REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NUMBER 43 OF 2017

DT....................................... APPELLANT

VERSUS

REPUBLIC.................... RESPONDENT

(Being an appeal against the original conviction and sentence from Criminal Case Number 1460 of 2016 by the Hon. R. Amwayi (Resident Magistrate) at Molo Chief Magistrate's Court)

JUDGMENT

1. The appellant DT was charged with;

INCEST CONTRARY TO SECTION 20(1) OF THE SEXUAL OFFENCES ACT NO. 3 OF 2006.

> *It was alleged that On the 21st May 2016 in Kuresoi district within Nakuru County, intentionally and unlawfully caused his penis to penetrate the vagina of FC, a child aged 8 years whom to his knowledge is his daughter.*

2. On 8th May 2017 he was found guilty of the offence of Incest, convicted and sentenced to life imprisonment.

3. Aggrieved he filed petition of appeal on 16th May 2017 on the following grounds;

> ***1. That I pleaded not guilty to the charges during plea time and I still maintained the same to date.***
>
> ***2. That the learned trial magistrate erred in both law and facts when he found the appellant guilty in the present case and yet the prosecution's evidence erred to was not meritable to warrant a conviction.***
>
> ***3. That the learned trial magistrate erred in matters of both law and facts when he convicted the appellant herein and yet section 151 of the Criminal Procedure Code was not complied with during trial.***
>
> ***4. That the learned trial magistrate erred in both law and facts when he only found a life sentence to be a minimum sentence against the appellant and yet the supreme authority in Sup. Pet. No. 15 of 2015 – Nairobi is in existence.***

4. The case for the prosecution was presented by six (6) witnesses.

5. It was the evidence before the trial court that the appellant was the step father of the complainant FC, **PW2** but the biological father to her brother EK, **PW3.**

6. On the material date, 21st May 2016 complainant's mother and wife to appellant JT had left home at 10:00am and gone to the farm leaving the children at home. Upon her return about 1.00 p.m. she found the complainant nine (9) year old FC crying. She asked her what the matter was. FC told her that her father had taken her to the house, made her sleep on the floor, removed her panty and defiled her. That her brother EK saw what had happened. On hearing this she proceeded to examine the child and she saw that the child was bleeding, she reported at Tamyota Police Post and was advised to go to hospital. The following day she went to Molo District Hospital where the child was examined, treated, P3 and Post Rape Care were both completed.

7. In her testimony JT told the court that when the appellant married her, she already had the complainant. At the end of her evidence in chief the appellant did not ask her any questions.

8. The complainant testified how her father called her into the house, spread a net on the floor and ordered her to lie there, and remove her panty. She obeyed. He removed his trouser and inserted the thing used for urinating into her vagina. She cried out and her brother EK came. When he was done he ordered her to get out of the house and not to tell anyone.

9. When her mother arrived, she was still crying and she reported to her what the appellant had done. That her father while he was armed with a knife warned her mother that he would kill her if she told anyone.

10. The following day her mother took her to the police station where they reported the matter and she recorded her statement, was taken to hospital where she was examined and treated. In cross examination the record shows the appellant, instead of asking any question stated;

> ***"I just ask for forgiveness from the child. I will not ask any questions."***

11. EK the complainant's brother was **PW3.** He testified that when the father came and ordered the sister into the house he was there. When the appellant pushed his sister to the floor he saw and even when the door was closed he peeped through the cracks and saw what the father was doing to his sister, he saw him put his urinating thing into FC's urinating thing, he heard her scream for help, and he too screamed for their mother but she was not at home. His father also warned him not to tell but when their mother came home they told.

12. **PW4 No. 2002052736 APC Robert Otieno** the arresting officer testified that the report was made on 22nd May 2016, that the complainant's mother told him that the previous day her husband had threatened to kill her, she then went to a *nyumba kumi* elder who took her to the police post. He proceeded to arrest the appellant from the shopping centre and took him to Tamyota Police station.

13. **PW5 No. 69315 Cpl Boniface Njuruni** was the investigating officer, he received the complainant, her mother on 22nd May 2016 at Tamyota Police Station assigned them the motor vehicle to take them to hospital together with a police escort. When the report came confirming defilement he charged the appellant. He caused age assessment to be done for the complainant and it showed she was below 10 years.

14. **PW6 Stanley Ngetich,** a Clinical Officer Molo Sub-County Hospital testified and produced the medical evidence, treatment notes, P3 and Post Rape Care forms. The child was examined on 22nd May 2016, there were no tears, blood stains but the hymen was broken. HVS produced a result of presence of epithelial cells but no spermatozoa but the cells were an indication of recent sexual intercourse. That urinalysis showed pus cells, some infection. He concluded that there was penetration by male genital organ.

15. The accused was found to have a case to answer.

16. In his sworn statement of defence he denied the charges and stated that he was arrested while working in the farm. That on the day of the alleged offence he was on the farm with some people he could not name. That he had lived with FC for 6 years, and EK was his son and he had no feuds.

17. This being a first appeal the court is required to re-evaluate re-assess the evidence and draw its own conclusions, bearing in mind it never heard or saw the witnesses giving evidence. **Okeno v Republic.**

18. The appellant in arguing his appeal relied fully on his submissions.

19. Addressing the issue of his seeking forgiveness from his child he submitted that this was out of shock on hearing his daughter give false testimony against him. He submitted that he lost his senses on hearing her, and that that was also the reason why his defence was the way it was. He submitted further that prosecution's case was full of contradictions, that there was hostility of witnesses and unconfirmed statements.

20. He submitted that after PW1 testified the charge was amended but PW1 was not recalled for him to cross examine her contrary to Section 214 of the Criminal Procedure Code. That in that regard that he was not accorded a fair trial.

21. That the *Nyumba Kumi* elder who escorted complainant to police post ought to have been summoned vide **Section 150 of the Criminal Procedure Code.**

22. That PW6, the clinical officer was not sworn yet his testimony was very crucial to the case. He relied on **Erick Omondi Mboya v Republic**, **Robert Fanali Akhuya v Republic**, **Sabastian Okweno Mrefu v Republic [2014] eKLR.**

23. That even with these omissions, that a retrial would only violate his fundamental rights as was held by the Court of Appeal in **Robert Fanali Akhuya**.

24. Regarding the sentence, he relied on the case of **Francis K. Muruatetu & Others v Republic**.

25. The appeal was opposed vide submissions by Ms. Wambui prosecuting counsel.

26. That the state had proved the age of the complainant.

27. That appellant was complainant's step father vide **Section 22(1) of the Sexual Offences Act.**

28. That penetration was proved by medical evidence and the child's testimony.

29. That the identity of the perpetrator was not in issue.

30. That the evidence was well corroborated.

31. In addition, the appellant given the opportunity to cross examine the complainant, had no questions for her and only sought her forgiveness. He also had none whatsoever for his wife.

32. Regarding the sentence, that the same ought to be upheld as the age of the child was confirmed.

33. The issue for determination are;

> 1) *Whether the court failed to comply with Section 214 Criminal Procedure Code and if so whether the appellant's right to fair trial was violated.*
>
> 2) *Whether the court failed to swear PW6 and if so, the probative value of that evidence.*
>
> 3) *Whether the prosecution proved its case beyond reasonable doubt to warrant the conviction.*
>
> 4) *Whether under the Muruatetu principle the sentence can be varied and if so, what is the appropriate sentence.*

On the first issue: *Whether the court failed to comply with Section 214 Criminal Procedure Code and if so whether the appellant's right to fair trial was violated*

The record speaks for itself. On 21st June 2016 upon the testimony of PW1, the charge which had only one count, **Incest Contrary to Section 20(1) of the Sexual Offences Act** and whose particulars did not even bear the age of the alleged victim was actually substituted with another charge bearing the main charge and the alternative charge under **Section 11(1) of the Criminal Procedure Code** was added**.**

Section 214 of the Criminal Procedure Code states;

> **"S. 214. Variance between charge and evidence, and amendment of charge**
>
> **(1) Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:**
>
> **Provided that—**
>
> > **(i) where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;**
> >
> > **(ii) where a charge is altered under this subsection *<u>the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate,</u>* and, in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination.**
>
> **(2) ………..**
>
> **(3) ………..**

The trial court had the duty to inform the accused person of his right to have the witness recalled, either to testify afresh or to be cross examined. By failing to do so the trial court prejudiced the accused's right to a fair trial.

34. **On the second issue** *Whether the court failed to swear PW6 and if so, the probative value of that evidence*

Section 151 of the Criminal Procedure Code provides that;

> ***"Evidence to be given on oath Every witness in a criminal cause or matter <u>shall</u> be examined upon oath, and the court before which any witness shall appear shall have full power and authority to administer the usual oath."***

The record shows that PW6 was not sworn, in fact it simply reads;

> ***"PW6, male adult. I am called Stanley Ngetich."***

The court did not indicate whether the testimony was unsworn or the court did not also indicate whether the witness was sworn, but what is evident is that the witness was not sworn. He simply proceeded to give his statement. Relying on this "evidence" the trial court stated;

> "*The evidence of the complainant that there was penetration was well corroborated by the medical documents and evidence on record…The complainant was taken to hospital and the medical officer stated that he concluded that there was penetration as there was absence of hymen and the presence of pus cells and epithelial cells indicates that sexual activity had taken place."*

35. In **Samwel Muriithi Mwangi v Republic [2006] eKLR** the court of appeal had this to say about unsworn evidence.

> **"…***there is no way in which we can determine, one way or the other, that the witnesses were or were not sworn before they gave their evidence. Most likely, they took the oath before giving evidence. But there is also the probability that they might not have taken the oath and if that be the position, it would mean that the appellant was convicted on evidence which was not sworn. That would be in violation of section* ***151*** *of the Criminal Procedure Code and the other provisions we have set out herein. That, in our view, cannot be a matter curable under* ***section 382*** *of the Criminal Procedure Code. To be convicted and sentenced to death on evidence which is not sworn must of necessity, be prejudicial to an accused person. In the event, we are satisfied that the trial of the appellant was a nullity because we are unable to exclude the probability of his having been convicted on unsworn evidence."*

36. In **Jamaal Omar Hussein v Republic [2019] eKLR t**he Court of Appeal went on to state:

> "*There is a presumption that a person who swears to tell the truth will do so and since evidence tendered on oath is subjected to cross- examination to test its credibility and veracity, then the same carries more probative weight. This is nonetheless not to say that unsworn evidence is totally worthless. It only means that the court considering such evidence has to consider it with circumspection and look for corroboration from other evidence adduced in the matter. This Court addressed the evidentiary value of unsworn statements, in* **May v Republic (1981) KLR** *(Law Miller & Potter, JJA.) as follows;* ***"An unsworn statement is not, strictly speaking, evidence and the rules of evidence cannot be applied to an unsworn statement. It has no probative value, but it should be considered in relation to the whole of the evidence. Its potential value is persuasive rather than evidential. For it to have any value it must be supported by the evidence recorded in the case."*** *In other words, unsworn evidence can still be relied on but it would require corroboration before it can form a basis for conviction. In more recent decision, this Court in* ***Mwangi v Republic (2006) 2 KLR 94*** *held that it is prejudicial for an accused person to be convicted on the basis of unsworn evidence."*

37. The record shows that the PW2 the minor gave sworn testimony and so did her mother. Her brother due to his age gave unsworn testimony. The question then is whether this court should go the route of the ***Samwel Muriithi*** case or the ***Jamaal Omar*** case way?

38. The justice of the case demands that both situations be weighed carefully. One, the appellant may have been severely prejudiced, while on the other, the other evidence could support the teetering unsworn testimony of PW6. Would the complainant's testimony stand without the testimony of PW6 and PW3 who was the eye witness, and who gave unsworn testimony? Examined as against the holding in the **Jamaal** case, it is evident that the only evidence so to speak was that of the complainant and that of her mother with regard to what happened.

39. Following the holding in **May v Republic (above) the question begging is whether there is other evidence on record to support the evidence of PW6?**

40. PW2's testimony was clear on how the incident happened. She immediately reported to her mother when her mother came home, and her little brother corroborated the story with what he had seen. Hence with regard to the circumstances of the offence, that evidence is solid. The appellant's reaction of seeking forgiveness from his daughter, though apparently incriminating in nature appears to have been a natural reaction to what was going on in court. It was not obtained from him by any questions, he is the one who uttered those words, unexpectedly in the proceedings. His submissions that he lost his senses due to its untruthfulness is not tenable, this is because he had ample opportunity during the whole trial to retract that plea for forgiveness. If it is true she was lying, why would he ask for forgiveness from a child who was lying? The natural reaction to a lie, so gross would not be to ask for forgiveness, it would be anger or revulsion and sadness, but not remorse, remorse for what? Hence the fact that when the child testified the appellant's reaction was unsolicited remorse cannot be removed from the records by his submissions. In my view it would appear that what happened was that he lost his senses, and allowed himself to defile his child. Even without that, the evidence of the complainant, her mother and her brother support the fact that the appellant defiled the child. The medical evidence was there to support this evidence. In the circumstances of this case, I find the evidence of the clinical officer of great persuasive value in confirming that the child's hymen was missing and she had been defiled.

41. In a nutshell, I find therefore that though the PW1 was not recalled to testify afresh after amendment of the charge, the appellant was not prejudiced. Neither was the failure by the trial court to swear the clinical officer fatal to the case.

42. Hence, it is my considered view that the charge of incest was proved beyond a reasonable doubt.

43. Regarding the sentence, the case of **Dismas Wafula Kilwake** settled the issue as to mandatory nature of the minimum sentences in the **Sexual Offences Act.**

44. In this case, there were no aggravating factors. However, this was the appellant's step daughter, and the appellant's son also saw what happened. It is difficult to fathom what drove the appellant to such an action. Hence before I determine the issue of sentence

I order for a pre-sentence report from the Nakuru County Probation and After Care services to be availed within Fourteen (14) days hereof.

Dated and Signed and Delivered at Nakuru this 9th Day of July 2020.

Mumbua T. Matheka,

Judge

In the presence of: VIA ZOOM

Edna Court Assistant

For state Ms. Wambui for state

Appellant: PRESENT

PROBATION OFFICER'S REPORT be availed ON 28TH JULY 2020

Judge

SENTENCE

Following the order for a Probation Officer's Report to assist the court in arriving at a suitable sentence for the appellant, one was filed by S. Kongani Probation Officer. What came out clearly from the report is that the appellant is unsuitable for a non-custodial sentence. In the SUMMARY OF FINDINGS of her report the Probation Officer concluded:

- ***The appellant is 30 years old.***

- ***He was charged with the offence of incest. The victim was an 8-year-old girl who was his step daughter***

- ***The young girl is still traumatized even up to date as she could not bring herself to comment on the matter. She could only cry.***

- ***The victim's mother was chased away from the home by the appellant's mother who blames her for the imprisonment of her son. She is now renting a house at Kinamba shopping center.***

- ***Relationship between the two families is now strained.***

- ***The appellant has no good report within his community. This is coupled with the fact that the community views the family as defilers and with no morals. Because of this the area chief does not guarantee protection to the appellant in the event of risk upon his life***

Section 33 of the **Sexual Offences Act** provides that a court ought to take into consideration the circumstances of the offence *inter alia* in arriving at the appropriate sentence. It states:

> "*Evidence of the surrounding circumstances* ***and impact of any sexual offence upon a complainant may be adduced in criminal proceedings involving the alleged commission of a sexual offence where such offence is tried in order to prove—***
>
> *(a) …—*
>
> *(i) …*
>
> *(ii) …; and*
>
> ***(b) for purposes of imposing an appropriate sentence, the extent of the harm suffered by the person concerned."***

The appellant continues to deny the offence. It is within his rights to do despite the fact of being found guilty.

However, the impact of what he did continues to be felt years after he went to prison. The child is still traumatized, wife and the other children were thrown out of the home by his mother, and his four other children are living a life without their father.

It is recorded that the appellant had an alcohol problem before committing this offence, and has a brother serving life imprisonment for a similar offence. As it is, it is not clear what the cause of this kind of behaviour is in that family or whether it is a family thing, mere coincidence or sickness. What is not in doubt is that it is a crime.

Following **Dismas Wafula Kilwake [2018] eKLR,** I find that though there were no aggravating circumstances e.g. use of violence, the act of defilement itself amounted to violence on the 8-year-old. Hopefully the period spent in custody will be a life changing one so that in the event the appellant leaves prison he will be a father to his children.

I am of the view that a sentence of thirty (30) years' imprisonment from the date of the first sentence would be appropriate in the

circumstances of this case.

Orders accordingly.

Right of appeal 14 days.

Dated Delivered and signed this 10th September, 2020.

Mumbua T Matheka

Judge

10/09/2020