REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 18 OF 2013

W.M ……..…… APELLANT

VERSUS

REPUBLIC ……..... RESPONDENT

(An Appeal from the Judgment of the Resident Magistrate Honourable B. Limo in Kapsabet Criminal Case No. 357 of 2011 dated 8th February, 2013)

JUDGMENT

1. The appellant was tried and convicted of the offence of incest contrary to ***Section 20(1)*** of the ***Sexual Offences Act.*** He was sentenced to life imprisonment.

2. The particulars of the offence were that on diverse dates between 2nd and 16th February 2011 within Nandi County, the appellant caused his penis to penetrate the vagina of *S.J* a girl under the age of 18 years who he knew to be his daughter.

3. The appellant was dissatisfied with his conviction and sentence. He lodged an appeal to the High Court through his advocates *Ms mburu Okara & Co. Advocates* in a petition of appeal dated 13th February, 2013. He subsequently chose to prosecute his appeal in person and with leave of the court, he amended his grounds of appeal on 11th February, 2016.

4. In his amended grounds of appeal, the appellant in the main complained that he was convicted on the basis of a defective charge sheet; that the learned trial magistrate erred in not giving due consideration to his defence; that the trial magistrate erred in convicting him on the basis of insufficient evidence as crucial prosecution witnesses were not called to testify and those who testified were not credible and lastly, that the trial magistrate in passing sentence

against him failed to consider that he was a first offender.

5. In prosecuting his appeal, the appellant largely relied on homemade written submissions filed in court on 11th February, 2016 but he also made brief oral submissions. In his submissions, he contended that the charge sheet was defective as it did not specify the exact age of the complainant and that even during the hearing of the case, no birth certificate or age assessment report was availed to the trial court to prove her age; that failure to prove the complainant's age not only made his conviction unsafe but also rendered the sentence imposed upon him unlawful. He further submitted that the complainant was not a credible witness given that the medical evidence in the P3 form showed that she was sexually active and therefore

it could not be said that her hymen was broken on 16th February, 2011 one of the days the offence was allegedly committed; that the charges were in any event a fabrication by *J*; that the offence was not proved beyond any reasonable doubt as the prosecution failed to call crucial witnesses like the complainant's grandmother and the chief. He urged the court to allow the appeal.

6. The state contests the appeal. On behalf of the state, learned prosecuting counsel *Ms Mokua* submitted that the appellant was properly convicted as the offence had been proved beyond any reasonable doubt. She also submitted that the charge sheet was not defective as the only requirement under *Section 20(1)* of the *Sexual Offences Act* is that the complainant be under 18 years of age and that the prosecution proved during the trial that the complainant was eight years old at the time the offence was committed. While responding to the claim that crucial witnesses were not called to testify during the trial, *Ms Mokua* submitted that it was not necessary to call more witnesses as the four witnesses who testified were sufficient to prove the charges beyond any reasonable doubt.

7. This is a first appeal to the High Court. I am therefore enjoined to re-evaluate and consider afresh the evidence presented to the lower court and to draw my own independent conclusions regarding the soundness or otherwise of the appellant's conviction. In doing so, I should be careful to remember that I should give allowance to the fact that unlike the trial court, I did not have the advantage of seeing or hearing the witnesses.

See: ***Okeno V Republic [1972] EA 32; Boru & Another V Republic [2005] 1 KLR 649 .***

8. I have considered the evidence tendered before the trial court, the amended grounds of appeal and the submissions made by the appellant and the state.

I wish to begin by addressing the appellant's claim that he was convicted on a defective charge sheet. I have perused the charge sheet. I do not find any defect in the charge as framed since the statement of the offence fully disclosed the offence of incest and the particulars thereof proceeded to specify that the victim of the offence was to the appellant's knowledge his daughter aged below 18 years.

9. A reading ***Section 20(1)*** of the ***Sexual offences Act*** which is the provision that creates the offence of incest shows that the exact age of the victim need not be specified in the particulars supporting the offence. It would be sufficient if the charge sheet disclosed that the victims age if a minor was under 18 years old. In my view, the age of the victim only becomes relevant during sentencing because the law prescribes a different punishment on conviction depending on whether the victim was an adult or a minor. If the victim is a minor, the offence on conviction attracts a mandatory sentence of life imprisonment but where the victim is an adult, the accused person is liable to imprisonment for a term of not less than ten years. Nothing therefore turns on the claim that the appellant was convicted on the basis of a defective charge sheet.

10. With regard to the complaint that the learned trial magistrate erred in failing to consider the appellant's defence, I have read the judgment of the trial court and it leaves no doubt that the learned trial magistrate considered the appellant's defence but dismissed it as unmerited after comparing it with the evidence presented by the prosecution.

11. I have carefully re-evaluated the evidence that was adduced before the trial court. The record of the lower court shows that the complainant who was aged about 8 years old when the offence was allegedly committed testified twice together with a *Mr. Paul Birgen* a clinical officer at Kabiyet Health centre.

The trial opened before *Hon. A. Lorot* (SRM) who heard the evidence of the minor who testified as PW2 and the evidence of the clinical officer who testified as PW1. The trial magistrate was subsequently transferred from Kapsabet law courts. The trial was taken over by *Hon. G. Mutiso* (RM) who after complying with the provisions of ***Section 200*** of the ***Criminal Procedure Code*** ordered that the trial should start afresh following the appellant's election under the aforesaid provision.

12. Having considered the evidence adduced by the complainant during the two occasions that she

testified before the court, I find that her evidence reveals major material contradictions which in my view casts doubt as to her credibility. When she testified on 18th October 2011 after a brief voire dire examination, she stated that at the material time, she used to stay with her grandmother with whom she shared a bed; that the appellant who was her father removed her from her grandmother's bed twice, took her to his house and defiled her. She could not remember the dates on which her father allegedly defiled her. However in her evidence on 7th February, 2013, she testified that she was living alone in a house with the appellant since her mother had ran away from their home; that on 2nd February, 2011 and 16th February, 2011, the appellant went to her room and defiled her.

13. The evidence on record further shows that when she was medically examined on 20th February 2011 by PW3 who had testified earlier as PW1, no bruises were found on her vagina wall but her hymen was broken. Her vaginal canal was open meaning that she had been sexually active.

14. The proceedings before the trial court on 12th September, 2011 shows that when the complainant first appeared before the court, she was crying uncontrollably saying she wanted to go back home with her father but after she was released to the care of a Children's Home, during her next court appearance, the trial court noted that she had informed the court that she no longer wanted to see the appellant. When she subsequently testified for the second time on 7th October, 2011 she somehow remembered the dates when she was allegedly defiled by the appellant and it is then that she changed her narrative to say that she used to live alone in a house with the appellant.

15. Having considered all the evidence on record in its entirety and the proceedings before the trial court, I find the contradictions in the complainant's evidence on the two occasions she testified before the court confounding and impossible to reconcile. It is difficult to understand how the complainant even given her tender age could confuse basic facts regarding who she was living with on the dates the offence was allegedly committed and the circumstances surrounding the commission of such a serious and traumatic offence.

16. These contradictions coupled with her attitude towards the appellant as captured in the proceedings before and after she started living in a children's home leaves me with a distinct impression that she may have been coached on what to say against the appellant. This may explain why her grandmother refused to cooperate with the police and was not called as a witness to support the prosecution case even though according to PW1 and PW2 (J), she was also notified of the allegations against the appellant at the same time as PW2. PW2 confirmed in her evidence that she at times used to live with the complainant and at other times the complainant used to live with her grandmother. Being a lady who had taken over the role of nurturing the minor, it is reasonable to assume that had the allegations been truthful, her grandmother would have been at the forefront vindicating the complainant's claims by volunteering information to the police or even testifying before the trial court.

17. In view of the foregoing, I am unable to agree with the learned trial magistrate that the complainant was a credible and reliable witness. In my opinion, the material contradictions in her evidence made her unworthy of any credit. I also find it curious that a child who was eight years old could have been defiled repeatedly by an adult and fail to sustain any injury on her private parts which PW3 could have noted on his examination hardly three weeks after the offence was allegedly committed. The fact that PW3 found that she had been sexually active prior to examination means that there was no evidence to support the prosecution's claim that she was indeed defiled on the dates stated in the charge sheet.

18. Given what I have said above, it is my finding that the learned trial magistrate failed to properly analyse the evidence adduced before the trial court including the complainant's earlier testimony which was part of the court record and thereby arrived at the erroneous conclusion that the charges had been proved against the appellant beyond any reasonable doubt. In my view, the evidence on record fell short of proving the offence charged against the appellant to the standard required by the law.

19. For all the foregoing reasons, it is my conclusion that the appellant's conviction was unsafe. I therefore find merit in the appeal and it is hereby allowed. Consequently, the appellant's conviction is

quashed and the sentence set aside. He shall be released forthwith unless otherwise lawfully held.

C.W GITHUA

JUDGE

DATED, SIGNED and **DELIVERED** at **ELDORET** this 27th day of April, 2016

In the presence of:

The appellant

Ms Mokua for the state

Naomi – Court clerk