NO. 263/2014

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 119 OF 2012

A W K...APPELLANT

VERSUS

REPUBLIC..RESPONDENT

(B*eing an appeal from the original conviction and sentence in Makindu*

Principal Magistrate's Court Criminal Case No. 709 of 2011 by

Hon. P. Wambugu - R.M. on 27/8/2012)

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 being that on the 18th June 2011 at **[Particulars Withheld]** in **Kibwezi District** within Eastern Province being a male person caused his penis to penetrate the vagina of **W M** who was to his knowledge his grandchild.

In the alternative count, he is charged with the offence of Indecent Act with a child contrary to **Section 11(1)** of the **Sexual Offences Act No. 3 of 2006**. Particulars of the offence being that on the 18th day of June 2011 at around 1200 hours at **[Particulars Withheld]** in **Kibwezi District** within Eastern Province intentionally unlawfully committed an Indecent Act with **W M** a girl aged 7 years old by touching her private parts namely vagina.

2. He was tried, convicted and sentenced to serve **thirty (30)** years imprisonment. Being aggrieved by the conviction and sentence he now appeals on grounds that:

i. The age of the complainant was not ascertained.

ii. The provisions of Section 198 of the Criminal Procedure Code were contravened.

iii. The case was not proved beyond any reasonable doubt.

iv. The sentence imposed was too harsh and excessive.

3. Facts of the case are that the appellant is a grandfather to the complainant (PW1). On the material date he sent her to buy a piece of bread. On her return she took it to the appellant's house who told her to

remove her underpants. He then lay on her, removed his penis and inserted into her vagina thrice. She was in pain. On finishing he released her. She reported the incident to her father. Incidentally PW3, **D M** who had been looking for her saw the appellant in the act. He notified his wife, PW2, **C M.** They reported the matter to the police. The complainant was examined by **Dr. Nganga** of Makindu District Hospital. His colleague PW4, **Dr. Makali Douglas** produced the medical examination report (P3) on his behalf. The child had a torn hymen. The degree of injury sustained was assessed as harm. There was evidence of penetration.

4. In his defence the appellant said that the charge was fabricated because his relative wanted to take away his land.

5. This being the first appeal, I am duty bound to analyze and re-evaluate the evidence which was adduced before the trial court and come up with my own conclusions bearing in mind the fact that I did not have an opportunity of hearing and seeing witnesses. (***See Okeno versus Republic (1972) EA 32).***

6. It was the contention of the appellant that he was prejudiced having not understood the language two (2) of the witnesses namely **PW4** and **PW5** used. He also argues that he was not accorded a fair trial as enshrined in **Article 25(c**) of the **Constitution.**

7. A perusal of the proceedings of the trial court reveal that there was an interpreter present in court when PW4 and PW5 testified. It is indicted they were duly sworn but the language used was not indicated. In the case of ***Said Hassan Nuno vesus Republic (2010) eKLR*** the appellant appealed on the ground that the trial court did not indicate what language was used in the proceedings by witnesses. He argued that prejudice and miscarriage of justice was occasioned to him. The court of appeal considered the issue and stated thus:

> ***"…at each stage of the proceedings a court clerk was in attendance and we take judicial notice that one of the core duties of a court clerk is to offer interpretation services to the accused or even the court where it does not understand the language of the accused; or a witness to the case".***

The court made a finding that the appellant had followed proceedings adequately.

8. Having been put on his defence the appellant said he understood the charges he faced and went on to tender his defence. The court clerk having been in attendance he did render interpretation services as was expected of him. In the premises the trial was fair.

9. The Doctor who filled the P3 form estimated the child's age as **7 years** per the medical examination report. It has been held that medical evidence is paramount in determining the age of the victim and the Doctor is the only person who could professionally determine the age in the absence of any other evidence like a birth certificate etc. (See ***Francis Omuroni versus Uganda, Court of Appeal Criminal Appeal No. 2 of 2000.)***

10. As to whether the case was proved beyond reasonable doubt, it is not in doubt that the complainant was the appellant's grandchild (granddaughter). Evidence was adduced which proved that the complainant's hymen was torn which was proof of penetration. In convicting the appellant the trial court made a finding that the evidence adduced by the complainant was corroborated by that of PW3. PWI, the complainant was taken through the voire dire process to establish whether she possessed some intelligence. As a result of the examination carried out the trial court formed an opinion that she understood what it entailed to state the truth.

11. At the time of testifying she told the court she was **9 years** old. Her testimony that the person who penetrated her was the appellant was corroborated by that of PW3 her father. He went home to find the complainant missing. He went looking for her at the appellant's house only to find the door closed. He checked through an aperture and saw the appellant lying on the child; defiling her. In his defence the appellant stated that he was framed but when PW3 testified, no suggestion was put to him to try and

establish the allegations. In the premises, the trial magistrate was correct in making a finding that the evidence of the child was indeed corroborated. The evidence adduced therefore proved the case against the appellant was proved beyond reasonable doubt. Consequently the conviction is affirmed.

12. The sentence imposed was 30 years imprisonment.

The proviso to Section 20(1) of Sexual Offences Act No. 3 of 2006 provides thus:

> ***"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…".***

13. The complainant herein having been under **eighteen years**, the sentence imposed was illegal. I therefore set it aside and substitute it with a sentence of **life imprisonment.**

14. It is so ordered.

DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **8TH** day of **APRIL, 2014.**

L.N. MUTENDE

JUDGE