REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 27 OF 2020

PG…………………………………..…APPELLANT

VERSUS

REPUBLIC….…………………………RESPONDENT

(*Being an appeal from the original conviction and sentence by Hon. E.W Ndegwa RM in Githongo SO No.29 of 2018 on 18/02/2020)*

JUDGMENT

1. **PG ('the appellant')** was charged with the offence of incest contrary to Section 20 (1) of the Sexual offences Act It was alleged that on 12/12/2018 at around 1840 hours at [particulars withheld]village, Mwereru Sub-location, Katheri Location in Imenti Central Sub-County within Meru County, being a male person he caused his penis to penetrate the vagina of **GK** a female person who was to his knowledge his daughter aged 13 years.

2. He faced an alternative count of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006. It was alleged that on the material day and place, he intentionally touched the breast and vagina of GK a child aged 13 years.

3. He denied the charges and the prosecution paraded 4 witnesses in support of its case. He was subsequently tried and convicted on the main count and sentenced to serve 40 years imprisonment.

4. Aggrieved by the said conviction and sentence, the appellant lodged this appeal raising 8 grounds which I have condensed into 3 as follows;

a. The trial court erred in law and fact in convicting the appellant based on the contradictory and inconsistent evidence of the complainant, despite the fact that the ingredients of the offence were not proved.

b. The trial court erred in law and fact in failing to note that the prosecution did not call crucial witnesses or produce a crucial exhibit, which would have absolved the appellant.

c. The trial court erred in law and fact in failing to take into consideration the appellant's defence.

5. In order to appreciate the merits or lack thereof of the appellant's appeal, it is important to set out the evidence at the trial. **PW1 GK**, the complainant, testified that she was 13 years having been born on 16/04/2005 and a class 8 pupil at [particulars withheld] Boarding School Riji. She recalled that she was on the material day sitting in the table room with her younger brother LN. Her stepfather, the appellant was outside cutting grass for the cows. Her said brother was playing in the table room at around 6.45 pm. She was seated doing her homework, when the appellant came and sat where she was. He started patting her shoulders and told her he loved her just the same way he loved her mother. He told her brother to go outside and play. Shortly thereafter, he held her and laid her on the sofa while she was facing up. He lowered her shorts, removed his trouser and half way lowered his shorts. He removed a condom from his trouser and wore it on his penis. He inserted his penis into her vagina and she felt pain. She started screaming but he covered her mouth using his palm. She started oozing and blood poured on the sofa. During the day, her period had started. When he saw her crying, he wore his trouser and went outside to milk the cow. She then dressed and continued doing her homework while seated on the sofa. At around 08.00 pm, her mother came back from the market. She had picked the used condom and placed it on the seat where her mother sits after getting back home. Her mother came and sat on the used condom. After she sat on it, the appellant left the table room and went to sleep in the bedroom. When her mother asked her about the condom, she denied knowing what it was because, the appellant had threatened to kill her, if she told anyone. When she asked the appellant the same, he accused her of being the one who had come with it. The following morning, she rang her grandmother and asked her to come and pick her. It was then that she remembered the immense pain she had felt and decided to tell her mother in order to save her life. After she told her mother the truth, they proceeded to Githongo police station to report. She was taken to Githongo sub county hospital where tests were carried out. Before the material day, her stepfather had defiled her again during school holiday in 2018, without condoms. During cross

examination, she stated that she started living with the appellant in 2017. Before that, she was living with her grandmother. During re-examination, she clarified that her brother was outside when the appellant lowered her shorts. She denied any conspiracy between herself, her mother and the doctor in order to send the appellant to prison.

6. **PW2 Peter Mbogori,** a clinician at Githongo Sub County Hospital, relied on the complainant's medical report, who alleged to have been defiled by her father. Upon examination 18 hours later, her genitalia was normal but there were traces of blood and her hymen was broken. It later turned that the blood was due to menstruation. Although she had no physical injuries, he concluded that she was sexually active due to the broken hymen. He produced the treatment notes and the P3 form in respect of the complainant. During cross examination, he confirmed that there were no injuries and no spermatozoa.

7. **PW3 HK,** the complainant's mother, testified that on the material day, she had gone to the market and left her children at home with their father. When she went back at around 0800 pm, she saw a wrapped used condom on the couch, which shook her. She asked the complainant what that was and she said she did not know. When she asked the appellant what that was, he accused her of having come with it after using it with other men. A quarrel ensued and she decided to keep quiet. The following day, after she asked the complainant to tell her what had happened, the complainant told her that the appellant had sexually assaulted her. They went to report the matter then later went to the hospital, where the complainant's P3 form was filled. She denied having any grudge with the appellant at the time. During cross examination, she said that when she came back home, she found the complainant's grandmother there. She was chased away by the appellant's family on the 24/12/2018 from their home. They threatened her and she fled for fear of her life.

8. **PW4 PC Anthonia Kioko** from Githongo Police post, recalled that the complainant accompanied by her mother came to make a report on 13/12/2018. The complainant was escorted to Meru level five for age assessment. Her years were approximated to be between 13 to 14 years. He compiled his file and preferred this charges. He produced complainant's age assessment report. During cross examination, he stated that he did not visit the scene. He stated that the complainant had told him that she had previously been defiled more than once by her father.

9. In his defence, the appellant told the court that on the material day, he was at home with his wife harvesting kales from the farm until 1.00 pm when they finished. After having lunch, he went to source for farm produce for the following day. When he arrived home at around 7.30 pm, he found his wife and children in the house. After they ate their supper, he went to sleep because he was tired. After 10 minutes, PW3 called him and he went to the sitting room. He found her holding a condom in her hands. When he asked her where she had gotten it from, she told him that he knew its source. He told her that she was the one holding it. She then called PW1 from her room and asked her what that was. PW1 said she did not know and she had never seen anything like it before. She asked PW1 to go back to sleep. She started hurling insults at him. She even accused him of being unfaithful and called him Malaya. He woke the following morning and milked the cow. When he came back from taking the milk to the dairy, he found PW1 and PW3 seated on the corridor. He was then arrested on 17/12/2018. He denied committing the offence and maintained that he was away on the material day. He also denied chasing PW3 away. During cross examination, he stated that he had a problem with PW1 for coming home late. During re-examination, he stated that in 2016, PW3 had given PW1 a panga to cut him.

10. **DW2 AK,** the appellant's sister**,** testified that on the material day, she was attending a church conference at Nkubu. She left her child with appellant's mother. She stated that the appellant was not at home when she came back at around 7.00 pm to pick her child. During cross examination, she stated her mother and Patrick were at home on the material day.

11. **DW3 HKM,** the appellant's mother, testified that the appellant and his wife left home at 2.00 pm. She remained behind with the three children. By 7.00 pm, the appellant had not returned but his wife returned at around that time. On 17/12/2018, the police officers came to arrest the appellant. During cross examination, she affirmed that she stayed home from morning till 7.00 pm on the material day with the children including PW1.

12. **PW4 PK,** the appellant's brother**,** testified that he was at home from 2.00 pm to 6.30 pm on the material day. The appellant and his wife were not at home at the material time. He maintained that position even during cross examination.

13. Directions were taken on 21/07/2020, that the appeal be canvassed by way of written submissions. The appellant filed on 2/7/2021 whereas the respondent had filed earlier on 28/06/2021. From the appellant's submissions, I note that only penetration of the complainant is disputed. He does not dispute the fact that the complainant was a minor and his step-daughter. On that basis, a strong view is taken that penetration was never proved and reliance is then put on the decision in **David Chege Waihenya v R (2016) eKLR, John Mutua Munyoki v R (2017) eKLR and Ben Maina Mwangi v R (2006) eKLR** in support the position that the medical evidence ought to prove sexual intercourse and link the accused to the offence.

14. It was further contended that the absence of hymen is not proof of defilement as was held in **F.O v R (2020) eKLR** and further that, if the used condom would have been subjected to the necessary tests and adduced in evidence, it would have either exonerated or linked him with the offence and asks the court to draw the inference that had the test been conducted, the same would have been adverse to the prosecution's case. Lastly, the trial court is faulted for failing to analyze, consider and give regard to the evidence given in his favour. He cited the case of **Okethi Okale & others v R [1965] E.A. 555** to support the position that the court is duty bound to consider the evidence as a whole including that by the defense and not to merely look at that by the prosecution alone. He concluded that the prosecution had failed to prove its case to the required standard and urged the court to allow the appeal, quash the conviction and set aside the sentence.

15. According to the respondent, all the ingredients of the offence had been proved beyond reasonable doubt. The case of **CMM v R (2020) eKLR** was cited to buttress the submissions on what forms the ingredients of the offence of incest. On the mainstay of the appeal and regarding whether or not there was penetration by the appellant, submissions were offered to the effect that the evidence by the complainant was succinct and sufficient to prove the offence.

16. In determining this appeal, the court is duty bound to re-appraise, review and re-evaluate the entire evidence on record afresh with a view of drawing its own independent conclusions and findings, bearing in mind that it did not have the advantage of seeing the witnesses testify.

See **Odhiambo v R (2008) KLR 565**.

17. There is only one issues for determination. The issue is whether the offence of incest was proved beyond reasonable doubt as all the ground of appeal challenge conviction without faulting the sentence.

18. The key ingredients of the offence of incest are proof of penetration, the age of the complainant and knowledge that the person is a relative. On age, the complainant's testimony was that she aged 13 years having been born on 16/04/2005. The court while conducting the *voire dire* examination equally noted that the complainant was a minor. Although no birth certificate was produced, the age assessment report of the complainant was tendered. According to that report, her age was assessed to be between 13 and 14 years. The P3 form produced as **Pexh 2** indicated 13 years as the estimated age of the complainant. I have also noted that the appellant did not broach any question of age during cross examination. In my finding, the evidence on age of the complainant was never contested nor controverted. I am therefore satisfied that the complainant at the time of commission of the alleged offence was a child aged between13 and 14 years old.

19. On whether the appellant knew that the complainant was his step-daughter, PW1 testified that the appellant was his step-father. That evidence was admitted by the appellant, who stated in his testimony at page 28 of the record of appeal that, **"Gloria mother, my wife called me."** In deed all the defense witnesses referred to the appellant and Pw3 as spouses. The relation between the appellant and the complainant as a daughter was thus proved and admitted by the defense beyond reasonable doubt.

20. The offence of incest is defined and created under **Section 20(1)** of the sexual Offences Act as follows: -

> **(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 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.**

21. Section 22(1) of the Act then goes ahead to define the prohibited degrees for incest, **"In cases of the offence of incest, brother and sister includes half-brother, half-sister and adoptive brother and adoptive sister and a father includes a half father and an uncle of the first degree and a mother includes a half mother and an aunt of the first degree whether through lawful wedlock or not."**

22. When I give regard to the definition of relations that are targeted by the offence of incest with the evidence adduced in this matter by both sides, I get satisfied that the appellant had the requisite knowledge that, the complainant was his step-daughter.

23. The next element is penetration which is defined under **Section 2 of the Act** to mean ***'the partial or complete insertion of the genital organs of a person into the genital organs of another person'.*** The evidence on record which the trial court relied on to convict the appellant was solely the complainant's own testimony. It is of note that after the *voire dire,* the trial court determined that the witness possessed sufficient intelligence, understood the magnitude of an oath and the duty to tell the truth. PW2 in his testimony stated that he concluded that the complainant was sexually active because her hymen was broken. He went on to state that there were no injuries and the blood was due to menstruation. The inescapable question remains whether there was credible evidence linking the appellant with the commission of the offence. The starting point is the fact that, if not for the complainant, nobody else witnessed the act. The evidence of the complainant was however sworn. Such evidence required no corroboration under **section 124 of** the Evidence Act and the decision by the Court of Appeal in ***Oloo v R (2009) KLR***, where it was held that:

> **"In law evidence of a child given on oath after voire dire examination requires no corroboration in law but the court must warn itself that it should in practice not base a conviction on it without looking and finding corroboration of it".**

24. The complainant gave a detailed account of how the appellant had defiled her on the material day. She stated that, **"I was sitting when my step father came and sat in the sofa in the table room where I was. He started patting my shoulders and told me he loves me just the same way he loves my mother. He told LN to go outside the house and play. After a short while, he got hold of me and lay me on the sofa while I was facing up. He lowered the pairs of shorts I was wearing. He removed his trousers and lowered the shorts he was wearing half way. He removed a condom from his trousers and wore it on his penis. He started abusing me sexually. He inserted his penis into my vagina. I felt pain."** That evidence was not discredited even during cross examination. In his judgment, the trial court found that the complainant had satisfied the court that she was truthful. The court said: -

> **" I am satisfied that the complainant was truthful, and that the minor gave an honest and accurate account of what transpired ... P.w 1 stated during the examination in chief and when recalled that the accused told her brother N to go out and play. She was composed, calm in her testimony and more so truthful/honest."**

25. Based on my analysis of the evidence led, I find that penetration was established beyond reasonable doubt and that it was the appellant who penetrated the complainant. To that extent I uphold the decision of the trial court and find no basis to interfere with the findings leading to conviction. I find no merit on the appeal against conviction and order the same dismissed.

26. In coming to this conclusion I have taken due regard of the evidence adduced by the appellant and his witnesses. That evidence is itself not coherent. DW2, 3 and 4 gave evidence that tended to show that the appellant was not at the scene at the time the offence was alleged to have occurred. The three said that the appellant was not home by 7 pm and could not have committed the offence but the appellant himself said that he was back home by 7.30 pm. While it is true that the complainant said the offence took place at about 6.45 pm, I find that that could have been an approximation of time just as the time indicated by the appellant. I find that the disparity in time of about 45 minutes does not take away the appellant from the scene of crime. In any event, if the appellants defense was that of alibi, he needed to prove the same by calling the people he alleged he was with. He failed to do that even after prompting by the prosecution in cross examination. Even though the trial court apparently failed to analyse the defense evidence, this court on a first appeal proceeds by way of a retrial and I have

reappraised the evidence I now find that the evidence led by the defense did not displace that by the prosecution by creating any reasonable doubt.

27. However, even if there had been an appeal against sentence, I note that the trial court did not go for the prescriptive mandatory sentence for the offence of incest with a minor being life imprisonment and imposed an imprisonment of 40 years. Even when no remorse was forthcoming from him during mitigation, the trial court still exercised its discretion and handed him a sentence of 40 years' imprisonment. That sentence to this court is fair, lawful, and justified in the circumstances when regard is given to the destructive and disrespectful nature of the offence.

28. In totality the appeal having been, on the ground of appeal, against the conviction only, lacks merit and is dismissed.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MERU THIS 15TH DAY OF JULY, 2021

PATRICK J.O OTIENO

JUDGE

In presence of

Mr. Maina for the state/respondent

No appearance for Nelima for the appellant

Patrick J.O Otieno

Judge