REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 26 OF 2019

(From the original conviction and sentence in Butere Senior Resident Magistrate's

Court Sexual Offence No. 13 of 2018 of 6th February 2019 (Hon. MI Shimenga, Resident Magistrate)

TOM.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The appellant was convicted by Hon. MI Shimenga, Resident Magistrate, in Butere PMCSO No. 13 of 2018, of incest contrary to Section 20(1) of the Sexual Offences Act No. 3 of 2006, and was sentenced to serve ten years in prison. The particulars of the charge against the appellant were that on the 26th day of May 2018, at [Particulars withheld] Village, Bushieni Location, in Butere Sub-County of Kakamega County, he intentionally and unlawfully caused his penis to penetrate the vagina of MAW, a girl aged sixteen years, who was, to his knowledge, his sister.

2. Although the appeal was against both conviction and sentence, when the same came up for hearing on 7th May 2020, via videoconference, the appellant dropped the appeal against conviction, and only urged the aspect of the appeal relating to sentence. He invited the court to consider reducing the sentence. I shall, therefore, not go through the rigours of reciting the evidence as recorded by the trial court, as a review of the entire record of the trial court would usually be relevant for the purpose of an appeal on conviction.

3. According to the record, the complainant who testified as PW1, was the sixteen year-old sister of the appellant. The age of the appellant was put at twenty-seven years, by the probation officer, in her pre-sentence report, dated 18th February 2019. Both PW1 and the appellant are orphans, following the deaths of their parents. PW1 described herself as HIV positive. She lived with her grandparents after her parents died. On the material day, she had been chased away by her grandmother, so she sought refuge at her late parents' home, where the appellant lived. As she had forgotten her ARV drugs at her grandmother's home, she asked the appellant to escort her there, so that she could retrieve them. He took advantage of the cover of darkness on the way there, to pounce on her and to forcefully have sexual intercourse with her. Since conviction is not challenged, I shall leave it at that.

4. The sentence imposed by the trial court was the minimum, under section 20(1) of the Sexual Offences Act, which should be not less than ten years of imprisonment. Although in the judgment the court cited the proviso to section 20(1) of the Sexual Offences Act, which prescribes the penalty where the victim is a minor, a maximum of life in prison, the trial court did not appear to take that into account at sentencing, and awarded the minimum sentence available under section 20 even for adult victims. In other words, the trial court did not approach the matter as one where the victim was a minor, but rather as a simple incest matter, and awarded the minimum sentence prescribed by the law for the crime of incest.

5. For avoidance of doubt section 20(1) of the Sexual Offences Act provides as follows:

> *"20. Incest by male persons*
>
> *(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."*

6. The manner in which the trial court approached the matter of sentencing in this case, disadvantaged the victim, for the offender got away with a much lighter sentence compared with a situation where he had been charged with defilement of a girl of 16 instead of incest. For a victim of sixteen years, the appropriate charge for defilement would have been under section 8(4) of the Sexual Offences Act, which would have attracted a penalty of not less than fifteen years in prison, upon conviction. Section 8(1)(4) says as follows:

> *"8. Defilement*
>
> *(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.*
>
> *(2) …*
>
> *(3) …*
>
> *(4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years."*

7. The facts disclose a simple case of defilement of a minor of sixteen years, and the appellant, if he had been properly charged under section 8(1)(4), ought to have been sentence of not less than fifteen years in prison. I have said previously, in other judgements, that I am yet to understand why the prosecution would prefer to bring incest rather than defilement charges in cases of this nature, where defilement and incest overlap. For a reason, that is not yet clear to me, committing incest with a minor is treated as an offence lesser to defilement. By preferring a charge of incest, rather than defilement, therefore, the prosecution advantages the offender rather than the victim, yet incest, which is really defilement committed within the family, ought, to my mind, to be the more serious of the two, given that the same amounts to a breach of trust by the offender and it is actually two offences in one. The child victim trusts the offender to be his or her protector, on account of the filial relationship, and any sexual attack on him or her would be a serious breach of that trust. The law ought to take a more serious view of defilement within the family as a result. That, unfortunately, does not appear to be the case in practice, and it appears to be the policy, since the prosecution appears to prefer mounting incest charges rather than the more serious defilement charges. In my view, this is an area crying out for reform.

8. Going back to what I have stated above, in paragraphs 5 and 7, aforegoing, the trial court ought to have considered imposing a much stiffer penalty, taking into account the proviso to section 20(1), which prescribes the maximum penalty for defilement of minors within the immediate family. It should also have considered section 8(4) for guidance. The penalty imposed was clearly unjust to the victim.

9. The appellant would like me to consider reducing the sentence that was imposed on him by the trial court. He did not say it at the hearing, but I sense that he would like me to do so on the basis of the recent determinations by the Supreme Court and the Court of Appeal, regarding minimum sentences, in *Francis Karioko Muruatetu & another vs. Republic* [2017] eKLR and *William Okungu Kitinya vs. Republic* [2013] eKLR, respectively. I shall determine the appeal on sentence with the said decisions in mind.

10. The victim of incest in this case was an orphan. She was being raised by her grandparents, and on the material day, she had, apparently, disagreed with them, and was chased away from their home. She sought refuge at her parents' home, where she expected that the appellant, her twenty-seven year-old brother, would offer care and protection. He did not. Instead, he ferociously attacked her, and sexually violated her. She was vulnerable as a minor, as an orphan and as a HIV positive person. She needed care and protection, which the appellant, her adult brother, ought to have offered. He did not offer the same, instead he did the worst. I am alive to the fact that he was also an orphan, but I have noted that he was more than ten years older than PW1. He was a mature adult of twenty-seven, while she was a sixteen-year-old. He should have known better. Without her parents, it fell upon him, being the eldest child, to take care of her, his youngest sibling. Instead of doing the right thing, he just did his worst.

11. I hold the view that the appellant was dealt with rather leniently in given the circumstances. He ought to have been charged with defilement, where he would have been given a more fitting sentence. Secondly, even with the anomaly in the manner the charges were brought, while noting that that did not invalidate them, the trial court should have given some attention to the proviso in section 20(1), as stated earlier. I am not persuaded, in the circumstances, that the appellant should benefit from a reduction of sentence. I am equally not persuaded that the principle, stated in *Francis Karioko Muruatetu & another vs. Republic* and *William Okungu Kitinya vs. Republic*, should apply, in the circumstances of this case, to favour him.

12. In the end, I find that the appeal against sentence is not merited, and I hereby dismiss the same, the sentence imposed by the trial court is accordingly confirmed. The appellant has a right to move the Court of Appeal appropriately, should he be aggrieved by the outcome herein.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 11TH DAY OF JUNE, 2020

W. MUSYOKA

JUDGE