REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 97 OF 2017

M U M …………………………….…..... APPELLANT

VERSUS

REPUBLIC…………………………... PROSECUTOR

JUDGMENT

1. The appeal herein arises out of a conviction whereby the appellant M U M was sentenced to life imprisonment on 17th November, 2014 by S.R. Wewa, Principal Magistrate, in Kaloleni Criminal case No. 214 of 2014.

2. The appellant was arraigned in court on 16th September, 2014 where the main charge and an alternative charge were read out to him. He pleaded not guilty to both charges. When he attended court on 22nd September, 2014 for the hearing of his case, the prosecution substituted the charges. **In the main charge, the offence was one of Incest by male contrary to section 20(1) of the Sexual Offences Act No. 3 of 2006.** ***The particulars were that on diverse dates between 1st February, 2014 and 28th February within Kilifi County, he unlawfully and intentionally committed an act which caused penetration of a male genital organ namely penis into a female genital organ namely vagina of H N M, a child aged 15 years who to his own knowledge was his daughter.***

3. The appellant faced the **alternative charge of indecent act with a child contrary to section 20(1) of the Sexual Offences Act No. 3 of 2006.** ***The particulars of the charge were that on diverse dates between 1st February, 2014 and 28th February, 2014 within Kilifi County, unlawfully and intentionality caused his penis to touch the vagina of H N M a child aged 15 years.***

4. The appellant filed his grounds of appeal which he later amended after the court granted him leave on 18th May, 2017 to so amend. He raises the following amended grounds of appeal:-

> (i) That the Learned trial Magistrate erred in law and fact in convicting him without considering that the burden of proof in the present case was not established beyond any reasonable doubt as the P3 form and the evidence of PW2 which would have formed an integral part in proving the present case had no substantial evidence to warrant his conviction thus contravening Section 36 of the Sexual Offences Act No. 3 of 2006, Section 107 as read with 109 of the Evidence Act and Article 159(2)(a) and (d) of the Constitution;
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> (ii) That the Learned trial Magistrate erred in law and fact in convicting him without considering that there were massive invariances (sic) and contradictions in the prosecution evidence that did

not warrant the conviction of the appellant thus contravening Section 153 as read with section 154 of the Evidence Act;

(iii) That the Learned trial Magistrate erred in law and fact in convicting him without giving due consideration to the alibi defence that was advanced by him which was substantial enough to vindicate him thus contravening Section 212 as read with Section 235 of the Criminal Procedure Code.

5. Ms Ocholla, Learned prosecution Counsel opposed the appeal and urged the court to uphold the conviction and sentence. She submitted that this being a case of incest, penetration was proved by production of the P3 form produced as p. exh. 2 by the Doctor, PW3 who confirmed that PW1 was 8 months pregnant at the time of examination. Counsel submitted that the foregoing corroborated PW1's evidence which was to the effect that in the month of February, 2014 the appellant had sex with her. PW3 did not see any injuries on PW1’s private parts due to effluxion of time. She added that the relationship between the appellant and PW1 was established. She indicated that PW1 testified that the appellant was her father, which fact was corroborated by her mother, PW4.

6. On the second ground of appeal, Counsel submitted that there were no contradictions in the case. She stated that PW1 testified that she was left with the appellant in February 2014 when her mother travelled to attend a wedding in Mombasa. PW4 confirmed that in February, 2014 she visited Bombolulu to attend a wedding. On returning to her home, she found that PW1 was not her usual self. On 9th September, 2014, PW1 was examined at St. Luke's hospital, by PW3 who confirmed that she was pregnant.

7. On the third ground of appeal, Ms Ocholla submitted that the appellant raised no alibi defence. She prayed for the appeal to be dismissed.

8. The appellant in response to the foregoing stated that he requested the Hon. Magistrate to wait for the child to be born for a DNA test to be done so that it could be established if he was the father of the child that had been born out of defilement. The appellant prays for the appeal to be allowed, conviction quashed and the sentence of life imprisonment set aside.

DUTY OF THE FIRST APPELLATE COURT

9. This court is alive to its duty as the first appellate court as laid out in the case of **Soki vs Republic** [2004] eKLR, where the Court of Appeal cited the case of **Gabriel Kamau Njoroge vs Republic** (1982 – 1988) 1 KAR 134 that held as follows:-

> ***“It is the duty of a first appellate court to remember that parties are entitled to demand of it a decision on both questions of fact and of law, and the court is required to weigh conflicting evidence and draw its own inference and conclusions bearing in mind that it has neither seen nor heard the witnesses and make due allowance for this.”***

10. In **Attorney General and 2 Others vs IPOA and 2 Others**, CA No. 324 of 2014, the Court of Appeal explained what re-evaluation of evidence entails, in the following terms:-

> ***“Re-evalution is not merely a rehashing of the evidence or findings of the trial court. It entails reconsidering the evidence afresh with a clear mind devoid of any influence from the findings of the trial court.”***

PROSECUTION EVIDENCE

11. The complainant, H N M, testified as PW1 after being taken through voir dire examination by the Hon. Magistrate. It was her evidence that in February between the 1st and 28th her mother had gone to their home in Bombolulu for a week. As she was reading at the veranda at 8:00p.m., her father, the appellant, approached her and asked her to allow him to check her. He told her to remove her cloth (sic). She removed her dress and remained with a pant. He told her to lie down and she lay on the cement. He

lay on top of her and inserted his penis. She felt pain but he told her to be calm. He finished and told her he was ashamed and asked for forgiveness. She told him, she had forgiven him. He warned her not to tell her mother and if she did, her mother would leave them to suffer. She stated that her siblings aged 10, 7 and 4 years had gone to sleep after supper and did not know of the defilement. She went and slept but felt pain. It was her evidence that her mother came back after 5 days but she did not inform her about the incident and her father did not talk to her thereafter.

12. It was the evidence of PW1 that in the month of May, her mother asked her why she does not wash her clothes and she said there was nothing wrong. Her mother told her that if she got money PW1 would go to hospital. The appellant said she should be checked well. On 5th September, 2014 she went to St. Luke's Hospital where she was told she was pregnant. She stated that until then, she had not told her mother about the incident because she still recalled what the appellant had told her. PW1 informed the trial court that her mother was told to go out when she was being examined. She was then asked who was responsible for the pregnancy and she disclosed to the Medical Officer. She was taken to the Police Station where she was given a P3 form which she took to hospital and went for it the following morning. It was her evidence that her mother got to know of the defilement after the appellant's arrest.

13. PW2 was Scolarstica Eghwa Chidui of St. Luke's Hospital, Kaloleni. It was her evidence that on 5th September, 2014 she examined PW1 who was 14 years old and carrying her first pregnancy. She said she did not know who was responsible. She stated that they use one basin to pass urine and that is what caused the pregnancy. She had been told to say that by the appellant. PW2 requested PW1 to go with her parents. On 9th September, 2014 she went with her mother who said that PW1 was pregnant because of passing urine in the same basin. She said that the appellant told them so.

14. PW2 testified that PW1 was fearful. She therefore told her mother to go out (of the examination room). PW1 then told her that it was the appellant who was responsible for the pregnancy. She recounted that when her mother was away at Bombolulu, at 8:00 p.m., her father told her he wanted to know if there was any man who had penetrated her and he told her to remove her clothes. Her father penetrated her. PW2 reported the matter to the hospital administration.

15. PW3 was Lilian Ooga, a Doctor at St. Luke's hospital, Kaloleni. She filled the P3 form for PW1 who had had a sexual encounter with her father. She told PW3 that she had never had a sexual encounter with any man. PW1 was 8 months pregnant. She had no injuries on her private area. PW3 produced the P3 form as exh. 2.

16. PW4, M B J, is PW1's mother and the appellant's wife. She told the court that PW1 was 15 years old and she had her birth certificate showing that she was born on 17th June, 1999. It was her evidence that in February, 2014 she went to their home at Bombolulu and left her husband with their children. She went away for 2 days and returned on the 3rd day. In the month of May, 2014 she noticed that PW1 was pregnant but she declined to disclose who was responsible for the pregnancy. She took PW1 to St. Luke's Hospital in September, 2014. They were told to go back and the Doctor asked her who was responsible but PW1 refused to disclose. PW4 was told to go out and the two remained inside. After the Doctor came out they were told to wait for another Doctor. They then boarded a hospital motor vehicle with the 2 Doctors to the Police Station. She was told to wait outside as the others entered. Her husband was arrested later and that is when she learnt the reason for his arrest. She took PW1's birth certificate to a Police Officer by the name Nyambura.

17. PW5 was No. 23391 Inspector Peter Nyamai of Kaloleni Police Station general duties and Acting Officer Commanding Station (Ag. OCS). It was his evidence that on 9th September, 2014 at 4:12 p.m., the complainant, her mother, a nurse from St. Lukes hospital and a social worker went to the Police Station and complained that PW1 had been defiled by her father between 1st February and 28th February, 2014 but they did not state the specific day. The report was booked in the occurrence book and she was issued with a P3 form to take to hospital. She returned the form duly filled on 10th September, 2014. He arrested the appellant on 15th September, 2014 and charged him. He assigned the case to PC Woman Nyambura.

18. PW6 was No. 97451 PC Woman Judy Nyambura of Kaloleni Police Station. Her duties were to deal with children and gender issues. It was her evidence that on 9th September, 2014, PW1 went to the Police Station accompanied by her mother, a nurse and a social worker from St. Luke's Hospital and reported that she had been defiled by her father, M U M. PW6 recorded the report and issued her with a P3 form. She took it to St. Luke's hospital where it was filled and she returned it the following day. She was 15 years old.

19. PW6 testified that the birth certificate shows that PW1's father was M U M and her mother M B. She was born on 17th June, 1999. She produced the birth certificate as exh. 1. PW6 stated that she did not make inquiries from PW1's mother to find out if she knew about the issue, as it was a sensitive one. PW6 stated that the complainant said that on diverse dates between 1st February, and 28th February, 2014 her mother had gone to their home when PW1 was defiled by the appellant. She did not tell anyone as the appellant had warned her that their mother would leave for their home and they would suffer. PW4 confirmed to PW6 that that there was a time in February, 2014 when she had gone to their home but she could not recall the date.

THE DEFENCE

20. On being put on his defence, the appellant informed the court that on 1st February, 2014 he was at home with his family where they dug a well until 14th February, 2014 when he and his wife PW4 proceeded to Chonyi for a ceremony for his aunt who had passed on. A neighbor told him that their daughter, PW1 was unwell. He sent her mother, PW4 to check on her and she gave her Panadol. He stated that in the month of April, 2017 he found that she had a swelling on her stomach and that she was supporting herself with both hands when standing up. He was told she was expectant. In September, 2014 he gave some money to PW4 and told her to take PW1 to the clinic. On 15th September, 2014, his cousin told him that he was needed at the Chief's Camp. On reaching there he was told to wait. A police officer from Kizuri came for him and he was booked in the cells. He was informed of the offence. He became shocked and worried and told them that he had not done such an act.

DETERMINATION

The issue for determination is if the prosecution proved its case beyond reasonable doubt.

21. On his first ground of appeal the appellant challenges his conviction as no DNA samples were taken as provided in section 36 of the Sexual Offences Act, to ascertain if he sexually assaulted PW1. Thus the burden of proof was not discharged in accordance with the provisions of sections 107 and 109 of the Evidence Act. The appellant herein was arrested and arraigned in court before the child that PW1 was carrying was born, taking DNA samples from the appellant to establish if he indeed sexually assaulted and impregnated PW1 would have been an exercise in futility. Although he submitted that he requested the Hon. Magistrate to wait for the child to be born for a DNA test to be done so that it could be established if he was the father of the child that had been born out of defilement, there is no record of the said request in the lower court proceedings. The above ground of appeal does not come to the aid of the appellant for it lacks a sound basis.

22. The Court of Appeal in the case of **Laban Mutua vs Republic** [2016] eKLR stated as follows on DNA testing:-

> ***"DNA testing pursuant to section 36 of the Sexual Offences Act is not a mandatory requirement. The section merely provides that, where a person is charged with committing a sexual offence, the court may direct that appropriate sample be taken from the accused for purposes of scientific testing including a DNA test, in order to gather evidence and to ascertain whether or not the accused committed an offence. As can readily be seen, the section can only be invoked at the instance of the court. Courts as arbitrators rarely descend in the arena of conflict. This may inform the discretionary nature of the wording of the section."***

23. The said court went further to cite the case of **George Kioji vs Republic**, CR App. No. 270 of 2012

(UR) that stated thus:-

> ***"Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to section 124 of the evidence Act, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief."***

24. In the present case, the Hon. Magistrate considered the evidence in totality and found that PW1 who is the appellant's daughter could not have implicated him in the offence, as there was nothing in both the prosecution evidence or the defence that could cause the appellant to be implicated. The Hon. Magistrate found the evidence by the prosecution well coordinated.

25. On the issue of PW1 having no injuries on her genitalia, it is worth noting that the offence was committed in February, 2014 and PW1 was examined on 9th September, 2014. Medical examination was done 8 months after the offence was committed. Injuries would not have been visible on PW1's genitalia after such a long duration of time.

26. The appellant in his grounds of appeal has stated that there were variances and contradictions in the prosecution's case. One of the contradictions that was pointed out is that PW1 testified that her mother had gone to Bombolulu for a week when the offence occurred, yet her mother said she had gone to the said place for 2 days. PW1 was 15 years of age when the offence occurred, she could not even recall the exact date when she was defiled. This court notes that with PW1 having gone through sexual assault, her mother's absence from their home for 2 days could have seemed like an eternity to her. It is my finding that the duration of time that PW4 was away does not vitiate the fact that the appellant defiled PW1. What is of critical importance is that PW4's absence from her home, gave the appellant an opportunity to commit the offence. It is thus immaterial whether PW4 was away from her home for 2 or 5 days. PW4 did confirm that she was absent from her home for 2 days in the month of February, 2014. PW1's evidence was that the appellant committed the offence when PW4 was away. The age of the pregnancy which was 8 months as at the time PW1 was examined in September, 2014 as per the medical report produced as p. exh. 2 goes to support PW1's evidence that she was sexually assaulted by the appellant in February, 2014.

27. The appellant claims to have raised an alibi defence, I see no such defence in the lower court proceedings. The appellant talked about him and his wife having gone to Chonyi for a funeral, thus suggesting that someone else committed the offence. PW1's evidence was that PW4 had travelled to Bombolulu, leaving her and her siblings with the appellant in February, 2014. The funeral the appellant alleges to have attended with PW4 was at Chonyi not Bombolulu. PW4 did confirm that she had traveled to Bombolulu in February, 2014 leaving behind her husband and children at home. Having found that the appellant did not raise an alibi defence, the 3rd ground of appeal falls flat on its face.

28. The appellant's written submissions indicate that PW1 told PW3 that she had never had a sexual encounter with any man. The evidence on record shows that when PW1 opened up to PW2 and told her that the appellant is the one who defiled her, she was taken to the Doctor, PW3 whom she told that she had not had a sexual encounter with any man, This court's understanding of the above statement is that PW1 had not had a sexual encounter with any other man apart from the appellant.

29. The conduct of the appellant goes a long way to prove his culpability in the commission of the offence. PW2 testified that when she asked PW1 who was responsible for the pregnancy, she said that she did not know but they were using one basin to pass urine and that is what caused the pregnancy. She told PW2 that she had been told to say that by the appellant. PW2 requested PW1 to go to the hospital with her parents and on 9th September, 2014 she went with her mother who said that PW1 was pregnant because of passing urine in the same basin used by others. She said that the appellant told them so. It is

thus evident from the foregoing that the appellant was trying to cover up his actions by informing PW1 and PW4 the improbable story of what had caused PW1's pregnancy.

30. I am satisfied that the prosecution proved that it was the appellant who defiled PW1 and warned her not to inform her mother or else she would leave them with no one to take care of them. He took advantage of the naivety of his daughter. The defilement resulted in a pregnancy but all along PW1 had kept the defilement under wraps as a result of the warning she had been given by the appellant. It is thus not surprising that when she went to hospital she did not readily reveal to PW2 the person who had impregnated her until PW4 was told to leave the hospital room they were in.

31. The prosecution proved that the appellant was PW1's biological father. This came out during the evidence of PW1, PW4 and even the appellant who stated that PW1 was his daughter. A birth certificate produced by PW6 as exh.1 bore the name of the appellant as PW1's father. The degree of consanguinity between PW1 and the appellant was proved beyond reasonable doubt as that of daughter and father, respectively. In the said circumstances the appellant was properly convicted for the offence of incest.

The Hon. Magistrate after considering the evidence adduced found that the birth certificate did show that the appellant was the biological father of PW1 and that she was 15 years old having been born on 17th June, 1999. She also found that the charge was proved beyond reasonable doubt. The decision of the Hon. Magistrate cannot be faulted as it stands on solid ground.

32. One last thing that this court would like to address is the manner in which the charge was drafted, the particulars of the charge are that ***"on diverse dates between 1st February, 2014 and 28th February, 2014, the appellant committed the offence".*** The evidence of PW1 was to the effect that she was defiled on one occasion and not on numerous occasions falling on different dates, which would have called for the use of the term **"diverse dates".** Since PW1 could not recollect the date when the offence occurred, it would have sufficed for the charge to read that the appellant committed the offence on an ***"unknown date between 1st February, 2014 and 28th February, 2014.***

33. The above anomaly however did not prejudice the appellant in giving his defence. I also find that it is an error that is curable under the provisions of the section 382 of the Criminal Procedure Code. A word of caution to the prosecution is that it should be diligent in ascertaining that charges are correctly drafted to avoid embarrassing or causing prejudice to accused persons.

34. The nett effect of the foregoing analysis is that the appeal herein has no merit and is hereby dismissed in its entirety. The appellant has 14 days right of appeal.

DELIVERED, **DATED** and **SIGNED** at **MOMBASA** on this **24th** day of **November, 2017.**

NJOKI MWANGI

JUDGE

In the presence of:-

Appellant present in person

Ms. Ocholla – Prosecution Counsel for the Director of Public Prosecutions.

Mr. Oliver Musundi - Court Assistant