REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARSEN

CRIMINAL APPEAL NO. 13 OF 2019

PKM.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from Original Conviction and Sentence in Criminal Case No. 3 of 2019 of the Principal Magistrate's Court at Lamu Law Court-T. A Sitati, PM dated 10th May, 2019)

CORAM: Hon. Justice R. Nyakundi

The appellant in person

Mwangi for the State

J U D G M E N T

The Appellant was charged with incest contrary to Section 20(1) as read with of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on the 10th day of February, 2019 in Lamu West sub-County within Lamu County intentionally and unlawfully touched the vagina of LNK with his penis who was to his knowledge his daughter aged Eight (8) years old.

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, on the 10th day of February, in Lamu West Sub - County within Lamu County, the accused intentionally and unlawfully touched the vagina of LNK a child aged Eight (8) years with his penis.

He was charged with Count 11- Deliberate transmission of HIV Contrary to Section 26 (1) (b) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence being that on the 10th day of February, 2019 in Lamu West Sub County within Lamu County, having actual knowledge that he was infected with HIV intentionally, unlawfully and knowingly penetrated the vagina of LNK with his penis which he knew or ought to have reasonably known was likely to lead the said LNK being infected with HIV.

He was also charged with Count 111- Sexual Assault Contrary to Section 5 (1) (a) (1) (2) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence being that on the 10th day of February, 2019 in Lamu West Sub County within Lamu County intentionally and unlawfully penetrated the vagina of LNK with his fingers.

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 relying on the evidence of a single witness which was insufficient to sustain a conviction.***
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> ***2) That the learned trial magistrate erred in law and fact by relying on the Doctor's testimony which did not corroborate the minor's testimony.***
>
> ***3) That the learned trial magistrate erred in law and fact by discounting and not considering in detail my defensive evidence.***
>
> ***4) That the learned trial Magistrate erred in law by giving a harsh and excessive sentence in the circumstances of this case.***

BACKGROUND

PW1 BWK, was the victim's mother. She informed the court she lives in Hindi. She told the victim's father was deceased. That the

Appellant is the victim's adoptive father whom she married in 2013 September and they have been living together since 2013 as husband and wife. She went ahead to state that the Appellant accepted her daughter as his own. She presented the victim's birth certificate showing that she was born on the 12th day of November, 2010. She stated that she recalls that on a Sunday, the 10th day of February, 2019 at 7 a.m she got up and started to prepare breakfast and as the Appellant was getting off the bed, he received a call from a hotel that needed charcoal urgently. The Appellant washed his face and started to prepare sealing the charcoal bags after which he went to a location where the charcoal was. That he called the victim to go and help him there.

She also informed court that when he finished packing up the charcoal, he came back home at around 8:30 a.m. she wondered why he had come back alone yet he had gone with the victim and when she looked out through the window, she saw the victim coming from the direction where the charcoal had been packed up. That the victim looked sad, her eyes were sore and she looked as though she was in pain. That she wanted to ask her what the problem was but she hesitated because of the harshness and violent history of the Appellant. She further informed the court that she escorted the father to go deliver his 2 bags of charcoal and after he left, she returned to the house and found the victim lying on the seat and when she saw her coming alone, she got up. That she asked her why she did not go to her when she was screaming earlier that morning. She told the victim that she did not hear her scream and she later asked her why she was screaming. She stated that the victim disclosed to her that her adoptive father had pinned her to the ground, lifted her skirt up before inserting his male organ into her vagina. she further stated that the victim informed her that the Appellant also inserted his middle finger into her vagina. That the above acts made her scream and that the Appellant left her at the location. That she lifted her skirt up and saw her thighs smeared with sperms, that the sperms and whitish discharge were coming out of her vagina. she took a piece of cloth and wiped herself on the thighs. She told the court that she called Mrs. Rhoda Karimi who is a Nyumba Kumi elder but she did not get her since she informed her that she had gone to church. That she walked with the victim up to Gattigi where they took a bodaboda which took them to Site Clinic after reporting to Administration Police Camp who then directed them to Site Clinic. She also told the court that the Clinician at Site Clinic declined to attend to them saying that they were closed and that they did not have the equipment to check and examine her. That the Administration Police called her back to their camp alerting her that they a police vehicle that could take them to hospital. That the police vehicle took them to hospital, the doctor examined her and she was bleeding. That she then went to the Police Station and recorded her statement. She also informed court that the police went to her house and took the blood-stained piece of cloth and brought it to the station.

It was her testimony that the victim revealed to her that prior to that date, the adoptive father had been telling her how he wanted to have sex with her but she was afraid to tell her. She also said that it was the victim who picked the piece of cloth when she went with the police back to the scene. That she did not go with the police to the scene of the incident. She stated that she did not have a grudge with the Appellant except for the quarrels with him.

At **cross examination** she confirmed that she cohabited with the Appellant from 2013 and they had quarreled a number of times during that time. She also told the court that from where they lived to Kwa Gattigi point was a short distance that one cold walk. That they walked to Gattigi in an hour's time. That the victim was 8 years old.

She also confirmed that the victim's vagina did not completely rapture but she got injured in the vaginal canal. That the victim said that the Appellant did not insert the whole penis and he also inserted his middle finger. She told the court that on an earlier date, the victim disclosed that the Appellant had bought petroleum jelly which he wanted to apply on her vagina, that he said she would grow big breasts once he inserted his penis into her.

She also confirmed to court that she saw the victim's thighs dripping with a whitish discharge that looked like sperms. That the victim said she felt something like mucous go into her. It was the Doctor who detected blood in her vaginal walls. She said that the victim is the oldest of the 5 children that she has. That she has two children with the Appellant.

She also said that prior to that incident, the Appellant used to urinate shamelessly in her presence and showed her his penis. That she feared confronting the Appellant about this because of his violent nature. That the victim said that the Appellant tried severally to insert his penis into her but she feared talking about it.

She also confirmed that she was HIV positive when she was carrying the victim's pregnancy. That she was born HIV Negative. She stated that she had her clinic Book in court showing that on two medical appointments she had been tested and found to be HIV Negative.

That on the day of the Appellant's arrest, she was tested and found to be HIV Negative and they were asked to go back 3 months later to test whether she had contracted HIV. The book showed that as of 11-02-2019 the victim was HIV Negative. She further told the court that there was a woman who saw the Appellant assault the victim but the victim said that the woman was unknown to her and that she could not identify the stranger.

Upon **re-examination,** PW1 stated that the victim had intimated to her on several occasions about the Appellant's moves to have sex with her but she did not confront him as he was violent and she was fearful.

PW2 LNK, the victim was sworn in after voire dire examination. She told the court that the Appellant called her to go with him and asked her to carry strings to seal up the charcoal bags to which I obliged. She further told the court that they went with him where the charcoal heap was and gave him the strings. That he only sealed one bag and turned to him, he told her to get closer. She said that she went closer but the Appellant grabbed her and pushed her very hard to the ground. He lifted her skirt which was black in colour, the Appellant then removed her panty then inserted his male organ into her private parts.

She said that the Appellant inserted his penis briefly, she screamed loudly but no one came. That the Appellant removed and then inserted his penis into her private parts. She further said that she screamed and he let her free. That she saw him smiling at her but she was feeling pain down there. That she went home much later and told her mother about it and her mother took her to the police. She stated that she wiped herself when mucous started dripping down her thighs. She identified the piece of cloth she used to wipe herself in court. She also said that the Doctor treated her and gave her mother some treatment book which she identified in open court.

Upon **cross-examination** through her intermediary, the victim said that when the Appellant called her aside, he showed her a place in the bush where he pushed her down and that after he finished inserting his finger he walked home. That she walked by herself from the house to where the boda boda pick up point was.

PW3 Dr. Ahmed Hassan based at King Fahad Hospital. He confirmed that he had a treatment book for the victim who was aged 8 years from Bobo. He stated that a nurse one Omar Jilani prepared those Medical notes who has worked under his supervision previously. He confirmed that he had worked with him for approximately 20 years and his writing and signature were known to him. He stated that nurse Omar treated the victim by giving her post exposure profilax. That he had recorded a history of defilement by a person known to the victim and that the offender was a patient under HIV drugs. That the victim was tested and found to be HIV Negative on the 11th day of February, 2019.

He told the court that he had medical notes that he had earlier taken down for the victim on 10-02-2019. His conclusion was that the vulva was excessively red, there were lacerations on the vulva on the right side, vulva was swollen and tender and the hymen was intact. He explained to court that the vulva is the first opening before reaching the hymenal membrane which is usually a little inside. He also said that nothing penetrated beyond the hymen and that the victim felt pain on palpation on the digital examination.

He also referred the minor for Post Rape Care examination the next day. The victim was then subjected to the following tests; HVS High Vaginal Swab, HIV Negative and a Urinalysis test. He also concluded that no spermatozoa was seen, there were laceration on labias and vulva and there was minimal vaginal discharge which was not normal for a girl of her age. The Medical Treatment Notes of 10-2-2019 were produced as PExhb. 2B.

He further stated that the Appellant presented to him a genuine Comprehensive Care Centre Card for HIV patients that shows that he is a HIV patient. His finding was that the injuries on the minor were consistent with a stressful vulva event or vaginal indicative of sexual intercourse or attempted intercourse. He also concluded that the female organ's excessive redness, laceration on vulva were consistent with partial insertion of an object could not cause internal excessive redness or a lacerated vulva. The P3 Form was produced as PExhb. 3.

PW4 No. 95918 PC Pascal Malala attached to Mokowe Police Post indicated to court that he had taken over the matter from his colleague P.C Wambua. Statements had been recorded and the entire file complied.

On the 10th day of February ,2019 he was near Mokowe Police Post at around 2p.m when the office on duty at the Report office called him over and alerted him of the presence of a female complainant who was reporting a case of defilement of her daughter. That the victim narrated to him how the father had defiled her. The same was recorded in the Occurrence Book vide No. O.B No. xxxx, the victim had gone with her father earlier that day to prepare charcoal around Hindi Location and it was at this time that the father defiled the victim. That the Appellant had also inserted his fingers into her vagina while ordering her to keep silent.

He stated that P.C Wambua and himself together with the victim and the mother went to Samaritan Health Center where Dr. Ahmed Hassan attended to them. That the Doctor treated the victim ad advised further medical attention, he collected some samples and referred the victim to King Fahad Hospital. He also stated that the sexual attack was extensively recorded in the victim's statement. A P.3 Form was issued and dully filled and Treatment Notes.

He told the court that he visited the scene together with P.C Wambua and the victim pointed out the location of the charcoal site where the offence was committed. The scene was at Bobo Sub Location and there they recovered the green piece of cloth that was used to wipe her. That upon escorting the Appellant to the police Post, he disclosed that he was HIV positive and that he was under medication. He showed him his CCC Card ad asked his wife to bring him his drugs.

He also added that they proceeded to escort him to Samaritan Medical Center where Dr. Ahmed Hassan examined him and confirmed that he was a HIV Patient. The minor's birth certificate was produced as an Exhibit and it was confirmed that the minor was born on the 12 th day of November, 2010.

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 on the 22nd day of January, 2019 which was on a Sunday, he had taken his wife to her parent's home to bid farewell to her aunts and prior to that day on the immediate Tuesday preceding the Sunday, he had been summoned to his wife's parent's home but the agenda was unknown. He said that the mother-in-law asked him whether B had informed him about the other children that were at home with her parents. That his response was that she had already informed him about the boy and girl children. The girl child was living with them while the boy child was staying with her parents.

That it was at this point that his mother-in-law narrated to him that there was a second boy who was then living with his wife's grandmother. That his mother-in-law explained to him that the boy could not leave because he was useful to the home. That he agreed to take care of the boy.

He further stated that they returned to their home and the victim's mother began being wasteful, she would sell chicken and waste money. That two years ago she abandoned an infant with him and vanished for 18 months and when she came back he received her back well.

That on the 9th he took his axe and went up to cut up logs in order to burn charcoal, he instructed L to go arrange the sticks and logs in preparation for burning the charcoal. At around 2p.m he sent L to the house to bring him drinking water and by this time she had completed her task of arranging the logs into two heaps, when she came back with the water she said that his wife had already prepared lunch in the house and so they went to the house for lunch.

That as they were taking lunch, he received a call from a client who needed charcoal, he went to the charcoal heaps and the victim followed him on her own volition. At the site, he sealed the charcoal bags and took a motor cycle to deliver it to the client.

He further told the court that the next day he returned to the charcoal site and while at the site, he discovered that the strings for sealing the bags were over. That the victim went to the house and fetched a number of strings and they later returned to the house. That as he was on his way to deliver the second bunch of charcoal, he met the police who arrested him and took him to the Chief's camp. He was interviewed and was later arrested by PC Malala.

Analysis and determination

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.

In criminal cases before a trial Court one of the fundamental duty of the Court is to establish whether the burden of proof and standard of proof has been discharged beyond reasonable doubt against an accused person. The issue of proof is a matter of evidence**. In R v Subordinate Court of the First-Class Magistrate at City Hall {2006} EA 330 it was held that:**

> ***"When a person is bound to prove the existence of any fact it is the Law that the burden of proof lies on that person."***

The general provisions on the legal and evidential burden is to be found in Section 107, 108 and 109 of the Evidence Act. It is trite Law that the state or the prosecution in criminal cases has the burden of proof to prove the existence of certain facts that the accused is guilty contrary to the right on presumption of innocence under Article 50 (2) (a) of the Constitution. The state has to discharge any given issue in an offence framed against an accused to create a doubt in the mind of the Court that he cannot be entitled a right of presumption to innocence**.** ***In Woolmington v DPP {1935} AC 462 Lord Sankey stated in the following terms:***

> ***"But while the prosecution must prove the guilt of the prisoner, there is no such laid down on the prisoner to prove his innocence and it is sufficient for him to raise a doubt as to his guilt, he is not bound to satisfy the jury to his innocence. Throughout the wees of the English Criminal Law, one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoners guilty."***

Having stated that, this being a first appeal, this court has a duty to revisit the evidence that was before the trial court, reevaluate and analyse it and come to its own conclusion. Further, the court has to bear in mind that unlike the trial court, it did not have the benefit of seeing the demeanor of the witnesses and the Appellant during the trial and can therefore only rely on the evidence that is on record. See ***Okeno v R (1972) EA 32, Eric Onyango Odeng' v R (2014) eKLR.***

I have considered the grounds of appeal, the respective submissions, and the record and the only issue for determination is whether the prosecution proved its case against the Appellant.

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."***

In view of the instant case which involves a minor victim, the ingredients for the offence of Incest are: *proof of the minority age of the victim, knowledge by the Appellant/accused that the victim is his relative* and *the evidence of penetration on the victim's genitalia or indecent act.* in terms of section 2 of the Act, ***Penetration*** means "*the partial"* or complete insertion *of the genital organs* of a person into the genital *organs, of another*. In terms of the same section, ***Indecent act*** means "any contact between any part of the body of a person with the genital organs, breast or buttocks of another but does not include an act that causes penetration."

In light of the foregoing provision, it is clear that the sentence for incest is grounded upon the age of the complainant. If the complainant is an adult, that is over eighteen years old, the court has discretion to mete a sentence of imprisonment of any length not being less than ten years. If the complainant is under eighteen years of age the court has discretion to mete a sentence of up to life imprisonment.

The minority age of the complainant is not in dispute herein. Neither did the Appellant challenge the evidence tendered by the prosecution in respect of the minor's age at the time the offence was committed. As regards penetration, the evidence of **PW2** is that the Appellant grabbed her and pushed her very hard to the ground, lifted her skirt which was black in colour, he then removed her panty then inserted his male organ into her private parts, the clinical officer **PW3** who examined the minor found that the vulva was excessively red, there were lacerations on the vulva on the right side, the vulva was swollen and tender and the hymen was intact. He explained to court that the vulva is the first opening before reaching the hymenal membrane which is usually a little inside. He also said that nothing penetrated beyond the hymen and that the victim felt pain on palpation on the digital examination. He also opined that this shows evidence of penetration. I hold the view that contrary to the Appellant's view that penetration was not conclusively proof, the evidence on record is very clear that the minor was indeed penetrated.

It is notable that 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. 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 God's 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."***

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 ***Domnic 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."***

On whether the Appellant was positively identified as the perpetrator of the alleged offence, the Complainant testified that it was the Appellant who sexually violated her. Therefore, since the Appellant is someone well known to the complainant, this was a matter of recognition. The effect of recognition as opposed to the identification of a stranger is that it drastically reduces the possibility of mistaken identity.

It is important to note that 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. 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. 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. 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.

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.

Having considered and looked at the entire record and particularly the offences that the Appellant was charged with, having been charged with three counts under the sexual offences to wit incest, indecent assault and deliberate transmission of HIV, it would be prejudicial for him to defend himself in the manner in which the offences were framed. That notwithstanding, the principles upon which an appellate Court will act in exercising its discretion to review or alter a sentence imposed by the trial court were settled in the case of ***Ogolla s/o Owuor, (1954) EACA 270*** wherein the Court of Appeal stated as follows:

> ***"The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors". To this, we would add a third criterion namely, "that the sentence is manifestly excessive in view of the circumstances of the case (R - v- Shershowsky (1912) CCA 28TLR 263)."***

See also the case of ***Shadrack Kipkoech Kogo –v- R, Eldoret Criminal Appeal No.253 of 2003*** *where the Court of Appeal stated thus: -*

> ***"Sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also Sayeka –vs- R. (1989 KLR 306)"***

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. Mr. Mwangi for DPP

2. Appellant