REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

CRIMINAL APPEAL NO 87 OF 2014

B. N. M.…..…….....……..... APPELLANT

VERSUS

REPUBLIC……..….RESPONDENT

(From original conviction and sentence in Criminal Case Number 523 of 2007 in the Resident Magistrate's Court at Wundanyi delivered by Hon F.K. Munyi (RM) on 23rd December 2008)

JUDGMENT

1. The Appellant herein, B .N .M, was tried and convicted by Hon F.K. Munyi Resident Magistrate for the offence of incest by males contrary to Section 20(1) of the Sexual Offences Act No 3 of 2006. He had also been charged with the alternative offence of committing indecent act with a child contrary to Section 11(1) of the said Act. The Learned Trial Magistrate sentenced him to serve twenty (20) years imprisonment on the alternative charge as she found that the offence of incest by males had not been proven.

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

"On 15thday of October 2007 at *particulars withheld* in Taita Taveta District within Coast Province, being a male person, had unlawful carnal knowledge of N .M, a female girl aged 3 years who was to his knowledge his daughter."

ALTERNATIVE CHARGE

"On the 15thday of October 2007 *particulars withheld* in Taita-Taveta District within Coast Province, unlawfully and indecently assaulted N. M by touching her private parts namely vagina."

3. Being dissatisfied with the said judgment, on 26thJanuary 2009 the Appellant filed a Notice of Motion application in **HCCRA No 232 of 2009 Mombasa** seeking leave to file his appeal out of time. The file was subsequently transferred to High Court of Kenya, Voi in 2016 when his said application was allowed and the Petition of Appeal deemed as having been duly filed and served.

4. His Grounds of Appeal were as follows:-

> **1. THAT the conviction on the offence of indecent assault was a miscarriage of justice as particulars and circumstances of the original case of attempting rape could not sponsor the latter** (sic)**.**

2. THAT the trial magistrate in substituting the case at judgment and subsequently entering conviction was outright denial of justice as he was not informed ad prepared in defence of new development (sic)**.**

3. THAT the produced P3 Form by the Clinical Officer was not only rejected by the same Court for not having been signed but also failed the test of justice as no qualified doctor examined or testified the subject (sic)**.**

4. THAT without the medical report the lower court erred in such substitute and conviction in rolling the wheel of justice (sic)**.**

5. THAT the evidence of PW 1 who was his wife was all hearsay from the neighbourhood and therefore had no basis (sic)**.**

6. THAT the two Principal witnesses, PW 1 and PW 2 both neighbours testified suspicion and rumours as none confessed eyewitnesses (sic)**.**

7. THAT the victims of his three old child and the allegations were caused by jealousy or k mentality after a quarrel with his wife (the mother) (sic)**.**

8. THAT the mother clearly admitted that they had badly quarreled the same day and that she was confused in all her action (sic)**.**

9. THAT the complainant in realising the consequences of her actions even tried to avoid the court for eight months and when appeared, the evidence given all amounted to hearsay and revenge(sic)**.**

5. On 3rd November 2016, the Appellant was directed to file his Written Submissions. On 29th November 2016, he filed his Written Submissionsalong with fresh Grounds of Appeal. The said Grounds of Appeal were as follows:-

1. THAT the learned trial magistrate erred both in law and fact when he fully relied on incredible evidence adduced by the Prosecution witness (sic) **yet he failed to find that the elements of indecent act wasn't proved to the standard required by the law**(sic)**.**

2. THAT the learned trial magistrate erred both in law and fact when he failed to find that the prosecution did not disclose whether x-rays were conducted by the doctor to establish exactly age of victim(sic)**.**

3. THAT the learned trial magistrate erred both in law and fact by failing to consider that no tangle (sic)**evidencewas found or adduced before the court linking him the Appellant the commission of sexual offences Act of indecent act** (sic).

4. THAT the learned trial magistrate erred both in law and facts by failing to see that the sentence against him the Appellant was manifestly excessive in the circumstances.

5. THAT the learned trial magistrate erred both in law and facts by not considering his alibi defence as the same was reasonable to award him the benefit of doubt (sic).

6. His Written Submissions in response to the State's Written Submissions dated 7th February 2017 and filed on 18th February 2017 were filed on 7th March 2017.

7. When the matter came up on 19th April 2017, both the Appellant and counsel for the State asked the court to rely on their respective Written Submissions in their entirety,which were not highlighted. The Judgment herein is therefore based on the said Written Submissions.

LEGAL ANALYSIS

8. 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".**

9. Having looked at the Appellant's and State's Written Submissions, it appeared to this court that the only issue that had been placed before it for determination was whether or not the Prosecution had proved its case beyond reasonable doubt. It therefore dealt with all the Amended Grounds together as they were related.

10. The Appellant submitted that the Charge as drafted did not prove the elements of the offence of indecent act and that the *voire dire* examination was not properly conducted. He argued that the offence of indecent assault was not proved because no Age Assessment Report or Birth Certificate was adduced in evidence to prove theageof the Complainant, N.M (hereinafter referred to as "PW 2")and that she testified that she did not know him.

11. He also stated that her assertions that he inserted his finger in her private parts were not proved beyond reasonable doubt. He pointed out that she contradicted herself when she testified that he had used a needle to cause injuries on her thighs which also contradicted the evidence of A .S (hereinafter referred to as "PW3") who stated that PW 2 told her that the Appellant had scratched her private parts using his fingers. It was his argument that inserting was not the same thing as scratching.

12. He further contended that the Clinical Officer,Morine Moraa Ratemo (hereinafter referred to as "PW 4") did not indicate the nature of the weapon that was said to have caused the injury to PW 2. He added that the sentence the Learned Trial Magistrate meted upon him was manifestly excessive in the circumstances as Section 11(1) of the Sexual Offences Act provided that the maximum sentence for an indecent act was ten (10) years.

13. On its part, the State submitted that the Learned Trial Magistrate conducted a proper *voire dire* examination and directed that PW 2 adduce unsworn evidence as she did not understand the nature of an oath or the duty to tell the Trial Court the truth. It stated that in any event, the Appellant was given an opportunity to Cross-examine PW 2 and as a result, he did not suffer any prejudice.

14. It averred that the evidence by the Prosecution witnesses was adequate for proving PW 2's age and that she did non fact inform the Trial Court that she was aged four (4) years at the time she was adducing her evidence. It was its contention that in a case of indecent act, there was no prejudice even if a birth certificate was not produced in court.

15. It urged this court to rely on the proviso of Section 124 of the Evidence Act Cap 80 (Laws of Kenya) that 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."**

16. It argued that PW 2's evidence was clear that the Appellant inserted his finger in her private parts and that the same did not amount to defilement. It was its contention that PW 2 positively identified him as her perpetrator as the incident occurred during the day.

17. It also submitted that although no other witness saw him committing the offence, her evidence was corroborated by the other Prosecution witnesses. It referred this court to the evidence of PW 3 who said that at about 10.00 am, PW 2 went to her house which was about twenty (20) metres from where PW 2 lived. She said that PW 2 did not play with other children but instead, she was sitting down and crying. Upon enquiring from her, she told PW 3 that the Appellant had scratched her private parts using his fingers.

18. It further submitted that the Appellant adduced unsworn evidence and failed to provide a credible defence. It was its averment that the Learned Trial Magistrate acted correctly when he sentenced him to twenty (20) years because he did not say anything in mitigation, he was not remorseful and the offence was committed against his very own step daughter who was of tender years.

19. The Appellant placed reliance on the cases that of **Cr App No 193/05- Kisumu Maoune Okoth & Another vs Republic** and **Wanjiku vs Republic (2002) KLR 825**which both dealt with an element of trafficking. This court did not find the same to have been relevant in the circumstances of the case herein and did not therefore analyse the holdings therein.

20. This court did not also analyse the case of **Court of Appeal 90**(sic) **of 2013 Stephen Nguli Mulili vs Republic** that the State relied upon as the same neither was a copy thereof annexed to its submissions nor was the point the State wanted to bring out, elucidated to enable thiscourt follow its argument.

21. Turning to the substantive issues, this court noted that when PW 2 was first called to the stand to testify on 27th June 2008, she informed the Trial Court that she did not understand the meaning of telling the truth or what swearing entailed as a result of which the Learned Trial Magistrate found her to have been an incompetent witness. However, when the Learned Trial Magistrate conducted a *voire dire* examination on 22nd July 2008, PW 2 informed her that she would tell the truth.

22. It is important to point out that there did not appear to have been any contradiction in PW 2's answer to the question whether she knew what to tell the truth was, a question she had also been asked on 27th June 2008 when she said that she would tell the truth. This court was thus satisfied that the Learned Trial Magistrate conducted a proper *voire dire* examination and that the Appellant was not prejudiced as he was in fact allowed to Cross-examine PW 2. His argument that a *voire dire* examination was not properly conducted thus fell by the wayside.

23. Notably, although PW 2 told the Trial Court that she did not know the Appellant, she nonetheless identified him in the dock by pointing at him. She was emphatic in both her Examination-in-chief and Cross-examination that he inserted his finger in her private parts and that at the material time, there was no one else at home apart from her brother Dominic, who PW 1 mentioned as having been left together with PW 2. She identified the pants she was wearing on the material date.

24. E. L (hereinafter referred to as PW 1) was PW 2's mother. She explained how on 15th October 2007 she came back home after taking her younger child to hospital when her neighbour Naomi Kulota (indicated elsewhere in the proceedings as "Naomi Kulunda)(hereinafter referred to as "PW 5") told her that she had seen PW 2 squat but she was unable to urinate. PW 1 further stated that PW 5 told her that PW 2 had told her that the Appellant, who was her husband, had inserted his finger in PW 2's private parts. She said that she looked at PW 2's pants and noted that they were blood stained. She then took PW 2 to hospital where she was issued with a P3 Form. In her Cross-examination, she stated that the Appellant came home in the morning while drunk and denied that she had quarreled with him.

25. PW 3 and PW 5 both confirmed having seen the blood stained pant. In line with the aforesaid fact, the Appellant's arguments that PW 2 contradicted PW 3's evidence when she stated that the Appellant had pierced her private parts with a needle and scratched her with his fingers was neither here nor there as the bottom line was that he did something to her private parts.

26. Indeed, PW 2 was four (4) years at the time of testifying and it was unreasonable to expect that she would remember all the details of what transpired on the material date without omitting or adding one (1)

or to (2) things which did not really deviate from her evidence.

27. Notably, PW 4 corroborated PW 2's evidence when she examined her the following day after the incident, that is 16th October 2007. She observed that there were blood stains on the thighs, labia majora and minora. She saw a perineal tear which was bleeding and concluded that there must have been penetration. She could not, however, determine what had been used to cause the said penetration.

28. No 54190 PC Rama Mwachuo (hereinafter referred to as "PW 6") reiterated the evidence of the Prosecution witnesses. Weighing the Appellant's unsworn evidence against that of the Prosecution witnesses, it was the view of this court that he failed to displace the evidence that had been adduced against him. Indeed, PW 2's evidence was corroborated by that of PW 1, PW 3, PW 4 and PW 5.

29. This court was satisfied that PW 2's evidence who was a child of tender years was corroborated by other material evidence. In this regard, this court fully associated itself with the holding in the case of**Musikiri vs Republic (1987) KLR 69** where it was held as follows:-

> **"The necessity o**f **material corroboration of the evidence of a child of tender years is, under Section 124 of the Evidence Act (Cap 80), an indispensable condition to a conviction of a person charged with an offence."**

30. Going further, the Appellant's argument that the sentence that was meted upon him by the Learned Trial Magistrate was excessive in the circumstances was not merited as the minimum sentence prescribed by the law is ten (10) years. The Learned Trial Magistrate had discretion to sentence him to more than ten (10) years irrespective of saying something in mitigation. The fact that the Appellant opted to say nothing during his mitigation was thus immaterial in the circumstances of the case herein.

31. As was rightly pointed out by the State, it was not necessary that the age of PW 2 be proved as the penalty in Section 11(1) of the Sexual Offences Act was not determinant on the age of a victim like in Section 8 of the Sexual Offences Act. The fact that the Appellant was emphatic that a *voire dire* examination of PW 2 ought to have been conducted was conclusive of the fact that he acknowledged that she was a child of tender years.

32. Notably, Section 11(1) of the Sexual Offences Act provides as follows:-

> **"Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years"** (emphasis court).

33. Notably, inconsistencies and/or contradictions in testimonies in a trial are expected because each witness will normally testify as to what he perceived and/or observed at any given time. However, these inconsistencies and/or contradictions must not be so glaring as to lead a trial court to entertain doubt as to what really transpired at any given time. The version of unfolding events must more or else be similar so as to render the inconsistencies and/or contradictions immaterial and irrelevant.

34. The inconsistencies and/or contradictions were not material so as to have dissuaded this court from finding that the Prosecution had not proved its case to the required standard. To the contrary having carefully analysed the evidence that was adduced in the Trial Court and the Written Submissions by both the Appellant and the State, this court came to the firm conclusion that the Prosecution proved its case to the required standard, which was, proof beyond reasonable doubt.

DISPOSITION

35. The upshot of this court's Judgment was that the Appellant's Appeal that was lodged on 26thJanuary 2009was not merited and the same is hereby dismissed. In the circumstances foregoing, this court hereby affirms the conviction and sentence that was imposed upon the Appellant herein as it was safe to do so, lawful and fitting.

36. It is so ordered.

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

J. KAMAU

JUDGE

In the presence of:-

Brightson N. Mwambili- Appellant

Miss Karani - for State

Josephat Mavu– Court Clerk