REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 70 OF 2017

PMK……..…….....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the conviction and sentence of the Principal Magistrate Hon. V. Wakumile delivered on 28th July 2017 in Nakuru Criminal Ca0`se No. 1502 of 2015.)

JUDGMENT

1. The appellant was charged with the offence of **Incest by male contrary to Section 20(1) of the Sexual Offences Act No. 3 of 2006**. The particulars being that on diverse dates of 17th May – 18th June 2015 in Njoro District of the County of Nakuru being a male person caused his penis to penetrate the vagina of **MNK** a female person aged 5 years who was to his knowledge his niece.

2. The appellant was also charged with an alternative charge of committing an **indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act No. 3 of 2006.** The particulars being that on diverse dates of 17th May – 18th June 2015 in Njoro District of the County of Nakuru unlawfully and intentionally committed an indecent act with a child by touching the private parts namely vagina, buttocks of **MNK** touched aged 5 years.

3. The appellant denied the charges and the case proceeded for hearing with the prosecution calling 8 witnesses in support of their case while the appellant in his defence gave sworn statement and called 4 witnesses. By the judgment delivered on 28th July 2015 the lower Court found the appellant guilty as charged and convicted him of the offence of incest. He was sentenced to life imprisonment.

4. The appellant being aggrieved and dissatisfied with the conviction and sentence, filed this appeal dated 9th of August 2017 on the following grounds: -

i. The trial magistrate erred both in law and in fact in convicting the appellant based on mere suspicion, emotions and sympathy without any satisfactory and/or conclusively evidence at all rendering the conviction legally untenable and sentence harsh and excessive.

ii. The trial court erred both in law and in facts in failing to conduct a voire dire examination to determine the capacity of the complainant to understand the concept of speaking the truth or telling lies and the legal consequences thereof.

iii. The trial magistrate erred in law and in fact in failing to fully evaluate the prosecution's case, the contradictory evidence thereto thus arriving at untenable legal factual conclusions.

iv. That the Trial magistrate erred both in law and in facts by failing to find and hold that the complainant's own brief testimony contained no level or amount of satisfactory evidence capable of linking the appellant to the offence in question.

v. That the trial magistrate erred both in law and fact in holding that the prosecution prove its case against the appellant beyond any reasonable doubt such holding fully and entirely repugnant to the weight of the evidence on record.

vi. That trial magistrate misdirected himself in failing to appreciate the fact that in law, the onus was on the prosecution to first prove its case against the appellant beyond ant iota of doubt before evaluating or considering the Appellant's defence.

vii. That in totality, the prosecution completely failed to prove its case against the appellant to the satisfactory standards as by the law required thereby rendering both the conviction and the sentence imposed herein both legally and factually unstainable.

5. The appeal is strongly opposed by the prosecution through its state counsel. On 11th of June 2020 the matter proceeded for hearing the appellant's counsel was not present but the appellant stated to Court he was ready to proceed without his advocate. The appellant and the state counsel for the prosecution gave their oral submissions.

APPELLANT'S CASE

6. The appellant submitted he denied the charge in the trial Court, he stated he was living with the child and his children for one year and could not defile her as she was his late brother's child. He stated that the child was aged 5 years at the time of the alleged offence and school going; that the child's mother was working in a club and on that fateful day, they had agreed that she would come home late therefore they agreed the child would go and stay with the appellant's children.

7. He further submitted that the child was asked by a neighbour the reason why she was not walking properly and at first she denied and later said the appellant had done bad manners to her which the appellant understood to be defilement. He stated that the chief went and interrogated the appellant and also saw where he slept and where the child sleeps and he never got anything. The appellant was arrested and taken to the police station. He submitted that in Court the child was asked by the magistrate and she said nothing was done to her. It is the Appellant's view that the complainant was coached to say that he defiled her. Appellant stated that on the day the incident occurred his wife was not at home but his children were at home. He said his wife was sickly and was in hospital.

8. The appellant urges the Court to consider the two issues as the child's mother was not involved in the issues because she trusted him that he could not do such a thing. He submitted that the Court should consider his appeal and set him at liberty as his parents passed on and he was taking care of his children before conviction. He urged Court to give him that chance to go back to his children and he has reformed in prison.

PROSECUTION'S CASE

9. The state counsel submitted that the appellant was convicted of the offence herein and sentenced on 28th July 2017 to life imprisonment by **Hon. Wakumile**.

10. She submitted that at the trial Court the prosecution was able to prove the ingredients of the offence; one the appellant was related to the complainant; the appellant was an uncle to the complainant. PW2 corroborated the same and identified her as her neighbour. She submitted that PW2 said the appellant lived alone with the complainant in the house and PW3 stated that the accused was his brother in law and stated that the child was his niece and the appellant had taken guardianship responsibility after the complainant's father passed on and her mother abandoned her. Further that the appellant's wife and his children had left him and he lived alone with the minor. She submitted that the complainant admitted that the complainant was her niece and that he had lived with her for one year.

11. The state counsel further submitted that PW2 noted the complainant had difficulty in walking and PW6 the doctor who examined the minor found that her hymen was broken and she had discharge in the vagina and lab tests showed there were pus cells.

12. On the issue of grudge, she submitted that PW2 clearly stated before Court that they had no grudge against the appellant. She urged the Court to take note that the complainant was 5 years old and lacked mind set to come up with a scheme to frame the appellant. The appellant was the complainant's guardian at the time and the child had no other family member around and no grudge would have been formed between the two.

13. She further submitted that the prosecution's evidence by PW2 and PW3 was that, the accused's wife left the matrimonial home contradictory to his allegation that his children were there. She stated that evidence on penetration was adduced; P4 form shows the child was infected. The state urged Court to dismiss this appeal.

ANALYSIS AND DETERMINATION

14. This being the first appellate Court. I am expected to subject the entire evidence adduced before the trial court t fresh evaluation and analysis. This I do while bearing in mind that I never had the opportunity to hear the witnesses and observe their demeanor. The principles that apply in the first appellate court are set out in the case Of **Okeno Vs Republic [1972] EA 32** where it was stated as follows: -

> **"The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala v. Republic [1957] EA 570.) 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 Court's findings 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 v. Sunday Post, [1958] EA 424.)"**

15. In view of the above I have perused and considered evidence adduced before the trial Court. I have also considered submissions by the appellant and the state counsel. What need to be proved in the offence of incest beside the three incidents of the offence of defilement is the relationship between the accused and the complainant. **Section 22 (2) of the Sexual offences Act** defines a niece of a nephew as follows;

> **"nephew" means the child of a person's brother or sister and "niece" has a corresponding meaning.**

16. From evidence adduced before the trial Court, there is no dispute that the child knew the appellant and that the appellant was the child's uncle being his late brother's child.

17. From the doctor's report there is no dispute that the child was defiled. She was therefore penetrated.

18. What I consider to be in issue is whether the prosecution adduced evidence beyond reasonable doubt that the child was defiled by the complainant and if so, whether the sentence imposed by the trial Court was harsh and excessive.

(i) **Whether evidence was adduced to prove beyond reasonable doubt that the appellant defiled the complainant.**

19. The appellant submitted that the prosecution evidence was marred with contradictions that would not warrant a conviction. On perusal of evidence adduced by prosecution witnesses I note that PW2 who was the appellant's neighbour stated that the appellant lived alone with the complainant. She said she noticed that the girl was not walking well and reported to the teacher who took steps to take her to police and later to hospital. PW3 testified that the girl's father who was appellant's father died during her infancy and the girl was later abandoned by her mother and that is when the appellant took her in to stay with his family. She said at the time of the incident, the appellant's wife had left with her children.

20. PW4 a teacher in complainant's school confirmed that she received report of suspected defilement of the complainant from the child's class teacher; she confirmed that they took her to health centre.

21. There was no doubt that PW1 and the Appellant's relationship fell within the prohibited degrees of consanguinity stipulated in **Section 22 of the Sexual Offences.**

22. **On penetration or indecent act**;

Penetration is defined as follows under **Section 2 (1) of the Sexual Offences Act No. 3 of 2006**:-

> **"penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person**."

23. The compliant broke down into tears before the trial Court while testifying. It was her testimony that the Appellant had done bad manners to her. In the case of **GMM Vs Republic [2019] eKLR** it was stated that:-

> **"The expression "bad man," "Bad manners" are ordinarily used by young children who do not have better expressions of people who do bad things to them and especially sexual assaults and conducts by either touching their genitalia or private parts like breasts or buttocks. Such expressions should therefore be so understood while discussing sexual offences to minors."**

10. It was the testimony of PW2 that she was a neighbour to PW1 and on the fateful day she went to fetch water at the appellant's house at around 8:00 am and it is when she realised PW1 was walking with difficulty. She reported the matter to her teacher. PW5 the nursery school teacher of PW1 was informed by PW2 that she suspect PW1 had been defiled due to her walking style, the teacher promised to investigate and interrogate PW1 who confined in her that her uncle Peter was in the habit of defiling her. During her interrogation with PW5 she kept crying and it took a while before she opened up.

11. PW6 in her testimony confirmed there was penetration. The medical evidence produced in Court clearly supported that PW1 had been

defiled as her hymen was torn, foul smell emanating from her genitalia and on vagina swap; molite bacteria, epithelial cells, and pus cells were detected though no spermatozoa cells were seen. It was the testimony of PW6, the clinical officer the presence of Pus cells and bacterial it was a finding that confirmed PW1 had been defiled.

12. **On the Age of the complainant**;

As per the P3 form the doctor who examined PW1 recorded on the estimated age as 6 years. The appellant never challenged the child's age.

(ii) Whether *voire* examination was done

13. Contrary to submission that *voire dire* examination was not done, I note that at page 5 of the proceedings the Court examined the child and decided that she gives unsworn evidence. Further the Court of Appeal in the case of **Manipett Loonkomok –vs- R (2016) eKLR** held as follows:

> **"We turn to consider the effect of failure by the court to administer voire dire on the complainant. It is firmly settled that not in all cases that voire dire is not administered or is not administered properly the entire trial would be vitiated. This court sitting at Nyeri has recently reiterated what has been said many times before that question will depend on the peculiar circumstances and particular facts of each case." See James Muriithi –vs- R Criminal Appeal No. 10 of 2014" ……**
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> **… But the evidence taken without examination of a child of tender years to determine the child's intelligence or understanding of the nature of the oath cannot be used to convict an accused person. But it is equally true as this court recently found that; "In appropriate cases where *voir dire* is not conducted, but there is sufficient independent evidence to support the charge … the court may still be able to uphold the conviction**."

14. From the above finding by the Court of Appeal, it is not in all cases where a *voire dire* examination has not been conducted that the prosecution case will be vitiated. However, in this case voire dire was conducted by the trial court.

(iii) Whether appellant's defence was considered

15. As to whether appellant's defence was considered, he stated that his elder brother's wife implicated him out of malice because she was unhappy for being given a lesser portion of land but he confirmed that he had stayed with the minor for one year. His witness PW2 who is the appellant's niece stated that she used to bathe the complainant but on the material day she had taken appellant's wife to her home because she had suffered mental breakdown. She also confirmed that the appellant had stayed with the complainant for one year in the absence of his family. The evidence of PW2 therefore corroborate prosecutions witness to the effect that the child was staying alone with the appellant.

16. DW3 and DW4 a friend and younger brother of the appellant respectively testified of the appellant's character saying he was a good person and he may have been implicated by her sister in-law because of family land. PW4 further stated she believed PW2 bewitched appellant's wife.

(iv) Whether sentence by the trial court was harsh and excessive.

17. The Appellant stated the trial magistrate erred in law by imposing a harsh and excessive sentence. The appellant was charged with **Section 20 (1) of the Sexual Offences Act** which provides as follows;

"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."

18. The trial magistrate sentenced the appellant to life imprisonment as stipulated by the law; the said sentence was the maximum but not mandatory sentence.

19. The Supreme Court however in the case of **Muruatetu** declared mandatory nature of sentences unconstitutional and it takes away the discretion of judicial officer and render mitigating factors superfluous.in view of the above I note that it is indicated under mitigation that he was first offender.in response to state counsel's submission, the appellant stated that his parents had passed on and he was taking care of the children. He prayed that he be given a chance to go and take care of the children. He said he had reformed while in prison.

20. I have considered circumstances of the offence. I have also considered the minors age and the fact that the appellant abused the responsibility bestowed to him as a guardian of the child. The child looked up to him for care and parental love but was instead abused. I agree that the offence is serious but in view of determination in **Muruatetu** case I find it fair and just to reduce the sentence to 15 years' imprisonment.

21. **FINAL ORDERS**

1. Appeal on conviction is hereby dismissed.

2. Appeal on sentence allowed and sentence reduced to 15 years' imprisonment.

3. Sentence to run from the date of sentencing by the trial Court.

Judgment dated, signed and delivered via zoom at Nakuru This 21st day of July, 2020

RACHEL NGETICH

JUDGE

In the presence of:

Jeniffer - Court Assistant

Rita for State

Appellant