N0. 225/2014

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL APPEAL NO. 90 OF 2012

F M K.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(B*eing an appeal from the original conviction and sentence in Kithimani Principal Magistrate's Court*

Criminal Case No. 26 of 2011 by Hon. A.W. Mwangi- P.M. on 26/1/2012)

J U D G M E N T

1. The appellant was charged with the offence of incest contrary to Section 20(1) of the Sexual Offences Act No. 3 of 2006. Particulars of the offence thereof being that on the night of 29th and 30th day of August 2011 at Muthesya location, in Masinga District within Machakos County, being a male person, intentionally caused his genital organ penis to penetrate the genital organ, vagina of **G M** a female person who was to his knowledge his grandmother.

> In the alternative, he is charged with committing an Indecent Act with an adult contrary to Section 11(A) of the Sexual Offences Act No. 3 of 2006. Particulars of the offence thereof being that on the night of 29th and 30th day of August 2011 at Muthesya location, in Masinga District within Machakos County, intentionally touched the vagina of **G M** with his penis against her will.

2. He was tried, convicted and sentenced to serve ten (10) years imprisonment. Being aggrieved by the conviction and sentence he now appeals on grounds that:

> i. The trial was irregular as part of the proceedings was conducted by an unqualified person namely P.C. Wachira which was in contravention of the provisions of Section 85 as read with Section 88 of the Criminal Procedure Code.
>
> ii. The prosecution's case was not proved beyond reasonable doubt.
>
> iii. The trial magistrate erred in failing to observe that there was need for an identification parade. In order for PW1's identification ability to be tested.

3. Briefly, the case was that PW1, **M M** is the appellant's paternal grandmother. She testified that on the

night of 29th and 30th day of August 2011 the appellant broke into her house, having entered through the window. He lay on her as she slept on her bed, held her by her neck and ordered her to remain silent lest he killed her. The threat made her remain silent. He removed her underpants, had sex with her in a violent manner as he tightened the grip on her neck. He warned her not to tell anyone about the episode. He opened the door, went out and locked it from outside. She raised an alarm as she had recognized his voice.

4. PW2, **C M M** on hearing screams emanating from PW1's house went to her aid. She told him that she had been raped by the appellant. He went called Mutuku's father. They went to PW1's house who narrated to them the same story as to what had transpired.

5. PW3, **C K** the appellant's father and son to PW1 stated that he also heard screams that night emanating from his mother's house. He woke up to go and check. On his way there he encountered **M M.** He observed that the window to his mother's house had been demolished. Bricks had been removed. PW1 told him that the appellant had entered the house through the window and raped her. They went to the appellant's house. They found the door not locked. They entered and asked the appellant about the incident but he denied having done anything.

6. In the morning he took both the appellant and PW1 to the Ekalakala administration police post. The appellant was detained and later taken to Matuu police station. Later he was subjected to examination. PW4, **Alfred Toronke** a clinical officer examined PW1. The 91 years old woman had sustained an injury on her left side of her neck. There were several injuries on her genitalia. She had pus cells. He concluded that there was a forceful penetration of the complainant. He also examined the appellant who did not have any abnormalities in his genetalia. PW5, **No. 232119 APC Monica Njeri** rearrested the appellant. PW6, **No.91272 P.C. Kenneth Kimei** investigated the case and charged the appellant.

7. In his defence the appellant said her quarrelsome grandmother alleged that he had committed the offence, an allegation that was not true. He stated that since his birth he has never engaged in sexual intercourse. Further, he stated that the complainant refused to use proceeds from sale of land to pay his fees. Instead she bought cattle that he used to herd. Thereafter the animals were given to his cousin. This left his family with a myriad of problems and his mother was not in good terms with the complainant.

8. The appellant filed written submissions while the state counsel **Mrs. Abuga** submitted orally.

9. This being the first appeal, I have duly reminded myself of my duty to re-evaluate the evidence adduced before the lower court bearing in mind that I never saw nor heard witnesses who testified in reaching my own conclusions***. (See Okeno -vs- Republic 1972 EA 32).***

10. It is not in dispute that the complainant herein is the appellant's grandmother. Further it is not in dispute that an act of indecency was committed on the person of the complainant, a 91 years old woman. The act did cause penetration into her genetalia per the evidence adduced by the clinical officer.

11. It is argued that the case was partly prosecuted by an unqualified person. Section 85(1) of the Criminal Procedure Code stipulate thus:

> ***"The Attorney-General, by writing under his hand, may appoint any advocate of the High Court or person employed in the public service, to be a public prosecutor for the purposes of any case".***

A perusal of the court proceedings of the lower court show that when the case came up at plea taking stage it was prosecuted by **P.C. Wachira.** Thereafter another magistrate took over the case and started denovo by reading the charge to the appellant. At that point in time it was prosecuted by inspector **Malel**. He did it to the end.

12. Following the provision of the law alluded to, any person with qualifications to prosecute as a public

prosecutor can do so as long as he is appointed as such by the Director of Public Prosecutions (DPP). In order to establish whether or not the inspector was unqualified to prosecute, the issue should have been raised at the trial stage for the Director of Public Prosecutions (DPP) to respond and establish that indeed he is gazetted. The prosecutor who prosecuted the case having been allowed by the magistrate who tried it pursuant to Section 88(1) of the Criminal Procedure Code and there having been no objection raised by the appellant, it follows that the prosecutor was qualified to act as such.

13. This brings us to the issue whether the complainant's identification of the appellant was cogent. This was an act committed at night. The complainant had slept. She was an old woman aged 91 years. No issue was raised regarding her mental status. The court therefore believes she was upright mentally. She said she recognized the appellant's voice. The issue of voice identification was considered in the case of ***Karani -vs- Republic (1985) KLR 290*** where the court of Appeal held thus:

> ***"identification by voice nearly always amounts to identification by recognition. Yet here as in any other cases care had to be taken to ensure that the voice was that of the appellant, that the complainant was familiar with the voice and that he recognized it and that there were conditions in existence favouring identification."***

14. In the case of ***Anjononi and others -vs- Republic (1976 – 80) 1 KLR 1566 at page 1668*** the court of Appeal held:

> **"…recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other."**

15. The complainant herein had known the appellant since his childhood from her evidence. She was familiar with his voice intonation. It was her testimony that the appellant on entering the house through the window that he damaged talked to her. He ordered her to keep quiet and threatened her with death. After violently raping her as he strangled her neck which got injured he told her to sleep and not to talk to anyone. Having talked to her before and after the ordeal she was able to recognize his voice. She could not have been mistaken about it.

16. It is important to note that when PW1 testified the appellant was given an opportunity of testing her evidence by subjecting her to cross examination. He however had no questions to put to her. This means that her evidence was not discredited. In his submissions he argues that he was found inside his house while PW2 was the one outside. This may be an insinuation that PW2 could have been the culprit. However, it is also imperative to note that after PW2 testified he had no question for him leaving his evidence unchallenged.

17. The trial magistrate having evaluated evidence adduced by both the prosecution and defence reached a conclusion that the complainant recognized the appellant's voice. He believed the complainant when she said there was moonlight therefore she was able to recognize the appellant and the appellant was the person who had raped her. In reaching the conclusion the trial magistrate made no error.

18. With regard to sentence, the minimum prescribed sentence of the offence is 10 years. This was the sentence meted out. It was within the law.

16. I have no reason to interfere with the decision of the lower court. The appeal is dismissed in its entirety.

DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **25TH** day of **MARCH, 2014.**

L.N. MUTENDE

JUDGE