REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA Criminal Appeal 284 of 2006

M N …….....…… APPELLANT

VERSUS

REPUBLIC …… RESPONDENT

JUDGEMENT

Before me is the appeal of M N (hereinafter referred to as the appellant). The appellant had been charged before the senior resident Magistrate, Voi Law Court with the offence of INCEST BY MALE CONTRARY TO SECTION 166 (1) OF THE PENAL CODE. The particulars of the charge are that

> "M NY: On the 1st day of January 2005 at Mwatate Location in Taita- Taveta District within coast Province, being a male person, had unlawful carnal knowledge of D W a female person aged five years who was to his knowledge his grand-daughter"

The prosecution led by INSPECTOR MUNGA called a total of five (5) witnesses in support of their case. The brief facts of the case were that the complainant child D was the grand-daughter of the appellant being the child of his daughter E M PW.1. PW.1 told the court that she lived together with her 5 year old child with her mother since her parents were divorced. Sometime in December 2005 the appellant insisted that PW.1 take the child to live with him so that he could take her to school. PW.1 went to her father's home with her child. On 1.1.2006 PW.1 went out of the house and left the appellant with the child. Upon her return she found the child crying and the appellant gone. She questioned the child who told her that the appellant had defiled and sodomized her. PW.1 went and reported the matter to authorities. The appellant was later arrested. The child was taken for treatment. The appellant was later charged.

At the close of the prosecution case the trial magistrate ruled that the appellant had a case to answer and placed him on his defence. The appellant gave a sworn defence in which he totally denied the charges. On 25.07.2006 the learned trial magistrate delivered her judgement in which she convicted the appellant of the charge of Incest. After hearing the appellant's mitigation she sentenced him to ten (10) years imprisonment. It is against this conviction and sentence that the appellant now appeals.

At the hearing of the appeal the appellant appeared in person and filed written submissions. Mr. Onserio learned state counsel appeared for the state and opposed the appeal.

In deciding this appeal I will be guided by the decision of the Court of Appeal in OKENO – VS – REPUBLIC [1972] E.A.L.R. 32] where it was held

"It is the duty of the first appellate court to reconsider the evidence, evaluate it itself and draw its own conclusions in deciding whether the judgement of the trial court should be upheld."

In his written submissions the appellant argued that he did not commit the offence in question. This is a matter of evidence to be decided by the trial court. The other grounds which he raised were

(1) Insufficiency of the medical evidence

(2) Failure by the trial magistrate to consider his defence.

At the outset I wish to point out that it is shown by the evidence that the complainant child was indeed the grand-child of the appellant. PW.1 the child's mother testified that the appellant was her father and the child's grand-father. The appellant himself concedes in his defence that the child D is his grand-child and the child herself in her evidence referred to the appellant as "Babu wetu". Therefore the relation-ship between the child and the appellant is no doubt whatsoever.

The first ground the appeal raised by the appellant was what he termed insufficiency of the medical evidence. Before I proceed to deal with this ground I will address the issue of identification. As PW.1 told the court the appellant who is her father asked her to bring her child to live with him in order to enable the child obtain an education. PW.1 obliged. The appellant does in his defence concede that he lived at his home in M with his daughter and grand-daughter PW.2.

PW.1 in her evidence told the court that on 1.1.2006 she left the appellant and PW.2 in the home whilst she went out on an errand. Upon her return she found the child crying. Upon enquiring the child told PW.1 that the appellant had defiled and sodomized her. The child D, gave an unsworn testimony in which she stated at page 4 line 20

"He then removed all my clothes. He then removed his 'mdudu' (penis). He also removed his shirt. He then put his 'mdudu' in my vagina (pointing to it) and anus (pointing to it). I felt a lot of pain. I cried a lot but he hit me on the legs while ordering me not to cry"

Further in her testimony PW.2 identifies the appellant as the one who did the deed to her. At page 5 line 3 she states

"It is babu wetu – (pointing to accused) who defiled me"

In his judgement at page 3 line 5 the court sated

"When PW.2 the minor gave evidence in court she pointed to the accused as the one who defiled then sodomised her. She was emphatic that it was the accused and none other. Though young, she appeared intelligent and I find no reason why she would be mistaken or lie to the court"

The learned trial magistrate had the benefit of hearing the child's evidence first-hand and observing her demeanour in court. She found her to be honest and reliable despite her young age. I would have no valid reason to dispute this finding. The trial court also observed that despite the fact that there were several other grand-fathers in the village the minor clearly stated that it was "babu wetu" who defiled her. Her evidence is corroborated by PW.1 who came home and found the child in tears. The child told her it was "babu wetu" who had defiled her. I am satisfied as the trial court was that there has been a clear and positive identification of the appellant. The incident occurred at about 3.00 pm in broad day light and the appellant was very well known to the child.

Moving on to the issue of the medical evidence PW.5 RESTITUTOR MGHOI, a clinical officer at Mwatate dispensary gave evidence that on 5.1.2006 the minor was examined by herself. She produces the clinical notes as well as her P3 form as exhibits Pexb.1 and Pexb.2. Her evidence is that she found the child's labia to be tender and noted a tear in the hymen. Her conclusion was that the child had been defiled. This evidence confirms and corroborates the evidence of PW.1 who said that she did examine her child on the material day and noted that her vagina was red. This is clear proof that there had been interference with the child and the torn hymen is proof of penetration. The child did state that the appellant beat her about her legs. The medical report corroborates this as it indicated tenderness on the lower limbs. I

find the medical report to be sufficient evidence of the defilement of PW.2. This coupled with her clear and emphatic identification of the appellant squarely incriminates him on this offence.

In his written submissions the appellant claims that it was PW.1 the child's mother who inserted her fingers into the vagina of PW.2 causing the tear in the hymen. What would cause PW.1 a mother to do this? The appellant does not explain. Further the appellant is seeking to open his defence at the appeal stage yet the record shows that he was accorded an opportunity and did present his defence at his trial. I find this ground of the appeal has no basis and I do hereby dismiss the same.

The appellant also raises as a ground of appeal, the allegation that the learned trial magistrate failed to give due consideration to his defence. This allegation is not borne out by the record at all. At page 3 line 2 of his judgement the learned trial magistrate states

> *"In his sworn defence the accused here denied sodomising his grand-daughter the minor herein …"*

At the same page he states that the appellant claimed that the child told him it was one B who had defiled her. Earlier in the trial the appellant attempted to blame one M (his brother) claiming that he had left the child with him. The said M testified as PW.3 and totally denied this claim. At page 3 line 13 the trial magistrate in concluding his analysis of the appellant's defence states

> *"To start with, I found the accused's evidence very unreliable. He came out as a liar. He kept changing his story. I find the claim about the said B to be an afterthought as the accused never raised it while cross-examining the prosecution witnesses here. The accused's defence is not reliable.'*

There is clear evidence from the record that the trial magistrate did consider and analyse the appellant's defence but rejected it as unbelievable. This second ground of the appeal likewise has no merit and I do hereby dismiss the same.

The upshot is that I do find that the appellant was properly identified and was convicted on the basis of sound and reliable evidence. I find no reason to interfere with the conviction rendered by the learned trial magistrate. As such the appeal against conviction fails and I do hereby uphold the conviction rendered against the appellant.

With regard to the sentence the court imposed a sentence of ten (10) years imprisonment. This was after hearing and duly considering the appellant's mitigation. Section 166 (1) (now repealed) of the Penal Code provides for a sentence as follows:

> *"166 (1) Any male person who has carnal knowledge of a female person who is to his knowledge his grand-daughter, daughter, sister or mother is guilty of a felony and is liable to imprisonment for five years provided that, if it is alleged in the information or charge and proved that the female person is under the age of thirteen years, the offender shall be liable to imprisonment for life"*

In this case the child PW.2 was five years old. As such the appellant was liable to a maximum life sentence. The trial court did not impose the maximum sentence. In view of the fact of the seriousness of the charge I am of the view that this sentence is neither harsh nor excessive in the circumstances. The sentence imposed was lawful and I find no reason to interfere with the same. As such the appellant's appeal against sentence also fails. I do hereby uphold the ten (10) year sentence imposed by the trial court.

Dated and Delivered in Mombasa this 22nd day of March 2010.

M. ODERO
JUDGE

Read in open court in the presence of:
Appellant in person

Mr. Onserio for state

M. ODERO

JUDGE

22.3.2010