REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 19 OF 2015

J M M………………..…………APPELLANT

-VERSUS-

REPUBLIC………..................RESPONDENT

(An appeal from the conviction and sentence of the Principal Magistrate's Court (S. Jalang'o) at Baricho, Traffic

Case No. 1418 of 2015 delivered on 22nd May, 2015)

JUDGMENT

1. The appellant **Joseph Muriithi Macharia** was charged in the Principal Magistrate's Court Baricho Criminal Case No. 1418 of 2014 with the offence of incest contrary to **Section 20 (1) of the Sexual Offences Act No. 3 of 2006.** The Appellant was in the alternative charged with committing an indecent act with a child contrary to **Section 11 (1) of the Sexual Offences Act**. The Appellant pleaded not guilty to the charges. After a full trial, the Appellant was found guilty of the offence of incest, convicted and sentenced to serve 10 years imprisonment.

2. The Appellant was dissatisfied with the conviction and sentence and filed this appeal raising five grounds. These were the additional grounds filed on 30th May, 2016 and he was granted leave to rely on new additional grounds on 31st May, 2016. He raised the following grounds:

> ***(i) That my rights of constitution were violated as per article 50 (2) M of the Kenyan Constitution.***
>
> ***(ii) That, the learned trial magistrate erred in law and facts by failing to comply with section 151 of the criminal procedure code.***
>
> ***(iii) That, the learned trial magistrate erred in both law and facts when he failed to consider P.W.3 (doctor) testified that he did not find any spermatozoa in the genital of the complainant.***
>
> ***(iv) That, the learned trial magistrate erred in both law and facts by failing to consider an existing grudge between me and some witnesses over sub-division of land.***
>
> ***(v) That, the learned trial magistrate erred in law and facts by not considering my defence.***

He prays that the appeal be allowed, conviction be quashed and the sentence imposed be set aside.

3.The appeal was opposed by State through the State Counsel Mr. Omayo who made oral submissions.

4. The facts of the case are that the complainant in this case JWI is a girl aged six years and the Appellant is her grandfather. On 3rd October, 2014 at about 12.00 noon the Appellant sent for the complainant. The mother of the Appellant released her daughter and she went to the house of the Appellant. The child overstayed in the house of Appellant which prompted her mother S.W.I to go to the home of Appellant. The mother of the complainant S.W.I (P.W.1) found the Appellant in the act of having sex with the minor. P.W. 1 screamed and members of the public rushed to the scene. She was advised to report to the Police. She reported to the area in charge. She then took the minor to Karatina Hospital for treatment. The matter was reported at Kiangwaci Police Post. A post rape care form and a P.3 form were filled. The clinical officer John Mwangi (P.W.3) examined the complainant and found that the hymen was broken but not fresh. There was a laceration with a small tear on the left Octoral position of the labia minora. There was a laceration wound on the vaginal opening. There was a white discharge emanating from the said opening. No spermatozoa was noted. The patient was put on antibiotics and drugs to prevent HIV infection. He filled a P. 3 form and Post rape care form exhibits 1 and 2. He testified that JWI was aged six years. The birth certificate which was produced as exhibit 3 shows that JWI was born on 21st April, 2008.

5. The Appellant gave unsworn defence and stated that on the material day he was digging near his house when children went to play near his home. He asked the children who damaged the sweet potatoes. They started blaming each other. The mother of the children went and started making a lot of noise and claimed that no sweet potatoes had been damaged. She told him it were better if he is the one who is dead and his wife be alive. He got annoyed and went to report the matter to the Police. When he reached he found her at the Police Station. He was then charged in court.

6. I have considered the evidence adduced. This being the first appellate court, I have a duty to analyse the evidence and make my own independent finding. This was so held in the case of **Ekeno -V- R (1972) E.A. 32.** The court to bear in mind that the trial court had the advantage of observing the demeanor of witnesses and hearing them giving evidence and to give allowance for that.

Evidence by P.W.1 S.W.I. is that the Appellant is her father-in-law and the complainant J.W.I. is a grand daughter to the Appellant. She testified that the Appellant sent for the complainant. After she went, P.W.1 realised she had overstayed and decided to go and find out. She found the Appellant having sex with the complainant. In cross-examination P.W.1 denied that she wanted land. She also denied that she had a grudge with the Appellant. I find that the evidence of P.W.1 was not shaken during cross-examination. The Appellant in his defence did not state what land P.W.1 wanted nor did he say what grudge he had with the P.W.1. His defence is on what transpired that day. I find that the allegation of land dispute and grudge is not true and is an after thought. P.W.1 caught the appellant in the act. Her evidence shows that the Appellant was in his room with the minor J.W.I.

7. The complainant, J.W.I who is P.W. 2 gave unsworn evidence. This was after a *voire dire* examination. She told the Court that on the material day the Appellant called her to his house. When she entered the room, the Appellant removed her clothes. He also removed his clothes. He then slept on her and inserted his penis in her vagina. The Appellant told her not to tell her mother. Her mother went and removed her from the bed. She took her to hospital and to the Police Station. She told the court that the Appellant is his grandfather. The complainant was a minor aged six years as shown on the birth certificate exhibit 3. The evidence of P.W. 2 corroborated the testimony of her mother P.W. 1. Her testimony was not shaken in cross-examination. She told the Court that she had stated what happened. The complainant is an innocent child. There is no reason to doubt her evidence.

8. The evidence of the complainant that the Appellant penetrated her was corroborated by the medical evidence. P.W. 3 the clinical officer testified that the hymen was broken, there was laceration, small tear and a laceration wound on the vaginal opening with a white discharge emanating from the said opening. P.W. 4 Cpl Justus Wambua testified that he received the report. The Appellant presented himself to the Police Post and he was arrested. According to P.W.4 the appellant presented himself to the Police but had not gone to make a complaint.

9. The complainant was a minor aged six years. The law requires that evidence of a child of tender years be corroborated. This is provided under **Section 124 of the Evidence Act**, that:

> ***"Notwithstanding the provisions of Section 19 of the Oaths and statutory declarations Act (Cap. 15 where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him."***

The evidence adduced before the trial magistrate met this threshold as it was corroborated by the evidence of an eye witness, that is, P.W.1 and medical evidence adduced by P.W.4. I find that the conviction of the Appellant was proper. P.W.1 testified that the Appellant was a grandfather of the complainant. The complainant testified that the Appellant was her grandfather. The Appellant in his defence does not deny that the complainant is his grand child. **Section 20 (1) of the Sexual Offences Act** provides:-

> ***"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, 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: 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 indecent act was obtained with the consent of the female person."***

I find that it is proved that the complainant was a granddaughter of the Appellant. He was properly charged with the offence of incest. The prosecution proved that there was penetration of a minor aged six years. The trial magistrate found that the prosecution has established an act causing penetration and that the evidence of the complainant that the Appellant removed her clothes and thereafter inserted his penis in her vagina was corroborated by medical findings. He found no reason to doubt the evidence of the complainant and her mother as to her relationship with the Appellant as the Appellant never commented on the relationship, with the complainant. There is no dispute that the Appellant is related to the complainant as her grandfather. The prosecution discharged the burden of proof that the Appellant was related to the complainant as he was her grandfather. I find that the magistrate was right to find that the charge was proved beyond any reasonable doubts.

10.The Appellant raised the ground that his rights under **Article 50 (2) (m) the Constitution** were violated. **Article 50 (2) (m)** provides:

> ***"Every accused person has the right to a fair trial, which includes the right – to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial."***

The Appellant is submitting that the trial magistrate conducted the proceedings in undisclosed language to the Appellant. I have perused the record. On 6th October, 2014 when the Appellant appeared in Court, the court interpretation was English/Kiswahili. On 4th April, 2015 the charges were read to the Appellant in Kikuyu language which he understands. Thereafter the trial proceeded with the court indicating that the interpretation was English/Kiswahili. I note that when the charges were read in English/Kiswahili, the appellant responded. It is also indicated that he understands Kikuyu. The magistrate did not indicate which language the witnesses testified in. The record shows that at all the court sittings there was a court clerk. The court clerk assists in interpretation if an accused person does not understand the language. The Appellant never indicated that he did not understand the language nor did he request for interpretation. The record shows that he fully participated in the proceedings by cross-examination of each and every witness who testified. He also gave his defence and mitigation. I find that it is too late to allege that he did not understand the language. I find that it is an afterthought as there is nothing on record of the trial court that he did not follow the proceedings. The accused relied on the case of **Katikenya -V- Republic (2007) E.A.** and **Irungu -V- Republic (2008) E.A. 126** where he submits it was held that the Court has a duty to indicate the language used. The record shows that throughout the

proceedings, the court indicated interpretation was English/Kiswahili and there was a court clerk to interpret. **Section 198 (1) of the Criminal Procedure Code** provides:

> ***"Whenever any evidence is given in a language not understood by the accused, and he is present in person, it shall be interpreted to him in open court in a language which he understands."***

The appellant understood Kiswahili when the charge was read to him for the first time. He also understood Kikuyu. I find that the trial court complied with the section as it indicated the interpretation was in English/Kiswahili. The Court of Appeal has held that where there was no indication in the trial the language used in the proceedings no prejudice is occasioned if accused was able to follow the proceedings. In **Mwendwa Kilonzo & Another -V- R (2013) eKLR** it was held:

> ***"In the present appeal however, we have come to the conclusion that the appellants did follow the proceedings before the learned trial magistrate conducted in a language they understood, though that was not noted on record. As we have stated, they did not complain to that court; they cross-examined witnesses and their statements in defence were taken down. They did not raise the issue of language or challenge either in the trial court or in the High Court where one of them had a lawyer. And there was always a court clerk on hand, whose role is to provide the interpretation required."***

The Court of Appeal has further held that although the language used was not recorded, it was clear that the appellant understood the proceedings. In **George Mbugua Thiongo -V- R (2013) eKLR** it was stated:

> ***"For the court to nullify proceedings on account of lack of language used during trial, it should be clear from the record that the accused did not at all understand what went on during his trial. That is not the case here. The Appellant cross-examined all three witnesses with no difficulty. He had no difficulty in conducting his defence. It is clear the appellant clearly understood the proceedings. We do not therefore consider that the omission by the learned trial magistrate to record the language occasioned a miscarriage of justice."***

As I have pointed out it was indicated throughout the proceedings the interpretation was English/Kiswahili. The appellant must have understood the languages because he never complained that he could not follow the proceedings and he cross-examined all the witnesses and also gave his defence and mitigation. As held in the above decisions, no miscarriage of justice was occasioned. The right of the Appellant was not violated.

The Appellant further raised the ground that **Section 151 of the Criminal Procedure Code** was not complied with. The section provides:

> ***"Every witness in a criminal cause or matter shall be examined upon oath and the court before which any witness shall appear shall have full authority to administer the usual oath."***

He submits that the P.W. 2 was unsworn. She was cross-examined and was not warned that she was under oath. P.W. 2 in this case J.W. was the complainant a minor aged six years. From the record a '*voire dire'* examination was conducted. The court directed that she would give unsworn statement. It is upon the court to determine whether a child of tender years should swear or give the evidence unsworn. It is the magistrate who conducted the examination and concluded that she was to give unsworn evidence. This Court have no opportunity to see P.W. 2. It cannot therefore interfere with the decision of the trial magistrate which was based on his observation of the minor. This examination of witness is made as provided under **Section 19 of the Oaths and Statutory Declarations Act (Cap 15) Laws of Kenya** which provides for admissibility of unsworn evidence by children of tender years. A child of tender years is defined under the Children Act to mean a child below the age of ten years. In the case of **Peter Kiriga Kiune -V- Republic Criminal Appeal No. 77 of 1982** the Court of Appeal held that;

> ***"Where in any proceedings before any court a child of tender years is called as a witness, the***

court is supposed to form an opinion on *voire dire* ***examination whether the child understands the nature of the oath in which even his sworn evidence may be received. If the court is not so satisfied, his unsworn evidence may be received if in the opinion of the court he is possessed of sufficient intelligence and understand the duty of speaking the truth. In the latter event an accused person shall not be liable to be convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him. (Section 19, Oaths and Statutory Declarations Act. Section 124 of Evidence Act."***

The trial court ruled that the complainant would give unsworn evidence after '*voire dire'* examination. The evidence which was unsworn required corroboration. The evidence of the complainant was corroborated by an eye witness, P.W. 1 and P.W. 3 the clinical officer. This was material evidence which is required to corroborate the evidence of the minor. I find that the evidence of a child of tender years is exempted from the provision of **Section 151 of the Criminal Procedure Code** by **Section 19** of the **Oaths and Statutory Declarations Act** which allows the court to receive the unsworn evidence of a minor child. The court will rely on the evidence to convict if it is corroborated. The case of **Mwaura -V- Republic (2004) E.A. 183** is not relevant as the witness was an adult whose evidence was supposed to be given under oath. I find that this ground cannot hold. The rights of appellant were not violated.

The Appellant faulted the trial magistrate for relying on the evidence of P.W. 3 the clinical officer who examined the complainant. The appellant submits that P.W. 3 did not explain what caused the laceration wound and tear noted in gentalia of P.W. 2 because she might have caused the same by herself scratching with her hand or being infected with bacterial diseases. That he did not indicate what caused the broken hymen as it is not only penile penetration that can cause the same. The appellant cross-examined P.W. 2 and did not suggest that she caused the injuries on herself. The P.W. 2 never testified that she is engaged in physical exercises like bicycle riding. P.W. 3 testified that he examined the P.W. 2 on allegation that she was defiled. He found that the P.W. 2 had injuries on her genitalia. It was not put to P.W. 3 that these injuries were caused by any other object other than a penis during sexual assault. P.W. 2 gave evidence that the Appellant penetrated her. P.W. 1 witnessed the act and corroborated the testimony of P.W. 2. P.W. 1 testified that P.W. 2 said the complainant stated that it was not the first time for the Appellant to defile the minor. This is confirmed as the P.W. 3 testified that the hymen was broken but not fresh. There was no other cause of the injuries on the complainant other than the sexual assault. Penetration does not mean the complete penetration of the male genital organ, penis into the vagina of the complainant. The offence is against penetration of a minor and as long as there is penetration whether only on the surface the ingredient of the offence is demonstrated and penetration need not be deep inside the girl's organ. Penetration is defined under **Section 2 of Sexual Offences Act** as follows:

"penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person."

The injuries on the genitalia of the complainant following a complaint of sexual assault that is defilement or this case incest of a minor aged six years is sufficient evidence to prove penetration and the charge. In view of the definition of penetration and the evidence on record, there was no requirement to examine the Appellant.

P.W. 3 stated that he is a clinical officer. The appellant cross examined him but he did not challenge his qualifications. It is too late for the applicant to raise the issue of competence of the clinical officer at this stage. In the case of **Timothy Kyalo Kioko & Another -V- Republic (2013) eKLR** the Court of Appeal held that the objection on qualification of the clinical officer should have been raised and dealt with during trial. Further the court in the case of **AGM -V- Republic (2014) eKLR** the Court of Appeal held:

"A critical issue raised in the memorandum of appeal relates to the qualification of a clinical officer who testified as P.W. 1. We have examined the record of appeal and it is apparent that when P.W. 7 testified on 20th November, 2001, he stated that he is a clinical officer. No objection was raised by the applicant as to the competence of P.W. 7 to give evidence. It is our considered view that even if the testimony of P.W. 7 is given little or no weight the evidence of the complainant is adequate to prove that the appellant committed the offence as particularized

in the charge sheet."

These are decisions which bind this Court. I am of the view that the Appellant ought to have challenged the evidence during the cross-examination which he never did. There is nothing on record to prove that the P.W. 3 was not competent. The Appellant was satisfied when P.W. 3 introduced himself as a clinical officer. He cannot question his competence at this stage. The ground must fail.

The Appellant raised the issue that he had a grudge with the parents of the P.W. 2. I find that this is a sham allegation as the Appellant in his defence did not tell the court there was a grudge. Indeed even the evidence by Appellant that arose because children damaged sweet potatoes was not put to P.W. 1 and 2 during cross-examination and the allegation was an afterthought. The submission of grudges with his sons is evidence which was not before the trial court and cannot be considered at this stage. When he was cross-examined by P.W.1 page 7 line 15, she stated that she did not want his land and she had no grudge with Appellant. The Appellant was satisfied with the questions. He never expounded the grudge in his defence. I am inclined to believe P.W. 1 that there was no land she wanted and she had no grudge with Appellant. In any case there is proof that the Appellant defiled the minor. The minor would not know of such grudges and would have nothing to do with it. The appellant had committed a crime, it was not a question of existence of a grudge. He was not framed. P.W. 1 was a competent and compellable witness to corroborate the evidence of the complainant. I find that the ground has no basis and cannot stand.

The Appellant went to the Police Station on his own. It is not unusual for suspects to surrender to Police. He could have done so to avoid 'mob justice'. The trial magistrate identified the issues for determination in his judgment. There was compliance with **Section 169 of the Criminal procedure Code.** The conviction and sentence was secure and based on cogent evidence laid before the trial magistrate. I find no reason to interfere with the finding of the trial magistrate.

The Appellant was sentenced to serve ten years. The state urged the Court to exercise its power under **Section 354 Criminal Procedure Code** and enhance the sentence. Sentencing is the discretion of the trial court and an appellate cannot interfere with exercise of discretion of the trial court unless the magistrate was wrong or the sentence was unlawful. **Section 354 of the Criminal Procedure Code** provides for the powers of the High Court. **Section 354 (3) (a) (i) (ii) (iii) (b)** gives the court the following powers after hearing the parties on appeal:

> ***"The court may then if it considers that there is no sufficient ground for interfering dismiss the appeal or may –***
>
> ***(a) In appeal from conviction***
>
> > ***(i) reverse the finding and sentence and acquit or discharge the accused or order him to be tried by a court of competent jurisdiction or***
> >
> > ***(ii) alter the finding, maintaining the sentence, or with or without altering the finding reduce or increase the sentence, or***
> >
> > ***(iii) with or without a reduction or increase or increase and with or without altering the finding alter the nature of the sentence.***
>
> ***(b) In an appeal against the sentence, increase or reduce the sentence or alter the nature of the sentence."***

These provisions allow the High Court to interfere with the sentence by either reducing it or increasing it. The Appellant urged the Court to consider the sentence and his age. The Appellant was charged under **Section 20 Sexual Offences Act**. As already pointed out the age of the complainant was proved with production of a birth certificate exhibit 3 to be aged six years. **Section 20 (1) Sexual Offences Act** which I have quoted in this judgment provides that where the female victim is less than eighteen years the accused person shall be liable to imprisonment for life. The trial magistrate despite the fact that the

prosecution proved the age of the complainant to be six years, imposed a sentence of ten years. I find that the sentence imposed was wrong. Sentencing is the discretion of the trial court. An appellate court will interfere with the exercise of discretion if the court acted wrongly, irregularly or on wrong principles. The Court of Appeal for East Africa in the case of **Ogola S/o Owuor -V- Regicum (1954) E.A.C.A. 270** it was held:

> ***"The principles upon which an appellate court will act in exercising its discretion to review sentences are firmly established. The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by trial judge unless, as was said in James -V- R – (1950) 18 E.A.C.A.:***
>
> ***"It is evident the judge has acted upon some wrong principle or overlooked some material factor. To this we would also add a 3rd criterion, namely, the sentence is manifestly excessive in view of the circumstances of the case" R –V- Shewky (1912) CCA 28 T.L.R. 364.***

The High Court in the case of **Wanyema -V- R (1971) E.A. 493** held:

> ***"An appellate court should not interfere with the discretion which a trial court has exercised as to sentence unless it is evident that it overlooked some material factor, took into account some immaterial factor, acted on wrong principle or the sentence is manifestly excessive in the circumstances of the case."***

The sentence imposed by the trial magistrate was clearly wrong. It overlooked a material factor in sentencing, that is, the age of the victim which was crucial in determining the sentence to be imposed. The sentence of ten years imposed on the Appellant was not lawful. The lawful sentence which the magistrate ought to have imposed is imprisonment for life based on the age of the victim. I will therefore interfere with the sentence. I set aside the sentence of ten years. The Appellant is sentenced to imprisonment for life. The appeal by the Appellant is without merits. I dismiss the appeal.

Dated and delivered at Kerugoya this 23rd day of June, 2017.

L. W. GITARI

JUDGE

Read out in open court, Mr. Omayo State Counsel for Republic, court assistant Naomi Murage, this 23rd day of June, 2017.

L. W. GITARI

JUDGE

23.6.2017