



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CRIMINAL APPEAL NO. 15 OF 2019**

**OSM.....APPELANT**

**-V/S-**

**REPUBLIC.....RESPONDENT**

**(Being an appeal against the decision by Hon. D. Odhiambo,**

**Resident Magistrate on 8<sup>th</sup> November 2018 in Shanzu S. O.**

**Case No. 6 of 2018, *Republic v Omari Samini Mkangi*).**

**JUDGMENT**

**Background**

1. OSM was charged with the offence of incest contrary to Section 20(1) of the Sexual Offences Act No. 3 of 2006. The particulars are that OSM on diverse dates between 1<sup>st</sup> December 2017 and 31<sup>st</sup> December 2017 at [particulars withheld], Bamburi Location in Kisauni sub-county within Mombasa County, being a male person caused his penis to penetrate the vagina of NR. a female child aged 15 years who was to his knowledge his granddaughter.

2. In Count Two, OSM was charged with the offence of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006. The particulars are that OSM on diverse dates between 1<sup>st</sup> December 2017 and 31<sup>st</sup> December 2017 at [particulars withheld], Bamburi Location in Kisauni sub-county within Mombasa County, intentionally touched the vagina of NR. a female child aged 15 years with his penis.

3. The trial magistrate considered the evidence of five prosecution witnesses and found that the prosecution established a prima facie case for the accused to be put on his defence. The accused then gave sworn evidence and did not call any other witnesses. The trial magistrate convicted the accused under Section 215 of the Criminal Procedure Code of the offence of incest contrary to Section 20 (1) of the Sexual Offences Act. The accused was then sentenced to 20 years in prison.

4. The appellant was aggrieved and dissatisfied by the decision of the trial court preferred the appeal herein on the following amended grounds:-

1) That the learned trial magistrate erred in law and fact by finding the conviction safe relying heavily on a defective charge sheet.

a. That the charges are in dispute with the evidence adduced

b. That there was non-compliance with Section 214 of the CPC

2) That the learned trial magistrate erred in law and fact by convicting the appellant to serve sentence of 20 years imprisonment relying on an irregular and illegal procedural conduct that cannot be cured under Section 382 of the CPC.

a. That the trial court record is silent during trial by the key witness (PW1).

b. That the court coram does not express regular and proper entry of coram to allow regular and legal procedural conduct that can be cured under Section 382 of the CPC

3) That the learned trial magistrate erred in law and fact to allow unsafe conviction to the appellant without clear consideration that evidence was contradictory and reflect clear fabrication due to its version of evidence adduced.

4) That the learned trial magistrate erred in law and fact by failing to consider that the accused is a first offender.

5. This appeal was canvassed by way of written submissions.

### **Prosecution's Case**

6. PW1, gave a sworn statement and said that on diverse dates in December 2017, she used to stay with her grandfather who is the accused. He told her to take him to Mitsajani at night because there was a music meeting. PW1 said that when they were going back home at 9.00 pm, the accused told her that he loved her and pushed her down on the road, removed her clothes and panties, removed his clothes and warned her not to say anything. PW1 said that the accused took his penis and put it in her vagina. She felt pain and blood was coming out. The accused warned her not to tell anybody and she did not tell anybody. The following day, the accused asked PW1 to take him to Colorado at 2.00 pm. The accused again grabbed her and took her to the bush, removed his clothes, took his penis, and put it in her vagina. She did not tell anyone. PW1 said that the 3<sup>rd</sup> time, he called her to his house, removed his clothes and put his penis into her vagina. PW1 started feeling pain. She told her father and uncle where she was taken to hospital. They reported to the chief and they were told to go to the police. PW1 says she did not know him very well until December 2017.

7. PW2, RAK said the complainant is his daughter. He said on 4.1.2018, his daughter slept up to late in the morning. She had gone to visit her grandfather during the school holidays. PW2 asked her what was wrong and she told him that the accused had asked her to accompany him to a meeting. PW2 said that PW1 told him that the accused had threatened her with a knife and had sex with her. On the 2<sup>nd</sup> day, PW1 and the accused went to Colorado and the accused again asked her to remove her clothes as he pushed her down. Again the accused timed when they were alone in the room and had sex with her again. PW2 said that PW1 was taken to Coast General Hospital where they were given a P3 form and PRC form which were produced as exhibits MFI-1 and MFI-2 respectively. PW2 was given the medical examination report. The chief gave them a letter and directed them to Kiembeni Police Station. PW2 said that it was the 1<sup>st</sup> time the Complainant was visiting the accused.

8. PW3, Dr. Majda Hassan a medical officer at Coast General Hospital said that he had a P3 form filled on 4.1.2017 for the Complainant who is aged 15 years old alleged to have been sexually assaulted by someone known to her. The P3 form was filled at Kiembeni Police station. PW3 said that the Complainant was attended to by Dr. Fatuma Said at Coast General Hospital. He said that he had worked with the doctor and can identify her signature. The patient was defiled 3 times. The age of the injuries are about one month old, a blunt object was likely used and the degree of injury is maim. HIV and hepatitis tests were done and they turned out negative. The hymen was broken with old scar. Outer genitalia was normal with menstrual bleeding from the vagina. PW3 produced the P3 and PRC forms as exhibits. The PRC form was filled on 5.1.2018. The doctor examined the patient on 15.1.2018 by Saida Mwinyi who is a nurse. The hymen was broken with an old scar which was healing. No treatment was given.

9. PW4, Thomas Levanabi Dzuya, a security guard with Wells Fargo says that on 4.1.2018 at 10 am, he was at home Bwagamoyo, Rabai with the whole family. PW4 found PW1 and PW2. PW1 his niece looked like she was not settled. And she told him that there was a time PW4 asked what was bothering her and she said that there was a time in December 2017 when she had left with her grandfather who was going to attend a traditional dance. After the meeting while they were coming back at 8 pm, he turned back on her and told her that he wanted to sleep with her. PW4 said that PW1 told him that the accused threatened her and had sex with her. PW4 went to the area chief and they proceeded to Kiembeni Police Station.

10. PW5, No. 71214 CPL Reuben Mwinyi attached to Kiembeni Police Station for investigations. He said that he took the case over from PC Elizabeth Kanze. PW5 said that on 4.1.2018 the victim was taken to the station for having been defiled by her grandfather who had sex with her on three different occasion and threatened her not to tell anyone or else he would eat her. They took her statement and took her to the hospital. P3 and the PRC forms were both filled at Coast General Hospital. They also got a clinic card for the Complainant MFI-3 and produced as Exhibit 3. They arrested the accused at his home and took him to the station and charged him in court.

### **Defence Case**

11. DW1, OSM gave sworn statement and said that on that day, he went back at 5pm. At around 9pm, he heard a knock on his door. The people asked to see him. He got out and greeted them. They said they wanted him. He was then arrested and taken to Kiembeni Police Station. He was then brought to court. He did not know what he had done. He was brought to court because he had problems with his son in law. He was not at peace with his wife. They used to fight. DW1 does not know why he was charged in court.

### **Appellant's Submissions**

12. The Appellant submits that the charge sheet was irregular in that it fails to comply with Section 214 of C.P.C. That the charge sheet demonstrates that PW1 minor N.R. was defiled on diverse dates between 1<sup>st</sup> December 2017 and 31<sup>st</sup> December 2017. The evidence of PW1 states that she was defiled 3 times in December 2017 at Mitsajuni Colorado, and at home which are three different scenes. The Appellant submits that there was no amendment of the charge sheet in accordance with Section 214 of the CPC.

13. The Appellant submits that the trial court record is silent on the language used during trial. That the language used by the complainant before and after being sworn in, and while giving her evidence before court is in doubt, bearing in mind that there was no interpreter. The Appellant cited the case of *Kiyato v Republic* (1982-88) KAR.418 where the Court of Appeal held that since Kiyato had not been provided with an interpreter contrary to Section 77(2) of the Constitution, his appeal would be allowed... The Appellant also cited the case of *Swahibu Simbani Simiyu & Another v Republic*, Criminal Appeal No. 243 of 2005 (Unreported) where the Court of Appeal held that since section 77(2) of the Constitution requires that ...every person who is charged with a criminal offence A...B shall be informed as soon as reasonably

practicable in a language that he understands and in details, of the nature with which he is charge... and since the record of the magistrate did not show the language used by the two appellants there was a violation of the appellant's constitutional rights under the foregoing section and the appeal was allowed.

14. The Appellant submits that it is important to set out questions and answers while deciding on whether a child of tender years understands the nature of an oath so that the appellate court is able to decide whether the matter was rightly decided. The Appellant submits by citing the case of *Republic v Campbell* [1982] where the Court of Appeal in England held that "If the girl (10 years) had given unsworn evidence then corroboration of those issues was an essential requisite. If she gave sworn evidence, there was no requirement that her evidence had to be corroborated but the jury had to be directed that it will not be safe to convict unless there is corroboration." The Appellant further cited the case of *Republic v Lal Khan* [1981] 73 Cr. App. 190 which made it clear that the questions put to a child must appear on the shorthand note... Justice Bridge said, "The important consideration... when a judge has to decide whether a child has sufficient appreciation of the solemnity of the occasion and the added responsibility of telling the truth which is an ordinary duty of normal social conduct." The Appellant submits that Section 19 of the Oath and Statutory Declaration Act deals with reception of evidence of children of tender years by court or any adjudication authority.

15. The Appellant submits that there was great contradiction in that the incident took place at Mitsajini at 9.00 pm in December 2017 and that the Complainant did not know the accused very well until 2017. This is expressed at page 4 paragraph 9 and 19 of the trial proceedings. However, the same was not corroborated with the evidence of other witnesses who failed to disclose the age, class and school that the minor went to.

16. The Appellant submits that the trial magistrate in determination came to the finding that there was proof of penetration. However, the Appellant submits that it is not easy to believe that there was penetration or not and that it is safe to any legal mind to believe that in the current generation, it is easy for a minor to lie. Further, it is also the current generation where children know more than their age.

17. The Appellant submits that this appeal be allowed, that he is remorseful and prays for leniency and that the prosecution case is doubtful in the manner in which the trial was conducted and therefore the findings were unsafe. The Appellant prays for the appeal to have merit.

### **Respondent's Submissions**

18. The Respondent submits by quoting Section 20 (1) of the SOA which provides that:- *(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 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.*

19. The Respondent submits that to establish a case under the above section, the Prosecution must prove the elements of the offence. For instance, there must be an indecent act or an act which causes penetration. Further, the victim must be a female person who is to his knowledge his daughter, sister, mother, niece, aunt or grandmother.

20. The Respondent submits that the evidence established that the complainant is a female person within the above definition and that the appellant is her grandfather and that the appellant knew her to be his granddaughter. Further that the evidence adduced established the act of penetration. These basic truths which are essential ingredients of the offence of incest were not contested at all.

21. The Respondent submits that in summary, the Respondent's response to the grounds of appeal are as follows:-

1. Charge-sheet was not defective since the evidence adduced is compatible with the charge. Section 134 CPC provides as follow

"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged." In this instance the charge as drawn contains a statement of a specific offence, namely incest, and the particulars given were sufficient to inform the Appellant that the offence was committed on diverse dates in December 2017. The fact that the minor testified about 3 incidents of incest in December does not make the charge sheet defective or inconsistent with the estimated age of injury being 1 month since she went to hospital in January.

2. The court coram when PW1 testified was proper as evidenced at page 3 line 12 to line 25 of the typed proceedings. With regard to failure to record the language used by PW1; the Respondent submits that the accused person cross examined the witness meaning that they understood each other. Therefore the same is curable under Section 382 of the Criminal Procedure Code since he suffered no prejudice.

3. There was no contradiction in the prosecution's case. The evidence was consistent and unshaken during cross-examination.

4. The Court considered the accused person's mitigation and sentenced him to a lenient sentence of 20 years considering the age of the complainant in consonance with Section 8 (3) of the Sexual Offences Act as guided by the courts decision in *SK v Rep* [2016] eKLR. It should be noted that under Section 20 (1) of the S.O.A the maximum sentence is life imprisonment where the minor is under the age of eighteen years.

22. The Respondent submits that the trial court rightly found that the evidence proved the case beyond reasonable doubt. Therefore the conviction was safe and the sentence of 20 years was not only lawful but also lenient. The evidence was overwhelming showing that the appellant did an abhorred act to his own granddaughter.

23. The Respondent submits by urging the Honourable Court not to interfere with the conviction and sentence meted by the learned trial magistrate and find that the appeal lacks merit thereby dismiss it.

#### **Analysis and Determination**

24. 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.”**

25. After considering the grounds of appeal, Records of the trial court, submissions and circumstances of the case, the issues for determination are as follows:-

- i. Whether the charge sheet was defective
- ii. Whether the trial court was silent on the language used during trial and whether there was regular and proper entry of coram
- iii. Whether the complainant as a child of tender years understood the nature of oath
- iv. Whether there was contradictory evidence and a clear reflection of fabrication
- v. Whether the court considered that the accused is a first offender

#### **Whether the charge sheet was defective**

26. The Appellant submitted that the charge sheet was irregular in that it fails to comply with Section 214 of C.P.C. That the charge sheet demonstrates that PW1 minor N.R. was defiled on diverse dates between 1<sup>st</sup> December 2017 and 31<sup>st</sup> December 2017. The evidence of PW1 states that she was defiled 3 times in December 2017. However, the Respondent submitted that the charge as drawn contains a statement of a specific offence, namely incest, and the particulars given were sufficient to inform the Appellant that the offence was committed on diverse dates in December 2017. The fact that the minor testified about 3 incidents of incest in December does not make the charge sheet defective.

27. In the case of **Isaac Omambia v Republic [1995] eKLR**, the court held that:-

**“In this regard, it is pertinent to draw attention to the following provisions of S. 134 of the Criminal Procedure Code which makes particulars of a charge an integral part of the charge: Every charge or information shall contain, and shall be sufficient if it contains a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence.”**

28. The Court of Appeal in **Peter Ngure Mwangi v Republic [2014] eKLR**, quoted the **Isaac Omambia case** with approval and further stated that:-

**“A charge can also be defective if it is in variance with the evidence adduced in its support. Quoting with approval from Archbold, Criminal Pleading, Evidence and Practice (40th Edn), page 52 paragraph 53, this Court stated in YONGO v R, [198] eKLR that:-**

**“In England it has been said: An indictment is defective not only when it is bad on the face of it, but also:-**

**(i) when it does not accord with the evidence before the committing magistrates either because of inaccuracies or deficiencies in the indictment or because the indictment charges offences not disclosed in that evidence or fails to charge an offence which is disclosed therein,**

**(ii) when for such reason it does not accord with the evidence given at the trial.”**

29. From the foregoing, this court finds that the charge sheet was properly drawn as it contains the statement and particulars of the offence. Additionally, the evidence adduced by the five prosecution witnesses was in support of the said offence. Therefore, the Appellant's ground of appeal that the conviction relied heavily on a defective charge sheet where the charges are inconsistent with the evidence adduced and that there was non-compliance with Section 214 of the CPC is unsubstantiated and is therefore dismissed.

#### **Whether the trial court was silent on the language used during trial**

30. The Appellant submitted that the trial court record is silent on the language used during the trial and it is in doubt the language used by

the complainant (minor) before and after being sworn in and while giving her evidence before court bearing in mind the absence of an interpreter. The Respondent submitted that the Appellant cross-examined the witness meaning they understood each other. Therefore, the same is curable under Section 382 of the Criminal Procedure Code since he suffered no prejudice.

31. Section 198 (4) of the CPC provides:-

**(4) The language of the High Court shall be English, and the language of the subordinate court shall be English or Swahili.**

32. In the case of *Hawo Ibrahim v Republic* [2016] eKLR, it was held that:-

**“...the burden is on the trial court itself to show that an accused person has himself selected the language which he wishes to speak and in which proceedings are to be interpreted to him. These are not procedural technicalities and the trial court ought to demonstrate compliance by showing on the face of the record the language the accused has chosen to speak.”**

33. On page 1 of the proceedings, the language used in court was recoded as English/Kiswahili-Kiswahili. The substance of the charge(s) and every element thereof was stated by the court to the accused person in the language that he/she understood. When PW1 testified, the Appellant cross examined her. All the other witnesses including the Appellant himself testified in Kiswahili. Therefore, the trial court recorded the language used in the court coram. The Appellant cannot deny that he did not understand the language of the court when he participated in the trial all along. Additionally, the Appellant did not raise any issue on the language of the court and the need for interpretation during trial.

#### **Whether the complainant as a child of tender years understood the nature of oath**

34. The Appellant submitted that the trial court failed to record the finding on whether or not PW1 understood the meaning of oath and whether or not she possessed sufficient intelligence and understood the duty of telling the truth before she was allowed to testify. The Appellant further submitted by stating Section 19 of the Oaths and Statutory Declarations Act which deals with reception of evidence of children of tender years by court in respect to *voire dire* examination.

35. *Voire dire* examination is conducted on children of tender years. **Section 2** of the **Children Act** defines children of tender years as children below 10 years. PW1 in her testimony stated that she is 15 years old. Further, the court stated on page 4 of the typed proceedings that the minor understands the duty of saying the truth and can be sworn in. This is sufficient proof that the complainant was not a child of tender years and understood the nature of oath.

#### **Whether there was contradictory evidence and a clear reflection of fabrication**

36. The Appellant submitted that there was great contradiction in the matter as the Complainant stated that the incident took place in Mitsajini at 9.00 pm in December 2017 and that the Complainant did not know the accused very well until 2017. When PW2 testified, she failed to confirm the age and where her child went to school. PW4 confirmed that PW1 was 16 years old and in standard six. That the investigating officer also failed to demonstrate on his evidence the age, class and school of the minor which rendered the evidence of the witnesses to be shallow and contradictory. The Respondent submitted that there was no contradiction in the prosecution's case. The evidence was consistent and unshaken during cross examination.

37. The holding in Uganda Court of Appeal in *Twehangane Alfred v Uganda, Crim. App. No 139 of 2001, [2003] UGCA, 6* quoted with approval by the Court of Appeal of Kenya in *Erick Onyango Ondeng' v Republic* [2014] eKLR. The Uganda Court of Appeal held:-

**“With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case.”**

38. The contradiction on whether the Complainant was a minor aged 15 years old in standard 7 or 16 years old in standard 6, or where the complainant went to school are minor contradictions that do not in any way affect the ingredients of the offence of incest contrary to Section 20 (1) of the Sexual Offences Act. The prosecution proved its case beyond reasonable doubt.

#### **Whether the court considered that the accused is a first offender**

39. **Section 20 (1)** of the **Sexual offences Act** under which the Appellant was charged states:-

**(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 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.**

40. The trial court considered the Appellant's mitigation and sentenced him to a lenient sentence of 20 years in prison where the Appellant would have been liable to mandatory imprisonment for life considering that the Complainant was under the age of eighteen years.

41. In conclusion, this court finds that the appeal lacks merit and is thereby dismissed. The conviction and sentence by the trial court is upheld. Right of appeal of 14 days explained to the Appellant.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS, THIS 9<sup>TH</sup> DAY OF DECEMBER 2021**

**HON. LADY JUSTICE A. ONG'INJO**

**JUDGE**

**In the presence of:-**

Turuki- Court Assistant

Ms. Karanja for the Respondent

Appellant present in person

**HON. LADY JUSTICE A. ONG'INJO**

**JUDGE**