REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 168 OF 2011

P M M .....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Kitui Senior Principal Magistrate's Court Criminal S.O. No. 34 of 2011 by Hon. A.G. Kibiru, PM on 9/8/2011)

JUDGMENT

1. **P M,** the Appellant was charged with the offence of incest contrary to section 20(1) of the Sexual Offences Act, 2006. Particulars of the offence being that on the 6th day of September , 2011 at 1.00pm at Lower Yatta District within Kitui, being a male person he caused his penis to penetrate the vagina of **C M N** a female person aged 14 years who was to his knowledge his granddaughter.
2. In the alternative, he was charged with committing an indecent Act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006. Particulars thereof being that on the 6th day of September 2011 at 1.00pm at Kyainya village Yatta District within Kitui County, wilfully and unlawfully had an act of indecency with **C M N** a girl aged 14 years by touching her private parts namely vagina.
3. The charge was read to the appellant who pleaded guilty to the main count. He was convicted on his own plea of guilty and sentenced to serve twenty (20) years imprisonment. Being aggrieved by the conviction and sentence he appealed. In his amended supplementary grounds of appeal he states that: -

i. The learned trial magistrate erred in both law and facts by failing to investigate as to why he pleaded guilty.
ii. The learned trial magistrate did not give him an opportunity to think about the subsequent admission of the charge and proceeded to convict him on the same day.
iii. His fundamental rights were violated as he was not produced in court within 24 hours as required by the constitution.

4. In his written submissions he reiterated what was stated in his grounds of appeal and added that his mitigating factors of being of ill-health were not taken into consideration at the point of sentencing; and that a retrial would not be prejudicial to the State.
5. The learned State Counsel, **Mrs Abuga** opposed the appeal. She stated that the charge was read to the accused in Kikamba; a language that he understood. Facts were read to him and he admitted them. The plea was therefore unequivocal. The facts proved the offence committed the

relationship between the appellant and victim who was his granddaughter. The sentence imposed was within the law for the maximum sentence for the offence is life imprisonment. She therefore urged the court to uphold the conviction and sentence by dismissing the appeal.

6. I have carefully considered submissions by the appellant and the learned stated counsel in respect of this appeal.
7. The charge was read to the appellant as prescribed by the law (*Criminal Procedure)* in a language that he understood namely; Kikamba. It is indicated on record that the charge was not only read to the appellant but was also explained to him as set out in the particulars of the offence. He admitted the charge.
8. The facts of the case were then outlined/presented as required. The prosecution in outlining the facts stated that the relationship between the appellant and the complainant, she was his granddaughter. The complainant's mother found the accused in the act of having penetrated the complainant a child aged 14 years. On examination her hymen was broken. The appellant admitted the facts as being correct.
9. The appellant faults the trial magistrate for having convicted him without giving him an opportunity to reflect on the offence committed. Section 207 (2) of the Criminal Procedure Code states as follows:-

> ***"if the accused admits the truth of the charge... his admission shall be recorded...and the court shall convict him and pass sentence upon or make an order against him unless there appears to it sufficient cause to the contrary."***

10. In this case the accused who understood the process undertaken was given an opportunity of mitigating to court prior to the sentence being passed. He did not raise any concern that would have made the court to suspend passing of the sentence until a later stage. The learned trial magistrate therefore acted in accordance with the law by passing sentence in the manner adopted.
11. It is the law that no appeal shall be allowed in the case of accused person who has pleaded guilty and has been convicted on the plea by a subordinate court, except as to the extent or legality of the sentence (see ***section 348 of the Civil Procedure Code***).
12. This is a case where the plea was unequivocal I would therefore have absolutely no reason to interfere with the conviction reached by the learned trial magistrate.
13. An issue has been raised about violation of constitutional rights of the appellant. He alluded to Article 49 (1) (f) which provides thus;-

> "***An arrested person has the right to be brought before a court as soon as reasonably possible; but not later than –***

i. ***Twenty – four hours. After being arrested; or***
ii. ***If the twenty fours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of next court day."***

14. This is a case where the appellant was arrested on 8th September 2011 and produced in court on 9th September, 2011 having committed the offence on 6th September 2011. It is apparent that he was arraigned in court within 24 hours of his arrest. There was no delay as alleged. Therefore his rights were not violated.
15. With regard to the sentence meted out, a person who commits the offence of incest is liable to imprisonment for a term not less than 10 years. However for a child, being a person under the age of 18 years, he is liable to life imprisonment. Having been imprisoned for 20 years, the sentence imposed was within the law.
16. In the result, I dismiss the appellant's appeal, uphold the conviction entered and confirm the sentence meted out in the circumstances out in the circumstances.

DATED, SIGNED and DELIVERED at MACHAKOS this 30TH day of OCTOBER, 2013.

L.N. MUTENDE

JUDGE