REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANGA

HIGH COURT CRIMINAL APPEAL NO. 440 OF 2013

(Appeal from the Original Conviction and Sentence in Criminal Case No. 3545 of 2011 dated 14th February 2013 in the Chief Magistrate's Court at Thika by Hon. Mutuku - Ag. SPM)

P K K……..……..APPELLANT

VERSUS

REPUBLIC……..RESPONDENT

JUDGMENT

The Appellant P K K was convicted by the Hon. Acting SPM Mutuku for the offence of incest contrary to Section 20(1) of the Sexual Offences Act, No. 3 of 2006. He was sentenced upon conviction to serve life imprisonment.

He has appealed to this Court against the said conviction and sentence. In the Appeal, he set out the Grounds as follows:-

1. That the learned trial Magistrate erred in law and fact by relying on the evidence of complainant of tender years which was inconsistent, uncorraborative and incredible once analysed critically.
2. That the learned trial Magistrate erred in law and fact by conducting the trial in a language that was difficult to understand.
3. That the learned trial Magistrate erred in law and fact by relying on historical tendered medical evidence that did not relate him in any way to have committed the act.
4. That the learned trial Magistrate erred in law and fact by failing to consider the defence of accused thus violating section 169 of the CPC.

He was furnished with the certified proceedings and filed an Amended Supplementary Grounds of Appeal. These were as follows:-

1. That the learned trial Magistrate made an error in both law and facts and misdirected himself by basing Appellants conviction without ascertaining the actual age of the complainant in view of the conflicting evidence adduced in this regards.
2. That the learned trial Magistrate made an error in both law and facts by holding that the prosecution case on the main count was proved whereas on the basis of evidence the burden of proof was not discharged.
3. That the learned trial Magistrate rejected the Appellant's alibi defence as a mere denial which amounted to the violation of Section 169(1) CPC.

The Appellant appeared before the single judge of the first Appellate Court at Muranga on 16th

October 2013 and urged his appeal. The learned State Counsel Mr. Okeyo appeared for the Republic and opposed the Appeal. He submitted that the Appellant was convicted for the offence of incest contrary to Section 20(1) of the Sexual Offences Act. The victim is the Appellant's daughter. He stated that at the time the offence was committed she was aged 12 years, an age the Appellant himself confirmed.

The issue arose after a teacher in which the victim was a student spoke to her and she opened up about the defilement that had been going on subject to her by the father. The Appellant had been separated from his wife and she left the 3 children with the appellant. A health worker and the teacher rescued the child from the home and a medical doctor on examination confirmed the minor had been sexually defiled. The victim had stated that the defilement was repetitive and that it used to take place when the other two siblings were asleep. The Appellant when placed on his defence just gave a mere denial and in mitigation never even appeared remorseful and instead asked the trial Magistrate to release him to go to attend to his tea bushes. Mr. Okeyo urged the Court not to disturb the sentence of life imprisonment meted out.

The Appellant attacked the conviction and sentence on grounds that the age of the victim was not ascertained, the medical evidence tendered and the defence raised. The Appellant was represented by an Advocate Mr. Muturi Njrogore of Muturi Njroge & Co. Advocates. He cannot be heard to complain that he did not understand the language in which the trail was conducted. At the point of taking plea on 27th July 2011, the charges were explained to him in Kiswahili a language he understood and he denied both counts. A plea of Not Guilty was entered against him. When the trial commenced on 4th November 2011, Mr. Muturi Advocate came on record for the Appellant. The ground relating to the Appellant not understanding the language used in the trial is thus untenable.

The Appellant also attacked the conviction on grounds that the age of the victim was not ascertained. The offence he was charged with was incest contrary to Section 20(1) of the Sexual Offences Act. He was charged for having sexual intercourse with his daughter aged 12 years, the victim of the crime. Incest is defined in **Blacks Law Dictionary** as – **sexual relations between family members, or close relatives including children related by adoption**. There is a challenge by the Appellant against the age of the victim his daughter. The medical evidence was that the child was aged between 9 and 10 years at the time of the incident. The Sexual Offences Act provides as follows in Section 20.

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 of 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 to 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.

It was therefore proper and just for the learned trial Magistrate to sentence the Appellant to life imprisonment per the proviso in Section 20(1) upon conviction for the offence of incest.

As regards the defence of alibi, in his unsworn testimony, the Appellant never raised an alibi or a meaningful defence. He just stated that he was collected from his house and asked where the children were. He stated they were in his mother's house where he was escorted to and the victim was called and both were taken to the police station where he was locked up in the cells and on being arraigned he denied the offence which he continued to deny even at the time of giving his unsworn testimony.

There was no alibi defence, the learned trial Magistrate saw the minor when she testified, the two other witnesses for the prosecution and after hearing them placed the Appellant on his defence. In his defence he gave his unsworn testimony which I have reproduced above.

I have evaluated and analysed the facts of the case and the verdict of the learned trial Magistrate and find that the said Magistrate did not err either on the law or facts. The conviction was safe and the sentence lawful. I find no merit in this Appeal and dismiss it in its entirety.

Dated signed and delivered this 27th day of November 2013

Nzioki wa Makau

JUDGE