IN THE HIGH COURT OF KENYA AT KIAMBU

CORAM: D. S. MAJANJA J.

CRIMINAL APPEAL NO. 62 OF 2019

BETWEEN

FMM..............................APPELLANT

AND

REPUBLIC............... RESPONDENT

(Being an appeal against the original conviction and sentence dated 16th August 2018 in Criminal Case No. 198 of 2016 at Limuru Magistrates Court before Hon. K.M. Njalale, SRM)

JUDGMENT

1. The appellant, **FMM**, was charged, convicted and sentenced to 25 years' imprisonment after being found guilty of the offence of incest contrary to **section 20(1)** of the ***Sexual Offences Act*** ("the ***Act***") The particulars of the offence were that between 8th March 2016 and 10th March 2016 in [Particulars Withheld] Village, Limuru Location of Kiambu County, he touched the vagina of EOK with his penis and who was to his knowledge his daughter.

2. The appellant has now appealed against conviction and sentence. Before I consider the grounds and arguments raised in this appeal, I must recall the duty of this court as the first appellant court. I am required to review all the evidence and come to my own independent conclusion as to whether or not to uphold the conviction bearing in mind that I neither heard nor saw the witnesses testify in order to assess their demeanour. In order to do so it is necessary to outline the evidence that emerged at the trial.

3. The complaint, PW 1, gave an unsworn testimony after a *voire dire*. She told the court that she was 12 years old and that the appellant was her father who she and her siblings had been living with since her mother had left. She recalled that on 8th March 2016, she had been sent away from school and found the appellant at home. She narrated what took place as follows:

> *He closed the door. He put me on my mother's bed…… He then removed my panty. He was wearing trousers. He removed it. He then removed his boxers. I saw his penis. He then inserted his penis in my private parts. It took a while, about (10) minutes. I was in pain. I tried to scream but he blocked my mouth with his hand …..*

4. After the appellant left, she went to call her siblings who were at a neighbours place. They came back, ate and slept. She did not tell anyone about what transpired. On 10th March 2016 at about 4.00pm, she informed the neighbour, PW 2, what had happened. The neighbour called another lady and together they went to hospital where she was examined and the P3 form which had been issued was filled. When cross-examined by the appellant, PW 1 stated that the appellant had previously asked her to have sexual intercourse.

5. The appellant's neighbour, PW 2, recalled that on 8th March 2016, the appellant's children were at her home except PW 1. They ate and left when they were called by PW 1. On 10th March 2016, the children came to her home but she did not. The children told her PW 1 was at home with the appellant. When PW 1 came, PW 2 suspected that there something wrong with her. PW 2 called her aside and asked her what had happened. She broke down crying and told her what happened on condition that she should not tell anyone. She decided to report the matter to the Assistant Chief who then called the Children's office. When another lady PW 3 came, PW 1 told them that even on that day, the appellant had sexually assaulted her.

6. PW 3 testified that she was called by PW 2 and informed of a case of incest. She also called a Human Rights activist, PW 4, and they proceeded together to see PW 2. They met PW2 who told them what had transpired. She testified that the child was in pain and when she looked at the vagina, it was dirty and had a white discharge. PW 1 told them that she had been sexually assaulted on that morning. PW 3 and PW 4 took the child to the hospital. While they were at the Assistant Chief's office, PW 3 called the appellant and he came and he was escorted to the police in the company of an administration police officer, PW 5. PW 6, an administration police officer, was also present when the appellant was brought to the police station in the company of PW 1, PW 3 and PW 4.

7. The P3 medical form was produced by a doctor, PW 7, on behalf of another doctor who examined PW 1 on 11th March 2016. The doctor recorded that he found a stained panty but not with blood. Her genitalia did not have any bruises or lacerations but the hymen was broken. A high vaginal swab did not reveal any spermatozoa. He opined that the injuries were hours old. PW 7 also produced the Post Rape Care (PRC) form whose key findings were unremarkable.

8. The investigating officer, PW 8, told the court that she took over the investigation from another officer. She gave an account of the investigation which formed a basis for the charges against the appellant.

9. In his unsworn statement, the appellant denied the offence. He admitted that PW 1 was his daughter and that his wife had left him. He also told the court that he would go to work in the morning and the children would go to PW 2's home. He recalled that in March 2016, his children were chased from school and told to bring their parents. When he went to school, he was told that PW 1 had not been in school for 2 weeks. He was annoyed with her and almost slapped her. He further stated that on 10th March 2016, as he was coming from work, he met a police officer and later PW 2 and other ladies who he thought had come to assist him take care of his children but he was shocked when he was informed that he was being accused of sexually assaulting PW 1. He told the court that on 8th and 10th March he was in school with the other children and that the whole case was planned against him.

10. Based on the evidence I have outlined; the trial magistrate was convinced that the prosecution had proved its case. The appellant has challenged the conviction and sentence based on the grounds of appeal filed on 30th July 2019 supported by written submissions filed on 6th January 2020. The thrust of the appeal is that the prosecution failed to prove the ingredients of the offence of incest beyond reasonable doubt, that evidence against him was improperly admitted and that he was denied the opportunity to examine witnesses.

11. Counsel for the respondent supported the conviction and submitted that the prosecution proved all the elements of the offence.

12. Before I deal with the substance of the appeal, let me deal with the appellant's complaint that his right to a fair trial as protected under **Article 50 (2) (k)** of the **Constitution** was violated as he was not allowed to cross-examine witnesses. I have examined the proceedings and on 13th February 2017, the appellant requested the court to start the case afresh as he was not confident in the manner he cross-examined the witnesses. The prosecution opposed the application on the ground that there was no reason to start the case afresh and that the child who had testified was traumatized and it would be unfair to subject her to further proceedings.

13. The trial magistrate held the appellant had not given any valid reason to recall the witnesses especially PW 1 who was a child and who ought not to be subjected to further trauma. The appellant was also denied the adjournment and the matter proceeded for hearing.

14. It is not correct for the appellant to state that he was not given the opportunity to cross-examine PW 1 or for that reason any of the other witnesses who had testified. He cross-examined PW 1, PW 2, PW 3 and PW 4 but his request to start the case afresh was denied by the court.

15. Apart from **Article 50** of the **Constitution** that protects an accused's right to cross-examine witnesses, the law provides for the recalling of witnesses. **Section 146(4)** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)*** provides:

> *146(4) The court may in all cases permit a witness to be recalled either for further examination-in-chief or for further cross-examination, and if it does so the parties have the right of further cross-examination and re-examination respectively.*

16. **Section 150** of the ***Criminal Procedure Code (Chapter 75 of the Laws of Kenya)*** states as follows:

> *150. A court may, at any stage of a trial or other proceeding under this Code, summon or call any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine a person already examined, and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case:*
>
> *Provided that the prosecutor or the advocate for the prosecution or the defendant or his advocate shall have the right to cross-examine any such person, and the court shall adjourn the case for such time (if any) as it thinks necessary to enable the cross-examination to be adequately prepared if, in its opinion, either party may be prejudiced by the calling of that person as a witness.*

17. The two quoted provisions give the court the discretion to recall any witness who has already testified but the discretion is not one to recall any witness at any time hence a good reason must be given before the court recalls any witness. In the present case, the appellant merely stated that, *"he was not confident in the manner in which [he] cross-examined."* He did not give any reason why he wanted PW 1 to be brought back to be subjected to questions. I also note that before the trial started the appellant had been furnished with witness statements and evidence and had cross-examined all the witnesses. The learned magistrate rightly pointed out that while no valid reasons were given, the court also had to look into the best interests of the child who had been traumatized by the ordeal of testifying. I cannot fault the trial magistrate on this matter and I find that the discretion was properly exercised.

18. The appellant was charged with incest under **section 20(1)** of ***the Sexual Offences Act, 2006*** which states as follows:

> *20. (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*. [Emphasis mine]

19. An *"indecent act"* under **section 2(1)** of the ***Act*** is defined as an unlawful intentional act which causes, *"(a) any contact between any part of the body of a person with genital organs, breasts or buttocks of another, but does not include an act that causes penetration." "Penetration"* under **section 2** of the ***Act*** means, *"the partial or complete insertion of the genital organs of a person into the genital organs of another person."* The importance of these provisions is that the offence of incest is proved either by establishing penetration or an indecent act.

20. The fact that the appellant was the father of PW 1 is not disputed and was in fact admitted by the appellant. As to whether the appellant committed an act of penetration or an indecent act, the key testimony implicating the appellant was that of PW 1 who testified how the accused had subjected her to an act of penetration. When she narrated her ordeal to PW 2, PW 3 and PW 4, she told the court that she had also been subjected to an act of penetration on 10th March 2018, the day she reported the incident. When cross-examined she told the court that the appellant had made sexual advances at her in the past.

21. Under the proviso to **section 124** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)***, the trial magistrate was entitled to convict the appellant on the uncorroborated testimony of the child, if for reasons to be recorded, she believed that the child was telling the truth. The trial magistrate did not make a specific finding on why she believed the child but went ahead to look for corroborative evidence.

22. In this case, there was the testimony of PW 2 who told the court that on 8th March 2016 when the first incident took place, PW 1 did not come to her place when the other children did. At this stage I would point out that the appellant, in his unsworn statement, said the children would normally go to PW 2's home when he left for work. Likewise, on 10th March 2016 when she reported the second incident, PW 2 testified that PW 1 did not come with the other children. PW 1 was in a state of distress when she was confronted and she proceeded to narrate what the appellant had done to her.

23. I have examined the P3 form and the PRC form produced by PW 7 and I find that apart from the finding that PW 1 had a broken hymen, the other findings were unremarkable. Both reports show that the laboratory tests did not detect any spermatozoa. It has been held that medical evidence is not decisive of the fact that penetration took place as the court is entitled to rely on any evidence including circumstantial evidence (see ***Kassim Ali v Republic*** **MSA CA Criminal Appeal 84 of 2005 [2006] eKLR**). In this case, I would hasten in light of the testimony of PW 1, the hymen was likely broken due to an act of penetration. Further, as I stated earlier the offence of incest was proved by establishing an indecent act which in fact may not lead to any form of injury.

24. The appellant complained that the P3 form and other medical evidence had been produced under the wrong provisions of the law. The record shows that the trial magistrate cited **section 78** of the ***Evidence Act*** which deals with admission of photographic evidence. The proper provision in my view was **section 77** of the ***Evidence Act*** which was complied with as the doctor who knew examining doctor testified. I find that reference to **section 78** aforesaid was a mere error and that the substance of **section 77** was complied with. The Court of Appeal in ***Stephen Mutuku Makau and Another v Republic*** **[2017] eKLR** explained this provision as follows:

> *Although generally expert documents should be produced by their makers,* ***Section 77*** *of the* ***Evidence Act*** *allows any other person to adduce an expert document such as medical, analyst, document examiner's and geologist reports so long as the authenticity of the documents is not disputed. The Section provides as follows;*
>
> > ***77 (1) In criminal proceedings any document purporting to be a report under the hand of a government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.***
> >
> > ***(2) The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it.***
> >
> > ***(3) When any report is so used the court may, if it thinks fit, summon the analyst, ballistics expert, document examiner, medical practitioner, or geologist, as the case may be, and examine him as to the subject matter thereof.***

25. The appellant's defence was that he was framed. It is not clear why he would be framed by anyone particularly PW 1. PW 1 clearly stated why she could not tell anyone what had transpired and it is only when PW 2 confronted her and promised not tell anyone that she was able to narrate her ordeal. PW 2, PW 3 and PW 4 also testified about PW 1's state of distress when she told them about her ordeal. Further, nothing was put to PW 1 in cross-examination to suggest that she had run away from school or that there were any circumstances that would point to a grudge. I therefore dismiss the appellant's defence.

26. Under **section 20(1)** of the ***Act***, the age of the child is not an essential ingredient of the offence of incest. PW 1 testified she was 12 years old. The appellant, as the father, did not contest this fact nor contest the fact that she was a child. Under the proviso thereto, where the age of the child is under 18 years, the maximum sentence for incest is life imprisonment.

27. In the sentencing notes, the trial magistrate took into account the Probation Officers report which noted that the appellant was 57 years old, was sickly as a result of a heart condition and did not have any criminal record. It noted that PW 1 wanted the appellant imprisoned as he would likely beat her while the step son stated that the case against the appellant was fabricated and he should be released. In mitigation, the appellant pleaded leniency as he was sick. He told the court that he did not know where the rest of his children were. The Children Officer's report noted that the appellant's other children wanted him to be released to take care of them while PW 1 wanted her father jailed. The trial magistrate took all this into account in reaching the decision that a term of 25 years' imprisonment was suitable.

28. I do not detect any misdirection on the issue of sentence and given the nature of the offence, the fact that the appellant took advantage of his daughter, I affirm the sentence.

29. The appeal is dismissed.

DATED and DELIVERED at KIAMBU this 7th day of JANUARY 2020.

D.S. MAJANJA

JUDGE

Appellant in person.

Mr Kasyoka, Prosecution Counsel, instructed by the Director of Public Prosecutions for the respondent.