REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 41 OF 2015

BETWEEN

J I ……...…….APPELLANT

AND

REPUBLIC ……. RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. P. Achieng, PM dated 25th March 2015 at the Kakamega Chief Magistrate's Court in Criminal Case (S.O) No. 57 of 2014)

J U D G M E N T

1. J I, the appellant herein faced the following charges before the trial court:

> ***COUNT 1***- *Incest contrary to* ***section 20(1)*** *of the* ***Sexual Offences Act****. The particulars were that on 29th June, 2014 within Kakamega County, he intentionally and unlawfully caused his penis to penetrate the vagina of MK a child who was to his knowledge his daughter.*
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> ***ALTERNATIVE COUNT*** *– Committing an indecent act with a child contrary to* ***section 11(1)*** *of the* ***Sexual Offences Act****. The particulars were that on 29th June, 2014 within Kakamega County, he intentionally and unlawfully touched the vagina of MK a child aged 9 years with his penis.*
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> ***COUNT 2*** *- Causing grievous harm contrary to* ***section 234*** *of the* ***Penal Code****. The particulars were that on 29th June, 2014 in Kakamega South District of Kakamega County, he unlawfully caused grievous harm to MK.*

2. The appellant was convicted on the principal counts. He was sentenced to life imprisonment on the first count and on the second one, he was sentenced to serve one-year imprisonment. The appellant appeals against conviction and sentence.

3. In his petition of appeal and written submissions, the appellant argues that the offence was not proved as the court relied entirely on the evidence of the child and failed to consider that there were no independent witnesses. He urged that the evidence was contradictory and could not sustain a conviction. He also submitted that failure to call the investigating officer was fatal to the prosecution case. Learned counsel for the respondent, Mr Ngetich, opposed the appeal and submitted that the prosecution proved all the ingredients of the offence.

4. As this is a first appeal, I am enjoined to consider all the evidence and reach an independent decision whether or not to uphold the judgment. In so doing, it is necessary to set out the facts as they emerged before the trial court.

5. The child (PW1) gave unsworn testimony after a *voire dire*. She told the court that she was 9 years old and that the appellant was her father. From her testimony it emerged that her mother had been chased away. She narrated to the court that on 25th June, 2014 at about 7.00pm the appellant, *"did bad manners to me"* in the bedroom. She stated that he had done so before and that her younger brother was in the house and that he warned her against telling anyone about what he did. PW 1 further testified that she reported the incident to her teacher who informed the Assistant chief. She also told the court that the appellant had beaten her on the head using a cooking stick which broke.

6. PW 1's maternal grandfather, PW 3, was called by the area assistant chief on 1st July 2014 and informed that the appellant was living with his granddaughter as *"a wife"*. He went to PW 1's school and spoke to the teacher and the child. PW 1 told her what the appellant had done to her. He assisted in taking the child to the hospital. He told the court that the child was aged 9 years old and was in class 3. In cross-examination, he told the court that the appellant used to live with his daughter and they had children.

7. PW 3, the doctor who examined PW 1 at Iguhu County Hospital on 2nd July, 2014, testified that she told him that she had been assaulted several times by the appellant. He examined her and found her stomach swollen. The left hand at the elbow and wrist joints were painful, when he examined her private parts, he noted that there were bruises on the cervix and there was no hymen. The bruises began to bleed when touched. There was also a brownish discharge. He concluded that there was penetration. He also assessed the other injuries as grievous harm. PW 3 also conducted an age assessment of the child and established that she was between 9- 10 years old.

8. PW 4, the Deputy Head Teacher at the school where PW 1 was, testified that on 1st July, 2014 at about 1.40pm, he noted that PW 1 had a problem walking. When he inquired from her, she told her that the appellant had beaten her with a cooking stick. He asked some female teachers to examine her and they informed him that the child had a problem on the private parts. He thereafter reported the matter to the Assistant Chief.

9. One of the teachers who examined PW 1 on 1st July, 2014 at the request of PW4 was PW5. She testified that the child told her that she was sleeping with her father in the house and he was doing *"bad manners to her."* She told the court that the child appeared weak. Thereafter she reported her finding to PW 4.

10. In his sworn defence, the appellant denied the charges against him. He told the court that he was arrested on 1st July, 2014 for an offence he did not know. In cross-examination, he denied that the child had any injuries and that at the time the child was living with her grandfather.

11. **Section 20(1)** of the ***Sexual Offences Act***, defines incest 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…….. is guilty of an offence termed incest.*

12. The prosecution has to prove that the appellant committed either an indecent act or one that causes penetration. Under **section 2** of the ***Act***, an indecent act means *"an unlawful intentional act which causes any contact with the genital organs, breasts, or buttocks of another, but does not include an act that causes penetration."* Penetration on the other hand is defined as, *"partial or complete insertion of the genital organs of a person into the genital organs of another person."*

13. The appellant complained that he was convicted on the basis of testimony of PW 1 only and there was no independent witness. Under **section 124** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)***, the court may convict on the basis is of uncorroborated evidence of a child if it is satisfied that the child is

telling the truth. In this case the child gave clear evidence that her father had sexually assaulted her. Although she described what had been done to her as *"bad manners"* it is clear that she slept in the same bed with the appellant and that there was penetration as evidenced by the medical testimony of PW 3 and the observations of PW 4 and PW 5 on her distressed state.

14. PW1's testimony was given further credit by the fact that reported the incident to her teachers as soon as this was possible. The same information was given to PW 3. PW 1's testimony was clear and was not shaken on cross-examination and was amply corroborated by the other evidence.

15. As I stated earlier, the offence of incest the prosecution may prove either an indecent act or penetration and even though PW 1 did not describe the act in detail, the injuries on her private parts could not have been self-inflicted, they point to penetration. PW 1 identified the appellant as her father. This was also confirmed by PW 2 who was PW 1's maternal grandfather. The appellant did not challenge the fact that he was PW 1's father. The case of mistaken identity does not even arise.

16. In light of the sufficient evidence I have set out, I find that it was not fatal for the prosecution to fact to call the investigating officer or any other teacher PW1 reported to. **Section 143** of the ***Evidence Act*** does not require a party to call all or any witness to prove a particular fact. The evidence before the court was credible and sufficient to establish that the offence of incest and grievous harm. I affirm the conviction on both counts.

17. Under **section 20** of the ***Sexual Offences Act***, the minimum sentence prescribed is 10 years' imprisonment and the maximum sentence is life imprisonment. In this case, the child was aged 9 years. Had the appellant been charged with the offence of defilement, he would have been liable to serve a mandatory life sentence under **section 8(2)** of the ***Act***. Thus, I cannot say the sentence is harsh or excessive as there was evidence of penetration and the child was aged 9 years and the act aggravated by the fact that the appellant was the child's parent. The life sentence for incest was proper and is affirmed. The sentence for grievous harm was neither harsh nor excessive.

18. The trial magistrate omitted to state that the two sentences should run concurrently. Save for the order that the sentences shall run concurrently, they are also affirmed.

19. Before I conclude, the appellant complained that his fundamental rights were violated as he was not given witness statement prior to the hearing. I have read the proceedings and I note that he asked for them. The trial magistrate did not record whether he received them. However, thereafter, the appellant indicated he was ready to proceed with the hearing and actively participated and made his defence. I find this complaint without merit.

20. The appeal is dismissed.

DATED and DELIVERED at KAKAMEGA this 31st day of August 2017.

D.S. MAJANJA

JUDGE

Appellant in person.

Mr Ng'etich, Senior Assistant Director of Public Prosecutions, instructed by the Office of Director of Public Prosecutions for the respondent.