REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL APPEAL CASE NO. 271 OF 2013

F M G……APPELANT

VERSUS

REPUBLIC…….RESPONDENT

(Being an appeal against conviction and sentence in the judgment delivered in the Thika Chief Magistrates' Court Criminal Case No. 793 of 2008, Hon. L.W. Gicheha on 3rd September, 2009)

JUDGMENT

The appellant was charged in Thika Chief Magistrate's Court Criminal Case No. 793 of 2008 with the offence of incest by a male person contrary to **section 20(1)** of the **Sexual Offences Act, No. 3 of 2006**. It was alleged that on the 28th day of February, 2008 at **[Particulars Withheld]** village in Murang'a South District of the Central Province the appellant committed an act which caused penetration with a female namely J M M a girl aged 13 years who to his knowledge was his daughter.

In the alternative, the appellant was charged with the offence of an indecent act with a child contrary to **section 11(1) of the Sexual Offences Act, No. 3 of 2006.** The prosecution's case was that on the 28th day of February, 2008 at **[Particulars Withheld]** village in Murang'a South District of the central province, the appellant intentionally did an indecent act with a child namely J M M by touching her private parts.

At the end of the trial, the learned magistrate held that the prosecution had proved the case against the appellant on the principle count beyond reasonable doubt; the appellant was accordingly convicted and sentenced to serve 15 years in prison.

The appellant appealed against the conviction and the sentence listing the following as his grounds of appeal:-

1. The learned magistrate erred both in Law and in fact for ignoring the appellant's sworn defence which was not challenged by the prosecution;

2. The learned magistrate erred in law and in fact for ignoring the fact that the appellant had been in police custody longer than the stipulated time before he was charged in court; and

3. The sentence imposed was harsh and excessive.

The complainant was aged 12 years and being a child of tender years, the learned magistrate properly complied with **section 19 of the Oaths and Statutory Declarations Act, Chapter 15 Laws of Kenya** and subjected her to a voire dire examination; she made a finding which, in the light of answers she gave to the court, was the correct finding that the complainant understood the nature of an oath before taking her evidence on oath.

From the evidence on record it was apparent and it was not in dispute that the complainant was the younger of the two appellant's daughters. Her, mother, the appellant's wife is said to have died several years back and since her elder sister was married, the complainant was the only one living with her father. Her maternal grandmother was living nearby and the arrangement between her and the complainant's father in so far as the welfare of the complainant was concerned was that the appellant would prepare and share meals with her daughter but lodge with her grandmother in her house.

On the fateful night, the appellant and the complainant cooked together as usual; however, before the complainant retired to sleep at her grandmother's house, the appellant asked her to bring him a pen from the bedroom which, apparently was only separated from the rest of the house by a curtain. The entire house was made up of only one room but divided and separated by the curtain.

A soon as the complaint went to the bedroom, so the complainant testified, the appellant accosted her, tore her pants and defiled her. He is said to have covered her mouth to prevent her from screaming and as soon as he was finished with her, he threatened her with death if she told anybody what he had just done. The complainant sustained injuries on her private parts but perhaps because of the threats she had been subjected to, she never told her grandmother what she had gone through before she went to sleep the previous night. However, the following day, she walked to her aunt's home, seven kilometres away, to tell her what had happened. She described her aunt, whom she identified as W, as her father's cousin. Once the complainant narrated to her the ordeal she had gone through, the previous day, W is said to have called M N N who also happened to be the complainant's aunt and inform her of the complainant's case. It is M who came the following day and took the complainant to the police to make a report and to the hospital for her treatment.

Both W and M testified; M herself testified as PW2, she confirmed that the complaint is her brother's child or her niece. According to her evidence, the appellant was the fourth born in their family. She testified that on 27th February, 2008, she had indeed received a call from her cousin, M W , who told her that she had found the complainant at her house crying. She was informed that the appellant had defiled his daughter; she came the following day and took the child to hospital.

On her part M W , who testified as PW3 said that she lived at a place called Kihiu Mwili which is about seven kilometres from **[Particulars Withheld]** where the appellant, his mother and the complainant lived. She confirmed that when she arrived at home on the evening of 27th February, 2008 she was called by her neighbour who told her that the complainant was waiting for her from the neighbour's house. She found the complainant crying and apparently one of her eyes was swollen; the complainant told her that she had walked for seven kilometres to come and report what the appellant had done to her.

M W confirmed that she indeed called PW2 who came the following day to take the complainant to hospital.

My assessment of the prosecution witnesses is that they were all credible, truthful and consistent in their evidence. As far as I can gather from the record, their evidence was not shaken. Of particular mention is the complainant who even after the appellant applied to have her recalled and cross-examined, she remained firm and consistent in her answers during the two occasions on which she was cross-examined by the appellant.

The complainant's evidence and that of the second and third prosecution witnesses was corroborated by the evidence of Dr Wilfrey Kamonye who, at the material time, was a medical officer at Thika hospital

where the complainant was treated. This witness presented the P3 form that had been filled by Dr David Osaro who examined and treated the complainant. Dr Osaro himself could not present his report because he had proceeded to Sweden for further studies. According to the medical officer, the complainant was treated on 28th February, 2008 and at the time her estimated age then was 13 years. The doctor's findings were that the complainant's hymen was broken and there was a vaginal discharge of foul smell. There were no spermatozoa seen and that the vaginal swap was normal. Apart from the P3 form this witness also produced the treatment note showing that the complainant was treated and counselled on 28th February 2008.

Although the appellant has complained that the learned magistrate did not consider his evidence in her judgment, I am unable to find such an omission in the learned magistrate's judgment. When the complainant woke up on the 27th February, 2008, the appellant had already left for work, but his evidence was that the complainant was up by six and that he even asked her to buy bread and milk though, according to his evidence, she had complained of diarrhoea. The complainant controverted this evidence when the appellant cross-examined her. According to her, she woke up after her father had left and ran away for fear of being killed by her father in the event he came to know that people knew what he had done to her daughter. The learned magistrate noted, quite correctly in my view, that neither the complainant nor any of her aunts had any reason to implicate the appellant.

The learned magistrate held that the complainant's evidence was corroborated by the medical officer's findings as presented in the P3 form. Those findings were not challenged in cross-examination. The appellant's position which the learned magistrate correctly considered but which she was not satisfied with was that the appellant was not examined. The appellant need not have been examined to prove that he committed the offence.

There is no doubt that the learned magistrate considered the appellant's defence but in her view she found that "his defence does not raise any reasonable doubt and the prosecutor(sic) have proved the offence of incest contrary to section 20(1) of Sexual Offences Act and the accused is accordingly convicted." It would appear that, in the premises, the appellant's first ground of appeal has no merit.

The second ground of the appellant's appeal is more to do with the alleged breach of his constitutional rights on the ground that he was in custody for a longer period than that required under the constitution. According to the charge sheet, the appellant was arrested on 1st March, 2008 but it was not until the 12th March, 2008 that he was charged in court. This was obviously way beyond the 24 hour period within which he should have been arraigned in court after the arrest.

This question was extensively addressed in the Court of Appeal decision in the **Criminal Appeal No. 50 of 2008, Julius Kamau Mbugua versus Republic 2010** eKLR where the court said:-

"In our view, the right of a suspect to personal liberty before he is taken to court under section 72 (3) (b) are clearly distinct from the rights of an accused person awaiting trial under section 77(1).

The main difference is that breach of right of personal liberty is not trial-related. It is a right to which every citizen is entitled. It is the function of the Government to ensure that citizens enjoy the right. The duty is specifically on the police where the suspect is in police custody. If by illustration, police breach the right to personal liberty of a suspect by unreasonable detention in police custody, there is a right to apply to the High Court for a writ of habeas corpus to secure release (see Section 389 (1) (a) of Criminal Procedure Code and Section 84 (1) of the Constitution).

In addition, Section 72(6) provided a remedy by way of damages to a person unlawfully arrested or detained.

In contrast, the right to a trial within a reasonable time guaranteed by section 77(2) is trial-related. It is related to the trial process itself and is mainly designed to ensure that the accused does not suffer from prolonged uncertainty or anxiety about his fate. The duty is mainly on the court which has the control of the trial to ensure that the right to speedy trial is observed."

The provisions in the 1963 constitution which the court of appeal referred to in its judgment the excerpt of which I have quoted above, were retained in the Constitution of Kenya 2010; for example, the requirement to bring an arrested person to court for purposes of being charged in **section 72 (3) (b)** of the old constitution is now covered under **Article 49 (1) (f)** of the new constitution. The rights of an accused person under **section 77 (1)** of the old constitution are now covered by **Article 50(1) and (2)** of the new constitution. **Section 72(6)** which provided for damages in compensation of breach of ones rights under **section 72(3)(b)** is now covered under **Articles 23 and 23** of the new constitution which provide for enforcement of the bill of rights and the remedies for breach of any of those rights, which include compensatory damages. It is safe to conclude, therefore, that the Court of Appeal's interpretation of those provisions in the old constitution that were carried over to the Constitution of Kenya 2010 is as relevant and applicable today as it was before this latter constitution was promulgated.

There is no doubt, therefore, that the question of being incarcerated beyond the constitutional time limits before one is charged in court has been settled; the remedy for such a breach lies not in an acquittal but in damages for which the appellant may sue in compensation for the wrongful confinement. By extension, it cannot succeed on an appeal such as this, as a ground for quashing a conviction.

The third ground of appeal is on sentence; the appellant is of the view that the sentence imposed was harsh and excessive. The sentence provided for the type of offence for which the appellant was convicted is life imprisonment. **Section 20(1)** reads as follows:-

"**20.(1) Any male person who commits an indecent act 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 not less than ten years.**

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 for 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."

Considering that the appellant could possibly have been jailed for the rest of his life, a jail term of fifteen years is relatively reasonable if not lenient in the circumstances. The third ground of the appellant's appeal falls on that account. There is no reason for this court to interfere with the learned magistrate's discretion and disturb the sentence imposed.

In the final analysis I find that the appeal has no merit; I uphold the conviction and the sentence and dismiss the appellant's appeal.

Signed, delivered in open court at Murang'a and dated this 29th day of November, 2013

Ngaah Jairus

JUDGE