REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL CASE NO. 111 OF 2017

ISMAEL HASSAN MEDZA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal From The Judgment of the Resident Magistrate Hon. A. Ndungu

delivered on the 7th Day of April 2017 In Shanzu Criminal Case Number 1156 of 2015)

Coram: Hon. Justice R. Nyakundi

Mr. Mutubia for the appellant

Ms. Mwangeka for the state

JUDGMENT

This is an appeal by the appellant against conviction and sentence from the decision of the Magistrate Court at Shanzu before **Hon. A. Ndungu (RM)** in which the appellant was convicted and sentenced to five years' imprisonment for the offence of incest contrary to Section 20 (1) of the Sexual Offences Act.

Being aggrieved with the entire Judgment of the trial Court, the appellant preferred an appeal based on the following grounds:

> ***(1). That the Learned Trial Magistrate erred in Law and fact in failing to find that the prosecution had totally failed to prove the charge of incest against the appellant and that there was no or no sufficient evidence to establish the degree of consanguinity between the appellant and the alleged victims.***
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> ***(2). That the Learned Trial Magistrate erred in Law and fact in relying on the uncorroborated evidence of a child of tender years without having properly satisfied herself as to the truth and veracity of the said witness and her evidence.***
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> ***(3). That the Learned Trial Magistrate erred in Law and fact in failing to find that the purported medical evidence did not link and/or was incapable of linking or connecting the appellant to the alleged offence.***
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> ***(4). That the Learned Trial Magistrate erred in Law and fact in failing to find that the prosecution case was riddled with grave and serious material contradictions and that the same was not proved beyond reasonable doubt.***
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> ***(5). That the Learned trial Magistrate erred in Law and fact in failing to properly evaluate and consider the appellant's evidence in his defence thereby arriving at a wrong decision.***
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> ***(6). That the Learned trial Magistrate erred in Law and fact in arriving at a conviction against the weight of the evidence on record thereby occasioning a miscarriage of justice as against the appellant.***
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> ***7. That the Learned trial Magistrate erred in Law and fact by handing down an excessive sentence.***

Background

The facts giving rise to this appeal is based on the particulars of the offence that on 22.9.2015 at Mtwapa Township in Kilifi – County, intentionally and unlawfully the appellant caused his penis to penetrate the anus of **L.T.** who was to his knowledge his granddaughter. The prosecution evidence in terms of discharging the burden of proof expressed under Section 107 (1) and 108 of the Evidence act summoned the attendance of six (6) witnesses.

In the testimony of **(PW1) L.T.,** identified as the victim of the offence aged 3 years told the Court that 22.9.2015 she was called into the house by the appellant. It was in that house where she was undressed by the appellant and while directed to face downwards he inserted his penis to the anal orifice. Later, the appellant issued threats against disclosure to any person regarding the incident.

(PW3) E.M.K, the victim's mother also informed the Court that she has been blessed with two children one **S.T.** and **L.T (PW1)** aged four (4) years. She further stated that in the course of having a conversation with her daughter **S.T.,** she came to learn that **L.T. (PW1)** had been defiled by the appellant generally referred to as Babu. That issue caused **(PW3)** to report the incident to the husband **(PW4) E.K.C**., who had returned home from a day's work.

(PW3) and **(PW4)** told the Court that they decided to take **(PW1)** to Mtwapa Health Center for medical examination and later to the police station. Regarding the issue of the medical report, **(PW3)** escorted **(PW1)** to Kilifi District Hospital for purposes of filling the P3.

Thereafter, **(PW3)** and **(PW4)** were to record their respective statements on the matter.

(PW2) S.T.H, aged 7 years old testified that 22.9.2015, she was playing near the grave yard with other siblings. In a short while (PW2) did not see **(PW1)** within the homestead. That is when she received information that **(PW1)** had gone to visit the appellant at his house. In a search to trace **(PW1)** it was **(PW2)** evidence that she went up to the house of the appellant. At the house **(PW2)** knocked the door and on opening saw **(PW1)** on the bed with the appellant *(Mdudu huko nyuma yake).* **(PW4)** in order to disguise his conduct **(PW2)** told the Court that the appellant sent her to pick a bottled under the bed as he dressed **(PW1)** in a hurry. In those circumstances **(PW2)** informed **(PW3)** and **(PW4)** on the encounter between **(PW1)** and the appellant.

(PW5) – Dr. Hashim Suleiman a medical officer attached to Kilifi Hospital adduced evidence with respect to the contents in the P3 Form initially filled by **Dr. Abdul** who exited public service to engage in private practice at Eldoret. According to **(PW5)** the referenced P3 examination report it was established that **(PW1)** had suffered physical injuries to the anus. He produced the P3 Form as exhibit together with Post Rape Form to confirm the positive findings on the unlawful act of defilement.

(PW5) No. 93630 PC. Christine Muguna of Mtwapa Police Station testified and recalled the complaint made to the station on the defilement of **(PW1)** by a known suspect who later happened to be the appellant. She told the Court to have recorded witness statements from **(PW1), (PW2), (PW3), (PW4)** and **(PW5)** on the alleged offence. The police thereby dependent upon the evidence of the witnesses recommended a charge of incest against the appellant. **(PW6)** was to produce a birth notification as **exhibit 2** and witness **exhibit 3.**

At the close of the prosecution case, the trial Court placed the appellant on his defence. on the charge itself appellant denied even committing the act of defilement against the victim. On the material day, however the appellant testified that he was not even within the precincts of the scene. That he was only to learn of the indictment when the police effected an arrest at his house and on arrival at the police station it was alleged that he sexually assaulted **(PW1)** on 22.9.2015.

In support of the defence, appellant called in the evidence of **(DW2) – F.A.,** who introduced herself as a wife to **(DW1). (DW2)** stated that on 22.9.2015 the appellant left home in the morning at 9.00 a.m. for Kaloleni only to return at 9.30 p.m. On this day **(DW2)** testified that **(PW1)** never went to their house, although they generally border each other within that village. She therefore through the complaint by **(PW1)** may have arisen as a result of a dispute over a hole dug next to their home.

During the hearing of this appeal parties agreed to file written submissions which formed the basis of the issues in controversy to be determined by the Court.

Submissions by the Appellant

Mr. Nyongesa for the appellant in support of the appeal submitted that Section 22 (1) of the Act puts in perspective the prohibited degree of consanguinity and in this case that relationship is not clear as demonstrated by the testimony of **(PW1).** Further Learned Counsel argued and contended that even the evidence by **(PW2) – (PW4)** failed to establish any family or blood relation between the appellant and the victim **(PW1).** Learned counsel placing reliance in the cases of **R v Bak {1911} AC 47 E.E. v R {2015} eKLR W.O.O. v R {2016} eKLR** submitted that it was the onus of the prosecution to proof that the issue of prohibited degree of affirmity was applicable in this case.

In addition Learned Counsel submitted that the key ingredient on penetration was neither established through the testimony of **(PW1),** nor circumstantial evidence of **(PW2) – (PW6).** That the evidence by **(PW1)** a child of tender years could not be relied as a basis for the conviction of the appellant.

The appellant counsel further argued and submitted that lack of corroboration from the other witnesses and medical evidence rendered such prosecution case fatal. In Learned counsel's contention, the entire evidence has been challenged as the discrepancies and contradictions pointed out fairly looked at went against the weight of evidence being touted by the prosecution.

Respondent Submissions

Ms. Mwangeka, the prosecution counsel in her submissions dated 6.6.2020 opposed the entire appeal. For appreciation of the matters, Learned prosecution counsel invited the Court to appraise the evidence which demonstrates existence of the ingredients of the offence proven

beyond reasonable doubt. On the issue of contradictions, Learned Counsel submitted and urged the Court to be guided by the legal principles in **Erick Onyango Ochieng v R {2014} eKLR.**

Being there no misdirections, Learned Counsel simply submitted that the appeal ought to be dismissed.

Determination

From here I remind myself on the first duty of an appellate Court which is to re-hear the case and evaluate the evidence a fresh of the trial Court. If the question arises which witness is to be believed and that question turns on manner and demeanor, I will be guided by the impressions if any made by the trial Court **(See Moses Thuo v R CCR Appeal No. 154 of 1985, Mark Kariuki v R CR Appeal No. 121 of 1984, Pandya v R {1957} EA 336)** then comes the vital question relating to the grounds of appeal and whether the appellant was properly convicted for the offence of incest. The nature of the offence under Section 20 (1) of the Sexual Offences Act refers to any Sexual Intercourse with a child under the age of 18 years but which act falls within the definition defined under Section 22 of the said Act.

It is notable that in both scenarios the common denominator is the act of penetration as defined under Section 2 of the Sexual Offences Act to the effect that the partial or complete insertion of the genital organs of a person into the genital organ of another person. Traditionally and through Gods command on creation, its presumed that penetration involves the male genital organ into that of the female genital.

In the case of **Erick Onyango Ondengi (supra)** the Court held:

> ***"In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence it is not necessary that the hymen be raptured."***
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> Further in the case of **Remigious Kiwanuka v Uganda SC. Criminal Appeal No. 41 of 1995:**
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> ***"Proof of penetration is normally established by the victims evidence, medical evidence and any other cogent evidence by the prosecution."***
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> Thus in **Domnic Kibet Mwamung v R {2013} eKLR** the Court stated that:
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> ***"In cases of defilement the Court will rely mainly on the evidence of the complainant which must be corroborated by medical evidence."***
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> Nonetheless as held in **Kassim Ali v R {2006} eKLR**:
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> ***"The absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence."***

I now turn to the evidence on this element of proof that the victim was subjected to sexual intercourse against the order of nature. From the testimony of **(PW1)** she testified on how the appellant took her to his house. At that moment and opportunity, the appellant placed her on the bed facing downwards, pulling off her skirt upwards followed by insertion of his penis to the anus. This act of penetration inflicted harm to her anus. Whereas **(PW2)** testified that it all happened when she realized that **(PW1)** was not at the scene where they were playing with other children.

(PW2), therefore moved to the house of the appellant where upon knocking and gaining entry she saw **(PW1)** lying on the bed with the appellant's penis in close contact with the anus of **(PW1).** According to (PW2), the appellant wore his clothes in a hurry, as he gave Kshs.10/= to her convincing her not to report the incident.

It is observed from the testimony of **(PW3)** that **(PW2)** did not keep quiet as requested by the appellant but did inform the mother of the sexual intercourse against **(PW1).** In all those circumstances, **(PW3)** in consultation with the husband **(PW4)** the matter was reported to police who in turn commenced investigations.

It is also on record that the post rape care form produced as exhibit made a couple of parts that on examination **(PW1)** the victim was found to be bleeding from the anus with visible abrasions. So the prosecution presented the third strand of medical evidence to show that the victim **(PW1),** was defiled by someone pushing his penis or genital organ into that part of **(PW1)** genitals. It can be fairly be stated that for purposes of the offence of defilement, the genital organ includes also the anus. There is very little in this record of appeal to indicate that what happened on 22.9.2015 between the victim and the appellant was a fabrication of some sort.

It appears to me that beyond any reasonable doubt a Court properly advised from the evidence adduced at the trial Court must come to the conclusion that **(PW1)** testimony on the chain of events of 22.9.2015 with that of **(PW2)** and **(PW5),** the irresistible inference is that the sex act took place and it does refer to the appellant as the perpetrator.

The appellant on the other hand, assert that Section 20 (1) read in context of Section 22 of the Act defines the incest offence and the degree with prohibition of sexual relations. According to the appellant counsel the asymmetry of prohibitions which are specified under Section 22 of the Act seems to exclude the instance being referred to by **(PW1), (PW2), (PW3)** and **(PW4).** That solely in the context of affinity and consanguinity there is no ban on sexual intercourse with grandfather in statute law. My interpretation of the offence of incest under Section 20 (1) of the Act was meant to prohibit sexual intercourse between persons so closely related that marriage between them is forbidden by

Law.

However, the common definition in Section 22 of the Act embodies the views of parliament which one may term as amorphous in both dictionary and legal definitions. Why do I say so? The scope of consanguinity varies from one race, tribe, ethnic society, community and country, for reason that various societies have stringent cultures customs and taboos which govern incestuous acts and prohibitions. It is important to note that what is proposed by Learned counsel for the appellant in his submissions is absolutely missing the point on the key elements. The core elements of the sexual acts committed by the appellant. Incest to say the very least is detrimental to the victims, particularly children of tender years like it's the case in this appeal in my view. This was a premeditated acts of coercion touching and fondling a child who was very young and not in a position to defend herself from the hurt or trauma.

Whether under Common Law or African Kenya is considered a multi-ethnic society with vast cultural and customs which transcends those communities. The definition by the Court under Section 22 that might shift the burden away from male perpetrators must also be deconstructed. More than everything else, the rights of children deserve to be protected and not to let loose, an offender because the rules of exogamy and endogamy as defined under Section 22 does not apply in the legal sense as defined in that provisions. It follows that in the case at bar this was not incestuous intercourse but defilement of a victim of tender years.

The concept of incest as a crime in Kenya under Section 22 of the Sexual Offences act in my considered opinion is a social phenomenon with which sexual regulation not permissible in the exceptions recorded therein. The primary source of weight into the intent of parliament is the language, of the state. Section 20 criminalizes sexual intercourse between persons within degrees of consanguinity within the scope of Section 22 of the Act that Section has a correlations with the provisions in the Marriage Act in which marriages are prohibited or declared by Law to be incestuous. There can be no doubt that the legislative is and has been fully acquainted with the offence as defined under Section 8 (1) (2) (3) and (4) of the Sexual Offences Act with that of incest under Section 20 (1) of the Act. Making it ready apparent that the legislature views in terms of the offence of defilement under Section 8 of the Act are as distinct and mutually exclusive in comparison with the provisions of Section 20 (1) of the same Act.

In sum, the police have no business of indicting an accused person under Section 20 (1) where his victim is a child of tender years. Section 20 as read with Section 22 of the Act has a limiting language for the prosecution would have a higher burden to establish the causal link of relationships by either consanguinity and by affinity to give meaning to the phrase the charge sheet. Because there are circumstances and exceptions to situations where persons related by affinity could be permitted to marry, it therefore follows, they should not be included within the incest prohibition.

I would therefore to that extent disallow the appeal in consonant with the provisions under Section 382 of the Criminal Procedure Code. Though, the appellant raised the issue of consanguinity; he has not adduced evidence that by that definition of the offence as a result of that omission or error it has occasioned him a failure of justice. That ground therefore on consanguinity holds specifics to overturn the trial Court Judgment.

On the age factor similarly the prosecution evidence in the support of this ingredient came from the mother. **(PW3)** who buttress it with birth notification card produced as exhibit 2. Definitely as already stated in the case of **Hudson Ali Mwachungo v R {2016} KLR** proof of age of the victim of defilement is an important component part of the charge because the prescribed sentence is dependent on that age.

That evidence suffices to illustrate the demerits of the element by the appellant. It is also necessary that a trial Court makes findings on identification or recognition of the appellant as the perpetrator of the crime.

It is well settled in Law that identification may be from a single identifying witnesses or under a framework regarding circumstantial evidence. The test and guiding principles on the satisfactory and watertight evidence on identification or recognition is well set out in the cases of **Abdalla Bin Wendo v R {1953} EACA 166 and Roria v R {1967} EA 583.**

In the instant case, the prosecution had the evidence of **(PW1),** the victim herself as corroborated in essence with the testimony of **(PW2)** to squarely place the appellant at the scene. On the face of it, there is no dispute that the prevailing conditions on the commission of the offence was favourable for a positive identification of the appellant. It is clear that the victim was well acquainted with the appellant prior to the defilement incident. Further, the prosecution evidence on this element depended on the description given by **(PW2)** how she found the victim in the house of the appellant lying on the bed in close proximity with the appellant pressing his penis to the genital organ of **(PW1).** This was the evidence which the trial Court had to consider, weighing its value against the alibi defence of the appellant.

> ***"On many occasions the Court has held that an alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in Law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of the Court a doubt that is not unreasonable."*****(See Kiarie v R {1984} KLR.)**

According to the appellant **(DW1)** and supporting evidence from his wife **(DW2)** contrary to the assertions by **(PW1)** and **(PW2)** that the defilement took place in their house on material day **(DW1)** happened to have travelled out of the home only to return at 9.30 p.m. For that same reasons the appellant could not be at the scene to commit the alleged offence. On careful evaluation of both the prosecution and defence case there is overwhelming evidence in support of the fact on recognition of the appellant. The appellant never succeeded in giving sufficient particulars of where he was at the time the crime was committed for the police to seek an adjournment with a view to investigate the claim. The appellant contended himself with the statement about his visit to Kaloleni and the statement made by his wife **(DW2).** It must be recalled that **(PW1)** and **(PW2)** evidence was consistent and is unlikely that they all framed it up to fabricate the appellant. So on the facts the alibi defence of the appellant crumbles like a pack of cards against the strength of the evidence by the prosecution.

Unfortunately, this Court is unable to be persuaded by the alibi defence as did the trial Court. I am satisfied that the appellant ground of appeal have not disclosed any matters of fact or Law which should cause this Court to disturb the findings by the Lower Court.

Finally, this Court is enjoined by Law to make a commentary on sentence of life imprisonment imposed by the Learned trial Magistrate. The grounds upon which an appeals Court can interfere with the sentence of a trial Court are well set out in the cases of **Ogalo s/o Owuor v R {1950} EACA 270.**

However, the predominant feature with penalties under the Sexual Offences Act was parliament assertion of their power to prescribe mandatory sentences. Mandatory sentencing regimes in Kenya which directs Courts as to how they must exercise discretion in passing sentence has since been declared unconstitutional by the Supreme Court in **Francis Karioko Muruatetu v R {2017} eKLR**. The Court understanding the arguments against mandatory sentence of death for the offence of murder under Section 204 of the Penal Code took the view that it offends other principles in sentencing like proportionality, rehabilitation and restoration.

The Court also emphasized the importance of judicial discretion to just retribution. In essence there must be left scope for discretion to be exercised in a judicial fashion and not arbitrarily or capriciously the alternative is not justice. The proponents of mandatory sentences opine that it provides effective deterrence to protect the public from the commission of such crimes by making it clear to the offender and to other persons with similar impulses, that if they yield to them, they will meet severe punishment **(See DMW v R {2015} eKLR).**

In so far as the principles in **Francis Muruatetu (supra)** are concerned, I am burned by it for it emphasizes the statement on the rule of Law principles that the judiciary should be independent with the power to control proceedings before them, in particular to ensure fairness and just sentences.

In the present case, the Learned trial Magistrate held and sentenced the appellant to life imprisonment upon seeing into account the mitigation and aggravating factors of the offence. At the very heart of this ground on sentencing is the question, whether the hands of the Learned trial Magistrate were indeed tied to only mandatory sentence of life imprisonment.

In my view, I do not think so, for reasons enunciated in **Francis K. Muruatetu** sentencing, therefore must meet certain criteria including the age of the offender, the gravity of the offence, the character and record of the offender, remorsefulness of the offender, the possibility of reform, proportionality to the reason for detention and overall legitimate objective. I am of the school of thought that when it comes to sentencing verdicts, there is need to balance between the rights of the offender and his or her possible rehabilitation, against the rights of the individuals who are victims of these crimes.

Considering the facts outlined about and the principles in the various superior Courts detention for life is a serious measure and should only be ordered by the Court after full considerations of the matter. Incidentally, this was not the case by the Learned Trial Magistrate. The scheme of sentencing adopted by the Learned Trial Magistrate was a one side approach on the anguish of the victim. It's in contrast with the prevailing judicial precedents on sentencing.

Here in relation to this offence consistent with the principles in **Ogalo s/o Owuar (supra),** I will interfere with the life imprisonment sentence for the arguments posed in Muruatetu case and substitute it with a term imprisonment of thirty (30) years from the commencement date of 7th October 2015. Therefore, save for variation of sentence the appeal is dismissed.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 9TH DAY OF FEBRUARY, 2021

R. NYAKUNDI

JUDGE

In the presence of

1. Appellant

2. Mr Alenga for the state