REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 169 OF 2009

P TK.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal from original conviction and sentence in Nakuru C.M.CR.C. NO. 236 of 2008 by Hon. C.A. OTIENO, [R.M.] dated 3rd June 2009)

JUDGMENT

The Appellant was charged with two counts namely, **defilement of a child** contrary to **Section 8(1)** as read together with **Section 8(4)** of the **Sexual Offences Act,** 2006 and **incest** contrary to **Section 20(1)** of the same Act. In the alternative, he was charged with committing an indecent act with a child contrary to **Section 11(1)** of the **Sexual Offences Act, 2006.**

The Appellant pleaded not guilty and was after full trial, convicted on the first count of defilement and sentenced to 20 years imprisonment. No finding was made in regard to the second count.

By the Petition of Appeal filed on 17th June 2009, the Appellant has appealed against the sentence of 20 years meted out against him. He has asked this court to reduce the sentence or by an act of leniency acquit him altogether on the ground that he is a first offender and deeply regrets the occurrence of the incident, that he is the sole provider of his three children after his wife deserted the matrimonial home and that his imprisonment has aggravated his ulcers and abdominal ailments. The Appellant promised not to repeat the offence and asked for mercy.

The Prosecution Counsel submitted that these are issues that ought to have been raised before sentencing and not at this juncture. Counsel for the State stated that the sentence of 20 years was lenient and urged the court to dismiss the appeal.

ISSUES FOR DETERMINATION:

The issues for determination raised by the appellant relate to the sentence imposed.

Although not raised, there are other co-related questions which arise and include; whether the charge sheet was defective and; whether the evidence adduced by the prosecution was sufficient to support the conviction of the Appellant on defilement and or incest.

ANALYSIS

This court being the first appellate court it is incumbent upon the court to re-assess and re-evaluate the evidence on record afresh and to arrive at its own independent conclusion and must be alive to the fact that the court did not have the opportunity to observe and or hear the witnesses. Refer to the case of **Okeno** V. **Republic** (1972) EA 32.

The prosecutions case was that on 21st December 2008 at ***[particulars withheld]*** village in Nakuru District within Rift Valley Province the Appellant intentionally and unlawfully had sexual intercourse with D.M. a girl aged 14 years and knowing her to be his daughter.

I will start with the issue of the charge sheet; From these set of facts and the evidence adduced the Appellant was convicted only on the count of defilement and the trial court did not make a finding on the charge of incest. Whereas the offence of defilement and incest are both distinct offences, separately provided for by the law and whose elements are different, they were committed against one complainant and arise from the same act.

The particulars of the offence indicate that the girl DM is aged 14 years. The evidence of **PW1** during the voire dire examination is recorded by the trial magistrate as 5years. It is not for this appellate court to speculate as to whether this was an error. In her testimony **Tabitha Ngugi (PW4)** who was the clinical officer, Njoro health Centre who examined **PW1** produced into court **'PExh.1'** a P3 Form and **'PExh.2'** an Out Patient Card and both exhibits indicate the age of the complainant as being 14 years.In her Judgment the trial court indicates that **PW1** was aged 14 years and then in conclusion she proceeded to convict the appellant sentence him for a term of 20 years under the first count.

This court has perused the court record and notes that the Charge Sheet reads;

> **"Defilement of a child contrary to Section 8(1) as read with Section 8(4) of the Sexual Offences Act 2006"**

The sentence provided for by Section 8(4) of the Sexual Offences Act is a term of not less than 15 years for the age bracket of sixteen to eighteen years. The complainant was aged fourteen years and therefore the correct section on sentencing ought to have been Section 8(3) which caters for the age bracket of twelve to fifteen years and provides for a sentence of not less than twenty years.

However, this court is of the view that even though the charge sheet is found to be defective on the penalty section the same is curable under the provisions of **Section 382** of the **Criminal Procedure Code.**

The next question that arises relates to whether the prosecution proved the charge of defilement or incest against the Appellant beyond reasonable doubt.

The complainant explained to the trial court that the appellant was her father and after separating with her mother the Appellant remained single and lived with the complainant alone in Njoro.

On a day,which she could not recall she was at home with the Appellant, who then took her to his bed, removed his trouser and her pant and inserted his penis into her front private part which she pointed to the court. The complainant felt pain in her stomach and bled from her private parts. After he was done, the Appellant warned the against telling anyone of what he had done and threatened to cut her into pieces with a *panga* if she did so.

She was examined by PW4 at Njoro Health Centre and upon examining her genitalia, the doctor observed a perforated hymen and that there was tenderness upon touch and some whitish discharge and a few pus cells were found in the urine. The injuries were about 3 days old. Her evidence was supported as stated earlier by the P3 Form and the Outpatient Form.

In his unsworn statement, the Appellant denied having committed the offence. The trial court considered the evidence of PW1 that the Appellant removed her clothes and inserted his penis into her vagina and the findings of PW4, the medical officer, that the complainant's hymen was perforated and that she had a whitish discharge.

With regard to whether the Appellant was the assailant, the court noted that the complainant knew the Appellant well before the incident and there was therefore no possibility of mistaken identity. The court also found that the Appellant's defence did not in any way cast doubt or displace the testimony of the complainant. After considering the evidence, the trial court found it was proved that the complainant was defiled. Accordingly the court found that the the first count of defilement had been proved beyond reasonable doubt.

After carefully analysing the evidence, I am inclined to depart from the finding of the trial court. The evidence discloses that the Appellant was the complainant's father and that he knew this to be so. PW1 told the court that she remained with the Appellant after he separated with her mother. PW2, their neighbour and PW3, the Appellant's brother, also gave evidence supporting this contention that the Appellant and the complainant were father and daughter. In his defence, the Appellant did not challenge this evidence.

In the circumstances, this court is of the view that the consanguine relationship of father and daughter was proved beyond reasonable doubt and that the probative value of the evidence on record is the offence of **defilement** and also supports the offence of **incest** contrary to **Section 20(1)** of the **Sexual Offences Act, 2006.**

The age of the complainant is not contraverted. In the instant case, the trial court found on the undisputed evidence of PW1 and PW4 that the complainant was fourteen years at the time of commission of the offence of incest and Defilement.

FINDINGS

For the reasons stated above, instead of curing the defect found in the Charge Sheet that relates to the punitive section and the age bracket, I will instead make a finding that count 1 is defective and then alter the finding on conviction and sentence of the trial court and substitute it with a conviction on the second count of commiting incest contrary to Section 20(1) of the Sexual Offences Act, 2006.

The proviso to the section provides that where it is proved that the female person was under the age of eighteen years at the time of commission of the offence, then the accused shall be liable to life imprisonment.

The Appellant was a first offender. He expressed remorse and regret for his actions and asked for leniency as he is the sole provider of his three children after his wife deserted the matrimonial home, that his imprisonment has aggravated his ulcers and abdominal ailments.

DETERMINATION

The upshot of the above is that the appeal herein succeeds in part. The conviction of the lower court for count 1 on defilement is quashed and substituted with a conviction of the offence of incest.

The sentence on the count of defilement is hereby set aside and substituted with that of 20 years.

Notwithstanding he committed a heinous act against his daughter which calls for a deterrent sentence. The sentence of 20 years imprisonment is found to be sufficient in the circumstances and the sentence is as good as life sentence as his best productive years will be spent in prison. The sentence to run from the date when sentence was passed by the trial court.

These shall be orders accordingly.

Dated, Signed and Delivered at Nakuru this 21st day of October, 2014.

A. MSHILA

JUDGE