REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 32 OF 2013

JMM ……..…..... APPELLANT

VERSUS

REPUBLIC ….....….....RESPONDENT

(*Being an appeal from the original conviction and sentence in Makueni Principal Magistrate's Court Criminal Case No. 236 of 2012 by*

Hon. R. Yator Ag. S.R.M. on 5/2/2013)

J U D G M E N T

1. **JMM,** the Appellant, was charged with the offence of **incest** by a male person contrary to **Section 20(1)** of the **Sexual Offences Act No. 3** of **2006.** Particulars are that on the 27th day of June, 2012 **Makueni** District within **Makueni** County intentionally and unlawfully caused penetration with his genital organs to that of **PNM** a girl aged 8 years and who is a niece to him.
2. In the alternative he was charged with **indecent assault** with a girl contrary to **Section 11(1)** of the **Sexual Offences Act No. 3** of **2006.** The particulars are that on the 27th day of June, 2012 in **Makueni** District within **Makueni** County unlawfully indecently assaulted **PNM** by touching her private parts.
3. Facts of the case were that on the 27th June, 2012 at about 4.30pm, **PN** , PW1, a minor aged 8 years old was at home playing with her siblings. She left them to go and fetch firewood. The appellant offered to help fetch firewood. They went to the bush where the appellant climbed the tree and cut for her some firewood. Thereafter he climbed down the tree and asked her to remove her pant but she declined. The appellant went on to remove it. He removed his pair of trousers and inner wear. He went on to remove his genital organ and inserted it into the complainant's genital organ.
4. In the meantime her mother, **JNM** was searching for her. She returned home to find the complainant having not fetched firewood. She took a panga and went in search for the same. She noticed firewood on the farm owned by one **Deina Nzembi.** She called out but got no response from the complainant. As she entered the bush to cut firewood she saw the appellant coming from the bush zipping up his trousers. He told her that he had cut the firewood for the complainant and ran away. Shortly thereafter the complainant emerged from the same direction with leaves stuck on the T-shirt she was wearing. She threatened to beat the complainant. Her threat made the complainant narrate what had happened. She checked the complainant whose pair of shorts were wet. She had some discharge covering upto the gluteal area. She reported the matter to the Assistant Chief, the Police and took the complainant to hospital for treatment.

5. **PW3, Winfred Mwende Wambua** examined the complainant and found her private parts having sustained vulva erosion with tenderness on vaginal opening. There was also ulceration at the right lateral side vestibule (lateral to the urethral/vaginal opening). The hymen was torn which was evidence of penetration. The appellant was arrested by members of Community Policing. He was handed over to the police.
6. When put on his defence the Appellant testified how he was arrested while ploughing on their farm on the 4th of July, 2012. He denied having defiled the complainant.
7. The learned trial magistrate evaluated evidence adduced and was of the view that evidence adduced by the prosecution was overwhelming as the victim of the offence had been penetrated by the appellant; and medical evidence confirmed the act of defilement. She went on to convict the appellant as provided by the law. He was sentenced to life imprisonment.
8. The appellant was dissatisfied by the conviction and sentence thereof. He appealed on grounds that the trial magistrate erred in law and fact:

i. When she convicted the appellant on evidence that was not sufficient to sustain a conviction;
ii. When she convicted the appellant based on hearsay evidence;
iii. When she convicted on evidence that was uncorroborated and contradictory in nature;
iv. When she dismissed the appellant's defence.

9. The appeal was canvassed by way of written submissions that have been considered.
10. This being a first appellate court, it is required to re-evaluate the evidence tendered before the trial court so as to come to its independent conclusion. Consideration must however take into account the fact that it did not see or hear witnesses who testified at trial (see ***Okeno -versus- Republic [1972] E.A. 32; Pandya –versus- Republic [1957] E.A. 336***.)
11. The trial magistrate has been faulted for having not considered the fact that the prosecution did not prove that the appellant had male attributes. The question to be posed would be; how was the prosecution supposed to prove that the appellant was of masculine gender? The charge as presented described the sex of the appellant as a "male". The accused did not dispute that particular fact. The trial magistrate had an opportunity of observing him and she described him as a male adult. No objection was raised at the outset for the court to interrogate the matter. With regard to qualities of the appellant, his character having not been a fact in issue, the prosecution was under no duty to investigate and adduce evidence as to his attributes.
12. The particulars of the offence indicate that the complainant was the accused person's niece. PW5, **MMK** testified that the appellant was his cousin. This meant that the complainant was the appellant's niece. The fact of the relationship that existed between the appellant and the complainant was not in dispute. The prosecution having adduced evidence to establish what is stated in the particulars of the offence and the same having not been disputed by the appellant at trial, it cannot be interrogated at this stage.
13. PW1 told the court that the appellant removed his trousers and inner wear having undressed her. He then inserted his "private parts" into her "private parts" and she felt pain. The question to be answered would be what a private part is to an eight (8) years old child? In respect of a sexual offence, an eight (8) year old may have not observed sexual acts. Depending on her exposure she may not have been used to uttering the terms ***'penis'*** or '***vagina'***. Some children may have children's words for a penis while others may simply look at it as something 'private' or something that is usually concealed. In court the complainant stated –

> "***He removed his trouser and inner wear and removed his private parts and slept on me and he inserted it into my private parts and I felt pain."***

14. The learned magistrate interpreted private parts to be 'penis' and 'vagina' respectively. It is on that ground that she has been faulted. There was medical evidence which corroborated the fact that there was penetration and the hymen was torn. The penetration was in the vagina. In her evidence the complainant stated that the appellant removed his trousers and innerwear and removed his 'private part'. The only private part that is usually concealed in the trouser and innerwear of a male person is the penis. Therefore the conclusion reached by the trial magistrate was accurate and no injustice was occasioned to the appellant.

15. Referring to what PW4 testified as to what he was told regarding what had befallen the complainant, it was argued that just like PW5 and PW6 they were merely reporting what they had been told which made the evidence hearsay. The said witnesses divulged their source of information and persons they alluded to, testified in court. Their evidence cannot be excluded as being hearsay.
16. The magistrate has been faulted for purportedly basing her conviction on uncorroborated evidence that was contradictory in nature. It is also alleged that PW1 was not cross-examined, therefore the proceedings were irregular. The child was taken through voire dire examination by the trial magistrate who formed an opinion that she was not seized of enough knowledge and intelligence of taking an oath. Therefore she testified and was not subjected to cross-examination.
17. Corroboration was defined in the case of ***Mutonyi –versus- Republic [1982] KLR 203*** as follows:-

> "***An important element in the definition of corroboration is that it affects the accused by connecting him or tending to connect him with the crime, confirming in some material particular not only the evidence that the crime has been committed but also that the accused committed it."***

18. PW1 testified that the person who took her into the bush and perpetrated the crime of penetrating her was the appellant. PW2 confirmed in material particular that it was the appellant who emerged from the area the complainant emerged from shortly thereafter having been defiled. Circumstances confirmed that he must have been the person who committed the crime.
19. It is submitted that the offence was allegedly committed on 27th June, 2012 and the complainant was examined on 29th June, 2012, three (3) days later; and without proof of spermatozoa having been found on the complainant, the offence was not proved.
20. The complainant is stated to have been defiled on 27th June, 2012. On the same date, she was examined and treated at Makueni District Hospital, hours after the defilement. It was the P3 form that was filled on the 29th June, 2012.
21. According to the **Sexual Offences Act**, penetration means partial or complete insertion of the genital organ of a person into the genital organs of another person.
22. PW1 testified that soon after the appellant inserted his private part into hers, PW2 called her out and the appellant ran away. His act of penetration was interrupted. There was no presence of spermatozoa as a result. The presence of spermatozoa is not a pre-requisite ingredient in such an offence.
23. It has been severally held that a court can convict on evidence of a child of tender years by virtue of the proviso to **Section 124** of the **Evidence Act.** The court can convict on her evidence without corroboration, but it ought to satisfy itself that she is truthful. (Also see **Jacob Odhiambo Onyumbo –versus- Republic - Criminal Appeal No. 80 of 2008)**. In her judgment the trial magistrate stated thus:-

> "***I found her to be truthful and courageous as she narrated what transpired without fear".***

24. She found the complainant trustworthy. The minor contradictions alluded to in submissions were therefore immaterial. Consequently, she did not err.
25. Having re-considered evidence as a whole. I am satisfied that the appellant was properly convicted of the offence of incest.
26. With regard to the sentence imposed, it was proved by way of evidence of her mother (PW2) and documentary evidence of the child health card issued at birth. She was 8 years old.
27. The proviso to **Section 20** of the **Sexual Offences Act** provides.

> "***Provided that, if it is alleged in the information or charge and proved that the female person is under the age of eighteen (18) 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".***

28. The complainant having been below eighteen (18) years the sentence meted out was legal. The appeal therefore lacks merit. Accordingly it is dismissed.

DATED, SIGNED and DELIVERED at MACHAKOS this 15TH day of JANUARY, 2015.

L.N. MUTENDE

JUDGE