REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 103 OF 2018

KT..APPELLANT

VERSUS

REPUBLIC...RESPONDENT

J U D G M E N T

1. KT -the Appellant herein, was an accused in Kwale Chief Magistrate's Court S.O. No. XXX of 2017 where he was charged with the offence of incest contrary to section 20 (1) of the Sexual Offences Act, No. 3 of 2006.

2. The particulars of the offence were that KT on the 27th day of July, 2017 at [particulars withheld] area in Diani location, Kwale County unlawfully and intentionally had his penis penetrate the vagina of his daughter-namely KK, a girl aged 12 years.

3. In the alternative, he was charged with the offence of indecent act with a child contrary to section 11 (1) of the Sexual Offences Act, No. 3 of 2006.

4. In count II KT was charged with the offence of sexual assault contrary to section 5 (1) (a) (i) and (ii) of the Sexual Offences Act, No. 3 of 2006.

5. Upon consideration of the evidence of the 5 prosecution witnesses and the Appellant's unsworn statement, the trial Magistrate found the Appellant guilty of the offence of incest contrary to section 20 (1) and section 5 (1) (a) (i) and (ii) of the Sexual Assault Offences Act, No. 3 of 2006 and he was convicted of the same.

6. The Appellant was convicted to serve 25 years each in count I and II to run concurrently.

7. Being aggrieved by the conviction and sentence, the Appellant preferred the appeal herein based on the amended grounds of appeal filed on 6th July, 2021 which stated:

> **i. That the learned trial Magistrate erred in law and fact in convicting the Appellant without considering that the Appellant was denied a right to fair trial contrary to Article 50 (2) (b) of the Constitution.**
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> **ii. That the learned trial Magistrate erred in law and fact in convicting the Appellant without considering that the offence of sexual assault was not proved beyond reasonable doubt.**
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> **iii. That the learned trial Magistrate erred in law and fact in convicting the Appellant without considering that charges brought against the Appellant were born out of malice and ill will.**
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> **iv. That the learned trial Magistrate erred in law and fact in convicting the Appellant without considering that penetration being an essential element in a case of defilement was not proved beyond reasonable doubt.**
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> **v. That the learned trial Magistrate erred in law and fact in convicting the Appellant without considering that the sentence meted on the Appellant was harsh, unfair, unjust, unconstitutional and unproportional to the offence committed.**

8. The prosecution's case was that PW 1 returned from her place of work and found her husband-the Appellant herein, sleeping on the same bed with her children and suspected he had defiled their 12-year old daughter. When she went to report to the brother of the Appellant, the Appellant ran away. When the Appellant's brother did not take action, she reported at the Diani Police Station where the complainant was

referred to hospital. The complainant was treated and P3 Form issued and was duly filled.

9. According to PW 1, she had earlier differed with the Appellant but they had returned to staying together prior to the Appellant defiling the child.

10. PW 2 gave an unsworn statement following a *voire dire* which had established her inability to understand the importance of giving evidence under oath. She testified that the Appellant was her father and the perpetrator of the offences for which he was being charged in court. It was her testimony that she had remained home with 2 of her younger brothers on the material day after her mother left for work. At 6:00 pm, her father came home and she prepared dinner before they all went to bed. PW 2 stated that they usually slept in one bed with her brothers and her parents slept on another bed. That after they had gone to bed, the Appellant went to their bed but she woke up and stood at a distance before going back to bed.

11. She further testified that when the Appellant went to her bed the second time, he took his private part and inserted it into her private part. It was around 8:00 pm and she shouted but the two neighbours did not respond. At around the same time, the complainant's mother returned home and found the Appellant lying on the children's bed with his short open while the complainant's green biker containing a watery discharge.

12. PW 3- Zena Mjembe, was the prosecution's third witness who worked as a Clinical Officer at Diani Health Center where the complainant was presented on 28th July, 2017 by her mother. PW 3 checked the complainant and performed tests which established that the hymen was still intact but the vagina was bruised. She recommended a DNA test and produced the P3 Form, Treatment Book and PRC Form as Prosecution exhibits 2, 3 and 4 respectively.

13. The prosecution also called a Government Analyst-George Lawrence Oguda (PW4) who produced a DNA report on analysis that had been conducted after receiving buccal swabs of the complainant and the Appellant together with the biker marked as MFI 1. According to this test, PW 4 had discovered 99.99% probability that the Appellant was the complainant's father. The analysis on the green biker confirmed that it had human semen and it had a mixed DNA profile belonging to the Appellant and the complainant.

14. Further to this, PW 5-Corporal Emma Mututa from Diani Police Station, stated that she worked at the gender desk and recalls getting a school card from Sunrise Junior Academy and taking the complainant to Msambweni hospital on 28th July, 2017. The assessment done at the hospital inferred that the complainant was 11 years old. She also applied for DNA test to confirm whether the Appellant was indeed the biological father of the complainant and received a positive match on the same. She also said that the DNA analysis established that the stains on the biker were semen that generated the DNA profile for the accused.

15. In his defence, the Appellant gave an unsworn statement and said he did not commit the offence. He stated that he went home on the material day, found the 3 children alone and asked about their mother and left them Ksh. 500/=.

16. This instant appeal was canvassed by way of written submissions of both the Appellant and the Respondent

17. The Appellant's submissions were to the effect that he was denied a right to a fair trial contrary to Article 50 (2) of the Constitution of Kenya, 2010. He submitted that on 30th of November, 2017, the prosecution amended the charge sheet but he was not informed of the right to recall PW 1 and PW 2 who had testified, contrary to section 214 of the Criminal Procedure Code. He relied in the case of **Paul Kinyanjui Kimauku v. Republic** where it was held that the Appellant was not given an opportunity to cross-examine the witness.

18. He also relied on the case of **Patrick Nyali Mwachoki v. Republic, Cr. App No. 135 of 2016** at Mombasa where it was held:

> **"In this case, the failure to give the Appellant an opportunity to cross-examine PW 1 was made by the trial court. Due to the said anomaly, it is not necessary to consider the other grounds of appeal raised herein."**

19. The Appellant also argued that he only took plea on one main count and the alternative count and that it was not clear why the trial Magistrate convicted him in the offences in the two counts and sentenced him to serve 25 years. That the trial Magistrate failed to inform him of the charge he was facing with sufficient details to answer and to be able to adduce and challenge the said evidence. That the same was a violation of his constitutional right which should make the appeal succeed. He relied in the holding in the case of **Albanus Mwasi Mutua v. Republic Cr. App No. 120 of 2004** where the Court of Appeal at Nairobi held :

> **"It is the duty of the court to enforce provisions of the Constitution and any unexplained delay should lead to an acquittal regardless of the weight of evidence available…"**

20. The Appellant further submitted that the offence of sexual assault was not proved because the complainant (PW 2) did not mention that the Appellant used his fingers to sexually assault her. In support of this position, the Appellant cited the Supreme Court of Canada in the case of **R V. Lifchus [1997] 3 SCR** 320.

21. In his further submissions, the Appellant submitted that the present case was brought out of ill-will, malice and vendetta as he had earlier differed with the complainant's mother as she used a child to settle a score. The Appellant argued that if it is true that he slept on a bed shared by three children, the other two children could have been woken up and there would have been witnesses as to what actually happened. That failure to call the two siblings of the complainant is a clear indication that the prosecution had a good intent to conceal the truth.

22. The Appellant also contended that the ingredient of penetration was an essential element in a case of defilement and ought to be proved

beyond reasonable doubt. He argued that the complainant's hymen was found to be intact and that this was a clear indication that nothing had taken place.

23. The Appellant argued that the lacerations, abrasions and bruises on the complainant were not a conclusion of defilement as they could be caused by other factors such as vigorous playing. It was his contention that the medical evidence in the P3 Form was that there was an attempted defilement and that nothing took place.

24. It was further the Appellant's argument that the biker presented for analysis was grey in colour whereas PW 2 told the court that she wore a green biker. That the government analyst report did not therefore connect him to the said offence, save that he was the father of the complainant.

25. On whether sentence was harsh and excessive, the Appellant submitted that punishment that is excessive serves neither the interest of justice nor the society. He cited the authority of **Gaston January Stephen v. Republic, Yusuf Dahar Arog v. Republic HCCR APP No. 110 of 2006, Shadrack Kipchoge Kogo v. Republic Eld Cr. App No. 253 of 2003 and S v. Scot Crossley 2008 (1) SACR at para 35.**

26. The Appellant argued that the sentence was way above the prescribed sentence in the act and does not put into consideration the rehabilitation factors. He submitted that the sentence is meant to eliminate him from society rather than reform him and is therefore offence and uncalled for.

27. The Respondent's submissions were to the effect that the prosecution in the lower court led cogent, consistent and uncontroverted evidence that met the required threshold of proof beyond reasonable doubt. It was submitted that there was no dispute that the complainant was the Appellant's daughter. The Respondent submitted that partial penetration was proved and that the essential ingredients of incest were not contested at all.

28. Regarding the grounds of appeal, it was submitted that failure to recall PW 1 did not occasion prejudice or miscarriage of justice to the Appellant. That the Appellant did not lay any basis for the recall of the witness. Further, that when the charge was amended and there was change of the trial Magistrate, section 200 (3) of the Criminal Procedure Code was relied with and the Appellant elected to proceed with the matter with where it had reached.

29. The Respondent conceded that the offence of sexual assault was not proved as it was only mentioned by the Clinical Officer but not the complainant.

30. On whether the charge was brought out of ill-will, malice or vendetta, the Respondent submitted that there was no malice on the part of the witnesses and nothing was brought to fore in the evidence that could demonstrate malice.

31. On the ground that penetration was not proved, the Respondent submitted that medical evidence confirmed partial penetration due to bruises and lacerations on the genitalia. That semen found on the complainant's clothes was established to match the DNA profile of the complainant. The case of **HKK v. Republic (2017) eKLR** was cited in proving that the elements of incest had been proved beyond reasonable doubt.

32. On sentence, the Respondents argued that the sentence was lenient as the accused ought to have been sentenced to life imprisonment. The court was urged to uphold the conviction and sentence in count I and set aside the conviction and sentence in count II.

33. This being the first appellate court, I am guided by the principles in **David Njuguna Wairimu v Republic [2010] eKLR** where the court of appeal held:-

> **"The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellant court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions."**

34. Based on the re-evaluation of the evidence and judgment in the trial court as well as the grounds of appeal and the submissions by the respective parties, the following issues arise for determination:

i. Whether the conviction of the Appellant was contrary to Article 50 (2) (b) of the Constitution.

ii. Whether the offence of sexual assault was not proved beyond reasonable doubt.

iii. Whether charges brought against the Appellant were born out of malice and ill will.

iv. Whether the ingredients of the offence of defilement were proved beyond reasonable doubt.

v. **Whether the sentence meted on the Appellant was harsh, unfair, unjust, unconstitutional and unproportional to the offence committed**.

35. In the initial charge, the age of the complainant was indicated as 9 years. Subsequently, on 30th November, 2017, the charge sheet was

amended and the age of the complainant amended to 12 years. However, when the amended charge sheet was read to the Appellant, the second count of sexual assault and its particulars were not read out to him. The Appellant pleaded not guilty in the initial charge and the complainant and her mother testified as to the age of the complainant as 12 years and exhibit 8-the school report, shows that the complainant was in standard 1 and the patient's record book indicated that she was 12 years as at 28th July, 2017. The P3 Form and the PRC Form also give the age of the complainant as 12 years and age assessment done at Msambweni District Hospital approximated the complainant's age as 11 years.

36. PW 1 and PW 2 having testified in respect to the offence of incest prior to the amendment of the charge sheet and their evidence not being inconsistent with the amended charge, it was not necessary to recall them. The Appellant had the opportunity to cross-examine PW 1 and PW 2 and this court finds that no prejudice or miscarriage of justice was occasioned and there was no breach to Article 50 (2) (b) of the Constitution of Kenya, 2010.

37. This court agrees with the Appellant that not having pleaded to the second count in the amended charge sheet and no evidence having been adduced to prove the offence of sexual assault as conceded by the Respondent, the trial magistrate erroneously found that the Appellant was guilty of an offence to which no plea was taken.

38. Whether the charge against the Appellant was brought out of malice, ill will or vendetta, the evidence by the complainant's mother was that she was married to the Appellant. She said that they had earlier differed but they started staying again and that they were together at the time of the act. The Appellant in his unsworn statement, stated that he and PW 1 were divorced. In this regard, this court fails to find demonstration of the particulars of malice alluded to by the Appellant. The Appellant had opportunity to cross-examine the complainant who is his daughter and he did not raise the allegations that PW 1 used the complainant to settle a score. He cannot raise it on appeal.

39. The complainant underwent medical examination and PW 3- Zena Mjembe, the Clinical Officer at Diani Health Center established that although her hymen was intact, she had a bruised genitalia and that her biker was stained with semen. She said the lacerations were still fresh. If it was true that the complainant was used by the mother to settle a score, the injuries observed in the complainant's genitalia would not have been there.

40. There was also the evidence of PW 4-the Government Analyst, who conducted a DNA analysis on the biker belonging to the complainant and he found human semen on the biker which generated a DNA profile that matched the Appellant and the child in question.

41. In conclusion, the evidence of the complainant, the Clinical Officer and the Government Analyst proves beyond reasonable doubt that the Appellant defiled the complainant and that the charge was not brought against him as a result of ill-will, malice and vendetta on the part of PW 1.

42. Section 20 (1) of the Sexual Offences Act provides that:

> **‘ 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 of a term not less than 10 years;**
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> > **provided that if it is alleged in the information or charge and proved that the female person is under the age of 18 years, the accused person shall be liable to imprisonment to 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. ”

43. The Appellant was sentenced to serve 25 years imprisonment which was far below the mandatory life imprisonment. The sentence was therefore not harsh and excessive as claimed. However, in consideration that it appears he was not released on bond during trial, this court orders that his sentence of 25 years imprisonment will run from 1st August, 2017 when he was arraigned in court.

44. In conclusion, the Appellant's appeal succeeds partially. The conviction in the second count is quashed and sentence set aside. The appeal against conviction and sentence for the offence of incest contrary to section 20 (1) of the Sexual Offences Act, No. 3 of 2006 in count 1 is dismissed. The conviction and sentence are upheld. The Appellant may appeal against this judgment within 14 days.

45. Orders accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 11TH DAY OF NOVEMBER, 2021

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of:-

OGWEL- COURT ASSISTANT

APPELLANT PRESENT IN PERSON

MS. KAMBAGA FOR THE RESPONDENT

Hon. Lady Justice A. ONG'INJO

Judge