REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 123 OF 2011

(BEING AN APPEAL FROM THE DECISION OF HON. M.N. GICHERU IN CRIMINAL CASE NO.488 OF 2011)

EEL.....APPELLANT

VERSES

REPUBLIC..... RESPONDENT

BETWEEN

REPUBLIC.....PROSECUTOR

VERSES

EEL.....ACCUSED

J U D G M E N T

1. The Appellant was charged with the offence of **Incest by male person contrary to Section 20(1) of the Sexual Offences Act No. 3 of 2006.** The particulars of the offence were that **on the 19th day of February, 2011 at Trans-Nzoia County intentionally caused his penis to penetrate the anus of SAE a child aged 1½ years who was to his knowledge his daughter.**

2. The Appellant after a full trial was convicted and sentence to life imprisonment hence this appeal. Before looking at the same it shall be appropriate to summarise the evidence as presented during trial.

3. **PW1 JOSEPHINE AKAI** testified that the Appellant was her neighbour and had problems with his wife who had even gone away and left him with the Complainant and another child who was aged 12 years. At some point and in the cause of time the two girls would come and sleep in her house. On 19/2/2011 the Appellant sent her to collect some millet. She overstayed for a while and when she came back the Appellant was with the child who was of tender years and aged about 1 ½ years.

4. She then went to the appellant's house and found the child crying and he told her that she had not eaten. They accompanied each other to her house and the appellant excused himself and went to bath at the river. She then checked the child and discovered that her genitalia were sore and there was blood and sperms. She called her neighbours who told her to report at the police station which she did. She took the child to Kitale district hospital where she was treated. The Appellant was later arrested after she had made a report at the police post.

5. On cross examination by the accused she maintained that it was him who was left with the child when she went to collect millet and therefore its him who defiled her.

6. **PW2 KIRWA LABATT** from Kitale District hospital examined the child and filled the P3 form. He found that the hymen was intact but there was anal tear which was bleeding while the child was in the ward. He concluded that the child had been sodomised.

7. **PW3 APC SARANGA DISHON** from Maili Saba District Commissioner's Office testified that he received information from pw1 concerning the incident and they even raised money for the child to be taken to the hospital. He thereafter proceeded with his colleague to the scene where they managed to arrest the appellant and escorted him to Kitale police station.

8. **PW4 PC PAUL KAMAU MWANGI** from Kitale Police station carried out the investigation, recorded statements from the witnesses and preferred charges against the Appellant. He also organised for the filling of the P3 form as well as having the Appellant also examined.

9. When placed on his defence the Appellant gave unsworn evidence denying the charge. He simply narrated how he was arrested in his

house on 18/2/2011 at 5.00 pm and taken to the police station and later charged with the offence which he denied.

ANALYSIS AND DETERMINATION

10. This being a first appeal the court is enjoined to evaluate and analyse the evidence afresh and come up with a fresh and independent finding with a rider that it did not have the benefit of conducting the trial and therefore seeing the witnesses and their demeanour unlike the trial court. (See **OKENO V. REP. (1972) E A 32).**

11. The court has perused the proceedings on record as well as the submissions of both the Appellant and the learned state counsel.

12. The ingredients for the offence such as this include prove of the age of the victim, the identity of the perpetrator, the relationship with the victim and whether there was penetration.

13. Though there was no production of any document to support the assertion that the Complainant was 1½ years old there was no contention that she was not of tender years. The proceedings all along as can be deduced from the record showed that she was a young child.

14. The relationship between the Appellant and the Complainant was that of a father and a daughter as clearly explained by PW1 who took a greater responsibility over the minor. Again the Appellant did not dispute this fact.

15. On the question of penetration, the evidence of PW1 as well as the Clinical Officer corroborated each other. The child was clearly sodomised as rightfully found by the trial court.

16. Was the Appellant the perpetrator? There was in my view sufficient evidence especially from PW1 that the Appellant was with the child at that particular time when PW1 went to collect millet. There was nothing to suggest that she was left with any other male during the brief period. There was also nothing to suggest that the child had not been staying with PW1.

17. In fact, on the way the appellant took the child from PW1 and one can conclude that this was a way of concealing from her the injuries which the child had suffered. There was no evidence that the child may have sustained the injuries elsewhere.

18. In the premises, I find that the evidence as presented by the respondent sufficiently placed the Appellant at the scene. There was nothing to suggest that there was any malice on the part of PW1 who had in fact been taking care of the said child as well as the other girl.

19. The upshot of it is that the Appellant took advantage of the absence of the child's mother and may have transferred his frustrations to the child. This appeal is unmeritorious and is hereby dismissed.

20. However, on the question of sentencing and pursuant to the Supreme Court of Kenya decision in the now famous case of **FRANCIS MURUATETU & ANOTHER VS. REP**. and the subsequent decision by the Court of Appeal in **JARED KOITA INJIRI V.REP (2019) eKLR,** this court is inclined to tamper with the period lawfully meted against the Appellant. In the above cited authorities, the superior courts opined that life sentence may not be the only efficacious sentence and that there must be a definite period in which one may remain in a lawful prison custody.

21. Taking the elements and facts of this case, and the circumstances thereof, the sentence of life imprisonment is hereby set aside and replaced with a custodial sentence of 20 years from 18/8/2011 when he was sentence.

22 . Orders accordingly.

Dated, signed and delivered in open court at Kitale this 17th day of February 2020.

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H. K. CHEMITEI

JUDGE

17/02/2020

In the presence of:-

Mr. Omooria for the respondent

Appellant – present

Court Assistant – kirong

Judgement read in open court