REPUBLIC OF KENYA

IN THE HIGH COURT

AT KITUI

HIGH COURT CRIMINAL APPEAL CASE NO. 7 OF 2017

MK.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

Being an Appeal from the Judgement delivered vide Kitui CM's Court

Criminal (Sexual Offence) Case No. 49 of 2013 delivered on 2nd February, 2017.

J U D G E M E N T

1. **MK**, the Appellant herein, was charged with the offence of incest contrary to ***Section 20(1) of the Sexual Offence*** **Act No. 3 of 2006, vide Kitui CM's Court Sexual Offence Case No. 49 of 2013.**

The particulars presented as per the charge sheet were that on 13th October 2013 at [Particulars Withheld] village, Katulani within Kitui County, the Appellant defiled his own daughter (name withheld) a child aged 11 years.

2. The Appellant was found guilty after trial and convicted. He was sentenced to serve life imprisonment.

3. The prosecution's case was mainly based on the victim's testimony to the trial court and the medical evidence tendered by Dr. Patrick Mutuku (PW3). The victim (PW1) testified that the Appellant called her out while asleep on 13.10.2013 and defiled her on the nearby garden. Evidence was further given by MK (PW2), a cousin to the Appellant who testified, that the incident of defilement on 13th October 2013 was not an isolated one as the minor had confided to him that the Appellant had repeatedly defiled her in the past.

4. The medical evidence of Dr. Patrick Mutuku (PW3) corroborated the evidence of PW2. The doctor giving evidence on behalf of Dr. Christopher Wahinya who authored the P3 after examining the victim, testified that the victim had been defiled and showed a history of repeated defilement.

He tendered P3 form as P Ex 1 which indicated that the victim's hymen was broken. The doctor also tendered age assessment report (P Ex 4) indicating that the child was aged 12 years as at 14.03.2014 when assessment was done meaning that when she was defiled, she was 11 years old.

The doctor also tendered PCR form (Ex 2) which also indicated that the girl had been defiled repeatedly.

5. When placed in his defence, the Appellant denied committing the offence and instead blamed his brother's wife for framing him because he had demanded his iron sheets back. He accused her for lying against him.

6. The trial court upon evaluation of the prosecution's evidence tendered found that the Appellant was guilty as charged.

7. The Appellant felt aggrieved and lodged this appeal raising the following grounds namely: -

(i) That the learned trial magistrate erred in both law and facts when it convicted him on hearsay.

(ii) That the learned trial magistrate erred in both law and facts by accepting the evidence of PW1 who was coerced during hearing to give a false information.

(iii) That the learned trial magistrate erred in both law and facts by convicting him without understanding that the case was not proved beyond reasonable standards.

(iv) That the trial magistrate erred in both law and facts by reaching a wrong decision without observing that this case was not fairly done, that trial magistrate was impressed by prosecution than defence.

8. In his written submissions, the appellant has raised additional grounds albeit without leave of this court under ***Section 350 (2) (v) of Criminal Procedure Code*** which provides: -

> ***''Notice in writing of an application for leave to amend a petition of appeal shall be given to the Register of the High Court and to the Attorney-General not less than three clear days, or such shorter period as the High Court may in any particular case allow, before the applications is made; and an application for leave to amend a petition of appeal shall be made either at the hearing of the appeal or, if made previously, by way of motion in open court.''***

9. As correctly pointed out by the Respondent, the additional grounds are incompetently raised because no leave was sought and will therefore not form of my consideration in this appeal.

10. The appellant submits that penetration was not proved by the prosecution's case because in his view, there were no physical injuries on the Complainant's genitals and there was no active bleeding when she was examined.

11. He further claims that the age of the victim was not also proven. According to the appellant, there was inconsistency as the Complainant stated that she was 11 years while the age assessment report indicated that she was 12 years old. He asserts that the doctor who assessed the age was not a dentist. He submits that his request to recall PW1 was not granted thus rendering the trial unfair.

12. The Respondent has opposed this appeal through its written submissions dated 15.07.2021. The Respondent submits that their case at the trial court proved beyond doubt the Appellant committed incest. It avers that penetration was proved by the evidence of the Complainant (PW1) and the medical evidence adduced through by Dr. Mutuku (PW3).

13. The Respondent contends that the Appellant was not prejudiced by unavailability of the complainant when she was to be recalled stating that he had the opportunity to cross examine her when she initially testified.

14. This court has considered this appeal and the response made. The work of this court as a first appellate was well illustrated in the case of ***Okero Versus Republic [1972] EA32*** where the Court of Appeal held;

> ***''An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya versus Republic (1957) EA 336) and to the Appellate Court's own decision on the evidence. The first Appellate court must itself weigh conflicting evidence and draw its own conclusions. (Ruwalla versus Republic (1957) EA 570). It is not the function of a first Appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions. It must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.''***

15. The Appellant was as I have observed above was charged with incest contrary to ***Section 20 (i) of Sexual Offence Act*** which provides;

> ***'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.''***

16. To establish a charge of incest, the prosecution is required to prove the following elements: -

(i) The victim must be a female person who is related to the perpetrator and the perpetrator had knowledge of the same.

(ii) An indecent act or an act which causes penetration.

17. To begin with the first ingredient, there is no doubt that the Complainant was a daughter to the Appellant. She told the trial court that the Appellant was her father and the Appellant did not controvert that fact in cross examination. In fact, the issue was uncontested both at the trial and in this appeal. The appellant conceded that fact even in his own defence when he stated that his brother's wife (sister in law), had lied that he had defiled his own daughter. This court therefore finds that the aspect of relationship between the Appellant and the victim was proved beyond doubt. He was the father to the victim.

18. The Appellant claims that he was framed by his sister in law but this court finds that there was no evidence to prove that fact because that sister in law in fact was not called as a witness. So the trial court did not base the conviction of the Appellant on her evidence.

19. On the question of penetration, this court is not persuaded by the Appellant's argument that mere absence of lacerations or any injuries on the victim's genitalia is sufficient prove that there was no penetration. The medical evidence presented by Dr. Patrick Mutuku to wit P3 form (Ex 1), and PRC form (Ex 2) corroborated the evidence of the Complainant (PW1) that she had been defiled. The conclusion made by the doctor that the minor had been repeatedly defiled was reached after the Complainant was taken through tests. The doctor told the trial court

the results of tests conducted revealed that the victim's hymen had been broken and that the victim had been sexually violated severally though there were no physical injuries noted as the vagina or active bleedings noted. This court is satisfied based on the evidence tendered that the trial court reached the correct conclusion that penetration had been proved beyond doubt.

20. On the question of age, there is no doubt that the same was also clearly established. The appellant claims there was some inconsistency because the child stated she was 11 years old while the age assessment report (Ex. 4) indicated that she was 12 years old. However, this court upon re-evaluation of the same, finds no inconsistency. The girl was assessed on 14/3/2014, while she was defiled in 2013 which means that when she was defiled, she was 11 years old.

In any event, the provisions of ***Section 20 (1) of Sexual Offence*** Act provides that anyone committing incest with a girl aged 18 years and below will upon conviction is liable to life imprisonment, ***Section 20 (1)*** states: -

> ***''Provided that, if it is alleged in the information or charge and proved 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.''(emphasis added).***

21. The Appellant has also raised an issue regarding his right to a fair trial stating that the complainant was not recalled after he applied to have the trial to start *de novo.*

22. This court has gone through the proceedings from the trial court and finds that the Appellant may have instigated disappearance of the complainant to cover the crime committed against the minor. The basis is for this conclusion is that the Investigating Officer PC Joram Gichuhi (PW4) when he testified stated in part;

> ***''I have been trying to bond the witnesses but since the time it was said that the accused person defiled the victim, the parents of the accused person chased away the accused person's wife with the child… The mother of the child (accused person's wife) was a witness but I never found her for bonding after she was sent away. I have been trying to trace her and the victim but in vain since her whereabouts is not known….''***

23. It was on the basis of the above frustrations that the prosecution applied under ***Section 34 of Evidence Act*** to admit the evidence that had earlier been tendered. The provision of ***Section 34 of Evidence Act*** provides: -

> ***''Evidence given by a witness in a judicial proceeding is admissible in a subsequent judicial proceedings or at a later stage in the same proceeding, for the purpose of proving the facts which it states, in the following circumstances-***
>
> ***a) Where the witness is dead, or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or where his presence cannot be obtained without an amount of delay or expense which in the circumstances of the case the court considers unreasonable.''***

24. This court finds that the Appellant suffered no prejudice at all by the courts action to admit the previous evidence given in court. The Appellant cross-examined the complainant fully and therefore had the opportunity to challenge the evidence or the veracity of the said evidence. He cannot engineer the disappearance of a witness and expect to benefit from the wrongful act. The evidence given initially by the complainant was admissible and the trial court was in order to admit the same.

25. In ***Abdi Adan Mohamed versus Republic [2017]***, the court made the following relevant observation's: -

> ***''Was Section 34 aforesaid intended to supply the evidence envisaged by Section 200 so that upon a magistrate who succeeds another who has partly heard a case can rely on the earlier recorded evidence it is demonstrated that the witness sought to be re-called for the reasons, among others that the witness is dead?***
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> ***Where, in the language of Section 200(3) the accused demands that any witness be ''re-summoned and re-heard'' the demand must be subject to availability of the witnesses sought to be re-summoned. It, of course, will be impractical where it is demonstrated that the witness sought to be re-summoned is deceased, to insist on calling such a witness. Similarly, if a witness cannot be traced and it is demonstrated to the satisfaction of the court that efforts to trace him have failed, the magistrate or judge may adopt and rely on the evidence on record previously recorded by the outgoing magistrate or judge. That is why in demanding the re-summoning of any witness the accused person must do so in good faith.***
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> ***The language of Section 34 is wide enough to encompass situation where the witness who had already testified is dead or cannot be found, or is incapable of giving evidence, or is prevented by the accused person from attending court, or where his presence cannot be obtained without an amount of delay or expense which in all fairness would be unreasonable.''***

26. From the foregoing this court finds that the Prosecution's case was proved beyond reasonable doubt. The Appellant defiled his own daughter who was aged 11 years. That means he took advantage of the girl's tender age to commit the heinous crime against her. The Law cited above, provides that anyone committing incest with a person below 18 years is liable to be imprisoned for life. The trial court was therefore, in order to send him in for life owing the seriousness of the crime he committed. The sentence was commensurate with the offence committed.

From the foregoing, this court finds no merit in this appeal. The same is dismissed. The conviction and sentence are upheld.

DATED, SIGNED AND DELIVERED AT KITUI THIS 9TH DAY OF NOVEMBER, 2021.

HON. JUSTICE R. K. LIMO

JUDGE