REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. 34 OF 2015

(INCEST)

(CORAM: J. A. MAKAU – J)

E O O...APPELLANT

VERSUS

REPUBLIC...RESPONDENT

(Being an appeal against both the conviction and sentence dated 19.1.2015 in Criminal Case No. 45 of 2013 in Siaya Law Court before Hon. J.N. SANI-SRM)

JUDGMENT

1. The Appellant **E O O** was charged with an offence of **Incest contrary to Section 20(1) of the Sexual Offences Act No. 3 of 2006**. The particulars of the charge are that on the 27th day of January, 2013, at Ramula Sub-Location, in Gem District within Siaya County E O O intentionally caused his penis to penetrate the vagina of FA, a child aged 9 years who was to his knowledge his niece.

2. After full trial, the Appellant was found guilty, convicted and sentenced to serve life imprisonment.

3. Aggrieved by the conviction and the sentence, the Appellant preferred an appeal through a petition dated 17th April 2015; however at the hearing of the appeal, the Appellant sought to rely on his supplementary grounds of Appeal attached to his written submissions setting out the following grounds of Appeal:-

> ***a) The Learned Trial Magistrate erred in fact and in law in failing to consider glaring consideration the defence put forward by the Appellant, in shifting the Burden of Proof to find for the Appellant on parallel evidence.***
>
> ***b) The Learned Trial Magistrate erred in fact and in law in failing to consider glaring contradictions and inconsistencies in the Prosecution's evidence and in failing to consider the evidence as a whole and especially for the defence.***
>
> ***c) The Learned Trial Magistrate erred in law and in fact in convicting the Appellant under Section 215 of the Criminal Procedure Code, without sufficient evidence and without making a specific finding to whether the Appellant in fact defiled the complainant on the date, time and place in the charge sheet, and evidence at the trial.***
>
> ***d) The Learned Trial Magistrate erred in law and in fact in convicting the Appellant in the absence of compelling Evidence from the medical practitioner.***

4. I am the First Appellate Court and as expected of me, I have subjected the entire evidence adduced before the Trial Court to a fresh evaluation and analysis while bearing in mind that I neither saw nor heard any of the witnesses and have to give due allowance. I am guided by the Court of Appeal case which set out the principles that apply on a first appeal. These are set out in the case of **ISAAC NG'ANGA ALIAS PETER NG'ANG'A KAHIGA V REPUBLIC CRIMINAL APPEAL NO. 272 OF 2005** as follows:-

> ***"in the same way, a court hearing a first appeal (i.e. a first appellate court) also has duty imposed on it by law to carefully examine and analyze afresh the evidence on record and come to its own conclusion on the same but always observing that the Trial Court had the advantage of seeing the witnesses and observing their demeanor and so the first appellate court would give allowance of the same. There are now a myriad of case law on this but the well-known case of OKENO -VS- REPUBLIC (1972) EA 32 will suffice. In this case, the predecessor of this court stated:-***

The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the Trial Court has had the advantage of hearing and seeing the witnesses (See Peters Vs. Sunday Post, (1958) EA 424)'

5. At the hearing of the appeal, the Appellant submitted written submission which he relied upon and stated that he had abandoned the grounds set out in the Petition of Appeal but shall rely on the supplementary grounds of appeal.

6. M/s. Maurine Odumba, Learned Prosecution Counsel, opposed the appeal against both the conviction and the sentence. She urged the Prosecution proved all the ingredients for an offence of incest, urging that indeed the victim and the perpetrator are related, that penetration was proved and the victim was proved to be a minor and lastly the sentence meted was within the law.

7. The facts of the Prosecution case form part of the record of appeal and I need not reproduce the same but shall make a brief summary of both the Prosecution's case and the defence.

8. The Prosecution case is that: FA, a class two pupil aged 9years, who knows the Appellant as "***Baba Mdogo***" but not by his real name and who used to stay in the same homestead with FA, stated that on 27.1.2013 at around 5.00pm, she went to posho mill to grind maize and returned home. That at around 9.00pm, FA went to her grandmother's house and met F. The Appellant also entered in the house and she left for her house where she met T. The Appellant also came in, called FA and took her to a nearby bush in the garden and inserted his penis into FA's vagina. FA raised alarm, Mama J came, the Accused then took FA to his house and defiled FA, having removed his long trouser halfway. FA felt pain but did not cry. The Appellant then released FA who went home where she found T. FA's mother was then at Kisumu but her father one L, was standing outside the house. FA told T of the incident and later her aunt, J A. FA was taken to the hospital and treated. She identified Child Health Card – MFI-P1, and P3 form MFI-P2. The Appellant was subsequently arrested and charged with the offence.

9. The Appellant gave unsworn defence denying the charge and stated that on 27.1.2013, he was asleep in his house when at around 10.00 pm. Policemen arrested him, took him to Ramula AP Post and in the morning escorted to Yala Police Station. That the following day he was taken to Court where he was surprised to hear the charge being read to him. He stated that he knew nothing about the allegation labelled against him. He stated it was a frame up because his blood brother J (PW3) wants him jailed because of a land dispute. He however, admitted that the complainant is his niece since she is a daughter of his brother L.

10. The Appellant contends that the Prosecution failed to prove to the required standard, the ingredients of the offence of incest. The Appellant faced a charge of Incest under **Section 20 (1) of The Sexual Offences Act No. 3 of 2006,** which section provides:-

"20(1) 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."

11. The Prosecution in an offence of incest is required to prove the relationship between the victim and the perpetrator is within the relation set out under **Section 22 (1) (2), of the Sexual Offences Act No. 3 of 2006 which Section** provides:-

"22. (1) In cases of the offence of incest, brother and sister includes half-brother, half-sister 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 half mother and an aunt of the first degree whether through lawful wedlock or not.

(2) In this Act -

(a) "uncle" means the brother of a person's parent and "aunt" has a corresponding meaning;

(b) "nephew" means the child of a person's brother or sister and "niece" has a corresponding meaning;

(c) "half-brother" means a brother who shares only one parent with another;

(d) "half-sister" means a sister who shares only one parent with another; and"

Lastly, the Prosecution is supposed to prove in a case of a female person, the victim is under the age of 18 years.

12. In the instant case FA (PW1) testified that the Appellant is his "***Baba Mdogo",*** PW2, J M K stated the Appellant is "***Baba Mdogo***" to the victim. PW3 L J A, testified that the Appellant was his biological brother, thus uncle to FA. DW1 the Appellant confirmed FA is his niece. I therefore find the relationship between FA, (PW1) and the Appellant is that FA is niece to the Appellant.

13. On penetration, FA (PW1) testified that the Appellant inserted his penis into her vagina forcing FA to raise alarm attracting Mama J to go there as the Appellant took FA to his house. PW2 testified that on 28.1.2013 while walking along the path, she heard FA call her "***Mama J***",

she flashed her mobile torchlight and saw an adult lying on the stomach, called village elder, searched the area but found nobody. PW2 went and knocked a nearby house where she found children who told her FA had left with "***Baba Mdogo***". The Appellant she said is known as "***Baba Mdogo***." PW2 and village elder proceeded to Appellant's house found padlock hanging from outside, heard Appellant's voice from inside his house as he was asking who was knocking, the village elder called police officers from Ramula, who came and broke into the Accused's house and found him with FA while the Appellant was naked. PW3 corroborated evidence of PW2 to the effect that when Police broke into the Appellant's house he was found with FA in his house. PW4, Josphat Owino, a Clinical Officer based at Got Agulu examined FA (PW1) and from her genitalia, he noted bruises along the ***Majora minora***, her hymen broken and concluded there was vaginal penetration. The P3 form exhibit P2 confirmed FA had bruises on the vaginal wall, hymen broken and that there was vaginal penetration. From the evidence of PW1, PW2, PW3 and PW4, I find that the Prosecution proved penetration.

14. On the age of the victim, PW1 testified that she was aged 9 years and identified her Child Health Card MFI-P1 and P3 form MFI-P2. PW4, the Clinical Officer who examined FA, stated that she was 9 years old. I have examined the Child Health Card exhibit P1 which shows FA was born on 24.8.2003 and P3 form exhibit 2 which shows FA was at the time of the commission of the offence aged 9 years. I therefore from the evidence of PW1, PW4 and on examination of the Child Health Card and P3 form satisfied that at the time of the commission of the offence, FA was a minor and age below eighteen years. I find the Prosecution proved FA was a minor and aged below 18years as of the time of commission of the offence.

15. **Section 20 (1) of Sexual offences Act** provides that the Prosecution in an offence of incest is required to prove the Perpetrator in committing the act of which causes penetration with the victim, a female person knew to his knowledge the person was related to him within the relation set out in **Section 22 of the Sexual Offences Act**. In the instant case, PW1 and PW3 categorically stated the victim FA was the Appellant's niece being daughter to Appellant's brother. The Appellant in his defence admitted he knew FA (PW1) was his niece. He indeed said FA was his niece.

16. The Appellant contends the Prosecution case is riddled with glaring contradictions and inconsistencies which the Trial Court failed to consider. The Appellant urges that FA (PW1) evidence is contradictory as to how the incident occurred and that her evidence is contradictory to that of other Prosecution witnesses. He challenges PW1's evidence on the time the incident occurred whether it was at 9.00 p.m. or 10.00 p.m. He further urged whereas PW1 stated she was released, went home and reported to T and later her aunt J A, PW2 and PW5 stated she was found in the Appellant's home. I have perused the evidence of PW1, PW2, PW3 and PW4, indeed I note PW1 talked of the incident having occurred on 27.1.2013 at night at 9.00 p.m. whereas PW2 talked of 28.1.2013, PW3 talked of 27.1.2013, PW4 of 27.1.2013 and PW5 talked of 27.1.2013. There are contradictions on evidence of PW2 on the date the incident occurred with that of other witnesses. PW1 in her evidence stated the Appellant took her to a nearby bush in the garden where he first defiled her and upon her raising alarm, Mama J came, and the Appellant then took her to his house where he further defiled her and then the Accused let her go out. In criminal cases where there are many witnesses, some of them are under pressure when appearing before Court for the first time and fear may be instilled by new environment, it is not inevitable to find contradictions in their evidence. In the instant case, the contradictions and inconsistencies are so minor that they do not affect the Prosecution's case and I disregard the same.

17. **Whether the Trial Court considered the Appellant's defence?** The Appellant denied the offence and gave unsworn statement. The Trial Court noted the Appellant's defence but did comment on the same. I shall consider his defence and as such I find the Appellant won't be prejudiced by Trial Court's failure to comment on the same. The Appellant denied the commission of the offence, however, PW1, FA who the Trial Court found to be a truthful witness and relied on **Section 124 of Evidence Act**, knew the Appellant as "***Baba Mdogo***" meaning, uncle, placed the Appellant at the scene of the incident. PW2, PW4 and PW5 found the Appellant having locked FA (PW1) in his house at the material date of the commission of the offence. PW4, the Doctor confirmed PW1 had been defiled. In light of the evidence of PW1, who the Trial Court believed and accepted her evidence under **Section 124 of the Evidence Act** as truthful and gave reasons for so finding, formed the basis for conviction supported by evidence of PW2, PW3, PW4 and PW5. I find the Appellant's defence was dislodged by Prosecution evidence and I find it as an afterthought.

18. **The Upshot is that the Appellant's appeal is devoid of merits and the same is dismissed. The conviction is upheld and the sentence confirmed.**

DATE AT SIAYA THIS 28TH DAY OF SEPTEMBER, 2017.

J. A. MAKAU

JUDGE

DELIVERED IN OPEN COURT IN THE PRESENCE OF:

Appellant in Person – Present

M/S. Maurine Odumba: FOR STATE

C.C.

1. Laban Odhiambo

2. Leonida Atika

J.A. MAKAU

JUDGE