REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

CRIMINAL APPEAL NO 55 OF 2016

M M M…….....APPELLANT

VERSUS

REPUBLIC……..….RESPONDENT

(From original conviction and sentence in Criminal Case Number 823of 2013 in the Senior Principal Magistrate's Court at Voi delivered by Hon E. G. Nderitu (SPM) on 6th October 2016)

JUDGMENT

1. The Appellant herein, M M M, was tried and convicted by Hon E. G. Nderitu, Senior Principal Magistrate on three counts. Count I related to the offence of incest contrary to Section 20(1) of the Sexual Offences Act No 3 of 2006. Count II was in respect of the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act. Count III related to the offence of sexually exploiting a child contrary to Section 15 as read with Section 20 of the Children's Act, 2001. The alternative charge was for the offence of committing indecent act with a child contrary to Section 11(1) of the said Act.

2. He was sentenced to serve twenty (20) years' imprisonment for the offence of incest. The Learned Trial Magistrate rejected Count II, Count III and the alternative Charge on the ground that they were a repetition /multiplicity of the charges.

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

COUNT I

"On various days in the month of October 2013 at [particulars withheld] **in Voi Town within Taita Taveta County, you caused your penis to penetrate the vagina of J W M a child aged 15 years who is your daughter."**

COUNT II

"On various days in the month of October 2013 at [particulars withheld] **in Voi Town within Taita Taveta County, you caused your penis to penetrate the vagina of J W M a child aged 15 years."**

COUNT III

"On various days in the month of October 2013 at [particulars withheld]**in Voi Town within Taita Taveta County, you sexually exploited J W M a child aged 15 years."**

ALTERNATIVE CHARGE

"On various dates in the month of October 2013 at [particulars withheld]**in Voi Town within Taita Taveta County, you committed an indecent act with a child namely;** (sic)**unlawfully and intentionally causing your penis to come into contact with the genital organs of J W M a child named 15 years."**

4. Being dissatisfied with the said judgment, on 19th October 2016 the Appellant filed his Petition of Appeal. His Grounds of Appeal were as follows:-

1. THAT the Hon. Magistrate erred in law by not finding that key witness(s) (sic) **was/were not called/recalled when the charges were substituted and evidence taken afresh.**

2. THAT a M (sic) **standing as a witness (PW 2) J M aged seven years testified giving** (sic)**without undergoing voire dire** (sic)**.**

3. THAT the Hon Magistrate erred by not detecting that the two DNA reports though had similar conclusions their date profiles differed(sic)**.**

4. THAT the DNA Profile M13/2014 (an Exhibit) showed the mother J a female with (Y) Chromosomes which is a scientific error.

5. THAT the scientific evidence on record was not prepared professionally yet the court relied on it.

6. THAT the Hon. Magistrate erred by not finding a DNA test cannot prove penetration.

7. THAT the prosecution evidence in its totality had material contradictions enough to warrant the high court to quash both the conviction and sentence herein.

8. THAT incest was not proved at all but framed. i

5. Subsequently, on 3rd November 2016, he filed a Notice of Motion application seeking leave to file an appeal out of time. The same was not necessary as he had already filed his Petition of Appeal within time. On 9th November 2016, M/S F.M. Mwawasi & Co Advocates filed a Notice of Appointment of Advocate of even date and a Notice of Motion application seeking leave to file Supplementary Grounds of Appeal and/ or amend the Petition of Appeal. The said application was allowed on 1st December 2016.

6. The Appellant's Supplementary Grounds of Appeal were dated 1st December 2016 and filed on 6th February 2017. The grounds of Appeal were as follows:-

1. THAT the Learned Trial Magistrate erred in law and fact in not realizing and appreciating that the prosecution had not proved the case against the accused to the standard required by the law.

2. THAT the Learned Trial Magistrate erred in law and fact in not realizing that the fact that the trial proceeded on a defective charge which was bad for duplicity occasioned a miscarriage of justice.

3. THAT the Learned Trial Magistrate erred in law and fact in arriving at an erroneous conclusion that incest had been proved when the accused himself stated that the complainant was not his biological daughter.

4. THAT the Learned Trial Magistrate erred in law and fact in not realizing that the purported plea taken by the Appellant was a nullity as the appellant who stood charged with

2 counts in the main count pleaded to a defective charge.

5. THAT the Learned Trial Magistrate erred in law and fact in failing to consider and evaluate the evidence adduced against the accused person independently, irrespective of whether it was medical evidence or not.

6. THAT the Learned Trial Magistrate erred in law and fact in failing to appreciate and realize that there was no evidence against the accused person to found a conviction either on the main count or the alternative count.

7. THAT the sentence was in the circumstances manifestly excessive.

7. The Appellant's Written Submissions dated 27th January 2017 were filed on 6th February 2017 while the State's Written Submissions were dated 6th March 2017 and filed on 7th March 2017. His Further Written Submissions were dated 13th March 2017 and filed on 15th March 2017.

8. When the matter came up on 26thApril 2017, both the counsel for the Appellant and counsel for the State asked this court to rely on their respective Written Submissions in their entirety, which submissions were not highlighted. The Judgment herein is therefore based on the said Written Submissions.

LEGAL ANALYSIS

9. This being a first appeal, this court is mandated to analyse and re-evaluate the evidence afresh in line with the holding in the case of **Odhiambo vs Republic Cr App No 280 of 2004 (2005) 1 KLR** where the Court of Appeal held 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".**

10. Having looked at the Appellant's and State's Written Submissions, it appeared to this court that the issues that had been placed before it for determination were:-

a. Whether or not the Charge Sheet was defective;

b. Whether or not the Prosecution had proved its case beyond reasonable doubt.

11. This court therefore addressed the said issues under the headings shown hereinbelow.

I. CHARGE SHEET

12. The Appellant argued Supplementary Grounds of Appeal Nos (2) and (3) together.

13. The Appellant contended that the charges that were preferred against him were bad for duplicity and were so fatally defective as to be completely unfairly and unjustly compromise his defence. He submitted that the defect in the Charge occasioned a miscarriage of justice as he was subjected to double jeopardy which, the Learned Trial Magistrate referred to in her Judgment.

14. He pointed out that he was largely unrepresented during the trial. It was his contention that the said Learned Trial Magistrate ought to have raised this issue after the fresh charges were introduced and consequently, his conviction ought to be quashed. He referred this court to the case of **James Bari vs Republic [2010] eKLR**.

15. On its part, the State submitted that the Appellant was not prejudiced or occasioned any miscarriage

of justice as the charges were clearly elaborated. It further stated that the Appellant was represented by counsel during his trial and that at no point did he raise an application regarding the charges that he faced.

16. It placed reliance of Section 134 and Section 135 of the criminal Procedure Code Cap 75 (Laws of Kenya) and the case of **Laban Koti vs Republic [1962] EA 439**where it was held that where there was a duplicity of charges, the test was whether a failure of justice had occurred or the accused had been prejudiced.

17. Section 134 of the Criminal Procedure Code provides as follows:-

> **"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."**

18. Section 135 of the Criminal Procedure Code states that:-

> **1. Any offences, whether felonies or misdemeanours, may be charged together in the same charge or information if the offences charged are founded on the same facts, or form or are part of a series of offences of the same or a similar character.**
>
> **2. Where more than one offence is charged in a charge or information, a description of each offence so charged shall be set out in a separate paragraph of the charge or information called a count.**
>
> **3. Where, before trial, or at any stage of a trial, the court is of the opinion that a person accused may be embarrassed in his defence by reason of being charged with more than one offence in the same charge or information, or that for any other reason it is desirable to direct that the person be tried separately for any one or more offences charged in a charge or information, the court may order a separate trial of any count or counts of that charge or information.**

19. A perusal of the pleadings showed that the Appellant's counsel came on record at the tail end of the trial and in fact only conducted the defence case. It was therefore not correct as the State had contended that the Appellant was represented on a large part of the trial. Be that as it may, it was clear from the Charge Sheet that the Counts he was facing could be proven by the same evidence that was being adduced by the Prosecution witnesses. In other words, the evidence that was adduced by the Prosecution witnesses could have proved any or all of the Counts he had been charged with.

20. This court did not therefore see any miscarriage or prejudice that was occasioned to the Appellant because there is no law that stipulates that an accused person can only face a particular number of charges in one (1) trial. However, as provided in Section 135(3) of the Criminal Procedure Code, a trial court may direct that the different charges be heard separately, if it is satisfied that the accused person will be embarrassed if all the charges are heard in one trial. This court did not see such a scenario in the case herein. In fact, the Learned Trial Magistrate disregarded the other charges that had been preferred as a safety net and stated as much in her Judgement.

21. In the premises foregoing, this court did not find the Appellant's Supplementary Grounds of Appeal Nos (2) and (3) to have been merited and the same are hereby dismissed.

II. PROOF OF THE PROSECUTION'S CASE

A. PROOF OF PW 4'S AGE

22. The Appellant submitted that save for assertions by the Complainant, J W (hereinafter referred to as "PW 4") that she was fifteen (15) years and that she was born in 1998, the record did not show that any

document was tendered in evidence before the Trial Court to prove her age.

23. He argued that the age of a complainant in sexual offences is a fact that the prosecution must prove beyond reasonable doubt because the sentence to be imposed on an accused person is dependent on the age of the said complainant. It relied on the cases of **Criminal Appeal No 178 of 2009 Mombasa Mtawali Bomu vs Republi**c and **Criminal Appeal No 288 of 2009 Mombasa Tsuma Mwamboe vs Republic**which he indicated were unreported. However, the said cases were reported and their citations were **Mtawali Bomu vs Republic [2010] eKLR** and **Tsuma Mwamboe vs Republic [2010] eKLR.**

24. On its part, the State submitted that the age of a victim was not only determined by production of the birth certificate but also by other means including the testimony of witnesses and observation of the victim.It pointed out that S S M (hereinafter referred to as "DW 2") confirmed that PW 4 was aged fifteen (15) years of age at the time of the incident and that she was a pupil at [particulars withheld]School. It added that in any event, the Appellant never contended **(sic**) PW 4's age.

25. It relied on the case of **Joseph Kieti Seet vs Republic [2014] eKLR** where Mutende J held as follows:-

> **"It is trite law that the age of a victim can be determined by medical evidence and other cogent evidence. In the case of Francis Omuroni versus Uganda, Court of Appeal Criminal Appeal No. 2 of 2000. It was held thus:**
>
> ***"In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense..."""***

26. It also referred to the case of Machakos **HC CR Appeal No 296 of 2010 Fappyton Mutuku Ngui vs Republic** where it was held as follows:-

> **"…that "conclusive" proof of age in cases under Sexual Offences Act does not necessarily mean certificate. Such formal documents might be necessary but other modes of proof are available and can be used in other cases."**

27. A perusal of the List of Exhibits in the Trial Court showed that no documentary evidence was adduced by the Prosecution to prove PW 4's age as the Appellant had rightly submitted. Again as was correctly pointed out by the State, the age of a victim need not be proved by a birth certificate only. Appreciably, the age of a victim can be proven by the evidence of witnesses and if the same is not contested by an accused person.

28. In her testimony PW 4 stated that she was seventeen (17) years at the time she gave her evidence. This meant that she was fifteen (15) years of age at the time of the incident. The Appellant did not dispute her age when he Cross-examined her. Going further, in her evidence, DW 2 confirmed that PW 4 was aged fifteen (15) years at the time of the incident.

29. After carefully considering the evidence that was adduced by PW 4 and DW 2, this court was more inclined to accept that despite there having been no birth certificate that was adduced to prove PW 4's age, she was aged fifteen (15) years. It was improbable for DW 2 to have adduced evidence that would have prejudiced the Appellant herein, who was her biological father.

30. Having said so, although the Learned Trial Magistrate did not address her mind to the issue of PW 4's age, this was not fatal in this case and/or she did not misdirect herself as the penalty that she was to impose upon the Appellant was not dependent on PW 4's age.

31. In that regard, while this court carefully considered the cases of **Mtawali Bomu vs Republic (Supra)**and **Tsuma Mwamboe vs Republic** (Supra) that were relied upon by the Appellant and **Joseph**

Kieti Seet vs Republic (Supra) and **Fappyton Mutuku Ngui vs Republic [2012] eKLR** that were relied upon by the State, it found the same to have been distinguishable from the facts of this case as they related to offences of defilement. As will be seen hereinbelow, the penalty for the offence of incest is not dependant on the age of a victim.

32. Appreciably, as this was not a ground of appeal but the same had featured prominently in the submissions of both the Appellant and the State, this court will say no more on it and delve directly into the substantive issues herein.

B. PROOF OF INCEST

33. The Appellant argued Grounds of Appeal Nos (7) and (8) of the Petition of Appeal dated 19th October 2016 and Supplementary Grounds of Appeal Nos (1), (3) and (8) together.

34. The Appellant submitted that during Cross-examination, he had denied that PW 4 was his biological daughter as he said that she came with her mother. However, he stated that the Learned Trial Magistrate overlooked the fact and stated as follows in her Judgment:-

> **"Admitted and hence no issue is that P. W. 4 herein is a daughter to the accused person herein."**

35. It was his submission that the offence of incest could only be maintained and proved if it was a biological daughter who was involved and consequently, his conviction ought to be set aside.

36. On its part, the State submitted that although the Appellant denied that he was PW 4's biological father, he took the responsibility of maintaining her which could be inferred that he had taken over parental responsibility over her and that for all intents and purposes, he was PW 4's half father. It added that the offence of incest did not only apply to biological children but also extended to step children where an accused person has assumed parental responsibility of a child.

37. In his response to the State's Written Submission, the Appellant contended that the word "half-father" had not been defined in the Sexual Offences Act unlike the concept of "half-brother" and "half- sister" and "step brother" and "step sister" which were understandable. He was emphatic that if the drafters of the Sexual Offences Act had intended that a "half –father" meant the same thing as a "step-father", then nothing would have been easier than for them to have said so expressly.

38. He further stated that the relationship of step- father and step- daughter was totally omitted from the prohibited degrees of consanguinity in the Sexual Offences Act. It was his contention that he was PW 4's step- father and she, her step-daughter, which relationship was not envisaged under the Sexual Offences Act.

39. In his defence, the Appellant stated that PW 4 was his daughter and that he brought her up. It was during his Cross-examination that he stated that she was not his biological daughter. He admitted that he was her step-father. In her evidence, DW 2 stated that PW 4 was her step-sister. His only grouse was that a step-father and step-daughter were not within the prohibited degrees of consanguinity.

40. Section 22 of the Sexual Offences Act 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 through lawful wedlock or not."**

41. As the Appellant ably submitted, there was no definition of a half-father in the Sexual Offences Act. However, it was the view of this court that the purported differentiation of a "step-father" from a "half-brother" by the Appellant herein was merely splitting hairs and a matter of semantics. Indeed, it was

evident from Section 22 of the Sexual Offences Act that a father who is not a biological father of a victim also fell within the prohibited degrees of consanguinity.

42. A half - father therefore is any person who assumes parental responsibility of a child by virtue of marrying such child's mother through lawful wedlock or where the mother of such child and such person cohabit as husband and wife without necessarily being lawfully joined in marriage, in which case such person and mother of such child would be presumed to be living as husband and wife. This would also include an adoptive father.

43. There was a possibility that since a father can either be a "step-father" or an "adoptive father", the legislators may have found it was more prudent to use the term 'half-father" to connote any person who is not a biological parent to a child. Whereas the legislators may not have defined the term "half-father" in the Sexual Offences Act, the understanding of this court was that the term "half" merely connoted a relationship where there is no blood relationship. Indeed, "half-brother" or "half- sister" means that a child who shares one parent with another child but they are not biological siblings. The term "half" can therefore be inferred to mean any relationship whether there is no blood relationship.

44. *In arriving at the same conclusion, in the case of* **M.K V Republic [2014] eKLR,** *Majanja J cited with approval the case of* ***BNM v Republic*** **[2011]*e*KLR** where it had held as follows:-

> ***"my own understanding is that 'half father' is a term which means exactly the same as 'step-father' – it means one who is not a biological father of the child. Therefore by dint of this S 22(1) of the Act the appellant being a step-father of the complainant and one who stood in 'loquo parenthis' can legally be charged and indeed convicted of the crime of incest with her."***

45. In the premises foregoing, this court found that Grounds of Appeal Nos (7) and (8) of the Petition of Appeal dated 19th October 2016 and Supplementary Grounds of Appeal Nos (1), (3) and (8) were not merited and the same are hereby dismissed.

C. MEDICAL EVIDENCE

46. The Appellant dealt with Grounds of Appeal Nos (3), (4), (5) and (6) of the Petition of Appeal dated 19th October 2016 and Supplementary Grounds of Appeal No (5).

47. Having established that the Appellant and PW 4 were within the prohibited degrees of consanguinity, the next question that arose was whether or not the Prosecution proved its case to the required standard, being proof beyond reasonable doubt.

48. At the time of giving her testimony, PW 4 had her child, E (hereinafter referred to as "the child"), who was aged ten (10) months. She said that the child was born as a result of an incestuous relationship with the Appellant herein. Although the Appellant had contended that PW 4's could not have been pregnant from October 2013 as she gave birth on 16th May 2014, PW 4 was emphatic that the Appellant first had sex with her in September 2013. Since the gestation period of a human being is nine (9) months, it appeared to this court that PW 4 was truthful that she first had sex with the Appellant in September 2013.

49. PW 3 testified how he took samples from the Appellant, PW 4 and the child. A further DNA test was done at the insistence of the Appellant. Notably, the DNA Reports that were submitted in evidence by Government Analysts, Lawrence Oguda (hereinafter referred to as "PW 3") and Dr Mwendo Muthini (hereinafter referred to as "PW 5") showed that there were 99.99% chances that the Appellant was the biological father of the child, E M. The Appellant's assertion that the result of the DNA did not prove penetration which he had stated was a vital ingredient to prove paternity,did not find favour with this court.

50. The fact that the DNA results showed that 99.99% of the chances that the Appellant was the father of the said child was indicative of the fact that there was penetration, which was corroborated by PW 4 in

her evidence of how the deceased took her in his room and had sex with her in September 2013. All the other technical issues that the Appellant had raised relating to the 1st DNA test having not been done in compliance with a court order or that PW 3's report showed that PW 4 had an XY Chromosome, which he averred was not scientifically correct, were mere red herrings whose intention was to deviate the focus of this court from determining the real issues in dispute.

51. Having analysed the oral and documentary evidence that was adduced by the Prosecution witnesses, this court was satisfied that the Learned Trial Magistrate arrived at the correct decision when she found and held that the Prosecution had proved its case beyond reasonable doubt.

52. In the circumstances foregoing, Grounds of Appeal Nos (3), (4), (5) and (6) of the Petition of Appeal dated 19th October 2016 and Supplementary Grounds of Appeal No (5) were also not merited and the same are hereby dismissed.

III. SENTENCING

53. The Appellant's Supplementary Ground of Appeal No (7) was touched under the headings of Proof of PW 4's age and Proof of incest hereinabove. He did not, however, expressly submit on the harshness of the sentence. He merely submitted that he ought not to have been convicted at all as the Prosecution had not proved its case against him.

54. On its part, the State addressed itself to the length of the sentence that was meted upon the Appellant. It stated that a trial court could exercise its discretion in sentencing of an accused person as was held in the case of **Alister Anthony Pareira vs State of Mahara**shtra and that an appellate court can only interfere if the sentence is manifestly excessive. Notably, the citation of the aforesaid case and a copy thereof were not annexed to its Written Submissions.

55. It also relied on the cases of **Cr Appeal No 157 of 2014 GJN vs Republic** and **Cr Appeal No 140 of 2012 DMW vs Republic**. However, as the proper citations were not given and copies of the same cases were not annexed to its Written Submissions, this court also opted not to analyse the same.

56. Notably, Section 20(1) of the Sexual Offences Act 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."**

57. It is evident that irrespective of the age of a victim, a trial court can mete upon an accused person a **minimum(emphasis court)** sentence of **ten (10) years (emphasis court).** This essentially means that a trial court has the discretion of imposing more than ten (10) years and if circumstances so require, upto life imprisonment in a case where the victim is below eighteen (18) years of age.

58. As the minimum sentence the Learned Trial Magistrate could impose upon the Appellant was ten (10) years, she did not misdirect herself when she exercised her discretion and sentenced the Appellant to twenty (20) years. Appreciably, even in the absence of proof of PW 4's age as the Appellant had contended to be critical in a case of incest, the Learned Trial Magistrate was still within the limit of what she could have handed down to him.

59. In the case of **Dominic Mbogo vs Republic [2015] eKLR**, this very court reduced the sentence of life imprisonment that had been meted upon the appellant therein for the offence of committing incest with

his daughter aged fourteen (14) years to twenty five (25) years.

60. It was therefore the view of this court that the sentence that was meted to the Appellant was commensurate with the offence that he had committed and did not warrant the interference by this court.

61. Dealt with separately, this court found and held that Supplementary Ground of Appeal No (7) on the question of the harshness of the sentence was not merited and the same is hereby dismissed.

DISPOSITION

62. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was lodged on 19th October 2016 was not merited and same is hereby dismissed. This court hereby affirms the conviction and sentence that was meted upon the Appellant by the Trial Court as the same was lawful and warranted.

63. It is so ordered.

DATED and **DELIVERED** at **VOI** this **29TH** day of **JUNE** 2017

J. KAMAU

JUDGE

In the presence of:-

Kertiony holding brief for Mwawasi- for Appellant

Miss Karani-for State

Josephat Mavu– Court Clerk