REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CORAM: A.K NDUNG'U J

CRIMINAL APPEAL NO. 62 OF 2019

JMM.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the original conviction and sentence of Hon. C.R.T Ateya – RM dated 10th January, 2018 at the Principal Magistrate's Court at Ogembo in Criminal(Sexual Offences)Case No. 10 of 2017)

JUDGEMENT

1. JNM (appellant) was charged with **Incest** contrary to **Section 20(1)** of the **Sexual Offences Act No. 3 of 2006**. That in the month of January 2017 at [particulars withheld] Sub-location in Gucha South Sub County within Kisii County, being a male person, caused his penis to penetrate the vagina of SKN, a female child who was to his knowledge his daughter.

2. He faced an alternative count of **indecent act with a child** contrary to **section 11(1)** of the **Sexual Offences Act**. That at the said time and place he intentionally touched the vagina of SKN a child aged 8 years with his penis.

3. The appellant was tried before the Resident Magistrate Ogembo and in a judgement dated 10/1/2018 he was found guilty of the offence of incest, convicted and sentenced to 20 years imprisonment.

4. Aggrieved by the entire judgement, the appellant lodged this appeal and in his petition he raised 6 grounds which can be condensed as follows;

> **1. The conviction was based on presumptions and misapprehension of the evidence without evaluation and scrutiny of the record as a whole.**
>
> **2. The appellant was never examined by a doctor to connect him to the offence.**

5. This being the first appellate court, I have the duty to re evaluate the evidence adduced at the trial court and make my own conclusions all the while alive to the fact that I neither saw nor heard the witnesses and give due allowance in that regard.

6. This is in compliance with the legal requirement that is well enunciated in the case of **Okeno –vs- Republic (1972) EA 32** where at page 36 the court stated;

> *"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 –vs- R [1975] E.A 336). 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 courts finding 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, see Peters –vs- Sunday Post 91958)E.A 424."*

7. A recap of the evidence is thus necessary. PW 1 the minor testified that she was fetching firewood when her father (the appellant) called her, removed her clothes and pant and did bad things to her.

Her mother (PW 2) came and found the appellant in the act. She alerted people and the people took the appellant to the police station. PW 2 confirmed that she found the appellant in the act. Both were naked. She found him raping the child. She sought help from people. The appellant chased her threatening to kill her for disclosing his act. The appellant was beaten by the people who came. Matter was reported at

Nyakegoira Police Post. The appellant was arrested.

8. Lawrence Oriki Manyira, a clinical officer, examined the minor on 1.2.2017. The minor was HIV –ve but she had an infection. There were no bruises or lacerations noted. She gave a history of sex with the father before. This fact was also established by P.C Gladys Buya the investigating officer.

9. In defence, the appellant in an unsworn statement stated that an argument ensued between him and his wife (PW 2) after he sent the complainant to call her to come home from where she was working and she refused. She threatened him. He took a stick and chased her. She screamed and alleged that the appellant had defiled the child.

10. The question that commends itself for determination in this appeal is whether the evidence on record was sufficient to secure a conviction and based on the answer to this question, whether the sentence imposed was appropriate.

11. I have had occasion to consider the petition of appeal, the record of the trial court and the submissions on record.

12. Having analysed the evidence, it is clear that PW 1 the minor stated that the appellant removed her clothes and pant and did bad things to her. PW 2 the mother came and found the appellant and the child naked and the appellant having placed the child on the laps facing him raping the child. The medical report indicates that there were no bruises or lacerations. There was no hymen and there were epithelial cells suggestive of an infection.

13. Of note is that the minor's representation to the clinical officer and the investigating officer was that it was not the first time that the appellant had sexual intercourse with the minor. It is a safe inference that this explains the absence of hymen.

14. It is a ground of appeal that there was no medical evidence connecting the appellant to the offence. That contention is made in ignorance of the applicable legal principle. In **George Kioji v Republic Cr. App No. 270 of 2012**, the Court of Appeal had this say on proof in sexual offences;

> *"Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by the accused person. Indeed under the proviso of Section 124 of the Evidence Act, Cap 80 Laws of Kenya, a Court can convict an accused person in a prosecution involving a sexual offence on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief."*

(See also **Robert Mutungi Muumbi –vs- Republic C.A No. 5 of 2013** and **Williamson Sowa Mbwanga –vs- Republic, Cr. App No. 109 of 2014**.)

15. In our instant case, there is the evidence of the minor and which is corroborated by direct eye witness evidence of PW 2 who found the appellant in the act.

16. In countering this evidence, the appellant states that he was framed by the wife after he called her and she refused to heed and he chased her with a stick. In light of the evidence on record, this narration of events cannot possibly be true.

17. My re evaluation of the evidence leads me to the findings that the trial court addressed itself properly to the evidence and the law. The court, as can be seen from its judgement, was alive to the ingredients of the offence and was correct in its finding that the appellant was guilty of the offence based on the evidence on record.

18. Am satisfied that the appellant's conviction was based on sound evidence and was thus safe.

19. As regards sentence, **Section 20(1)** of the **Sexual Offences Act** provides as follows;

> ***"S 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."*

20. The victim herein was below 18 years. I note from the record that the trial magistrate appreciated that the Law provided for a minimum sentence. The court, however, exercised discretion and meted out a sentence of 20 years imprisonment.

21. The approach of the court regarding appeals against sentence was well expressed in **Benard Kimani Gacheru v Republic Cr. App No. 188 of 2000** where the court stated;

> *"It is now settled law following several authorities by this Court and High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case or that the trial court overlooked some material factor, or took into account some wrong principle. Even if the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering*

with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."

22. I have looked at the record of court while sentencing the appellant. I find no basis upon which to interfere with the sentence imposed.

23. With the result that the appeal herein lacks merit. It is disallowed in its entirety.

Dated and delivered at Kisii this 13th day of May, 2020.

A.K NDUNG'U

JUDGE