REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO.35 OF 2019

DAVID NGENY.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(BEING AN APPEAL FROM THE DECISION OF HON. R. AMWAYI (SRM) IN CRIMINAL CASE NO.57 OF 2018 AT MOLO DATED 4TH APRIL 2019)

JUDGEMENT.

1. **The appellant was charged with the offence of Incest contrary to Section 8 (1) and (4) of the Sexual Offences Act no 3 of 2006.** The particulars of the offence were that on diverse dates on the month of April and May 2018 in Kuresoi division within Nakuru County intentionally and unlawfully caused his penis to penetrate the vagina of JC a child aged 14 years.

2. **The alternative count was committing an Indecent Act contrary to Section 11(1) of the Sexual Offences Act no 3 of 2006.** The particulars of the offence were that on diverse dates on the month of April and May 2018 in Kuresoi division within Nakuru County intentionally touched the vagina /buttocks of JC a child aged 12 years with his penis.

3. The appellant was convicted and sentenced to 20 years' imprisonment hence this appeal. The appellant's grounds of appeal are basically touching on the entire evidence as presented during trial namely that it never achieved the threshold of convicting him. In other words, the same did not go beyond reasonable doubt as is usually expected.

4. The learned state counsel on the other hand submitted that the respondent did establish its case against the appellant and therefore the trials courts findings should not be disturbed.

5. The court before looking at the merits or otherwise of the case shall summarise the evidence as presented during trial.

6. **PW1 JULIUS KIPKORIR CHERUIYOT** the chief Nyota location and a resident of Chesirikwa testified that he was called by one Dr. Boen who informed him that AR the mother to the complainant had brought her to his clinic and upon examination she was found to be three months pregnant. He told him that the appellant had been responsible for the said pregnancy.

7. He then interrogated the complainant who confirmed to him that the appellant had defiled her severally. He said that she was mentally retarded. She was taken to Keringet hospital where she was examined and p3 form filled as well as post rape form. Thereafter they looked for the appellant who was then arrested in his house. They took him to Keringet police station.

8. When cross examined by the appellant the witness said that he did not get him defiling the minor but she positively identified him. He said that there were allegations that the appellant had committed same offence within the area.

9. **PW2 JOHN TOWETT** the assistant chief Langwenda sub location testified that they received information concerning the incident while he was with pw1. They arrested him and called for the complainant who came with her mother and informed them that the appellant had defiled her. They also interrogated the appellant who denied committing the offence. While in the office members of the public came and wanted to lynch the appellant. They took him to Keringet police station. The complainant was taken to the hospital.

10. **PW3** the complainant gave unsworn evidence after the trial court conducted a *voire dire* examination. She said that the appellant defiled her in his home after removing her panty and laying her on the bed she went on to state that she felt pain in her private parts. She said that there were people outside but did not know what was going on as the appellant was her cousin.

11. The complainant said that the incident took place during morning hours and that she told her mother when she went home. When cross examined by the appellant she said that there were people who saw them leaving the house.

12. **PW4 PC TERESIA WANGARE** attached to Keringet police station carried out the investigation after the matter had been reported at there. She gave parties who reported the p3 form which was to be filled at the hospital. She interrogated the appellant who admitted the offence. She proceeded to record the witness statements and preferred charges against the appellant. She said that the incident took place severally but had not been reported.

13. **PW5 KIPROTICH NATHAN** a clinical officer at Keringet sub county hospital examined the complainant and filled the P3 form. He found that she was already pregnant and concluded that there was defilement. He also filled the post rape form which he produced together with the P3 form.

14. **PW6 AR** the mother to the complainant testified that she was 12 years old and at that time pregnant. She said that the complainant told her that it was the appellant who was responsible for the pregnancy. She did not however witness the incident. She took her to the hospital and later to Keringet police station. The accused was a cousin to her husband.

15. **PW7 PC DAVID OKETCH** took over investigation from PW4 who was on maternity leave. He produced the age assessment report in respect to the complainant. She was found to be aged between 12 and 16 years.

16. When placed on his defence the appellant gave unsworn evidence denying the charge. He simply said that he had just been implicated.

ANALYSIS AND DETERMINATION.

17. The court has perused the entire proceedings herein as well as the submissions by the appellant and the learned state counsel. The line of submissions is of course taking the tangent of their positions. The appellant in particular submits that the evidence as tendered at the lower court was full of contradictions and incapable of a conviction. He says that the ingredients of the offence were not established and for that reason the appeal should be allowed.

18. The learned state counsel on her part maintained that the trial courts finding was sound and should not be disturbed. That all the elements were proved and the appeal was dismissed.

19. It is true that at this juncture what is relevant is for this court to look afresh into the matter with a view of arriving at an independent finding noting that it did not have the benefit of seeing the witnesses and their demeanour. **(SEE OKENO V.REP (1972) E.A. 32.**

> ***"An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya v R [1957] EA 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M Ruwala v 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 findings and conclusions; 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 v Sunday Post [1958] EA 424."***

20. The ingredients for the offence namely the age of the victim, the identity of the perpetrator, as well as penetration must be proved.

21. In this case the issue of penetration was proved by virtue of the fact that she was found to be three months pregnant at the time of carrying out the examination. On the same note the relationship between the appellant and the complainant was not disputed namely that they were cousins.

22. The next issue was the age of the complainant who was found by the clinical officer to be between 12 and 16 years. The complainant's mother said that she was 12 years old. The minor as well said that she was 12 years old. The clinical officer estimated her age to be between 12 and 16 years. In the absence of any objection by the appellant this court takes the view that the minor was aged around 16 years.

23. The court in **PAUL OTIENO OKELLO (2019) eKLR**

> ***"I hereby reiterate that proof of the age of a victim in sexual offences is very crucial as that has all the bearing in sentencing. If the age of a victim is not properly settled, then a Court may find itself at a cross road in passing a lawful sentence. Ideally, age ought to be proved by way of documents including, but not limited to, a Certificate of Birth, a Birth Notification, medical documents, official religious documents, official school documents, among others. Having said so, it should not be lost that there are instances where none of the said documents may be available and in such a case a court may revert to its observation of the victim or the oral admissible evidence on record."***

24. On the issue of identification, the minor stated that the appellant was her brother and they lived together. The incident took place in a house which belonged to him. From her evidence it seems that there are several houses within the same homestead as clearly described by the minor. Everybody within the vicinity was a relative and it appears that there was nothing suspicious between the appellant and the minor being together.

25. This also goes to the issue of the relationship between the appellant and the minor. There was no doubt that he was the brother in law to the complainant's mother and thus a nephew to the minor. Whichever African way of relationship, the two were closely related a fact not

disputed by either of the parties.

26. The evidence of the minor though unsworn was unshaken during cross examination. She was clear on the scene of the incident, namely, a bed during morning hours. The provisions of **Section 124 of the Evidence Act** clearly states that the court shall proceed to convict in sexual offence if it believes that the victim was truthful. It goes on to state that;

> ***"Notwithstanding the provisions of Section 19 of the Oaths and Statutory Declarations Act , where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:***
>
> ***Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."***

27. Taking the totality of the evidence and specifically the minor's uncontested evidence this court is of the considered view that she was truthful.

28. The appellants defence was of not much probative value considering that the same was unsworn as he could not be cross examined. His argument that he was framed does not hold much water as the same was not raised during cross examination of the witnesses. This was an afterthought and a mere denial.

29. The upshot of all this is that the appeal is unmeritorious. On sentencing however, it is noted that the charge was under **Section 8(1) and (4)** which gives the maximum sentence of 15 years. The trial court sentence of 20 years presupposed that the minor was between the ages of 11 to 15 years. From the age assessment above it was concluded that she was between the age of 12 and 16 years. Ordinarily the courts ought to take into account the higher side of the age. This removes any disadvantage to the accused.

30. For the foregoing reasons the sentence is hereby reduced to 15 years' imprisonment instead of 20 years. The same shall take effect from the date of the lower court's judgement. This period is commensurate considering the circumstances herein. The appellant took advantage of his nephew who was a minor with some mental retardation. Apart from defiling her, he as well impregnated her which was not only evil but she will carry the burden for life albeit prematurely.

31. **The appeal is otherwise dismissed.**

DATED SIGNED AND DELIVERED VIA VIDEO LINK AT NAKURU THIS 11TH DAY OF MARCH 2021.

H. K. CHEMITEI

JUDGE.