REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 257 OF 2009.

LESIIT, J

A G……..APPELLANT

V E R S U S

REPUBLIC…….RESPONDENT.

(FROM THE ORIGINAL CONVICTION AND SENTENCE IN CRIMINAL CASE NO. 233 OF 2008

IN THE PRINCIPAL MAGISTRATES COURT AT CHUKA BY HON. P. NGARE S.R.M.)

JUDGEMENT

1. The Appellant **A G** was charged with two counts of incest by Male Person contrary to section 20(1) of the Sexual offences Act No. 3 of 2006. He was sentenced to 10 years imprisonment on each count and the sentences were ordered to run consecutively.
2. He relied on five grounds of appeal which are as follows:-

1. **That the learned Senior Resident magistrate erred in law in facts in taking plea on an incurably defective charge sheet.**

2. **That the learned Senior Resident magistrate failed in law to recognize the defects in the charge sheet in that the mandatory words intentionally and unlawfully as provided by section 3(1) of the Sexual offences Act 3 of 2006 were missing.**

3. **That the learned Senior Resident magistrate erred in law and fact in failing to order for age assessment of the complaints before conviction and sentence.**

4. **That the learned Senior Resident magistrate erred fact in failing to establish on the records that the complainants were intelligent enough to give evidence and whether or not they understood the nature and purpose of an oath.**

5. **That the learned Senior Resident magistrate erred fact in failing to appreciate the evidence adduced that no incest or even attempted incest ever took place at all in the circumstances of this case.**

3. The Appellant was represented by Mr. Riungu in this appeal while Miss. Murithi represented the State and opposed the appeal.

4. The brief facts of the prosecution case are that the two complainants, daughters of the Appellant had been left by their mother with the Appellant who was their father after the parents separated. On the material day the Appellant went home with a meal of meat and ugali which he gave the complainants. He then sent S PW2, the younger daughter outside to cut grass. He was left with the older daughter C PW1 whom he forced on the bed before defiling her. The Appellant then called S through the window and sent C outside. He defiled her too.
5. The two children reported to their grandmother PW4 who at 8 pm same evening informed PW3, an aunt to the complainants. The complainant PW2 was bleeding from her private parts. She was 11 years then. PW1 who was 14 years then did not bleed.
6. Medical examination on both complainants confirmed that the hymen of both girls had been broken. In PW1 her vaginal wall had lacerations while in PW2 her vaginal wall had abrasions. These were fresh wounds at the time of examination which was on the same day of the offence.
7. The Appellant in his defence put forward an alibi as his defence that on the material time of the alleged offence, he had gone to have beer with his friends. He alleged that he had been framed with the offence.
8. I have carefully considered this appeal and have subjected entire evidence to a fresh analysis and evaluation and have drawn my own conclusion while bearing in mind I neither saw nor heard any of the witnesses.

   I am guided by **Okeno Vrs. Republic** 1972 EA 32 where the court of Appeal stated the duties of the first Appellant court as follows:-

   "An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya Vrs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vrs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters Vrs Sunday Post [1958] E.A 424."

9. Mr. Riungu for the appellant urged that the charge against the Appellant was defective as the words **"intentionally and unlawful**" as required under section 3(1) of the Sexual Offences Act were missing for the charge. He cited **Sharok Ogao versus Republic Nakuru HCCA No. 13 of 2010.**
10. The learned counsel for the Appellant got it wrong. The Appellant faced two counts of incest by male person contrary to section 20(1) of the Sexual Offences Act. What Ms Muriithi stated was correct that words intentional and unlawful related only to rape charge under section 3 of the Sexual Offences Act. That section stipulates.

    "3. (1) A person commits the offence termed rape if - (*a*) he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs; (*b*) the other person does not consent to the penetration; or *(c*) the consent is obtained by force or by means of threats or intimidation of any kind."

11. The particulars of the charge against the appellant stated that on the 1st count that on the 17th day of March, 2008 at [particulars withheld] in Meru South District within Eastern Province, committed an indecent act namely incest which act caused penetration with a female person namely S K G aged 11 years who to his knowledge the said female person was his daughter. And on the 2nd count that on the 17th day of March 2008 at [particulars withheld] Location in Meru South District within Eastern Province unlawfully committed an act namely incest which act caused penetration with a female person namely C M G who to his knowledge was his daughter aged 14 years. The offence against the Appellant was not rape contrary to section 3(I) of the Sexual Offences Act but incest contrary to section 20(1) of Sexual Offences Act . Section 20(1)

of Sexual Offences Act provides:

"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."

The particulars of the charge were in my view sufficient to disclose the offence of incest contrary to section 20(1) of Sexual Offences Act.

12. The case cited by complaint does not apply as the statement of the offence and the particulars of the charge as set out in the charge sheet were sufficient to disclose the charge and offence facing the Appellant. The court is satisfied that the Appellant did not have any illusions as to the offence he was alleged to have committed. Nothing turns on this ground.
13. Mr. Riungu urged that the ages of the complainants were not ascertained. He also urged that the learned trial magistrate did not examine the complainant to ascertain whether they were intelligent enough to give a sworn statement or whether they knew the nature of an oath.
14. I have perused the record of the proceedings. I noted that the learned trial magistrate did examine each complainant after which he made a ruling to the effect each witness understands why she is in court and the consequences of not speaking the truth.
15. Voire dire examination is an examination conducted by a trial court of a child witness to ascertain three things. One whether the child understands the meaning of oath; two whether the child understands the duty to tell the truth and thirdly whether he/she is possesses of sufficient knowledge to testify. These are explained in the leading case of **Muiruri vs Republic [1983] KLR 445**

Where, in any proceedings before any court, a child of tender years is called as a witness, the court is required to form an opinion, on a *voire dire* examination, whether the child understands the nature of an oath in which even his sworn evidence may be received. If the court is not so satisfied, his unsworn evidence may be received if in the opinion of the court is possessed of sufficient intelligence and understands the duty of speaking the truth. In the latter event, an accused person shall not be liable to be convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him.

16. The witnesses were not of tender age per se. PW1 was 14 years old. The voire examination was not necessary in her case as she was old enough to testify. That notwithstanding the learned trial magistrate did conduct one in her case. As for PW2, she was 11 years at the time she testified. The voire dire examination was important to conduct in her respect.
17. The learned trial magistrate did not include the question put to the witness (PW2). All the learned trial magistrate considered was whether the child witness understood the meaning of an oath and the duty to tell the truth. He made no mention of whether as a result of that examination he was satisfied that the witness PW2, was possessed of sufficient knowledge to testify.
18. I do not find the omission affects the prosecution case in a substantive way. What is required is that where the child witness evidence is sufficient the court must require that such evidence be corroborated. PW2's evidence was corroborated by that of PW1. This is because the evidence of PW1, even standing on its own was strong enough to sustain a conviction. The court could convict on PW1's evidence alone if court indeed finds that the case against the Appellant was proved to the required standard.
19. Regarding the age of the complainants, first of all the Appellant was the father of both girls. He must have known their ages. Secondly PW3 was sister in law of the Appellant as she was married to the Appellant's brother. PW 4 was the grandmother of both complainants. All these witnesses gave the age of the complainants out of their personal knowledge.
20. The medical officer who examined the complainants also gave their approximate ages. The

medical evidence was in tandem with that of PW3 and 4 in regard to the complainants' ages. I agree with the learned trial magistrate decision to accept the ages of the complainant as given by PW3 and 4.

21. I am satisfied as was the learned trial magistrate that the complainants were below 15 years of age for the purposes of sentence. In a charge of incest contrary to section 20 of Sexual Offences Act, all the prosecution needed to establish is whether the child victim was below or whether she/he was above 18 years old. Both were below 15 years of age. Nothing turns on this ground.
22. Mr. Riungu for the appellant urged the court to reduce the sentence under section 354 (3) (1) (a) of the Criminal Procedure Code if the court upheld the conviction. Counsel urged that Appellant had suffered enough in prison, was remorseful and was ready to live a peaceful life. He said that Appellant had been in prison for five years.
23. The sentence for a charge of incest is provided under Section 20(1) of the Sexual Offences Act including the Proviso thereof. That section states.

"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."

24. The section and the proviso are very clear that once the age of the victim is quoted in the particulars of the charge and is found to be below 18 years, then the accused shall be sentenced to life imprisonment.
25. The particulars of each charge specifically stated that the complainant victims were aged 11 years and 14 years respectively. The charge is therefore specific that the complainants were below 18 years old. The appellant should have been sentenced to life imprisonment as the section is framed in mandatory terms. The sentence of 10 years imposed on each court was therefore an illegal sentence.
26. Consequently in exercise of this court's power under S.354(3)(1)(a) of the CPC I set aside the sentence of 10 years imprisonment imposed in respect of each of the two counts and in substitution impose life imprisonment sentence. The sentence will be served concurrently.
27. I have come to the conclusion that the appeal has no merit and is dismissed subject to the substitution of sentence from 10 years imprisonment to life imprisonment as ordered herein above.
28. Those are my orders.

DATED SIGNED AND DELIVERED AT MERU THIS 13TH DAY OF NOVEMBER, 2013.

J. LESIIT

JUDGE