REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

CRIMINAL APPEAL NO. 49 OF 2019

KKM..APPELLANT

VERSUS

REPUBLIC .... RESPONDENT

(Appeal from Original Conviction and Sentence in Criminal Case No. 10 of 2018 of the Senior Resident Magistrate's Court at Lamu Law Court-T. A Sitati, PM dated 17th August, 2018)

CORAM: Hon. Justice R. Nyakundi

The appellant in person

Mr. Mwangi for the State

J U D G M E N T

The appellant was charged with incest contrary to Section 20(1) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on the 23rd day of May, 2018 at around 0500hrs at [Particulars Withheld]Village in Lamu West Sub-County within Lamu County being a male person unlawfully and intentionally caused his penis to penetrate the vagina of **DKK** female person who was to his knowledge his daughter who is Fifteen (15) years.

He was charged with an alternative count of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act, the particulars of the offence being that on the 23rd day of May, 2018 at around 0500 Hrs at [Particulars Withheld] Village in Lamu West Subcounty within Lamu County intentionally and unlawfully touched the vagina of DKK a child aged Fifteen (15) years with his penis.

Aggrieved by the sentence and the conviction of the trial court, the Appellant lodged an appeal on the following grounds:

1. **That the learned trial magistrate erred in law and fact by discounting and not considering in detail my defensive evidence which was unrebutted, thereby casting doubt on the prosecution case**

2. **That the learned trial Magistrate erred in law by giving a harsh and excessive sentence in the circumstances of this case.**

3. **That the learned trial magistrate erred in law and fact by failing to consider that the Appellant was denied the right to a fair hearing at trial.**

4. **That the learned trial Magistrate erred in law by sentencing him to life imprisonment without proper finding that the charge of incest was not proved beyond reasonable doubt.**

Background

PW1 DKK, the victim was sworn in after voire dire examination. She told the court she goes to [Particulars Withheld] Primary School. She recognized the father who was in the Magistrate's chamber pointing at him. She also told the court that her mother died some years ago. That she remembers what happened in May, 2018 on the 23rd day of that month. She was at home at 5 a.m at grandmother's together with her 4 sisters and one brother. She got up and went to light up the fire and that the father usually slept in the kitchen.

She further stated that when she got there her father called her to go near him and when she went over, he said that he needed to have sex with her. She rejected his request and then he pulled her by force laid her on his bed and had sex with her. After he finished, he let her go and as she was getting up to leave her grandmother saw her and she told her what happened.

She went ahead to report to her grandmother that the Appellant had removed her panty before inserting his male organ into her vagina. That he just unzipped his trousers but did not lower his trousers and they had sexual intercourse. That it was her grandmother who actually caught them doing it who then called neighbours to the scene. She also said that one of the neighbours who came to the scene was Francis and he found her sitting outside the house. She went ahead to inform the court that her grandmother beat her up using a stick.

She stated that one of the neighbours called the village elder who came and escorted her to Mokowe Police Station and that her father went with them. The police questioned her and recorded her statement and was later taken to Hindi Hospital, the medical officers examined and treatment her and gave her some drugs.

At cross examination, she confirmed that the appellant was her father. She came to the kitchen where they usually lit up the fire to prepare food and that was where the appellant slept and that there was also an adjoining room. She also stated that she knew Mwanza whom she had gone with to Mpeketoni and Lamu and that she did not have sexual relations with the said M.

She stated that she was arrested by the Chief of their location, he arrested her because he saw her with M and that he thought they were having sex in one of their houses but there was no such sex. That the appellant had promised Mwanza that he would marry her off to him after she completed school. That the appellant refused to marry off her sister M to M.

She further told the court that the appellant inserted into her private organ his male organ and that that was not the first time he did it. That her sisters know that the appellant has been having sex with her for a number of years.

PW2 TKM who the victim's grandmother informed the court that the appellant was her only child who is aged Fifty-six (56) years old. She stated that she lives with the appellant and his six children. She explained to court that when the rainy season came, their houses were flooded and this forced them to move to their neighbour's house called **K**. That it was in their neighbour's house where the event took place. That the appellant was accommodated in a mud house where one room was his sleeping chamber and the other half was used as the kitchen.

That on that date, she woke the victim up and asked her to go light up the fire and warm water for the others to bathe. She also told the court that she had been suspecting the appellant for some years because he would lock up himself with the victim. That she would ask the victim what was happening under the closed doors and she would respond that it was a game.

She further told the court that one day she confronted the appellant about the game and the appellant hit her. That on that particular morning after she sent the victim to the kitchen, she decided to follow her to see if she was preparing the water as directed. She informed court that when she went in, she found the appellant on top of his daughter and when she got in they were startled. That the victim's underwear was on the floor, the appellant quickly got up and tried to hide his penis, he zipped up quickly while the victim got up. She also told the court that she slapped the victim and then using her walking stick, hit the appellant.

That when the appellant walked out, she raised an alarm and **Karisa** and others came. That the village elder was called and he in turn called the police. That they were escorted by the village elder to Mokowe Police Station then later to Hindi Dispensary.

Upon cross examination, she confirmed to having caught the appellant having sexual intercourse with her granddaughter. That **K, M, F** and others came when she raised an alarm. She confirmed that Mwanza wanted to marry the victim and it was the appellant who informed her. That the appellant asked her if **Mwanza** could be in the company of the victim. She told the court that it was painful for her because she caught the appellant having sexual intercourse with his own daughter.

PW3 FK told the court that he remembered the events of that morning after 5a.m, an old lady who is his neighbour came by frantically asking for their help to arrest his son for having intercourse with his daughter. That she said that she knew that every morning the appellant was suspected to be preying on his own daughter as she went to prepare breakfast. That he agreed to go in the company of **K** and **M**, that they hid in the bush near the appellant's house. That the old lady instructed the victim to give her a signal that her father was having sex with her. The signal was that the victim coughs loudly the moment the appellant begins the sexual acts, that the victim agreed and went inside.

That the victim went to the house and begun arranging the firewood. He told the court that he was nearby and he heard the appellant call the victim into his sleeping room, she hesitated saying she had to light up the fire but he kept pressing her to go into his room. That after she lit up the fire, she agreed to go into the room.

He informed court that after some time, the victim coughed and **(PW2)** then said that the victim had given them a signal to go in. That after **(PW1)** went in, they followed her because she had alerted them to go in after the coughing signal. That he was behind her when he saw the appellant get up, quickly zip up his trouser and that the victim's panty was on the floor. That they wanted to lynch him but they feared being arrested.

That they later alerted a home guard who is a village elder to come and help them arrest the appellant. That he was arrested and taken to Mokowe Police Station.

At cross examination, he confirmed that he had no prior differences with the Appellant. That he was in the company of **K** and **M** chewing miraa at about 5a.m. he also confirmed that he did not see **M**. He also said that **(PW1)** gave them prior alert to help her establish if it was true that he was having regular sex with his own daughter.

PW4 Joseph Njeru a Clinical Officer at Hindi Dispensary told the court that he had a P3 Form, a Post Rape Care (PRC) and Treatment Notes dated 23.05.2018. That he interviewed the victim who had been defiled and she informed him that the defilement had been taking place for a long time and she also said that it was unprotected sex. That she named her father as the perpetrator.

He concluded that no injuries were seen on her genitalia, no discharge was seen and her hymenal membrane torn long ago as it was not freshly torn. That the victim was taken to the laboratory and the results show that she suffered a yeast infected based on the yeast cells that were seen and that she was HIV Negative. He also confirmed to court that yeast cells are not a common occurrence unless sex takes place. He also told the court that he gave her anti pregnancy drugs and anti-venereal disease drugs. The Treatment Notes were marked as **PExh. 1,** the P3 Form as **PExh. 2** and the P.R.C Form as **PExh. 3**

PW5 PC No. 113829, PC Daniel Kibet Kipchumba based at Mokowe Police Post. He informed the court that on the 23rd day of May, 2018 an elderly lady came by with a young girl and complained that her own son was defiling his own daughter. He recorded the report and stated that he escorted the victim and the grandmother to Hindi Dispensary where she was examined and treated and finally recorded statements.

That he visited the scene and saw that the appellant used to sleep in an adjourning room to a mud-built kitchen. He complied the police file and the suspect escorted to court. He also stated that the victim was Fifteen years old.

At the close of the prosecution case, the trial court found that a prima facie case had been established and the appellant was placed on his defence and he elected to give a sworn statement.

He stated that he recalled on the 22nd day of May, 2018 he prepared fish and rice and went to sleep. On 22nd May, 2018 his mother came into the house with his daughter took drinking water and went away. That he overheard Mwanza outside speaking with his mother. On the morning of 23rd May,2018 he heard a knock on his door, it was his daughter. That no sooner had she knocked on the door than **M** and other home guards showed up. That he was taken to the police station and accused falsely and all those charges are fabrications.

He also informed court that he had no ability to have intercourse. That **M** was the problem and he is the one who has been preying on his daughter and her older sister.

Analysis and Determination

Given that this is a first appeal the role of this court is well settled. It was held in the case of **Pandya v R [1957] EA 336** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

The offence of incest is encapsulated in terms of section **Section 20(1)** of the sexual Offences Act. The said Act states 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."**

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.

When the prosecution initiated and charged the appellant with the offence of incest in terms of Section 20 (1) of the Sexual Offences Act, they set to proof the following elements:

> **(a). The act of penetration of the genitalia of the victim.**
>
> **(b). That the victim of the defilement was a female aged below eighteen (18) years old.**
>
> **(c).That on the material day, named in the charge sheet it was the appellant who had carnal knowledge with the victim intentionally and unlawfully with full knowledge that she was his daughter.**

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. Further, genitalia, is expanded to comprise of the vagina and anus for purposes of the offence of defilement. In **Mark Oiruri v R {2013} eKLR** the Law concedes that there can be a possibility of sexual penetration without evidence of spermatozoa or semen for that matter. In this respect the court stated:

> **"Many times, the attacker does not fully complete the sexual act during the commission of the offence. That is the main reason why the Law does not require that evidence of spermatozoa be availed, so long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated and penetration need not be deep inside, the girl's organ."**

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."**

Further in the case of **Remigious Kiwanuka v Uganda SC. Criminal Appeal No. 41 of 1995:**

> **"Proof of penetration is normally established by the victim's evidence, medical evidence and any other cogent evidence by the prosecution."**

Thus in **Dominic Kibet Mwamung v R {2013} eKLR** the Court stated that:

> **"In cases of defilement the Court will rely mainly on the evidence of the complainant which must be corroborated by medical evidence."**

Nonetheless as held in **Kassim Ali v R {2006} eKLR**:

> **"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."**

In the present case, **(PW1)** narrated to court the events of the 23rd day of May, 2018 of how the appellant pulled her by force, laid her on the bed and had sex with her. She also told the court that after he finished, her grandmother saw her and that it was not the first time that that had happened. Her testimony also pointed the court the appellant had been having sex with the victim for a number of years. Her testimony was corroborated by that of **(PW2)** on that fateful day she found the appellant on top of his daughter, her underwear was on the floor, that the Appellant quickly got up and tried to hide his penis. **(PW3)** also witnessed the events of that day.

A closer look at the evidence of **(PW1), (PW2)** and **(PW3)** in regard to the events of the 23.5.2018. For the most part the complainant evidence remained consistent with that of **(PW2)** and **(PW3)** as to how the appellant called her to go near her, that the appellant had removed her panty before inserting his male organ into her vagina. The complainant's statement on how penetration occurred is simple and straight forward, appellant took his male organ- penis and penetrated her vagina.

In this appeal, bearing in mind the principles in **Okeno v R (supra) , (Ruwalla v R {1957} EA 570),** I have carefully analyzed the evidence given by **(PW1), (PW2)** and **(PW3)** on this element, as corroborated with medical evidence by **(PW4)**. However, it's also a principle for this court to remember that on appeal, the court goes by the record but makes due allowance to the inferences drawn by the trial court which had the advantage of hearing witnesses, observing their demeanor and making footnotes as to their credibility.

The second element in the present case subject matter of the charge was for the prosecution to proof age of the complainant. The evidence once again from **(PW1), (PW2)** and **(PW4)** informed the of the victim to be Fifteen (15) years was final and conclusive and shall not be questioned by any court or persons. **(See Francis Omuroni v Uganda CA Appeal No. 2 of 2000).** That being so, in so far age is concerned no dispute exists. The minority age of the complainant is not in dispute herein.

Lastly this court has to deal with the question relating to identification of the appellant. No doubt this was a case of recognition rather than general identification.

The incidences and threshold on identification or recognition and the position stipulated in Law is now settled as can be observed from the principles in **Abdalla Bin Wendo v R {1953} 20 EACA 156, Roria v R {1967} EA 583, R v Turnbull {1976} 3 ALL ER 549.** The evidence required for this offence on recognition must fit the guiding principle in **Simiyu v R {2005} IKLR 192,** wherein the Court of Appeal stated:

> **"In every case in which there is a question as to the identity of the accused, the fact of them having been a description given and terms of that description are matters of the highest importance of which evidence ought always to be given first of all by a person or person who gave the description and purpose to identify the accused and then the person to whom the description was given."**

In the trial of the primary suit, **(PW1), (PW2)** *and* **(PW3)** all narrate the events of the morning of the 23rd day of May, 2018, how the appellant committed the offence against the complainant. In my view the evidence of recognition of **(PW1), (PW2)** and **(PW3)** had all the hallmarks of truthful testimonies to satisfy and support the fact on recognition, in consonant with the principles in **Simiyu case (supra)**.

All the above factors put together leave no doubt that there was in view of this court an irresistible inference ordained in **Rex v Kipkering Arap Koske {1949} 16 EACA 135** that the prosecution evidence establishes beyond reasonable doubt that the facts proven with regard to the offence of incest are incompatible with the innocence of the appellant.

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 present appeal sheds lights as to how children are abused under the care and protection of the people who are supposed to protect their innocence. In that respect there is need to protect children from sexual predators. This is because there is a high possibility that they may suffer psychic or physical injury. In my view, the rationale is much broader. It is against morality for a man to have sexual intercourse with a child eighteen years and below. It is therefore for the preservation of society's sense of morality that the offence exists.

In the premises this appeal lacks merit on both facts and Law. It is hereby dismissed. The conviction is hereby affirmed.

Accordingly, the appeal is dismissed.

DATED, SIGNED AND DELIVERED AT GARSEN THIS 14TH DAY OF OCTOBER, 2021

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R. NYAKUNDI

JUDGE

In the presence of

1. Appellant

2. Mwangi