REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NANYUKI

CRIMINAL APPEAL NO. 124 OF 2015

T. M. K.…………………………………………………….…. APPELLANT

versus

REPUBLIC …………………………………………….………. RESPONDENT

(Being an appeal from the original conviction and sentence in

Nanyuki Chief Magistrate's Court Criminal Case No. 45 OF 2015

by Hon. T. MATHEKA Chief Magistrate on 23rd March 2015).

JUDGMENT

1. T.M.K. was charged before the Nanyuki Chief Magistrate Court with the **offence of defilement of his daughter I.K.M. contrary to Section 8(3) of the Sexual Offences Act Cap 62A.** After trial the trial court convicted him of the **offence of incest contrary to Section 20(1) of Cap 62A.** He was sentenced to serve **20 years** imprisonment. He has now appealed against both his conviction and sentence.

2. This court is expected as a first appellant court to subject the evidence adduced in the trial to re-examination and re-evaluation. This court is expected to draw its own conclusion after that exercise bearing in mind that it did not see or hear the witnesses testify.

3. The evidence before the trial court was that I.K.M. at the time a 13 year old girl was asleep in the house. She used to leave the front door unlocked so that her father could enter the house when he arrived at night. Her mother had passed away in the year 2007. On 3 different days starting with the 24th of December 2014 and ending on 1st January 2015 she stated that she was defiled by her father. She stated that on the 1st occasion as she slept alone in the house a person she who at first did not know but later she said it was her father removed something from a package which she said was a condom. He then got into bed and on removing her inner clothes lay on top of her and defiled her. After that defilement he covered himself and slept. I.K.M. went to her brother's house which was close by and told him that someone had defiled her. Her bother stated that they would make inquiries the following day. That night she slept in her brother's house. The following day I.K.M said that her brother asked their father if he had defiled her. Their father denied it.

4. On the second occasion the same thing happened. She said that again she went and informed her brother who promised to find out who the person was.

5. When it occurred on the 3rd occasion I.K.M. said in evidence that she could not persevere it any more. She went to her older sister who inturn took her to their aunt that is, the sister to the father.

6. Both the sister and the aunt of I.K.M. confirmed that she told them that her father had defiled her 3 times. The matter was referred to the police who sent I.K.M. to hospital for examination. PC Samwel Hunya Ndirangu stated in evidence that T.M.K. the appellant went into hiding when the matter was reported to the police. According to the charge sheet he was arrested on 18th January 2015.

7. A P3 form was filled by the doctor. He carried out physical examination of I.K.M. He found that her vaginal had a tear or a laceration. The hymen was broken. The doctor noted that penetration was inconclusive.

8. The appellant in his defence confirmed that I.K.M was his daughter. He stated that on 1st January 2015 he slept in Timau and did not return home until 2nd of January 2015. On his return he learnt that the police were looking for him. He said that he did not know why the police were looking for him. He attributed the charges he was facing to a grudge that his sister, the aunt of I.K.M, had against him. It should however be noted that the appellant in his cross examination of his sister did not put to her the allegation of that grudge.

9. The grounds brought by the appellant in support of his appeal call upon this court to determine:-

a. **Whether the prosecution had proved the case on the required standard of proof.**

b. **Whether the trial court erred in changing the offence against the appellant.**

c. **Whether the trial court erred in sentencing the appellant to 20 years imprisonment.**

10. The appellant submitted that since I.K.M slept in unlocked room and because it was dark the prosecution did not prove that it was him who committed the offence.

11. In response I would state that the prosecution's case did not rely on mere identification of a stranger but rather the evidence was one of recognition. I.K.M. recognised her father as the person who defiled her and reported it first to her brother and as a result her brother inquired from their father if he had raped I.K.M. She also told it to her sister and to her aunt. Recognition of an offender was a subject of discussion in the case of **ANJONONI & 4 OTHERS VS. REPUBLIC** the Court of Appeal held as follows:-

> **"…….. recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other."**

12. In this regard I wish to refer to the learned trial magistrate judgment. It is important to remind myself that the trial court saw and heard the witnesses which benefit this court does not have. In the trial magistrate's judgment she stated as follows:-

> **"….. It is worthwhile to note here that i had noted that the PW 1 her aunt and herself were sympathetic to the accused. Be that as it may the subject told them that her father defiled her on the eve of Christmas 2014 and on 1/1/2015. That he had also done it previously but she attempted to say that she was not sure he was the one. ……..however I was persuaded by the subject's testimony in court that indeed she was defiled. I could see that attempts had been made to influence her to change her mind hence the declaration of forgiving her father for what he did to her."**

13. The appellant was recognised by I.K.M and it follows that his reliance on authority which speaks to the correct mode of identification under unfavourable circumstances do not advance his appeal.

14. The appellant submitted that the medical evidence produced at the trial failed to prove that there was defilement and that consequently there could not have been penetration.

15. Contrary to that submission the doctor's report noted that IKM was complaining of feeling pain in her genitalia and the doctor did also note injury to her vagina. The doctor who submitted the P3 form at the trial stated that the examination revealed that I.K.M had had a sexual intercourse. Penetration is defined in Cap 62A as being partial or incomplete insertion of the genital organ of a person into genital organ of another. It follows that whether the penetration of IKM was complete or partial the offence was committed as defined in Cap 62A. Further I.K.M testified that she was defiled by her father then the trial magistrate who observed her testimony stated in her judgment as follows:

> **"I heard her testimony and I believed her, as all the other evidence supported her testimony that she had been defiled."**

16. The other issue of consideration was whether the trial court erred in charging the appellant with the **offence of incest** as provided in **section 20 (1)** of **Cap 62A**. In charging the appellant under that section the trial court stated that the evidence adduced during the trial proved that I.K.M. was the daughter of the appellant. The trial court concluded that the correct section under which the appellant should have been charged was section 20(1) of cap 62A. The trial court found that to charge the appellant under that section would not cause him prejudice since the original charge under section 8(3) provided a minimum sentence of 20 years. Whereas I agree with that finding it is important to note that under **section 184** of the **Criminal Procedure Code Cap 75** a person who is charged with an offence of rape can be charged with another offence under the sexual offences act. That section is in the following terms.

> **"Where a person is charged with rape and the court is of the opinion that he is not guilty of that offence but that he is guilty of an offence under one of the sections of the Sexual Offences Act, he may be convicted of that offence although he was not charged with it."**

17. The trial court did not err in charging the appellant with the offence of incest contrary to section 20(1) of cap 62A.

18. The appellant was sentenced to 20 years imprisonment. Under **section 20(1)** the court has discretion to order imprisonment of one who is convicted under that section to life imprisonment. The section is in the following terms:-

> **"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 of 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."**

19. Attention is drawn to the proviso of that section. It provides that when a child is under 18 years which I.K.M. was and a person is convicted of incest with such a child they can be committed to life imprisonment. This is what was discussed by the Court of Appeal in the case **MK VS REPUBLIC (2015)eKLR** . The Court of Appeal had this to say:-

> **"19. What does "shall be liable" mean in law? The Court of Appeal for East Africa in the case of <u>Opoya –v- Uganda</u> (1967) EA 752 had an opportunity to clarify and explain the words <u>"shall be liable on conviction</u> to suffer death". The court held that in construction of penal laws, the words "shall be liable on conviction to suffer death "provide a maximum sentence only; and the courts have discretion to impose sentences of death or of imprisonment. The court cited with approval the dicta in <u>James –v- Young</u> 27Dh. D. at P. 655 where North J. said:**
>
> ***"But when the words are not 'shall be forfeited' but 'shall be liable to be forfeited' it seems to me***

that what was intended was not there should be an absolute forfeiture, but a liability to forfeiture, which might or might not be enforced."

We consider such to be the correct approach to the construction of the words "shall be liable on conviction to suffer death: especially when contrasted with the words of S.184 which are "shall be sentenced to death".

"……..21.Guided by the decision in Opoya –v- Uganda(1967) EA 752 and the persuasive dicta of North J. in James –v- Young 27 Ch. D. at P. 655; we are satisfied that the sentence stipulated in the proviso to *Section 20(1)* of the *Sexual Offences Act* is not a minimum mandatory sentence of life imprisonment. The proviso simply states that the trial court has discretion to mete out a maximum term of life imprisonment. Read in conjunction with the general provision in section 20(1) we hereby state that the correct interpretation of the proviso in section 20(1) is that a person convicted of incest when the female victim is under the age of eighteen years is liable to a term of imprisonment between 10 years and life imprisonment.

20. It is important to note that I.K.M.'s health card of immunization was produced in court and it showed that she was born on 23rd November 2002. As at December 2014 and January 2015 I.K.M. was 12 years old. She therefore fell within the proviso of that section.

21. The above decision of **M.K. vs REPUBLIC** (supra) makes it clear that the court has the discretion under the proviso of section 20(1) of cap 62A on the sentencing of the convicted person. Bearing the above in mind I cannot find any error in the sentence given to the appellant by the trial court. The circumstances under which an appellant court can interfere with the trial court's sentence was a subject in the case of **JANET MUTHONI THIAKA vs REPUBLIC(2016)eKLR** as follows:-

"Sentencing is the discretion of the trial court but such discretion must be exercised judiciously and not capriciously. The trial court must be guided by the evidence and sound legal principles. It must take into account all relevant factors and eschew all extraneous or irrelevant factors. Certainly the appellate court would be entitled to interfere with the sentence imposed by the trial court if it is demonstrated that the sentence imposed is not legal or is so harsh and excessive as to amount to miscarriage of justice, and or that the court acted upon wrong principle or if the court exercised its discretion capriciously. In Shadrack Kipchoge Kogo vs Republic, the Court of Appeal stated:-

"Sentencing is essentially an exercise of the trial court and for this court to interfere, it must be shown that in passing the sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of those the sentence was so harsh and excessive that an error in principle must be inferred."

Those circumstances discussed in the case of **JANET MUTHONI** vs **REPUBLIC** (supra) do not appertain to this case. There is therefore no basis to interfere with the trial court's sentence.

22. In the end the **appellant's appeal against conviction and sentence is hereby dismissed.**

DATED AND DELIVERED THIS 8TH DAY OF JUNE 2016.

MARY KASANGO

JUDGE

CORAM:

Before Justice Mary Kasango

Court Assistant – Njue

Appellant: T. M. K. …......................

For the State: ….....................................

COURT

Judgment delivered in open court.

MARY KASANGO

JUDGE