellant when he removed her pant, lay on her and did "bad manners" at night. She said that PW 2 and M were sleeping in the kitchen. She stated that she told her mother what had happened the following morning and she took her to hospital.

26. PW 4 reiterated PW 1's, PW 2's and PW 3's evidence. His evidence was that the P3 Form showed that PW 3 was defiled and confirmed having visited the Appellant's home where he found one (1) big house and another smaller one that was used as a kitchen. In his Cross-examination, he stated that there were no neighbours nearby.

27. Restitutah Mgoi (hereinafter referred to as PW 5") was a Clinical Officer attached to Moi Referral Hospital Voi. She confirmed having examined PW 3, who she said was three (3) years of age, on 18th September 2014, about eighteen (18) hours after the alleged incident. She observed that although PW 3's hymen was broken, there were no injuries to her labia majora and labia minora.

28. She produced an Age Assessment Report that showed that PW 3 was aged six (6) years at the time of the trial. In her Cross-examination, she stated that there were no spermatozoa or traces of blood. She added that she could not say that PW 3's hymen had been broken by a penis but rather, that there was some kind of penetration.

29. In his sworn evidence, the Appellant stated that his wife was arrested for selling unlicensed alcohol. He said that he was arrested from his home by members of "sungusungu" on 25th September 2014 and charged with the current offence. In his Cross-examination, he denied that PW 3 visited his home on 17th September 2014 and was categorical that PW 2 and PW 3 had been coached by PW 1 to lie.

30. The Proviso to Section 124 of the Evidence Act Cap 80 (Laws of Kenya) is 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"**

31. The purport of the aforesaid proviso is that a trial court can choose to believe the evidence of a sole

victim of a sexual offence if it is satisfied that such victim is telling the truth. However, it must record the reasons that led it to believe such sole victim. Notably, in this case, the Learned Trial Magistrate was clear that he did not only rely on the evidence of PW 3 in convicting the Appellant herein.

32. In his Judgment, the Learned Trial Magistrate stated that he was satisfied that the penetration which PW 5 could not attribute to the Appellant herein was caused by the Appellant herein as PW 1's and PW 2's evidence of where PW 3 slept on the material night corroborated each other. He also observed that PW 1's demeanour looked forthright and that he had found no reason to have for the Prosecution witnesses to have wanted the Appellant been charged with the offence herein.

33. He added that there was a chain of unbroken circumstantial evidence which pointed irresistibly to the fact that the Appellant had the opportunity to defile and did in fact defile PW 3 on the material date.It was his opinion that the circumstances of the case herein met the threshold that was set out in the case of **Republic vs Kipkering Arap Koske & Another (1949) 16 EACH 134**regarding the issue of an unbroken chain of circumstantial evidence.

34. He detailed the chain of unbroken circumstantial evidence as follows:-

> **i. PW 3 never returned to PW 1's home on 17th September 2014.**
>
> **ii. PW 2 testified that PW 1 slept at the Appellant's home on the material date.**
>
> **iii. PW 2 testified that PW 3 shared a bed with the Appellant while he slept in the kitchen.**
>
> **iv. PW 1 went to school on 18th September 2014 and found PW 1 unhappy and uncomfortable.**
>
> **v. PW 1 was taken to hospital on 18th September 2014 where PW 5 confirmed that PW 3's hymen had been broken.**

35. He found the contradiction in PW 1's and PW 2's evidence that E M was not at the Appellant's house not to have been a material contradiction that could have shaken the Prosecution's case.

36. Although the Learned Trial Magistrate found the contradiction that E M did not sleep at the Appellant's house not to have been material, this court found the same to have a material contradiction that it could not overlook.

37. It was not clear from PW 2's evidence if E M slept at the Appellant's home on the material date. According to PW 1, E M returned from school together with her daughter but without PW 1. Her evidence seemed to suggest that the said E M slept at her house. However, PW 3 was emphatic that when she slept with the Appellant, E M and PW 2 were sleeping in the kitchen. This was very troubling to this court because it was a critical piece of evidence as far as corroboration of PW 3's evidence was concerned.

38. Going further, according to PW 1, PW 3's mother had already been arrested by the time the Appellant allegedly defiled PW 3. Indeed, she had testified that she had custody of PW 3 as at 17th September 2014.Although it was not clear from PW 2's testimony if PW 3 was living with their mother at Kwa Kweli at the time of the alleged incident, it did appear to this court that as at the time of his testimony in court on 2ndFebruary 2015, his mother had already been incarcerated.

39. He had stated as follows:-

> **"The complainant was not living with us. She was living with my mother at Kwa Kweli. My mother is now in jail. I know that the complainant was living with aunt A** (emphasis court)**. Complainant only came to our home that night."**

40. This ambiguity could not be taken lightly because PW 3 was also not very clear in her evidence. She said as follows:-

> **"It was at night when my dad did bad things to me. I told <u>my mother</u>**(emphasis court) **the following day morning. She took me to hospital… <u>My real mother was at Kwa Keli that day. She was not at home</u>**(emphasis court)**."**

41. Notably, PW 3's evidence materially contradicted that of PW 1 who testified that she went to school the following morning to find out if PW 3 was in school and on reaching there, she found PW 3 looking unhappy and uncomfortable. It was her further testimony that PW 3's teacher who was present at the time PW 3 was narrating her ordeal is the one who advised her to take PW 3 to hospital.

42. On her part, PW 3 said that she went home and her mother took her to hospital. Undoubtedly, PW 3 would not have confused who took her to hospital. She never mentioned anything about her going to school on that material date.

43. It is not lost to this court that the Prosecution is not required to call a particular number of witnesses to prove a fact. Appreciably, Section 143 of the Evidence Act Cap 80 (Laws Kenya) provides that:-

> ***"In the absence of any provision of law to the contrary, no particular number of witnesses shall be required for the proof of any fact."***

44. Be that as it may, failure to call a crucial witness can deal a fatal blow to a prosecution's case. In arriving at this conclusion, this court had due regard to the holding in the case of **<u>Julius Kalewa Mutunga v Republic[2006] eKLR</u>** which the Court of Appeal reiterated in **<u>Alex Lichua Lichodo v Republic [2015] eKLR</u>** that:

> **"As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive".**

45. This very court made similar observations relating to calling of crucial witnesses in the case of **<u>Paul Mwakio Mwashumbe vs Republic [2016] eKLR</u>**, where a child witness was said to have narrated what had happened to her in the presence of her teacher. It concluded as follows:-

> **"Failure to have called the persons who interrogated PW 1 and the other children and established that PW 1 had been defiled dealt a fatal blow to the Prosecution's case."**

46. Notably, the contradiction in PW 1's and PW 3's on the issue of how PW 3 went to hospital was material and could not be wished away. It was the opinion of this court that the teacher PW 1 referred to was a vital witness and ought to have been called to testify in this case. This is because he or she was said to have been present at the time PW 3 was narrating what happened to her and would have corroborated PW 1's evidence. This court found and held that the Prosecution's failure to call the said teacher as a witness herein diluted PW 1's evidence.

47. Turning to PW 5's evidence, this court was not persuaded to find as the Learned Trial Magistrate found that the breaking of PW 3's hymen was caused by the Appellant's penetration of PW 3. Indeed, PW 5 testified that she could not confirm that the hymen had been broken by the Appellant as had been contended by PW 3 but rather there was evidence of penetration.

48. Unlike the Learned Trial Magistrate, this court was not satisfied that the chain of circumstantial evidence was unbroken because this case as presented had several inconsistencies, contradictions and gaps shown hereunder:-

> **i. PW 5 could not confirm that PW 3's hymen had been caused by the Appellant's**

penetration;

ii. PW 1's, PW 2's and PW 3's evidence regarding where E M slept on the material night was inconsistent and contradicted each other;

iii. PW 1's and PW 3's evidence regarding who took the latter to hospital was inconsistent and contradicted each other. PW 1 stated that she was the one who took PW 3 to hospital while PW 3 said that she was taken to hospital by her mother;

iv. PW 1's and PW 3's evidence regarding the place from where PW 3 was taken to hospital was inconsistent and contradicted each other. PW 1 said she took PW 3 from school and took her to hospital while PW 3 said that she went home and her mother took her to hospital;

v. PW 3's assertions of where her real mother was on that material date were inconsistent. She stated that her real mother was at Kwa Keli on the material date and again said that her mother was not at home on the material date;

vi. PW 2's evidence that he never saw the Appellant defile PW 3;

vii. PW 2's evidence that PW 3 never told him that the Appellant defiled her.

49. Accordingly, having carefully analysed the evidence that was adduced by the Prosecution witnesses, the Appellant's Written Submissions and those of the State and the case law it relied upon, this court could not say with certainty that PW 3 slept in the Appellant's house on the material date. There was also no evidence that was adduced by the Prosecution to link the Appellant to PW 3's broken hymen.

50. It will be a sad day if the Appellant goes scot free after having committed the said offence, if at all. Notably, his sworn evidence did little to shed light on what could have happened on the material date as he did not allude the said date at all.

51. However, he was under no obligation whatsoever to assist the Prosecution or to adduce any incriminating evidence against himself. As this is a court of evidence, this court found that the legal and evidentiary burden of proof had not shifted to the Appellant as the Prosecution's case had too many unexplained gaps, inconsistencies and contradictions. This court thus came to firm the conclusion that the Prosecution did not prove the offence of incest against the Appellant herein beyond reasonable doubt.

52. In this regard, this court found the Appellant's Grounds of Appeal Nos (1), (2), (3), (4), (5) and (6)were merited.

II. <u>EXTENT OF THE SENTENCE</u>

53. Having found that the Appellant's Grounds of Appeal had succeeded, there was no need to analyse the sentence that would have meted upon him as this court had found that the Prosecution did not prove its case against him. Nonetheless, it felt obliged to render itself on the length of the sentence.

54. There was no doubt that PW3 and the Appellant's relationship fell within the prohibited degrees of consanguinity stipulated in Section 22 of the Sexual Offences Act. The said Section provides as follows:-

"In cases of the offence of incest, brother or sister includes half brother and adoptive brother and adoptive sister and a father includes a half father and an uncle of the first degree and a mother includes a mother and an aunt of the first degree whether <u>through lawful wedlock or not</u>."

55. It is also evident in Section 20(2) of the Sexual Offences Act that a person who is convicted of the offence of incest is liable to life imprisonment. The said Section provides as follows:-

"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."

56. Be that as it may, this court wholly concurred with the State's submissions that the sentence of life imprisonment was excessive as the said sentence was the maximum but not mandatory sentence. It hopes that the Learned Trial Magistrate will note the distinction in future.

DISPOSITION

57. As doubt was created in the mind of this court as to what really transpired on the material date, it 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 affirm the same.

58. The upshot of this court's judgment, therefore, was that the Appellant's Appeal that was lodged on 10th February 2016 was merited and the same is hereby upheld. The court hereby orders that the Appellant be set free forthwith unless held or detained for any other lawful reason.

59. It is so ordered.

DATED and **DELIVERED** at **VOI** this 11th day of April 2017

J. KAMAU

JUDGE

In the presence of:-

Paul Mwanyumba Mdenyi - Appellant

Miss Anyumba - for State

Josephat Mavu – Court Clerk