REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCRA NO. 159 OF 2019

PETER MUTUKU KIVUNZIO.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(From the original conviction and sentence of Hon. T.A. Sitati (P.M) in

Makindu Principal Magistrate's Court PMCR (S.O) No. 96 of 2018

issued on 8th November, 2019).

JUDGMENT

1. The appellant was charged in the magistrates' court with incest contrary to section 20(1) of the Sexual Offences Act No. 3 of 2006. The particulars of offence were that on unknown day in November 2018, at Kalimakoi location in Kibwezi sub-county within Makueni County intentionally and unlawfully caused his penis to penetrate the vagina of FMM (name withheld) a child aged 7 years who was his daughter.

2. In the alternative, he was charged with indecent act with a child contrary to section 11(1) of the Sexual Offences Act. The particulars of offence were that on the same unknown day and place intentionally and unlawfully caused his penis to touch the vagina of FMM a child aged 7 years who is his daughter.

3. He denied both charges. After a full trial, he was convicted of the main count of incest, and sentenced to life imprisonment.

4. Dissatisfied with the conviction and sentence of the trial court, the appellant has come to this court on appeal, and relied on the following grounds of appeal –

1. The magistrate erred in failing to observe that the charge is defective.

2. The learned magistrate erred in convicting the appellant without observing that the voire dire examination of the complainant was biased and defective.

3. The learned magistrate erred in convicting the appellant while failing to note that the defence was not served with information as stipulated in 2010 Constitution.

4. The magistrate erred in convicting him while failing to note that the defene was not served with prosecution documentary evidence.

5. The magistrate erred by misdirecting the process and neglecting application of section 200(1) and (3) of the Criminal Procedure Code thus conducting a mistrial.

6. The trial magistrate erred in admitting indirect evidence and convicting him on such evidence.

7. The magistrate erred in failing to observe that prosecution witnesses were unreliable, and the sidelining witnesses that were best placed by the prosecution.

8. The trial magistrate totally and fatally failed to make findings and conclusions, which vitiated the trial process.

9. The magistrate erred in failing to note that the investigations were shoddy, incredible, and hence unsafe for conviction.

10. The magistrate erred in convicting on evidence which was riddled with glaring contradictions and lacking corroboration.

11. The conviction of the appellant lacked merit as the trial court relied on dock identification which fell below the required standard of proof.

12. The appellant has suffered gross prejudice for being detained for long and handed down a sentence which was long and unknown.

13. The appellant suffered gross prejudice having been denied the opportunity to cross-examine the original maker of the medical examination report hence the scientific evidence was not proved to the required standards.

14. The trial magistrate disregarded the appellant's alibi defence.

5. The appeal proceeded by way of filing written submissions. The appellant and the Director of Public Prosecutions filed their respective written submissions, which I have perused and considered.

6. This being a first appeal, I have to start by reminding myself that I am duty bound to evaluate all the evidence on record afresh and come to my own independent conclusions and inferences – see **Okeno –vs- Republic (1972) E.A 32.**

7. I have also to bear in mind that in criminal cases, the burden is always on the prosecution to prove their case against an accused person beyond any reasonable doubt. An accused person has no burden to prove his innocence – see **Woolmington –vs DPP (1935) Ac 462** – an English case which has consistently been followed by courts in Kenya.

8. The appellant herein was convicted of incest. The prosecution was thus required to prove that the appellant and the complainant were within the relationship alleged; a father and a daughter. Secondly the prosecution was required to prove that sexual penetration occurred. Thirdly, the prosecution was required to prove that the appellant was the culprit.

9. Were the appellant and the complainant a father and daughter? The prosecution called 4 witnesses and the appellant tendered a sworn defence. From the evidence of the prosecution and the defence, the appellant and the complainant are a father and a daughter. This has not been disputed by either the complainant or the appellant. It is clear from the evidence on record that the appellant is the father of the complainant and that the mother of the complainant is deceased. The complainant lives with the grandmother. Thus the prosecution proved beyond any reasonable doubt that the appellant is the father of the complainant.

10. Did sexual penetration of the complainant through her sexual organ (*vagina*) occur? The complainant (Pw1) and Pw3 Faith Murumbi the Clinical Officer say so. The appellant has contested, on appeal, the medical examination form on the ground that the maker of the original medical examination form (*P3 form*) was not availed in court to enable him cross-examine him. However from the record, the defence did not object at the trial.

11. In my view, the medical report (P3 form) was validly produced in court under section 77 of the Evidence Act (cap.80). From the report, it was clear that the complainant was penetrated sexually as there were lacerations in her vagina and the hymen was broken. She also had a swelling above the vagina, which the Clinical Officer said, was a result of sexual intercourse with by fully erected penis on a child of such tender age of 7 years. Since Evidence Act (cap 80) allows production of medical (*expert*) evidence by a person who is familiar with the handwriting of the original maker, I find no fault in the procedure adopted by the trial court. I find that from the evidence on record, penetration of a sexual nature on the complainant was proved by the prosecution beyond any reasonable doubt.

12. Before I go to considering whether the appellant was the culprit, I will deal with technical issues raised. The appellant has raised the issue of a defective charge. I have perused the charge sheet and find no defect on the same. I dismiss that ground.

13. The appellant has also complained that section 200 of the Criminal Procedure Act (*cap 75*) was not complied with by the trial court. Again, I find no basis for that allegation as the entire hearing to the judgment and sentence was conducted by one Magistrate Hon. T. A. Sitati – Principal Magistrate. The necessity to comply with section 200 Criminal Procedure Code did not thus arise.

14. The appellant has further said that he was not provided with necessary information by the prosecution at the trial, contrary to the provisions of the Constitution of Kenya 2010. I find no basis for that contention, as the record does not show that the appellant at any time asked for any such information. I dismiss that ground.

15. I now turn to the issue as whether the appellant was the culprit. On this issue the appellant says that the voire dire examination of the complainant aged 7 was not properly done. I have perused the record voire dire examination conducted by the trial court, and in my view, it was properly done and the trial court came to the conclusion that the complainant should testify but not on oath, and be assisted by an interpreter. The appellant was even given an opportunity to cross –examine the complainant which he did though was not necessary on the complainant did not testify on oath.

16. I observe that the evidence connecting the appellant to the offence is that of a single victim of a sexual offence who is also a minor of tender years. However, such evidence does not require corroboration to sustain a conviction under the provisal to section 124 of the Evidence Act (80) provided it is believable and is so believed by the trial court. The said provisal states as follows –

"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."

17. Considering the totality of the evidence in this case, in my view, the evidence of the complainant (Pw1) was believable as neither the complainant nor any of the witnesses who testified stood to again anything by implicating the appellant with this serious offence. The complainant was also the daughter of the appellant and there is no suggestion that anybody could have influenced her to implicate the appellant. It is also instructive to note that the appellant being told to take his daughter to hospital, never showed any sign of bother and just went to his work as if nothing had happened without informing anybody at all for assistance.

18. I thus agree with the trial magistrate that the evidence of the complainant truthful and believable, and I also believe the same. I find that the prosecution proved beyond any reasonable doubt that the appellant was the culprit. I will thus uphold the conviction.

19. With regard to sentence, the mandatory statutory sentence for committing incest on a child below 18 years is life imprisonment. Since the Muruatetu case decision of the Supreme Court, courts have held that mandatory sentences be considered to be maximum sentences and that mitigation factors should be considered in determining the appropriate sentence in each case. In the present case the appellant is a first offender. He said in mitigation that he wanted to be freed to take care of his children. There was however no indication on record that he was taking care of the children, who were living with grandparents. In my view he needs to be kept away from the children. I however reduce his sentence to fifty (50) years imprisonment as the appellant is a first offender.

20. Consequently, and for the above reasons, I dismiss the appeal on conviction. I uphold the conviction of the trial court. I however set aside the sentence and order that the appellant will instead serve 50 years imprisonment from the date he was sentenced by the trial court.

DELIVERED, SIGNED & DATED THIS 16TH DAY OF JUNE, 2021, IN OPEN COURT AT MAKUENI

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GEORGE DULU

JUDGE