REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 140 OF 2012

D M W…………………………………........……………………APPELLANT

VERSUS

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

(Appeal against Judgement, conviction and sentence in Cr. Case No. 527 of 2011, Republic vs D M W at Mukuruweini, delivered by W. Kagendo, P.M. on 31.7.2012).

JUDGEMENT

D M W (hereinafter referred to as the appellant) seeks to quash the conviction and sentence passed against him by the Learned Principal Magistrate in criminal case number **527 of 2011** delivered on 31.7.2012. In the said case the appellant was convicted of the offence incest contrary to Section **20 (1)** of the Sexual Offences Act No. **3** of 2006 and sentenced to serve life imprisonment.

The particulars of the offence were that on diverse dates between 2011 and the 8th day of October 2011 in Mukuruweini District within the Nyeri County intentionally touched the vagina of **J M M** with his penis who to his knowledge his is daughter.

The prosecution called a total of seven witnesses whose evidence is summarized below. In determining this appeal, this court fully understands its duty as explained in the case of **Okeno v. R** where the court of appeal for East Africa stated the duty of an appellate court on first appeal as follows:-

> *"An appellant on a first appeal is entitled to expect, the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions.It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower courts findings and conclusions; it must make its own findings and draw its own conclusions; only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.*

I now turn to the evidence adduced before the trial court with a view to treating it to fresh and exhaustive scrutiny. The evidence of all the prosecution witnesses is summarized below:-

PW1, J M, the complainant was aged 13 years at the time of giving evidence. The court conducted a *voir dire* examination and was satisfied that the minor did not understand the nature of oath and allowed her to give unsworn evidence. Her testimony was that her mother differed with her father and left and that her father placed her in bed, removed her clothes, covered her mouth with clothes and defiled her three times and threatened to throw her into the river if she told anyone about it. Her teacher noticed her walking with

legs apart and sought to know why and she explained to her the ordeal. The teacher informed the school head and area chief.

PW2 M M the childs' teacher confirmed that she noticed **PW1** was walking with her legs apart and her dress was wet at the back and she took keen interest and asked her. Though initially she was reluctant citing threats from her father not to disclose to anyone, she ultimately opened up after she was assured of safety and told her that her father had defiled her several times.

PW3 Simon Mwangi Kiama the area chief confirmed that he received the report from the child's head teacher and accompanied by the area assistant chief and an administration police officer **PW4** they arrested the appellant and took him to the Police Station.

PW5 the clinical officer produced the **P3** form. He confirmed the following, the hymen was broken, the minor had dermatitis, she had yellow discharge and the genitalia was reddish an indication of inflammation and the vulva was painful/tender. She had pus cells. Conclusion was that the injury could have been caused by a male organ.

PW6 R K N, the head teacher collaborated the evidence of **PW2** and confirmed that he passed the information to the chief who took further steps and had the appellant arrested.

PW7 PC Erick Nyangau from Mukuruweini Police Station was the investigating officer in this case. He interviewed the witnesses, issued the P3 form and charged the appellant in court.

At the close of the prosecution case, the trial magistrate ruled that the appellant had a case to answer and complied with the provisions of section **211** of Criminal Procedure Code. The accused elected to give unsworn evidence and opted not to call witnesses in support of his defence. His brief testimony was that he was falsely implicated, that al the witnesses lied and that the doctor said he did nothing.

Other than the above general denial, the appellant never responded directly to the allegations levelled against him by the complainant. The learned magistrate analysed the evidence of all the witnesses and the above defence and concluded that the appellant was guilty as charged and convicted him as charged and sentenced him to life imprisonment.

Aggrieved by the above verdict, the appellant appealed to this court seeking to quash the conviction and sentence and has in his supplementary grounds of appeal advanced **3** grounds which can be summarized into two, namely, whether the prosecution proved the case to the required standard and secondly whether the defence of the appellant was considered. I will address the said grounds shortly in this judgement.

The appellant handed in written submissions and cited the uncertainty of the dates when the alleged offence was committed and submitted that on that note the offence was not proved and that for the life sentence to be imposed it ought to be based on cogent evidence. He cited the case **Charles K. Muraya vs Republic** where it was held that the more serious the charge, the heavier the burden of proof on the prosecution. The appellant also submitted that his defence was plausible and that he was under no obligation to prove his guilty and in support of the foregoing he cited the case of **Stephen Mungai Macharia vs Republic.**

Learned State Counsel **Miss Kitoto** urged the court to uphold the conviction and sentence and submitted that there was overwhelming evidence to support the offence of incest and that the ingredients of the offence were proved, that the defence was considered and found to be wanting that the sentence is provided for under the law.

I have carefully considered the submissions made by the appellant and the state counsel. I have also reviewed the evidence on record and the relevant law. Section **20 (1)** of the sexual offences Act provides that:-

> ***20 (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.

Provided that, if it is alleged in the information or charge and proved that the female 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.

To establish a case under the above section, the prosecution must prove the elements of the offence. For instance, there must be an **indecent act** or **an act which causes penetration**. Further, the victim must be *a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother.* I find no difficulty in believing that the complainant is a female person within the above definition and that the appellant is her father and that the appellant knew her to be his daughter. These basic truths which are essential ingredients of the offence of incest were not contested at all.

An indecent act is also defined in Section **2** of the Act as follows:-

‘*Indecent act’ means an unlawful intentional act which causes:-*

a. *Any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act of penetration.*
b. *……………………………………………………………………………………….*

‘ *Act which causes penetration’ means an act contemplated under this Act.’*

It is also necessary to bear in mind the definition of penetration which is defined in the Act as ‘*the partial or complete insertion of the genital organs of a person into the genital organs of another person.’*

In my view it is important at this stage to mention that the evidence adduced established the act of penetration even though the particulars of the charge sheet only refer to the appellants’ penis coming into contact with the genitals of the minor which is an indecent act within the above definition. Either way, an indecent act as defined above or an act which causes penetration are the key ingredients of the offence of incest. Thus, even though the evidence is tilted towards penetration as opposed to “coming into contact” it does in any manner prejudice the appellant because the two i.e coming into contact or an cat of penetration are sufficient to prove the offence of incest. In any event, there cannot be penetration without contact, but there can be contact without penetration. Thus, the evidence adduced only aggravated the indecent act.

In support of the indecent act and the act of penetration is the evidence of the complainant who narrated her ordeal in the hands of the appellant. **PW2** also collaborated her testimony; she asked her why she had difficulties in walking and the child revealed to her that she had been sexually assaulted by her father. This evidence was further collaborated by **PW3**, **PW4, PW5 & PW6.** Indeed **PW4**, the clinical officer confirmed that the complainant’s hymen had been broken, that she has injuries and infection in her genitalia possibly caused by a male organ. The testimony pointed to several incidents of incest.

The learned magistrate who had the benefit of seeing the witnesses testify believed the above evidence. The proviso to section **124** of the Evidence Act, Cap 80, Laws of Kenya provides:-

“Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth”

In my view, despite her tender age, the complainant was clear in her testimony. On the contrary the defence offered by the appellant is too shallow and does not cast doubts in the prosecution case. This calls

for a close examination of the evidence and as I do so I wish to point out that the legal burden of proof in criminal cases never leaves the prosecution's backyard. **Viscount Sankey L.C.** in the celebrated case of **Woolmington vs. DPP** in a subtle and masterly fashion stated the law on legal burden of proof in criminal matters, that;

> *'Through the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception…No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."*

The above quotation expresses the correct legal position, which is the legal burden of proof in criminal cases rests on the prosecution and this burden must be discharged at all material times. Thus, the legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial the prosecution has failed to establish these to the appropriate standard, the prosecution will lose.The burden of the prosecution in criminal cases is to establish its case beyond reasonable doubt. The question that follows is whether the prosecution in this case established its case beyond reasonable doubt. This calls for close scrutiny of the evidence on record and also an examination of the defence advanced by the accused. In **Uganda vs. Sebyala & Others**, the learned Judge citing relevant precedents had this to say:-

> *"The accused does not have to establish that his alibi is reasonably true. All he has to do is to create doubt as to the strength of the case for the prosecution. When the prosecution case is thin an alibi which is not particularly strong may very well raise doubts"*

As pointed out earlier, the defence put forward by the appellant is extremely shallow and does not in any manner cast doubts on the evidence adduced to warrant this court to give the appellant the benefit of doubt. The appellant carefully avoided addressing or answering the allegations levelled against him. Having subjected the entire record to a fresh scrutiny, I find no contradictions which if resolved in the appellants favour would create a doubt in the prosecution's case. I am satisfied that the prosecution proved the offence of incest and that the necessary ingredients of the offence as enumerated above where proved beyond doubt.

Accordingly I find no merit in grounds of the appeal. Further, I find that the evidence adduced proved the offence of incest. I conclude that the conviction was supported by the evidence on record and I up hold the conviction.

On the sentence, it is important to recall that the complainant was aged 13 years at the time of the offence. Commenting on the age of a victim in cases of this nature the court of appeal in **Kaingu Elias Kasomo vs Republic** had this to say:-

> *"Age of the victim of sexual assault under the Asexual Offences Act is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim"*.

The evidence adduced was that the child was 13 years at the time of the offence. This is the age disclosed in the P3 form and the Hospital treatment cards while the social inquiry report prepared by the Children's officer filed in court on 16.11.2011 showed that the child was 14 years. Either way, the child was below 18 years. The appellant never disputed the age of the minor at the trial.

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.

The Supreme Court of India in **State of M.P. vs Bablu Natt** stated that '*the principle governing imposition of punishment would depend upon the facts and circumstances of each case. An offence which affects the morale of the society should be severely dealt with.'* Moreover, in **Alister Anthony Pareira vs State of Maharashtra,** the court held that:-

> *"Sentencing is an important task in the matters of crime. One of the prime objectives of the criminal law is imposition of an appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of the crime and the manner in which the crime is done. There is no straightjacket formula for sentencing an accused on proof of crime. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep the gravity of the crime, motive for the crime, nature of the of the offence and all other attendant circumstances"*

Thus, while exercising its discretion in sentencing, the court should bear in mind the principles of proportionality, deterrence and rehabilitation and as part of the proportionality analysis, mitigating and aggravating factors should also be considered.

In **Shadrack Kipchoge Kogo vs Republic**, the court of appeal stated:-

> *"Sentence 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"*

The proviso to Section **20 (1)** of the Sexual Offences Act provides that:-

> *Provided that, if it is alleged in the information or charge and proved that the female 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.*

I pose the question *"What is the construction of the terms shall be liable?* In searching for the intention of parliament, the first observation to make is that generally speaking, the penalty prescribed by a written law for an offence, unless a contrary intention appears, is the maximum penalty.This principle is contained in section **66 (1)** of the Interpretation and General Provisions Act.Which provides:-

> *"Where in a written law a penalty is prescribed for an offence under that written law, that provision shall, unless a contrary intention appears, mean that the offence shall be punished by a penalty not exceeding the penalty prescribed"*

Even though the offence in this case falls under the Sexual Offences Act, it may also be useful to draw a parallel with the relevant provisions in the Penal Code. My observation is that the principle of law in Section **66** aforesaid is entrenched in Section **26** of the Penal Code which expressly authorizes a court to sentence the offender to a shorter term than the maximum provided by any written law and further authorizes the court to pass a sentence or a fine in addition to or in substitution for imprisonment except where the law provides for a minimum sentence of imprisonment. In particular, section **26 (2)** and **(3)** of the Penal Code provides:-

> *(2) Save as may be expressly provided by the law under which the offence concerned is punishable, a person liable to imprisonment for life or any other shorter period may be sentenced to any shorter term.*
>
> *(3) A person liable to imprisonment for an offence may be sentenced to a fine in addition to or in substitution for imprisonment.*

There is however a proviso to Section **26(3)** of the Penal Code that a fine cannot be substituted for imprisonment where the law concerned provides for a minimum sentence of imprisonment. In my view, from the wording and language of Section 26 and 28 of the Penal Code, it is clear that those are general provisions of law which apply not only to the offences prescribed in the penal code but to offences under other written laws.

The phrase used in penal statutes *(ie shall be liable to*) was judicially construed by the East African Court of Appeal in **Opoya vs Uganda** where the court said at page 754 paragraph B:-

> *"It seems to us beyond argument the words "shall be liable to" do not in their ordinary meaning require the imposition of the stated penalty but merely express the stated penalty which may be imposed at the discretion of the court. In other words they are not mandatory but provide a maximum sentence only and while the liability existed the court might not see fit to impose it"*

I with tremendous respect adopt the above construction and find that the penalty of life imprisonment is the maximum and the court may in exercising its discretion pass a lesser sentence than the maximum prescribed for the offence after considering the principles of sentencing enumerated above.

I have carefully considered the facts of this case, the severity of the offence, the principles of proportionality, deterrence and rehabilitation and as part of the proportionality analysis, the mitigating and aggravating factors which in my view include the age of the victim at the time of the offence, the scar the incidence left in her life, the social implications, the relationship of the appellant and the victim.

I have also considered the purpose of sentencing and the principles of sentencing under the common law which are:-

- i. To ensure that the offender is adequately punished;
- ii. To prevent crime by deterring the offender and other persons from committing similar offences;
- iii. To protect the community from the offender;
- iv. To promote the rehabilitation of the offender;
- v. To make the offender accountable for his or her actions;
- vi. To denounce the conduct of the offender
- vii. To recognize the harm done to the victim of the crime and the community prevent

Guided by the above principles, **I hereby reduce the sentence from life imprisonment to forty years.** The sentence shall run from the date of conviction by the lower court.

The up-shot is that this appeal against conviction is dismissed. The sentence is reduced as aforesaid.

Right of appeal 14 days

Dated at Nyeri this 28th day of October 2015

John M. Mativo

Judge