REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 84 OF 2016

JA .....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the original conviction and sentence by T. Matheka, Chief Magistrate, in Mombasa Chief Magistrate's Court Sexual Offence Case No. 15 of 2016).

JUDGMENT

1. The appellant was charged with the offence of rape contrary to Section 3(1)(a)(b)(3) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge were that on the 6th February, 2016 at [particulars withheld] area in Likoni District within Mombasa County, unlawfully and intentionally caused his penis to penetrate the vagina of MSA [name withheld], a person with mental disability.

2. As an alternative charge to Count I, the appellant was charged with the offence of committing an indecent act with an adult contrary to Section 11(A) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge were that on the 6th of February, 2016 at [particulars withheld] area in Likoni District within Mombasa County, intentionally touched the vagina of MSA [name withheld] with his penis, a person with mental disability.

3. The appellant was also charged in Count II with the offence of incest contrary to Section 20(1) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge were that on the 6th February, 2016 at [particulars withheld] area in Likoni District within Mombasa County, being a male person caused his penis to penetrate the vagina of MSA [name withheld] a female person who was to his knowledge his niece and a person with mental disability.

4. The Trial Court found the appellant guilty of the charge of incest in Count II and sentenced him to serve 30 years imprisonment. He was aggrieved by the decision of the said Court and on 29th July, 2016, he filed a petition and grounds of appeal. The same were amended on 30th October, 2019, with leave of the court. He raised the following grounds of appeal:-

(i) That the Learned Trial Magistrate erred in law and fact by placing much reliance on PW1's evidence of identification without considering that the same was an afterthought;

(ii) That the Learned Trial Magistrate erred in law and fact by relying on medical evidence tendered by PW6 without considering that the same was unreliable;

(iii) That the Learned Trial Magistrate erred in law and fact by admitting PW1's testimony without considering that she was not subjected to an oath in accordance with Section 151 of the Criminal Procedure Code;

(iv) That the Learned Trial Magistrate erred in law and fact in failing to consider that the prosecution failed to prove its case as required by law;

(v) That the Learned Trial Magistrate erred in law and fact by failing to consider his defence which was cogent and to give him the benefit of doubt; and

(vi) That the Learned Trial Magistrate erred in law and fact by imposing a harsh and excessive sentence against him.

5. In his written submissions, the appellant stated that the complainant (PW1) did not connect him to the commission of the crime as in her

evidence, she at first said that she could not see the person who hurt her in court and did not know if he was in the room (court room). The appellant wondered at what stage PW1 changed her stand so as to say that it was him who was the culprit. He asserted that he was not positively identified by PW1 who failed to reveal his name. He was of the view that the prosecution should have applied for an intermediary to represent PW1.

6. It was submitted by the appellant that the garments which were soiled with blood stains were not subjected to any forensic examination to determine if the blood belonged to PW1. Further, he argued that the piece of cloth which PW4 said that he used to wipe himself with after having sex with PW1, was also not subjected to forensic examination.

7. The appellant wondered why PW2 failed to scream to attract members of the public after noticing that his sister had been raped.

8. It was contended that PW1's evidence was null and void as it was not taken under oath as required under Section 151 of the Criminal Procedure Code.

9. The appellant indicated that the Doctor, PW6, testified that PW1's hymen was broken and she was bleeding on 6th February, 2016, but he did not state if the bleeding was as a result of PW1 being on her monthly period or as a result of the alleged rape.

10. On the issue of the sentence imposed on him being harsh and excessive, the appellant made reference to Section 20(1) of the Sexual Offences Act which provides for a sentence of not less than 20 years imprisonment. In his view, because PW1 was 26 years old, the sentence of 30 years imprisonment was harsh and excessive. He cited the case of **Kichanjehe s/o Ndamungu v Republic** (1941) EACA 64 and **Opoya v Uganda** (1967) EA 752 at page 754 on the interpretation of the words *"shall be liable"* which grant the court discretionary power in imposing sentence. He urged this court to allow his appeal while bearing in mind the provisions of Article 27 of the Constitution.

11. Ms Mwangeka, Prosecution Counsel, filed her written submissions on 2nd December, 2019 on behalf of the Director of Public Prosecutions. She submitted that for an offence of incest to be proved beyond reasonable doubt, it must be shown that the act causing penetration was done and that the appellant and PW1 were related within the prohibited degrees of affinity or consanguinity. She indicated that PW3 in her evidence stated that the appellant was her brother-in-law.

12. It was submitted for the respondent that when testifying, PW1 appeared shy and did not want to look at the appellant but she narrated how he raped her. This court was invited to take note of the fact that PW1 was mentally challenged but she stated that the appellant was known to her.

13. Ms Mwangeka submitted that PW1's evidence was supported by that of PW2 who found the appellant putting on his trouser in the room where PW1 was. That PW2 testified that PW1 was on the bed bleeding.

14. It was further submitted for the respondent that PW2 rushed to call the Chief, PW3, who went to the house and found PW1 cleaning herself. PW1 reported to PW4 what had happened and that she had been raped by her uncle, the appellant. It was stated that the appellant was well known to PW3 as the cousin to PW1's father and that one of PW3's relatives was married into the appellant's family.

15. The Prosecution Counsel pointed out that the appellant in his unsworn defence confirmed that he was related to PW1 as her uncle, as the complainant's mother was his brother's wife. It was submitted that the relationship between the appellant and PW1 was well established.

16. On the issue of rape, it was submitted that the evidence of PW1 that she was raped was corroborated by medical evidence contained in the PRC form. That she was examined on the same day of the incident and found to have lacerations on her labia minora. Her hymen was broken.

17. The Prosecution Counsel stated that PW1 was examined by the Trial Court which formed the opinion that she could give evidence and be cross-examined and the said information was captured in the Judgment. It was submitted that the provisions of Section 151 of the Criminal Procedure Code were complied with.

18. On the issue of sentence, Ms Mwangeka submitted that the charge of incest attracts a minimum sentence of 10 years imprisonment. She cited the case **Charles Ndirangu Kibue v Republic** [2016] eKLR, where the court in upholding the sentence meted out against the appellant therein, noted that sentencing is left to the discretionary power of the court.

19. The Prosecution Counsel concluded her submissions by stating that PW1 was a person with mental disability and she was taken advantage of by the appellant who was her uncle. She submitted that in view of the aggravating factors on record, a deterrent sentence was justified. She was of the view that the sentence of 30 years imprisonment was neither harsh nor excessive. She urged this court to dismiss the appeal.

THE EVIDENCE ADDUCED BEFORE THE LOWER COURT

20. The victim in this case was PW1, a mentally challenged 26 year old woman. Her name was MM also known as MSA. Her evidence was that when she was at home the appellant went there, put her on the bed, removed her dress and pant. He then "*inserted his stick*" in her private parts. She said that "*he did her*" after removing her clothes. She then went to the doctor's place where she was given medicine.

21. PW2, ASA [name withheld] was PW1's brother. He testified of how on 6th February, 2016 at 9:00 a.m., he took a shoe for repair and left his sister, PW1, who had mental instability outside their house. When he went back, he found the door which he had locked had been broken. The door was at that time locked from inside. He managed to open the door and found PW1 on the bed bleeding. The appellant was inside the house and he was putting on his trousers. The two were in PW1's and PW2's parents' bedroom. PW2 went to call the chief. On

going back, they found blood trickling down PW1's thighs. Her dress was also blood stained.

22. PW3, MM [name withheld] was PW1's mother. Her evidence was that on 6th February, 2016 she went to work and left PW1 with PW2. At 11:15 a.m., she was called by her mother-in-law who told her to go home because PW1 had been raped. She went home and took PW1 to Makadara Hospital (Coast Province General Hospital) where she was examined. They took the medical documents to Inuka Police Station.

23. PW3 stated that her daughter, PW1 has cerebral palsy and produced her registration card to prove that she had mental disability. She also produced PW1's immunization card. She indicated that PW2 told her that the appellant was the one who had raped PW1. She further indicated that the appellant was her brother-in-law.

24. PW4, Fatuma Juma Hamisi, was the Senior Chief of Mtongwe location. It was her evidence that on the morning of 6th February, 2016, PW2 went to her house appearing shocked. He asked her to accompany him to their home and see what had been done to PW1. PW4 stated that when they reached the said house, she found PW1 cleaning blood which was flowing down her legs. She further stated that she took PW1 to their mother's bedroom and questioned her in PW2's presence.

25. It was PW4's evidence that PW1 told her that her uncle J had raped her by forcing his big private part into her private parts. PW4 stated that PW1 demonstrated what he had done to her. She also told PW4 that the appellant covered her mouth. PW4 indicated that she saw blood stains on the bed which showed that there had been roughness. PW4 said she knew the appellant as the cousin of PW1's father.

26. PW4 organized for PW1 to be taken to Inuka Police Station by PW2 after their family members reached home. She was later taken to Coast Province General Hospital (CPGH) in the evening, PW4 learnt that the appellant had been arrested by PW1's father. PW4 rushed to PW1's house and found the appellant being beaten by members of the public. She called the police who went to the scene. PW4 indicated that she knew that PW1 suffered from epilepsy and has a mental handicap.

27. PW5 was the Investigating Officer. He received the report of the incident and referred PW1 to hospital on 6th February, 2016. He collected the PRC form and escorted PW1 to hospital for completion of the P3 form. He stated that the documents showed that she had been raped. He visited the scene and saw the blood stained pink dress which PW1 was wearing on the date of the incident and a piece of mattress which was blood stained. There was also a piece of cloth that the appellant had wiped himself with after raping PW1. PW5 further stated that the appellant was taken to Inuka Police Station on the same day by PW4 and Inspector Omondi.

28. PW6 was Dr. Samira who produced the P3 form on behalf of Doctor Zamzam, whose handwriting she was familiar with. She also produced the PRC form for PW1. The reports indicated that PW1 had a broken hymen, lacerations on her labia minora and she had vaginal bleeding. The Doctor sated that PW1's medical history showed that she had cerebral palsy.

29. When put on his defence, the appellant stated that he used to do casual jobs in ships and that on the day in issue, he met PW1's mother (PW3) at the ferry and asked him to get a job for PW2 at a ship. He stated that he told her that he would inform her as soon as he heard anything about her request. The appellant indicated that PW3 told him that he was aware that there were jobs available but he was refusing to assist her and if he failed to get her the job, she would *"show him"*.

30. He further said that while at the port, his brother S went with 3 men and started to beat him and told some police officers who were passing by that they were planning a rape case against him to *"finish all his things"*. He was taken to the police station and charged with the present offence. He urged the Trial Court to look at the issue critically.

ANALYSIS AND DETERMINATION

31. The duty of the 1st appellate court is to re-evaluate and analyze the evidence adduced before the lower court and come to its own independent conclusion while bearing in mind that it has neither seen nor heard the witnesses testify and make an allowance for the said fact.

32. The issues for determination are:-

(i) If failure to take PW1's evidence under oath was prejudicial to the appellant;

(ii) If the appellant was positively identified;

(iii) Whether the medical evidence adduced was unreliable;

(iv) If the appellant's defence was considered;

(v) Whether the prosecution proved its case beyond reasonable doubt; and

(vi) Whether the sentence was harsh or excessive.

If failure to take PW1's evidence under oath was prejudicial to the appellant.

33. The hearing of the lower court case commenced on 23rd February, 2016. On that day, Ms Milanoi from the Kenya Association of the intellectually handicapped watched brief for the complainant. When it was the complainant's turn to give evidence, the Trial Magistrate, Hon. Shitubi, Chief Magistrate, observed that PW1 who was a female adult was a bit mentally handicapped. She examined PW1 who said

her name, that she never went to pray in the mosque and that she just sits. She indicated she had gone to court with her mother.

34. The Trial Magistrate did not record if PW1 gave sworn or unsworn evidence. It is thus clear that since the prosecution did not apply for PW1 to testify through an intermediary, the Trial Magistrate erred when she failed to administer an oath to her as provided under Section 151 of the Criminal Procedure Code. A similar issue arose in the case of **Jared Odhiambo Ouya v Republic** [2014] eKLR. The Judge therein stated thus-

> ***"In the event the issue of competence of the complainant to testify was raised, it was the duty of the learned magistrate to conduct a voire dire to determine whether or not she could the question (sic) and give rational answers. As it turned out the evidence given by PW1 was clear and consistent. There is no indication that she was suffering from mental incapacity at the material time. Notwithstanding, the failure of the learned magistrate to swear the PW1, I do not find any prejudice occasioned to the appellant. He was given the opportunity to cross examine PW1 and he indeed examined her."***

35. In the present case, after PW1 saw the appellant in the court room, she was able to recollect that he had raped her. She also gave a brief account of what happened on the day she was raped. She was cross-examined by the appellant. It is this court's finding that no prejudice was occasioned to the appellant as a result of PW1 having given evidence without taking an oath.

If the appellant was positively identified.

36. The appellant in making reference to PW1's evidence submitted that PW1 said no one went to their house when she was alone and that it was the grandfather of the mosque who hurt her. She also said that she had not seen the person who hurt her (in court) and she did not know him. The lower court proceedings reveal that further into her evidence and upon being shown the appellant, she indicated that she knew him and she had seen him before at their home. The Trial Magistrate observed that PW1 did not want to look at the appellant directly and that she looked away shyly. The lower court proceedings reveal that PW1 indicated that she did not want to see the appellant's eyes and that she had seen his *"dudu"* (penis). She also said that he put her on the bed at home, removed her dress and her pant and *"did her after removing her clothes".*

37. The evidence of PW1 was rather disjointed which is not surprising as she had a mental disability. It is however clear that she was able to identify the appellant in court as someone she had seen before and as the one who raped her.

38. The identity of the appellant as the one who raped PW1 was confirmed by PW2, a brother to PW1. His evidence was that on the morning of 6th February, 2016, at 9:00a.m., he took his shoe for repair. He left PW1 seated outside their house, which he locked. On going back, he found the door broken and locked from inside. He somehow managed to open it and on getting in the house, he saw his sister PW1 on the bed. He also found the appellant, who was putting on his trousers. He saw blood trickling down PW1's thighs. PW2 rushed to the area chief PW4, and reported to her what he had seen. She went to the scene and on questioning PW1, she told her that her *"ami"* (uncle) J had forced his big private part into her private parts. PW4 said she knew J who was a brother to PW1's father.

39. From the evidence of PW1, PW2 and the information given to PW4 and PW5 by PW1 and PW2, it is evident that identification of the appellant was by way of recognition as he was an uncle to PW1. In any event, the offence of rape occurred in broad daylight when circumstances were ideal for positive identification.

40. Further, when PW2 barged into the house, he found the appellant in the act of putting on his trousers. PW1 was bleeding from her private parts. In the said circumstances, PW1 and PW2 could not have been mistaken about the identity of the perpetrator of the offence, who was the appellant herein.

Whether the medical evidence adduced was unreliable.

41. The appellant contended that the bleeding which was seen coming from PW1's private parts could have been due to her monthly period but not as a result of being raped. PW6, Dr. Samia Osman produced both the PRC and P3 forms for PW1. She testified that on being examined on 6th February, 2016, PW1's hymen was found to be broken, she had lacerations on her labia minora and she was bleeding vaginally. The doctor also said that the urine sample taken from PW1 had blood cells. As to whether the bleeding observed on her vagina was her menses or not, PW6 stated in re-examination that normal menses could not have cause laceration or a broken hymen.

42. PW1's brother who testified as PW2 rebutted the proposition made by the appellant that the bleeding he saw on PW1, was her menses. On PW2 being cross-examined on the same, he stated that PW1 was his sister and she was not having her monthly period. He further said that because of her disability he understood her medical issues. On being re-examined on the same issue, PW2 said that he knew PW1's monthly period and she was not having it at that time. He was of the view that the bleeding was because of breaking of her virginity.

43. This court notes that PW2 was not a novice when it came to medical issues as he was in charge of St. John's Ambulance, in Likoni. This court believes his evidence that he knew when his mentally handicapped sister had her menses and that the bleeding she had on 6th February, 2016 was as a result of the rape incident. The issue of whether a woman who has been raped bleeds or not is even immaterial as it is not a mandatory outcome in a rape case. The said issue is therefore without merit. This court's finding is that the medical evidence which was adduced by PW6 was reliable and supported the fact that PW1 was raped.

If the appellant's defence was considered.

44. Hon. Teresia Matheka, Chief Magistrate (as she then was), took up the hearing of the lower court case from Hon. Shitubi, CM, after she was transferred. Hon. Teresia Matheka in her Judgment considered the evidence adduced by the prosecution and also the unsworn defence given by the appellant. She was of the view that the defence by the appellant to the effect that this case was as a result of a grudge with

PW1's mother over PW2 did not in any way challenge the case for the prosecution. She held that the appellant raised the issue as an afterthought and never did so in cross-examination with PW2 or the mother of the complainant (PW3). Having gone through the evidence by the prosecution and having considered the defence put forth by the appellant, this court arrives at the same finding as the Trial Magistrate that the appellant's defence was an afterthought. He never cross-examined PW3 on the issue of the job, which she had allegedly asked him to look for, on behalf of PW2. The said defence was far-fetched, unbelievable and was rightly rejected.

Whether the prosecution proved its case beyond reasonable doubt.

45. The appellant was almost caught in the act of raping PW1. As at the time PW2 entered their house, he found him putting on his trousers. PW2 found his sister, PW1, on their parent's bed. From her evidence, the appellant put her on the bed at their home, removed her dress and pant. He then "*did her after removing her clothes*". This court's understanding of the said statement is that the appellant raped her. In her evidence, she said she did not want to see his eyes as she had seen his *"stick"* (penis). Due to PW1's mental disability her ignorance of the male anatomy played itself out during the lower court proceedings.

46. The ingredients of the offence of incest include *"intentional"* and *"unlawful"* penetration of the genital organ of one person by another, coupled with the *"absence of consent"* by a person within forbidden degrees of consanguinity or affinity. **Section 42** and of the *Sexual Offences Act* No. 3 of *2006* provides as follows:-

> ***"For the purposes of this Act, a person consents if he or she agrees by choice, and has the freedom and capacity to make that choice."*** *(emphasis added).*

47. Section **43(1)** of the said Act states that an act is *"intentional"* and *"unlawful"* if it is committed –

> ***"(a) in any coercive circumstance;***
>
> ***(b) under false pretences or by fraudulent means; or***
>
> ***(c) in respect of a person who is incapable of appreciating the nature of an act which causes the offence."*** (emphasis added).

48. Section **43(4)** of the Sexual Offences Act states that:-

> ***"The circumstances in which a person is incapable in law of appreciating the nature of an act referred to in subsection (1) include circumstances where such a person is, at the time of the commission of such act –***
>
> ***(a) asleep;***
>
> **(b)** ***unconscious;***
>
> **(c)** ***in an altered state of consciousness;***
>
> **(d)** ***under the influence of medicine, drug, alcohol or other substance to the extent that the person's consciousness or judgment is adversely affected;***
>
> **(e)** ***mentally impaired; or***
>
> **(f)** ***a child."*** (emphasis added).

49. This court notes that the particulars of the charge did not disclose that the act of incest happened without the consent of PW1. In **Republic v. Oyier (1985) KLR 353**, the Court of Appeal held as follows on the issue of consent:-

> ***1. "The lack of consent is an essential element of the crime of rape. The mens rea in rape is primarily an intention and not a state of mind. The mental element is to have intercourse without consent or not caring whether the woman consented or not.***
>
> ***2. To prove the mental element required in rape, the prosecution had to prove that the complainant physically resisted or, if she did not, that her understanding and knowledge were such that she was not in a position to decide whether to consent or resist.***
>
> ***3. Where a woman yields through fear of death, or through duress, it is rape and it is no excuse that the woman consented first, if the offence was afterwards committed by force or against her will; nor is it any excuse that she consented after the fact."*** **(emphasis added).**

50. This court's finding is that the omission by the prosecution to include the words *"without her consent"* was not fatal to the prosecution case and was curable under the provisions of Section 382 of the Criminal Procedure Code. Due to her mental disability, which was proved by production of a medical assessment report dated 23rd November, 2010, PW1 lacked capacity to give consent to the appellant for sexual intercourse to take place. This court is thereof of the finding that the appellant raped her.

51. PW2 had left the house locked from outside. He found the door broken and locked from inside. He managed to get in and found the

appellant putting on his trouser. The direct evidence of PW1 was corroborated by circumstantial evidence adduced by PW2. The appellant took advantage of the opportunity which availed itself when he found PW1 sitting outside their house with none of her minders nearby. That explained the reason why PW2 became alarmed when he found PW1 missing from where he had left her and also found the door to their house broken from the outside, but locked from the inside.

52. The medical evidence adduced by PW6 by way of PRC and P3 forms corroborated the evidence of PW1 that she was raped. It was also proved that the appellant was PW1's uncle and therefore the offence of incest was proved beyond reasonable doubt. I uphold the conviction against the appellant.

Whether the sentence was harsh or excessive.

53. The appellant was sentenced to 30 years imprisonment. The Trial Magistrate considered the additional fact that PW1 was a person with mental disability and that the appellant being her uncle, knew of her medical condition. The said Magistrate also took into account that due to the said condition, the appellant ought to have gone out of his way to protect her but he was the one who hurt her most in an indignifying and inhuman way.

54. This court finds that the sentence of 30 years imprisonment imposed on the appellant was well merited and I uphold the same. This court notes that the appellant was in remand throughout his trial before the lower court. In accordance with the provisions of Section 333(2) of the Criminal Procedure Code, the sentence imposed on him shall be effective from the 12th December, 2016, being the date when he was first arraigned in court. The appeal is hereby dismissed save for the sentence which shall be computed as specified in this Judgment. The appellant has 14 days right of appeal.

DELIVERED, **DATED** and **SIGNED** at **MOMBASA** on this **12th** day of **May, 2020. The Judgment was delivered through Microsoft Teams online platform due to the outbreak of covid-19 pandemic.**

NJOKI MWANGI

JUDGE

In the presence of:-

Appellant present in person

Ms Valerie Ongeti, Prosecution Counsel, for the DPP

Mr. Mohamed Mohamud - Court Assistant.