REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL APPEAL NO. 423 OF 2013

J W M……..APPELLANT

VERSUS

REPUBLIC …….RESPONDENT

(Being an appeal against sentence and conviction in Thika Chief Magistrate's Court Criminal Case No. 874 of 2011 (Hon. L.M. Wachira) on 16th February, 2012)

JUDGMENT

In the charge sheet filed in court on 21st February, 2011, the appellant was charged with two counts of incest by a male person contrary to section 20(1) of the Sexual Offences Act, No. 3 of 2006 and indecent act with a child contrary to section 11(1) of the same Act. According to the particulars of the first count, it was alleged that on the 18th day of February, 2011 at [Particulars Withheld] in Murang'a county, within the Republic of Kenya, the appellant by use of his genital organs namely penis caused penetration into the genital organs namely vagina of J N a girl aged seven years who, to his knowledge was his daughter. As far as the second count was concerned the particulars were that on the 18th day of February 2011 at [Particulars Withheld] in Murang'a County within the Republic of Kenya, by use of his genital organs namely the penis caused contact with the genital organs namely vagina, buttocks and breast of J N a girl aged six years.

I must outset that the second count ought to have been included as an alternative charge to the first count and not an independent count since both counts were based on the same transaction. In her judgement, the learned magistrate correctly took this path and treated the second count as an alternative to the first count. In any event no prejudice was caused to the appellant and nothing much turned on this minor discrepancy since the appellant was eventually convicted of the principle count only. He was sentenced to life imprisonment.

Being dissatisfied with the learned magistrate's decision, the appellant appealed against the conviction and sentence. Amongst the grounds upon which the appellant's appeal is based are that the learned magistrate erred both in law and in fact for failing to consider that the appellant's constitutional rights had been violated by keeping him in custody longer that the constitution allowed before he was charged; that the learned magistrate erred in law and in fact for failure to consider that the case against the appellant was not proved because he was not medically examined and without such examination, there was nothing linking him to the offence for which he was charged particularly considering that the complainant had tested to be HIV positive. The learned magistrate is also faulted for having ignored the appellant's defence. In what the appellant described as his amended supplementary grounds of appeal, which he brought to the attention of court when the appeal came up for hearing on 16th October, 2013 the appellant complained that doctor testified in a language he did not understand and therefore he was prejudiced.

The state counsel opposed the appeal and urged the court to uphold both the conviction and sentence because the case against the appellant had been proved beyond reasonable doubt. the state counsel contested the appellant's argument that the proceedings were conducted in a language he did not understand because the record shows that an interpreter was provided and in fact the appellant cross-examined all the prosecution witnesses. The appellant therefore actively participated in the proceedings.

Before considering the submissions by both the appellant and the state counsel, it is necessary at this stage to lay out the evidence as presented in the trial court. The submissions by the parties will be considered in the context of the analysis and evaluation of the evidence afresh and the conclusions this court is legally bound to arrive at. This is the path that this court as the first appellate court has always followed since the court of appeal decision in **Okeno versus Republic (1972) EA 32** where it was held that**:-**

> ***"An appellant 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 court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrates' findings can 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."(See page 36).***

The complainant in the case against the appellant was a girl aged seven. The learned court affirmed her after establishing that she understood the duty of speaking the truth. She told the court that she was in class two and that on 18th February, 2011, she was at her grandmother's place together with her brother J and two other children. The appellant whom she described as her father's brother sent her to light a fire at her grandmother's house. While in the house, the appellant accosted her and removed her pants; he unzipped his trouser and defiled her. The complaint cried out of pain but the appellant promised to appease her with pancakes. She reported this incident to J G R (PW2) and her mother, J W R (PW3), who reported the matter to the police at Makuyu police station and took the complainant to hospital for treatment.

J G R (PW2) confirmed that on 18th February, 211 at around 5.30 pm, he had just arrived at home from school when his younger brother came to him and told him that the complainant was in the kitchen crying; when J shouted out the complainant's name, the kitchen door opened and the complainant came out crying. She told this witness what the appellant had done to her. When J questioned the appellant about it, he said that he was drunk. The appellant became violent and threatened to beat J; he even went to the house and armed himself with a panga at which point J ran away to seek for assistance. When he went back the appellant had disappeared but J's brother had come home. Together they searched for the appellant and when they got hold of him they arrested him and took him to the police station.

One of the witnesses who saw the complainant immediately after the incident was the complainant's mother, J W R (PW3). She told the court that when she went back home on the material date at around 5 pm she heard screams and together with her friend Grace Waceke (PW4) rushed to the scene to find out what the screams were all about. J (PW2) told her that the appellant had defiled the complainant. It is then that this witness and her friend Grace checked the complainant and confirmed that there was a discharge from her private parts and noticed that her pant had been torn. The witness also noticed that the complainant had stains on her thighs. By then the appellant had been arrested. The complainant was treated at Thika district hospital. This witness confirmed that her daughter was then aged 7 years having been born on 30th October, 2004. She produced the complainant's pant, the child heath card or immunization card, the treatment card and the P3 form which exhibits were all marked for identification.

Grace Waceke (PW4) confirmed that she examined the complainant together with her mother (PW3) and other neighbours; she also noticed there was discharge on the complainant's thighs. This witness together with the complainant's mother took the complainant to Makuyu health centre but since they could not find the doctor, they proceeded to Thika hospital where the complainant was treated.

Police Constable Emanuel Kipkorir (PW5) who was then based at Makuyu police station testified that he received both the complainant and the appellant at his station on the 18th February, 2011. The complaint against the appellant was that of defilement. He retained the complainant's torn pant which he produced and was admitted in court as part of the prosecution evidence. He also confirmed having issued the complainant with the P3 form and charging the appellant after his investigations established that the appellant was liable for the offence for which he was charged and convicted.

Dr Rose Jalang'o (PW6) from Thika level 5 hospital examined the complainant on 19th February, 2011. She confirmed that the complainant's hymen was broken and in her estimation, the extent of the injury sustained by the complainant was grievous harm. She produced the treatment notes and the P3 which she filled upon examination of the complainant as prosecution exhibits.

In his evidence, which he opted to give on oath, the appellant denied the offence; he said that on the material day, he had been doing his casual jobs as usual and on his way back home he went to drink chang'aa. He said that before he even reached home, he met his brother's son and two other people who set upon him and beat him. He testified that he was then taken to Makuyu police where the police preferred the charges of incest and indecent assault against him. In his view he was being framed because of a land dispute between him and his brother.

Section **20 (1) of the Sexual Offences Act, No. 3 of 2006** under which the appellant was charged states:

> ***20.(1) Any male person who commits an indecent act with 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.***
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> ***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.***

According to this section all that the prosecution needed to prove for the appellant to be liable was that first, the appellant had committed an act which caused penetration with the complainant and second, that the complainant fell into any of the categories of relationships mentioned in that section; that is, that the complainant was either his daughter, granddaughter, sister, mother, niece, aunt or grandmother. If these two elements of the charge were proved beyond any reasonable doubt, then the next issue was the age of the complainant which would determine the sentence that would be meted out against the appellant.

An analysis of the evidence, in its entirety shows that the prosecution proved all these pertinent and material facts beyond reasonable doubt. On the issue of penetration, the complainant who, being a child of tender years as understood under section 19 of the Oaths and Statutory Declarations Act, Chapter 15 Laws of Kenya, was properly subjected to a voire dire examination before her evidence was taken related vividly how the appellant lured her to a house and defiled her. The appellant locked her in the house where the two remained until her brother, J G R (PW2), came calling out her name. She told him what the appellant had done to upon his enquiry on why she was crying as soon as she came out of the house. Her evidence was not shaken and was corroborated by the evidence of (PW2) who saw her come out of the house where the appellant was. The appellant's combative and aggressive conduct when the complainant's brother sought to know why he had defiled his sister was consistent with the complainant's and her brother's testimony that he had defiled the complainant. He was in house which was not his and in that house he had locked himself and the complainant for illicit purposes. In all circumstances, the appellant had the time and opportunity to commit the offence for which he was charged.

The complainant's mother and her friend who physically examined the complainant after her ordeal in the hands of the appellant were consistent and there evidence was not displaced that the complaint's pant was torn and there was vaginal discharge that was trickling on the complainant's thighs. In their view the complainant had been defiled.

The act of penetration was ultimately confirmed by the medical doctor who examined the complainant. In her evidence she characterised the injury that the complainant sustained as grievous harm; her hymen was broken. This crucial information which was not contested was contained in the P3 form which she produced and was admitted in evidence besides the medical treatment notes demonstrating that the complainant was treated soon after she was sexually assaulted. This evidence was not contested.

It was established, also beyond doubt, that the complainant was the appellant's niece. She was a daughter to his brother. The complainant said in her evidence and the appellant did not challenge her evidence that the appellant was a brother to her father. The complainant's mother told the court that the appellant was the younger brother of her husband. The accused himself, in his defence admitted that the complainant is his brother's child. Although the charge sheet erroneously described the complainant as the daughter of the appellant, there was enough evidence that the complainant's relationship with the appellant is among those relationships covered under Section 20 (1) of the Sexual Offences Act, No. 3 of 2006.

As regards age, the complainant's mother told the court that the complainant was born on 30th October, 2004. She produced a child health card in which it is indicated that the complainant was born on that date and the witness is clearly indicated as the mother. The appellant himself admitted that the complainant was seven years. In a nutshell the complainant's age was proved to the required standard that she was less than eighteen years of age prescribed by the Act.

Although under **section 124** of the **Evidence Act, Chapter 80** of the Laws of Kenya, a trial court is entitled to convict on the evidence of a victim of a sexual assault only so long it is satisfied that the victim is telling the truth, there was sufficient corroboration of prosecution evidence which went towards proving that the an offence under section **21(1) of the Sexual Offences Act** had not only been committed but also that the appellant was the perpetrator.

I am unable to agree with the appellant that he should not have been convicted and sentenced because he was not subjected to a medical examination and therefore there was no evidence linking him with the offence of incest. As I have noted, and as the learned magistrate correctly held, there was sufficient and credible evidence on record to convict the appellant. Medical examination of the appellant was unnecessary to prove the offence against the appellant. The appellant also argued the complainant was found to be HIV positive; this allegation is not supported by the evidence on record and it is at best misconceived. Again the appellant did not establish that there was any dispute between him and his brother before he was charged with the offences in issue. I agree with the learned magistrate that the allegation that there was a land dispute between the appellant and the complainant's father who did not even testify was an afterthought.

The record shows that the appellant cross-examined all the prosecution witnesses including the doctor. He would not have cross-examined them if he did not understand the language in which they testified. There is no basis for the appellant's argument that he was prejudiced because he could not understand the language used by the court.

The contention by the appellant that the learned magistrate should have taken into consideration the fact that the appellant was in kept in custody for more than twenty-four hours before he was charged is also misplaced. The appellant was arrested on 18th February, 2011 which date happens to have fallen on a Friday. He was arraigned in court on 21st February, 2011 which was a Monday the next working day after he was arrested. The appellant's constitutional rights under section 72 of the old Constitution were not contravened and even if there was evidence of such breach, the remedy thereof would lie in damages and not in an acquittal.

My conclusion is that the appellant was properly convicted and based on the evidence before the trial court he was properly sentenced too. A person convicted for the kind of offence for which he was charged and convicted is liable to imprisonment for life. The learned magistrate while imposing this sentence noted that the appellant did not mitigate despite having been given opportunity to do so and was also not remorseful. There is no basis for interfering with the sentence which the learned magistrate imposed upon the appellant. For the foregoing reasons the appellant's appeal is dismissed.

Signed, dated and delivered in open court this 24th day of February, 2014.

Ngaah Jairus

JUDGE