IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL APPEAL NO 197 OF 2013

(FORMERLY NYERI HC CR APPEAL NO 159 OF 2012)

(From original Conviction and Sentence in Kangema PM Criminal Case No 89 of 2012 – J O Magori, PM)

K C………………..…………………..…………APPELLANT

VERSUS

REPUBLIC……………………………………...RESPONDENT

J U D G M E N T

1. The Appellant herein, **K C,** was convicted after trial of two counts of ***incest by a male person*** contrary to **section 20(1)** of the ***Sexual Offences Act, No. 3 of 2006*****.** It was alleged in the two counts that on 10th and 12th February 2012 respectively, being a male person, he caused his penis to penetrate the vaginas respectively of **FWK** and **EWK ,** children aged respectively 17 and 16 years, who were to his knowledge his daughters. He was sentenced to life imprisonment in each count, concurrent. He has appealed against both conviction and sentence.

2. In his petition of appeal the Appellant complained that the trial court erred in law and fact –

(i) by failing to hold that he was never subjected to medical examination;

(ii) by failing to hold that the complainants were medically examined before the alleged offences were committed;

(iii) by failing to hold that potential witnesses were never called to testify; and

(iv) by failing to hold that none of the prosecution witnesses was an eye-witness.

3. At the hearing of the appeal the Appellant filed **"amended supplementary grounds of appeal"** along with written submissions, which I have read and considered. Three additional complaints emerge –

(v) That the prosecution did not prove the offences charged beyond reasonable doubt;

(vi) That the prosecution evidence relied upon by the trial court to found the convictions was not **"sufficiently trustworthy";** and

(vii) That his defence was not considered as required by law.

4. Learned prosecution counsel supported both convictions and sentences. He submitted that the

evidence placed before the trial court was consistent and overwhelming, and that there is no reason for this court to interfere with the convictions.

5. I have read the record of the trial court in order to evaluate for myself the evidence placed there and arrive at my own conclusions regarding the same. This is my duty as the first appellate court. I have borne in mind however, that I neither saw nor heard the witnesses testify, and I have given due allowance for that fact.

6. There was no dispute at all regarding the relationship between the Appellant and the two complainants. They were his daughters with whom he was living, along with a younger son. His wife (their mother) had been dead a number of years.

7. There was also no dispute regarding the complainants' ages. Their own testimonies and documents produced in evidence proved beyond reasonable doubt that they were aged respectively 17 and 16 years and were in primary school class 7 and 6 respectively. These girls were in fact on the verge of their adulthood.

8. The complainants testified (PW1 and PW2) under oath to their father's repeated defilement of them on previous occasions, and more particularly the two incidents of 10th and 12th February 2012 at their home that formed the basis of the two charges of incest. They testified how they sought refuge at the home of PW4 (**PWW**) for three days, and reported the assaults to her, and how subsequently they had reported the matter to the assistant chief of the area (PW3: **Daniel Kamau Macharia**).

9. PW3 referred the complainants to the area chief, but was later instructed by the chief to accompany the complainants to see the Children's Officer. Later he escorted them to hospital where they were examined and treated.

10.PW 6 (**Lucy Wanjiku Irungu**) prepared the complainants' medical reports and later produced them in court. There was medical evidence of penetration of both of them. She also produced their treatment notes.

11. PW5 (**APC Emilio Githu**) was one of the officers who arrested the Appellant in the company of the area assistant chief. PW7 (**CPL Khadija Kenga**) was the investigating officer. She recorded the statements of witnesses and recovered some exhibits that she produced in evidence.

12. The Appellant gave sworn evidence in his own defence and did not call any witness. He was not cross-examined by the prosecutor. He never denied the charges in terms, though by necessary implication he can be said to have denied them. He alluded to a land case with some people, though he did not state how this was connected to the charges he faced.

13. The Appellant cross-examined all the prosecution witnesses, including the two complainants. He did not shake any of them.

14. Upon my own evaluation of the evidence placed before the trial court, the Appellant was convicted upon clear and overwhelming evidence. There was no reason at all suggested by the Appellant why the complainants might lay such grave charges against their own father with whom they lived. They gave clear and candid testimony of repeated defilement of them by him on his marital bed. They had reported the previous defilements to their teacher, but apparently no action had been taken. Thankfully action was finally taken, and the children were referred to a children's officer and then to the local administration and the police, and justice was finally done to them.

15. The complainants' own testimonies were sufficient to found the Appellant's convictions; but there was ample corroboration of their stories, if such were required, including the medical evidence by PW6 and the testimony of PW3 and PW4. The two main charges that the Appellant faced were proved beyond reasonable doubt, and there is no proper basis at all for this court to interfere.

16. As for the sentences, the complainants having been aged below 18 years, and that fact having been stated in the charge, the Appellant was liable to imprisonment for life. That is what the trial court awarded him. But it was not a mandatory sentence under the law; it was a maximum sentence that the court could award in its discretion. There was a minimum sentence though, of ten (10) years imprisonment. See section 20(1) of the Act aforesaid and the *proviso* to it.

17. I have considered that the Appellant had another child who he was taking care of, the boy he was living with along with the two complainants. I have also considered the ages of the two complainants at the time the offences were committed. I note that the age of the Appellant himself was not given in his mitigation.

18. I consider, in the circumstances of this case, that life imprisonment was manifestly harsh and excessive. I will set aside that sentence and substitute therefor imprisonment for ten (10) years on each count, to run concurrently from the date of the original sentences, 13/09/2012. To that limited extent only does the appeal against sentence succeed.

19. The appeal against conviction is hereby dismissed. It is so ordered.

DATED AND SIGNED AT MURANG'A THIS 20TH DAY OF SEPTEMBER 2017

H P G WAWERU

JUDGE

DELIVERED AT MURANG'A THIS 22ND DAY OF SEPTEMBER 2017