REPUBLIC OF KENYA

IN THE HIGH COURT

AT MACHAKOS

CRIMINAL APPEAL 96 OF 2014

J M M.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal arising out of the judgment and sentence of E.M. Muiru R.M

in Criminal Case No. 978 of 2013 delivered on 14th March 2014

at the Principal Magistrate's Court at Makindu)

JUDGMENT

The Appellant was convicted of the offence of incest contrary to section 20(1) of the Sexual Offences Act, Act No. 3 of 2006 and sentenced to life imprisonment by the trial Court. The particulars of the offence were that on 10th August 2013 in Nzaui District within Makueni County, he intentionally and willfully penetrated his male organ namely penis to the vagina of M M, who was to his knowledge his daughter.

The Appellant was also charged with an alternative offence in the trial Court, being committing an indecent act with a child contrary to section 11(1) of the of the Sexual Offences Act, Act No. 3 of 2006. The particulars of the alternative offences are that on 10th August 2013 at [particulars withheld] village, Nzaui District within Makueni County, he intentionally and willfully touched the vagina of M M with his penis.

The Appellant being aggrieved has appealed the conviction and sentence meted by the trial magistrate. His grounds of appeal are stated in his Petition of Appeal filed in Court on 7th November 2014, and in amended grounds of appeal availed to the Court during the hearing of the appeal. The Appellant was unrepresented during the appeal.

His grounds of appeal are as follows:

1. That, the learned trial Magistrate erred in law and facts by falling to observe the contravention of section 198 of the Criminal Procedure Code, whereby PW 4 was duly sworn in English of which the Appellant is not fully conversant.

2. That, the learned trial Magistrate erred in law and fact as the prosecution case was not proved

beyond reasonable doubt.

3. That, the learned trial Magistrate erred in law and fact in relying on the expertise evidence of the doctor which was not as regards the age of injuries.

4. That the learned trial Magistrate erred in both law and facts by basing his conviction and sentence on circumstantial evidence of PW I.

5. That, the learned trial Magistrate erred in both law and facts by failing to give his unsworn testimony in contravention of section 211 of the Criminal Procedure Code

6. That, the learned trial Magistrate erred in both law and a fact by failing to observe section 169 of the Criminal Procedure Code, whereby the judgment lacked points of determination.

7. That, the learned trial magistrate erred in law and facts by failing to observe that the sentence imposed herein was manifestly harsh and excessive notwithstanding that the Appellant was a 1st offender and yet the prescribed sentence for the offence was not meant to be "mandatory" but discretionary.

The Appellant provided the Court with written submissions wherein he argued that under section 198 of the Criminal Procedure Code and Article 50 (3) of the Constitution, it is the role of the trial court to ensure that proper language has been applied to accused person, which will enable the accused to follow up the proceedings. He averred that he did not understand the language used by PW 4 and referred to page 14 of the typed proceedings of the trial court, and submitted that the prosecution case must fall in its entirety. The Appellant also relied on the decision in **Njeru s/o Njoroge v R (1949) E.A.C.A. 47** in this regard, and sought a retrial.

The Appellant submitted further that it was upon the prosecution to discharge their burden of proof of all reasonable doubt which it failed to do, and that expertise evidence is very essential to an offence of incest in compliance with section 124 of the Evidence Act. Further, that the evidence of the doctor who examined the victim was inconsistent, therefore making his testimony doubtful for the court to rely upon. The Appellant contended that the age of the injuries was not noted in the P3 form to enable the evidence of the doctor corroborate that of the victim, nor was the type of the weapon used during the incident indicated.

The Appellant also submitted that the prosecution case was based on circumstantial evidences especially that of PW I, which must be tested with great care by the Court. The Appellant cited the decision in **James Mwangi vs R (1983) KLR 327** in this respect. Further, that there was no inquiry as to whether the accused in his defence was telling the truth.

On the ground that the judgment did not contain points of determination, the Appellant submitted every trial judgment must consist points of determination in pursuant to section 169 of the Criminal Procedure Code, which did not happen in this case. Further, that that a life sentence is not mandatory, but discretionary, and no reason was rendered why the trial court imposed the maximum sentence without considering that the accused was remorseful, was a 1st offender, and a family man, after he has been found guilty as charged.

Ms. Saoli, the learned counsel for the State on her part submitted that the prosecution called 5 witnesses who discharged the burden of proof. PW I who was the complainant gave a sworn statement upon a *voire dire*. She testified that her father came home at night, put her in bed and started to do 'matabia' to her. Further, that she was very clear as to what the Appellant did to her and stated that he threatened to kill her. The learned counsel for the State submitted that PW I positively identified the Appellant who was her father, and was consistent in her evidence.

As regards the other witnesses, it was submitted by the State that PW 3 was told of the act by PW 1 and testified that the children were fearful of going home, and got the necessary information as to what was

happening which she reported to PW 2 who was the local chief. Further, that PW 2 testified that he knew that the Appellant had chased his wife away, and that after getting the report from PW 3 he arrested the Appellant with the help of the assistant chief and administration police. That PW 4 who was a medical doctor testified that there were signs of penetration even though the hymen was not broken, while PW 5 testified that he received the report from PW 2 and commenced investigation and arrested the Appellant.

Lastly, it was submitted by the counsel for the State that the trial court considered the Defence evidence and allegation of frame up by PW 2 but found that it was not enough to shake the prosecution case. The learned counsel asked that the Appellant's appeal be dismissed and his conviction be upheld

As this is a first appeal, I am required to conduct a fresh evaluation of all the evidence in the trial court, and come to an independent conclusion as to whether or not to uphold the conviction and sentence. This task must have regard to the fact that I never saw or heard the witnesses testify (see **Okeno v Republic [1973] EA 32**).

The key evidence given at the trial is as follows. The prosecution called five witnesses. PW1 was the complainant who stated she was 8 years old, and after a *voire dire*, testified on oath that she was a pupil at Ngolani Primary School and in class 2. She further testified that on 10th August 2013 her father came at night, took her to the bed, removed her inner clothes, started to do "matabia" (Kiswahili term for bad habits) to her and touched and inserted his "mulise" (nickname for penis in the local Kikamba language) in the area where she goes for short calls, and threatened to kill her if she told.

It was PW1's testimony that she then told Mama Ben, and was taken to the police station and hospital at Sultan by the chief. She stated that the person who did these acts to her was her father and that her mother was in Machakos on that day. Further,that the other children were sent to harvest sugar cane, to the river and to bathe and that she remained behind at home.

PW2 was the area chief of [particulars withheld] location, and he testified that on 11th August 2013 he received a call from a villager who informed him that the Appellant had chased away his wife and defiled his daughter. He stated that he went together with the assistant chief and administration police officers and arrested the Appellant, and also picked PW1 and took them both to Sultan Hamud police station, and later took PW1 to Sultan Hamud health centre to be treated. He also testified that he previously knew the Appellant as they both reside in the same area.

PW3 was a farmer who lives in the same village as the Appellant, and she testified that on 11th August 2013 at 7pm while on her way home, she found two of the Appellant's children on the road including PW1, and the children told her that they had gone to play because their father had chased them away. Further, that when she told them to go home they were reluctant and they told her they feared their father, and she then took them to her house. She testified that in the morning she told a lady to go and tell the Appellant that his children were in her house, and PW3 stated that the said children were still reluctant to leave her house when she told them to go home, and also when their brother came to pick them up.

PW3 stated that she then decided to take the children to their home, and on the way there met two ladies who inquired why the children were crying. Further, that it was at this time that PW1 told them that her father rapes her, and one of the ladies then called PW1's teacher, and the teacher is the one who called a village elder who told the chief. PW3 testified that she was advised to go back with the children to her home which she did. Further, that the next day she was summoned by the chief, and she told him that she had learnt that PW1 was being raped by her father, and she also recorded a statement at Sultan Hamud District hospital. She stated that she knew the Appellant who was like a son to her.

PW4 was a medical doctor at Sultan Hamud sub-county hospital, and he testified that PW1 was treated at the hospital on 12th August 2013, and that he filled the P3 form on 13th August 2013 which he produced as an exhibit. Further, that PW1's genitalia showed that the hymen was broken, but there were no bruises on the genitalia.

The last prosecution witness (PW5) was a police officer attached to Sultan Hamud Police station who

confirmed that the Appellant and PW1 were brought to the police station by PW2 accompanied by 2 administration police on 13th August 2013, and that he received a report from the PW2 that the Appellant had defiled PW1. PW5 testified that PW2 then escorted PW1 to Sultan Hamud hospital and brought her back to the station, whereupon PW5 then issued a P3 form and escorted PW1 to Sultan Hamud hospital where she was examined and the doctor filled the P3 form. PW5 further stated that he then recorded statements from witnesses and charged the Appellant with incest, as PW1 was his child.

After the close of the prosecution case, the Appellant was put on his defence and gave unsworn testimony. He stated that on 12th August 2013 he had gone to[particulars withheld] to charge his phone, and that while he was here he was summoned by the chief and taken to Mwangine administration police post and later to Sultan Hamud police station. He further testified that he did not know what he was supposed to have done, and that upon being informed that he was arrested for defiling his child, he was shocked and denied ever doing such a thing and that he could never do such a thing to his children as he loved them.

The Appellant explained the events of the material day when the defilement occurred, and stated that he had sent the children to fetch water and that they did not come back home, and that he later learnt that they had slept at PW3's house. Further, that when he went to charge his phone the next day he left them at home. He stated that he was separated from his wife and contended that his wife's preference for the chief's word over his led to their separation. He also alleged that the chief (PW2) was interfering with his family, and that the said chief colluded with his wife to frame him in this case. He also alleged that when the chief went to his house to pick up PW1, he broke in and took money, his Maasai "fimbo" (stick) and his title deed.

Upon consideration of the submissions made and evidence in the trial Court, I find that the issues raised in this appeal are firstly, whether the trial was conducted in a language that the Appellant did not understand; secondly, whether the Appellant's conviction for the offence of incest was based on sufficient and satisfactory evidence; thirdly, whether the judgment of the trial court conformed to section 169 of the Criminal Procedure Code; and lastly whether the sentence meted on the Appellant was legal and lawful.

I have also in this regard considered the ground of appeal raised by the Appellant that his conviction was based on the circumstantial evidence by PW1. Circumstantial evidence is evidence that enables a court to deduce a particular fact from circumstances or facts that have been proved, as opposed to direct evidence. In the present case PW1 gave direct evidence as to the acts done by the Appellant and therefore this ground of appeal has no factual or legal basis.

Coming back to the issues, the first issue raised by the Appellant was that of the language of the trial, and Article 50 (2)(m) of the Constitution provides in this regard that every accused person has the right to a fair trial, which includes the right to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial. Section 198 (1) of the Criminal Procedure Code further provides as follows:

> **"Whenever any evidence is given in a language not understood by the accused, and he is present in person, it shall be interpreted to him in open court in a language which he understands."**

In the present appeal, the Appellant referred the court to page 14 of the typed proceedings of the trial, where it was indicated that PW4 gave his testimony in English. I have perused the record of the trial court, and note that it is recorded that the charge was read to and explained to the Appellant in Kikamba language at the time of taking the plea; the testimony of PW1 was translated from Kikamba language to Kiswahili language; PW2 and PW3 gave evidence in the Kiswahili language; and it is not only PW4 but also PW5 who gave evidence in the English language. The Appellant also gave his testimony in the Kiswahili language.

In all the instances the Appellant cross-examined the witnesses in the Kiswahili language, including PW4 and PW5. In the cross-examination of PW4 and PW5 it was evident that he was referring to, and

understood the evidence given by PW4 and PW5. It cannot therefore be said that he did not understand the evidence given by the two witnesses. I am in this respect guided by the decision in the case of **George Mbugua Thiong'o V R , CR. No. 302 of 2007** in which the Court of Appeal stated that:

> **"For the court to nullify proceedings on account of lack of language used during the trial, it should be clear from the record that the accused did not at all understand what went on during his trial. That is not the case here. The appellant cross- examined all three witnesses with no difficulty. He had no difficulty in conducting his defence. It is clear that the appellant clearly understood the proceedings. We do not therefore consider that the omission by the learned trial magistrate to record the language occasioned a miscarriage of justice."**

See also **David Njuguna Wairimu V R, Criminal Appeal No. 28 of 2009[2010] eKLR**, **Moses Mohammed Fadhili V R, [2014] eKLR** and **Philip Mbondo Kioko vs R, Criminal Appeal No. 145 of 2007 (2014) eKLR.**

In the circumstances of this appeal it is apparent that the Appellant understood and actively participated in the proceedings in the trial court including cross-examination of PW4 and PW5, and at no stage did he indicate that he had difficulty in understanding what the two witnesses were stating. Therefore the omission by the learned trial magistrate to record if there was translation of the evidence of the two witnesses who testified in English did not occasion a miscarriage of justice. This ground of appeal therefore fails.

On the second issue as to whether the conviction of the Appellant was based on satisfactory evidence, the appellant was charged with incest under section 20(1) of the Sexual Offences Act, 2006 which states as follows:

> **"(1) 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…"**

The key ingredients therefore of incest are an indecent act or penetration with a female who is within the stated degrees of relation. In the present case the Appellant admitted that the complainant was his daughter. As regards the ingredient of penetration the evidence by PW1 was categorical that the Appellant inserted his penis into her vagina which she described as the place she uses for short calls, on 10th August 2013 at 6 p.m., and she positively identified the Appellant as the person who did it.

The Appellant has unsuccessfully tried to exclude the medical evidence by PW4, which showed that PW1's hymen was broken, and therefore that penetration occurred. This medical evidence in my view corroborated the evidence of PW 1 that she was defiled and that there was in fact penetration. Even if the medical evidence was to be excluded, the proviso to section 124 of the Evidence Act provides that no corroboration is required in sexual offences where the court believes that the complainant is telling the truth as in this case.

Therefore, even if I exclude the testimony of PW 4, I find that the prosecution proved that there was penetration. I am in this regard guided by the holding of the Court of Appeal in **Geoffrey Kioji v Republic**, **Crim. App. No. 270 of 2010 (Nyeri)** where it was stated that;

> "**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."

Lastly on this issue, I will address the argument by the Appellant that his defence was not considered by the trial court. I note that he did not cast any doubt on the evidence of PW1 as to the act of defilement other than declare his love for his children and state that he had sent them to fetch water on the material day. During his cross-examination of PW1 she was persistent that when he sent the others to fetch water or to bathe she would remain behind, and that on the material day she remained behind when he told the other children to go and bathe, and that is when he defiled her.

It is also my view that the Appellant's allegation of being framed by his wife and PW2 was not substantiated as the Appellant did not bring any other independent evidence to corroborate his unsworn statements. In addition PW2 on cross-examination denied knowing the Appellant's wife.

On the third issue raised, it was argued by the Appellant that section 169 of the Criminal Procedure Code was not complied with. The said section 169 provides as follows

"(1) Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.

(2) In the case of a conviction, the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted, and the punishment to which he is sentenced.

(3) In the case of an acquittal, the judgment shall state the offence of which the accused person is acquitted, and shall direct that he be set at liberty."

I have examined the judgment by the learned trial magistrate, and note that while the learned magistrate analysed the evidence tendered during trial in great detail, there was no identification of the issues and the applicable law to the issues, so as to support the finding by the magistrate that the prosecution proved its case beyond reasonable doubt. I also note that the said judgment did not specify the offence and the section of the law under which the accused was convicted as is required by section 169(2) of the Criminal Procedure Code and as stated in **Nyanamba v Republic (1983) KLR 599.** I therefore agree with the Appellant's submissions in this regard.

However, this finding notwithstanding, it is my view that this being a first appeal**,** the duty of this court to reconsider and to re-evaluate the evidence adduced, and to reach its own independent determination as to whether or not to uphold the conviction of the Appellant. I am in this respect guided by the decision in **Odhiambo vs Republic [2005] 1 KLR 564** wherein it was held as follows:

"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".

The Court has already found that the prosecution adduced satisfactory evidence of the commission of the offence of incest by the Appellant. The Appellants' conviction of this charge is therefore upheld irrespective of the non-compliance with section 169 of the Criminal Procedure Code by the trial magistrate.

Lastly, on the issue of the legality of the sentence meted on the Appellant by the trial magistrate, this Court notes that the minimum sentence for the offence of incest is 10 years imprisonment while the maximum sentence is life imprisonment. The proviso to section 20(1) of the Sexual Offences Act states;

"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."

It is my view that reasonable grounds exist for the exercise of discretion in favour of the imposition of a life sentence on the Appellant, as in this case the offence was aggravated by the facts that the Appellant is the father of the complainant (PW1) and violated her trust, and also given the fact that the PW1 was a child of tender years being 8 years old. It is also noted by the Court that under section 8(2) of the Sexual Offences Act the defilement of a child under the age of eleven years attracts a minimum sentence of imprisonment for life. Lastly, it is also noteworthy that contrary to the Appellant's submissions, he was not remorseful after conviction and he instead insisted that he had not committed the offence.

The Appellant's appeal is accordingly dismissed and I affirm the Appellant's conviction for the offence of incest contrary to section 20(1) of the Sexual Offences Act. I also find that the sentence of life imprisonment for this conviction was legal and it is also accordingly affirmed.

It is so ordered.

DATED AT MACHAKOS THIS 23rd DAY OF JULY 2015.

P. NYAMWEYA

JUDGE