REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

CRIMINAL APPEAL NO 7 OF 2016

S Y M…….…….…….....APPELLANT

VERSUS

REPUBLIC……RESPONDENT

(From original conviction and sentence in Criminal Case Number 574 of 2014 in the Senior Resident Magistrate's Court at Taveta delivered by Hon J. Omburah(SRM) on 18th November 2015)

JUDGMENT

INTRODUCTION

1. The Appellant herein, S Y M, was charged with the offence of incest by male contrary to Section 20 (1) of the Sexual Offences Act No 3 of 2006. He was convicted of the said offence and sentenced to serve thirty (30) years imprisonment. He had also been charged with an Alternative Charge of committing an indecent act with a child contrary to Section 11(1) of the said Act.

2. The particulars of the main charge were as follows :-

> **"On diverse dates between 20th January 2014 and 30th January 2014 at unknown times at [particulars withheld] within Taita Taveta County, unlawfully and intentionally touched the vagina of S S H with your penis who was to your knowledge is** (sic) **your daughter aged sixteen (16) years."**
>
> **ALTERNATIVE CHARGE**
>
> **"On diverse dates between 20th January 2014 and 30th January 2014 at unknown times at [particulars withheld] within Taita Taveta County, unlawfully and intentionally touched the vagina of S S H . A child aged sixteen (16) years."**

3. Being dissatisfied with the said judgment, on 10th February 2016 the Appellant filed a Petition of Appeal. The Grounds of Appeal were as follows:-

> **1. THAT the learned trial magistrate erred in law and fact by convicting him relying on the evidence of the Investigation Officer which yielded no corroboration** (sic)**.**

2. THAT the trial magistrate erred in law and fact by using single evidence form the medical report which was not corroborated any where (sic)**.**

3. THAT the learned magistrate erred in law and fact in that he did not at all take into accounts (sic) **the submissions that he made.**

4. THAT the trial magistrate erred both in law and fact by only looking the prosecution side which was circumstantial evidence (sic)**.**

4. On18th July 2016, this court directed him to file Written Submissions. Instead, on 6th September 2016, he filed his Written Submissions together with Amended Grounds of Appeal. The fresh Grounds of Appeal were as follows:-

1. THAT the learned trial magistrate erred in law and fact to consider that the prosecution proved their testimony without seeing that the circumstantial evidence surrounding this case was denied a thorough investigation before warranting the conviction (sic)**.**

2. THAT the learned trial magistrate erred in law and fact by finding that the evidence that was adduced by PW 3 was proved enough by the DNA report without seeing that it was a true arrangement that was organised upto the time the DNA was done regarding the circumstances of the case to prove that it was not a fabrication (sic)**.**

3. THAT the trial magistrate erred in law and fact by failing to believe that PW 1's evidence was corroborated by that of PW 2 in his sentencing (sic)**.**

4. THAT the learned trial magistrate erred in law and fact by misleading himself during his judgment Pg 36 lines 21-25 whereby no proved evidence on record to sustain the harsh charge (sic)**.**

5. THAT the learned trial magistrate erred in law and fact by failing to believe that DW 2's evidence was solely and had contradiction (sic)**.**

6. THAT the learned trial magistrate erred in law and fact by failing to consider that the unplanned and unproved allegations from PW 5, that the benefit of doubt should be upon the appellant as per the case (sic)**.**

5. The State's Written Submissions were dated and filed on 27thSeptember 2016. In response to the said Written Submission, the Appellant filed Additional Submissions on 1st November 2016.

6. When the matter came up on 1st November 2016, both the Appellant and counsel for the State requested this court to rely on their respective Written Submissions. The Judgment herein is therefore based on the said Written Submissions.

LEGAL ANALYSIS

7. This being a first appeal, this court is mandated to analyse and re-evaluate the evidence afresh in line with the holding in the case of **Odhiambo vs Republic Cr App No 280 of 2004 (2005) 1 KLR** where the Court of Appeal held that:-

"**On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour".**

8. In establishing whether or not the Appellant's guilt was proven, this court identified the following

issues for its determination:-

a. Whether or not the Prosecution had proven its case beyond reasonable doubt;

b. Whether or not the Appellant's defence displaced the Prosecution's case;

c. Whether the sentence that was meted upon the Appellant was excessive in the circumstances warranting interference by this court.

9. The court therefore dealt with the said issues under the following heads.

I. PROOF OF PROSECUTION'S CASE

10. All the Amended Grounds of Appeal were more or less related. The court therefore dealt with the same under this head.

11. The Complainant, S S H (hereinafter referred to as "PW 1") was the Appellant's daughter. The Appellant had separated from P M M (hereinafter referred to as "PW 2") who was PW 1's mother. He contended that this was case between PW 1 and PW 2 on the one hand and him and his son, S S (hereinafter referred to as "DW 2") on the other hand.

12. He denied that DW 2 ever went for any trip as had been contended by PW 1, which was the time PW 1 had averred he had had sexual relations with her resulting in her pregnancy. He set out PW 1's and PW 2's evidence in detail and discredited it in its entirety by raising several questions arising out of the said evidence.

13. He urged this court to believe his evidence and that of DW 2 as it was the truth and reject that of PW 1 and PW 2 because it was all fabricated their evidence. The crux of his submissions was really that PW 1's and PW 2 evidence was total lies and the DNA results were doctored to fix him.

14. On its part, the State submitted that DW 2 had confirmed in his testimony in the Trial Court that PW 1 was staying with the Appellant in the month of January 2014 but he was not, a fact the Appellant contradicted in his evidence. It added that the DNA results proved that the Appellant was the father of the child PW 1 gave birth to and consequently, the charge of incest in line with Section 22 of the Sexual Offences Act,had thus been proven beyond reasonable doubt.

15. It was its further argument that PW 1's evidence was sufficient to have proven the offence the Appellant had been charged with as Section 124 of the Evidence Act Cap 80 (Laws of Kenya) provided that a trial court could believe a sole victim's evidence if it was satisfied that such victim was telling the truth. It referred the court to the case of **Edward Shivanji Makanga vs Republic [2015] eKLR** where Mshila J analysed the issue of single witness testimony in defilement cases.

16. This was a fairly straight forward matter. It was made easy by the scientific evidence that was adduced by George Lawrence Oguda (hereinafter referred to as "PW 3") who worked as an Analyst with the Government Analyst. He carried out scientific examination to establish whether there was a nexus between PW 1, the Appellant and the child who was said to have been born out of a sexual union between the Appellant and PW 1. He established that the Appellant was 99.99% the father of the said child.

17. This corroborated PW 1 and PW 2's evidence that indeed, the Appellant had engaged in an incestuous relationship with PW 1, sufficient to have brought it within degrees of consanguinity that are prohibited in Section 22 of the Sexual Offences Act.

18. The said Section 22 of the Sexual Offences Act provides as follows:-

"In cases of the offence of incest, brother or sister includes half brother 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 mother and an aunt of the first degree whether <u>through lawful wedlock or not</u>."

19. It was evident from the DNA results that the Appellant was guilty of the offence of incest. All his submissions that PW 1 and PW 2 had fabricated their evidence or that the DNA results were doctored to fix him or that his evidence and that of DW 2 had displaced the evidence that was adduced by the Prosecution witnesses fell by the wayside. There could never be a more accurate way of confirming the sexual relation between the Appellant and PW 1 than through the scientific proof that obtained by the DNA examination.

20. In that respect, Amended Grounds of Appeal Nos (1), (2), (3), (4), (5) and (6) were not merited and the same are hereby dismissed.

II. <u>SENTENCE</u>

21. Ordinarily, this court would not have addressed the issue of the extent and legality of the sentence because it was not a ground of appeal. However, the harshness of the sentenced was somehow addressed in Amended Ground of Appeal No (4).

22. Having found that the Prosecution had proved its case beyond reasonable doubt, there was need to interrogate the question to establish whether or not the sentence the Learned Trial Magistrate meted upon the Appellant was legal and proper.

23. Notably, proof of a complainant's age is critical as it has a bearing on the sentence that a person convicted of the offence of incest should be given under Section 20(1) of the Sexual Offences Act. The said Section provides as follows:-

"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."

24. According to the evidence that was adduced by the dentist from Taveta District Hospital, Eliud Macharia Doga (hereinafter referred to as " PW 4"), PW 1 was aged sixteen (16) years. He adduced in evidence an Age Assessment Report evidencing the same.

25. Appreciably, the minimum sentence the Learned Trial Magistrate could have imposed on him was ten (10) years.He was therefore correct in observing that he had the discretion of sentencing the Appellant to life imprisonment as PW 1 was under the age of eighteen (18) years but that he was exercising his discretion by sentencing him to thirty (30) years imprisonment.

26. Be that as it may, so as to come with a good assessment of the appropriateness of the length of the sentence that was imposed on the Appellant herein, this court nonetheless had due regard to the provisions of Section 8(4) of the Sexual Offences Act that provide a minimum sentence of fifteen (15) years where a person has been found guilty of having defiled a child between sixteen (16) and eighteen (15) years of age.

27. This was the same consideration that this very court made in the case of **<u>Dominic Mbogho vs Republic [2015] eKLR</u>** where it reduced the sentence of life imprisonment to twenty five (25) years imprisonment as **<u>"liable to life imprisonment"</u>(**emphasis court) does not connote that a maximum sentence is mandatory.

28. This court rendered itself as follows:-

> "**Bearing in mind the provisions of Section 8(3) of the Sexual Offences Act that provide a minimum sentence of twenty (20) years where a person has been found guilty of having defiled a child between twelve (12) and fifteen (15) years against the backdrop that PW 1 was the Appellant's daughter and she was aged fourteen (14) years at the time of the alleged offence, this court was of the considered view that a sentence of twenty five (25) years imprisonment for the offence the Appellant was charged with would still be within what is prescribed by the law. This is because there were no aggravating factors such as the Appellant infecting PW 1 with a sexually transmitted disease or Human Immuno deficiency Virus (HIV).**

29. In the instant case, impregnating PW 1 was an aggravating factor. As the Learned Trial Magistrate observed, it was un-imaginable that a father could impregnate his daughter, forcing her to drop out of school and carry a burden that she was not ready for. In addition, it had brought shame to PW 1 and the entire family, observations that this court wholly concurred with.

30. This court experienced a very high temptation to enhance the sentence that was meted to the Appellant herein but it restrained itself. This is because, firstly, as the Learned Trial Magistrate noted, the Appellant was a first offender. Secondly, an appellate court should not to interfere with the discretion of a trial court merely because it holds the view that if it was the court that was hearing the matter during trial, it could have awarded a harsher sentence. For those two (2) reasons, this court was not persuaded that it should disturb the said Learned Trial Magistrate's determination.

31. Bearing in mind the circumstances of the case herein, this court came to the firm conclusion that the sentence that was imposed on the Appellant by the Learned Trial Magistrate was not harsh.

CONCLUSION

32. Accordingly, having considered the Appellant's Appeal, the Written Submissions by the Appellant and the State and the case law that they each relied upon, this court was not persuaded that the conviction against the Appellant herein ought to be set aside or that the sentence that was meted upon him by the Learned Trial Magistrate ought to be quashed and substituted with any other sentence for the reason that the same was lawful, proper and fitting in the circumstances of the case herein as the Prosecution had proved its case beyond reasonable doubt.

33. The Learned Trial Magistrate acted correctly when he convicted and sentenced the Appellant to thirty (30) years imprisonment.

DISPOSITION

34. For the foregoing reasons, this court hereby affirms the conviction and sentence that was imposed upon the Appellant herein as it was safe to do so.

35. The upshot of this court's Judgment was that the Appellant's Appeal that was lodged on 10th February 2016 was not merited and the same is hereby dismissed.

36. It is so ordered.

DATED and DELIVERED at VOI this 13th day of December 2016.

J. KAMAU

JUDGE

In the presence of:-

Shaibu Yusuf Mwachipanga…….Appellant

Miss Anyumba…… for State

Josephat Mavu– Court Clerk