REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO 198 OF 2012

R W G…….Appellant

Versus

Republic…….……Respondent

(Appeal against Judgement, conviction and sentence in Criminal Case Number 556 of 2012, Republic vs Richard Waweru Gitonga at Othaya, delivered by F. W. Macharia, S. R.M, delivered on 26.11.2012).

JUDGEMENT

R W G (hereinafter referred to as the appellant) was sentenced to serve life imprisonment in criminal case number **556 of 2011** at Othaya Resident Magistrates Court having been found guilty of the offence of incest contrary to Section **20 (1)** of the Sexual Offences Act.

In exercise of his rights of appeal, the appellant seeks to quash and set aside the said conviction and sentence and has cited three grounds in his supplementary petition of appeal. The said grounds can safely be reduced into two, namely whether the evidence adduced was sufficient to sustain the conviction and secondly whether the defence of the appellant was considered.

In determining this appeal, this court has a legal duty to re-analyse, re-evaluate and assess the evidence adduced in the lower court so as to come up with its own conclusions bearing in mind that it did not have the benefit of seeing the witnesses testify.

The prosecution called four witnesses as follows:-.

PW1,M W the complainant aged 14 years at the time of giving evidence and as the law commands, the learned Magistrate conducted a *voir dire* examination and was satisfied that the minor did not understand the meaning of giving evidence on oath and directed that the minor to give unsworn testimony and her evidence was that her father led her to the tea planation, he dismissed the younger siblings to go home and threatened to cut her with a panga if she screamed, he asked to remove her pant, he told her to bend, he unzipped his trouser and had sex with her. Her evidence was that he has sex with on three previous occasions. Thereafter she had stomach pain, her mother bought her medicine, but the pain continued, then she told her mother what had happened. They reported at Othaya Police Station, and she was also taken to hospital, treated and discharged. She informed the court that her father used to have sex with her while at the shamba. She said she was born in 1997.

PW2 Ian Ngumo Waitere clinical officer testified that the hymen was broken and the minor had been sexually assaulted.

PW3 J W W, mother to **PW1** testified that the child was 15 years at the time **PW3** was giving evidence.

She produced her birth certificate. She confirmed PW1 complained of stomach-ache, she gave her medicine but the pain persisted, then PW1 told her that her father was having sex with her when they went to the shamba. She also said her father had threatened to beat her if she revealed to anyone. She informed the assistant chief who also questioned the child and she confirmed it was true. It was her evidence that her husband had been defiling her daughter; she witnessed it once when the child was in class 6. She reported the incident to the elders and the assistant chief but they never helped. She also said her husband defiled her other child born out of wedlock when she was young and the child left home.

PW4 No. 88355 Cpl Linus Lotulya, the investigating officer gathered the evidence and charged the appellant in court.

After evaluating the above evidence, the trial magistrate was satisfied that a *prima facie* case had been established and put the accused on his defence and complied with the provisions of section **211 CPC**. The accused elected to give sworn defence and said he had no witnesses to call.

In his brief testimony the appellant denied ever defiling his daughter and added that on the material day he was picking tea at home, then at 4pm he went to the tea buying centre, that he returned at about 8pm and found his wife was not in, he stayed with the children for a while then returned to the tea buying centre, that the vehicle for tea buying came at around 9.45pm. He claimed that he came to know the charges in court. He also said no exhibits were produced nor were there eye witnesses to prove the charges and cited what he called contradictions as to where the offence was allegedly committed. He denied that he ever defiled his daughter

The learned magistrate in her well-reasoned judgement analysed the evidence and identified the following as the key issues for determination:-

i. *If the accused is the father of the child.*
ii. *Whether the accused's genitalia penetrated the genitalia of the complainant; or*
iii. *In the absence of (b) above, if his genitalia had any contact with the genitalia of the complainant.*
iv. *Whether the accused was framed as alleged in the defence statement.*

The learned Magistrate re-visited the evidence and answered all the above issues in the affirmative, and found that the prosecution had proved its case beyond doubt and convicted the appellant. The trial magistrate considered that this was not the first time the appellant had defiled the complainant, though he was not prosecuted for the same and arrived at what she considered to be a deterrent sentence, which is life imprisonment.

Aggrieved by the said verdict, the appellant appealed to this court seeking to quash the conviction and sentence. The appellant handed in written submissions which he adopted at the hearing of this appeal. In the said submissions, the appellant insists that the evidence was questionable and cited the case of **Ndungu Kimani vs Republic.** He further cited contradictions on the age of the minor and insisted that his defence was not considered and cited the case of **Stephen Mungai Macharia vs Republic** insisting that an accused person is under no obligation to prove his innocence.

Learned State Counsel **Miss Kitoto** urged the court to uphold the conviction and sentence and submitted that the allegations were sufficiently proved, that the ingredients of the offence were proved in that the child was a minor, the appellant is the father, that there was penetration, which constitutes an indecent act and that the Doctor confirmed the that her hymen was broken, and that from the judgement, the defence of the appellant was considered and found to be wanting. In reply, the appellant cited some inconsistencies on the dates in the P3 form and urged the court to allow the appeal. .

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. I have also studied the judgement of the trial Magistrate and her analyses of the evidence and I find that she correctly identified the key issues for determination.

Section **20 (1)** of the Sexual Offences Act:-

> ***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*.

It is therefore imperative that the prosecution must prove the existence of a father/daughter relationship between the appellant and the complainant. From the evidence, there is no dispute that the appellant is the father and I find that of the learned Magistrate correctly answered this issue.

I find no difficulty in believing that the complainant is a female person within the meaning of the Section **20 (1)** of the Act 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 at '*the partial or complete insertion of the genital organs of a person into the genital organs of another person.'*

The prosecution bears the onus of proving that an "**indecent act**" or "**act which causes penetration**" has been committed in addition to proving the relationship between the accused/appellant and the complainant as well as the age of the complainant.

In determining this appeal, this court will be considering whether the above ingredients have been proved beyond reasonable doubt. In support of "**indecent act**" and "**act which causes penetration**" is the evidence of **PW1** who told the court that her father defiled her and her clear testimony referred to the last incident which triggered this case and **3** other previous incidences. **PW3** collaborated and informed the court that she once found the appellant sexually assaulting the child and she reported to the elders and the assistant chief who advised them to resolve the matter. It was also **PW3's** evidence that she had **5** children with the appellant, that she had one child out of wedlock and that the appellant also sexually molested the said child and she ran away from home. **PW2** produced the **P3 form** and testified that the child's hymen was broken raising a possibility of sexual assaulted.

My conclusion based on the above evidence is that there is proof that the complainant had been sexually molested. The evidence on record to me proves beyond reasonable doubt that there was an act which caused penetration and the evidence also points irresistibly towards the accused.

The complainant narrated how the appellant asked her to remove her pant and had sex with her. She developed stomach pains and after medicine given by her mother could not work, she informed her mother about the encounter and revealed three previous ones. 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 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"*

With regard to age, the birth certificate was produced in court and it shows the child was born on 18.7.1996, thus in 2011 she was 15 years. I find that age was sufficiently proved. In defilement cases, the age of the complainant is an important factor especially when sentence is being considered. In the case of **Dominic Kibet Mwareng –vs- Republic it was** held thus:-

> *"The critical ingredients forming the offence of defilement are:- the age of the complainant, proof of penetration and positive identification of the assailant. …..…Mr. Chebii, Counsel for the Appellant submitted that none of these ingredients was established. On the age of the Complainant, he submitted that failure to conduct an age assessment on the Complainant was fatal to the Complainant's case. He referred the Court to the case of* ***Hilary Nyongesa Vs Republic*** *where Mwilu J (as she then was) stated that:-*
>
> > *"Age is such a critical aspect in Sexual Offences that it has to be conclusively proved…And this becomes more important because punishment (sentence) under the Sexual Offences Act is determined by the age of the victim."*
>
> *I agree and add that while the Court may in certain circumstances rely on evidence other than an age assessment report, the onus of proving the age of the victim resides with the Prosecution and a simple statement by the Complainant as to their age does not in my view, constitute such proof."*

In **John Cardon Wagner –vs- Republic,** Warsame J (as he then was) held that:-

> *"In defilement cases, the age of the complainant is proved by either medical evidence or through other evidence since the sexual offences act have different categories of ages and sentences of different ages…"*

Mutende J in **Musyoki Mwakavi –vs- Republic Machakos** held that:_

> *"…apart from medical evidence, the age of the complainant may also be proved by birth certificate, the victim's parents or guardian and observation or common sense…".*

In the case of **Francis Omuroni versus Uganda,** it was held thus:-

> *"In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense..."*

In the present case, as stated above, I find that age of the child was sufficiently proved. I have also considered the defence advanced by the appellant in the lower court and I find no material inconsistencies in the evidence adduced and that the evidence adduced in the lower court proved the offence beyond doubt and on this account I find that the learned magistrate properly addressed herself to the evidence and arrived at the right conclusions.

The upshot is that the appeal lodged by the appellant against the conviction lacks merit and is hereby dismissed. The prosecution established its case to the required standard of proof that indeed the appellant committed the offence of incest.

Regarding sentence, 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.*

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"*

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, the apparent propensity of the appellant in committing such offences evidenced by the repeated acts of sexual assault upon the minor and the alleged sexual assault on yet another child who had to flee the matrimonial home and also I have borne in mind the purpose and 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.*

Guided by the above principles and the facts of this case I hereby up hold the sentence imposed by the lower court.

The up-shot is that this appeal against both conviction and sentence is hereby dismissed.

Right of appeal 14 days

Dated at Nyeri this **28th** day of **October** 2015

John M. Mativo

Judge