REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCRA NO. 67 OF 2019

BONIFACE MUTUNGWA PAUL.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal from the sentence of the Senior Resident Magistrate Hon. E. M. Muiru

dated 18/12/2018 in Kilungu SRM Criminal Case No. 63 of 2018.)

JUDGMENT

1. **Boniface Mutungwa Paul** the Appellant herein was charged and convicted of the offence of incest contrary to section 20(1) of the Sexual Offences Act No. 3 of 2006. The particulars were that the Appellant on the 8th day of September 2018 at Ndononi village, Kilungu location of Kilungu sub-county within Makueni county, being a male person caused his penis to penetrate the vagina of M.M. a girl aged 12 years, who was to his knowledge his daughter.

2. Upon conviction he was sentenced to life imprisonment. He filed this appeal against the judgment and raised the following grounds:

a) **That,** the Honourable trial Magistrate erred in matters of law and fact by failing to find that one of the key ingredients of the offence i.e. penetration by the accused person was not proved by the evidence on record.

b) **That,** the Honourable trial Magistrate erred in matters of law and fact by rejecting the cogent defence case which not only exhibited bad blood between the Appellant and Pw2 but also reasonably exonerated him from any wrong doing.

c) **That,** the Honourable trial Magistrate erred in matters of law and fact by meting out a sentence that was both excessive and harsh in light of case law and statutory guidance on sentencing of similar offences of similar nature.

d) **That,** in default of any acquittal, this honourable court will exercise its discretion in giving another sentence after considering the mitigation that will be tendered by the Appellant herein.

3. The prosecution case was premised on the evidence of five (5) witnesses. The complainant (M.M) testified as Pw3. She was aged 12 years and was taken through a *voir dire* examination by the trial court. She gave unsworn evidence and was cross examined by the Appellant.

4. It was her evidence that on the day in question his brother and sister (*Muoki and Kanini*) were outside the house when the Appellant who is her father removed her pant and his trouser. He then inserted his penis into her vagina and she felt pain. It was in the evening when he did that to her in the room he shared with her mother. She reported to her mother (Pw1) and her teacher.

5. In cross examination she denied having been told by her mother what to tell the court. She further said Muoki saw what he did to her as he was also on the bed.

6. Pw1 **Anna Ndunge Mutungwa** is the Appellant's wife and mother to Pw3. On 8th September 2018 at about 5:00 pm – 5:30 pm she said she left the house to buy paraffin. As she returned she met her first born child Kanini who informed her that something had happened and she began to cry. She went with Kanini to the place they got water from and she told her she was to report to their grandfather as directed by their grandmother.

7. They managed to go home and she found Pw3 and the Appellant on her bed. M.M was lying on her side as the Appellant held her. They were dressed. She heard him tell her not to report as he would educate her till she is old and grey. She exchanged a few words with the Appellant before asking M.M to go out and she followed her. Its then that Pw3 told her how the Appellant had done "*tabia mbaya*" to her. The Appellant then chased her and Kanini away at 7:00 pm.

8. Since father in-law was un-cooperative, she went and made a report to her mother. On her return, she found when the Appellant had locked the door and placed Pw3 and her brother on her bed. Her mother Katiwa came and they went to her house leaving the Appellant in the house. No action was taken as their mother Katiwa did not want embarrassment. Later the head teacher of Pw3's school (*Kavata Nzou primary school*) took up the matter and a report was made. Pw3 was treated and examined at Mutungu hospital.

9. In cross examination she denied telling the Appellant that she would have him jailed and take his property. She denied falsely accusing him or colluding with the daughter to frame him.

10. Pw2 **Eunice Ngundo** is the head teacher of Kavata Nzou primary school. She testified that on 24th September 2018 at 11:00 am she was in her office when a pupil called (K.M) in standard six reported to her that her father had sexually assaulted her sister (M.M). Pw2 called M.M and confirmed that the father had defiled her on 8th September 2018. She said K.M told her that their mother (Pw1) was aware but had kept quiet.

11. Pw2 alerted the area chief **Mark Kimenye** who came. Pw3 and K.M repeated the same in the chief's hearing. Pw1 was summoned and she also came. Pw1 and M.M were taken to Kilome police station by the chief.

12. In cross examination she said as a teacher her role was to protect the girls while at school. That she simply did what duty calls her to do by reporting the matter to the chief.

13. Pw4 **Eric Kasiamani** examined Pw3 and found her hymen to have been broken and she had a urinary tract infection. He produced the P3 form (EXB1), outpatient card (EXB2) PRC form (EXB4). She was taken for age assessment and found to be 12-13 years old. The age assessment report was produced as EXB3.

14. In cross examination he said M.M ought to have been taken for examination immediately after the offence. He confirmed that an infection can stay in the body for long before it reveals it self.

15. Pw5 **No. 106150 P.C Damaris Musili** received the complaint from M.M who was accompanied by Pw1 and the chief on 24th September 2018. The incident complained of had occurred on 8th September 2018 at about 6:00 pm and the culprit was the father. M.M was then escorted to hospital for examination while the Appellant was arrested. She produced the investigation diary as EXB5.

16. The Appellant gave an unsworn statement of defence. He denied the charges saying he had been framed up and brought to court by people who could do what they wanted.

17. The appeal was canvassed by way of written submissions. In his submissions he states that the complainant was not taken for medical treatment within the prescribed period. She was taken 16 days after the alleged incident. To support this argument he relied on the case of **Chrispine Waweru Njeru –vs- Republic (2015) eKLR**. Further on this he argues that a broken hymen and urinary tract infection were not proof of defilement.

18. He has submitted that there was bad blood between him and Pw1 to the extent that she was used by some unknown persons so that they could take away the only property in his name as an inheritance. That this issue has a real tussle in his life.

19. On sentence he submits that it was not the intention of Parliament to have laws that would lead to the fragmentation of family especially where a breadwinner is kept away. He asks the court in default of an acquittal to give him a minimum sentence of 10 years' imprisonment to afford him an opportunity to rehabilitate. He cites the case of **Francis Muruatetu Petition No. 15 of 2015** (*Supreme Court*) to support this.

20. Learned counsel M/s Eunice Gitau filed the Respondent's submissions in opposing the appeal. She contends that penetration was proved beyond reasonable doubt by the evidence of Pw1-Pw4. That the grounds the Appellant has raised were never issues before the trial court. Pw3 was clear that she was not coached. She contends that his defence was a mere denial. On the issue of frame up she argues that its not Pw1 who brought up the issue to the authorities. That if she had any ill will against the Appellant she would have reported the matter immediately.

21. On sentence she has submitted that Pw1 was a young child of 12-13 years and life imprisonment is the mandatory sentence. She contends that there is no unconstitutionality in life imprisonment, and in the circumstances of this case the life sentence is merited.

22. Counsel has asked the court to consider the best interests of the child, especially in a case where a father instead of protecting is the one harassing.

Analysis and determination

23. This is a first appeal and this court is duty bound to re-analyse and re-consider the evidence and arrive at its own independent conclusion. It is to be remembered that unlike the trial court this court did not see or hear the witnesses.

24. In the case of **Kiilu & Another –vs- Republic (2005) I KLR 174** the Court of Appeal outlined the mandate of the first appeal court as follows:

> ***(2) An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion.***
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> ***(3) 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' 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.***

25. I have considered the evidence on record, grounds of appeal, both submissions and the law. The main issue for determination is *whether the prosecution proved its case beyond reasonable doubt*.

26. Section 20(1) of the Sexual Offences Act provides this:

> ***"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:***
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> ***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 cause penetration or the indecent act was obtained with the consent of the female person.***

27. There is no dispute that M.M is a minor. An age assessment was done and a report (EXB3) produced herein. The trial court which saw the child, conducted a *voir dire* examination on her in terms of section 19(1)(2) of the Oaths and Statutory Declarations Act which provides:

> ***(1) Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with CAP. 15 Oaths and Statutory Declarations [Rev. 2018] 8 section 233 of the Criminal Procedure Code***
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> ***(Cap. 75), shall be deemed to be a deposition within the meaning of that section.***
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> ***(2) If any child whose evidence is received under subsection (1) willfully gives false evidence in such circumstances that he would, if the evidence had been given on oath, have been guilty of perjury, he shall be guilty of an offence and liable to be dealt with as if he had been guilty of an offence punishable in the case of an adult with imprisonment.***

28. The learned trial Magistrate made her observation and found that M.M did not understand the nature of an oath. She gave unsworn evidence and the Appellant cross examined her. I am therefore satisfied that age in this case was proved.

29. The next issue to determine is whether there was proof of penetration. Penetration is defined under section 2 of the Sexual Offences Act as:

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

30. M.M explained to the court what was done to her by her father on 8th September 2015 at about 7:00 pm. The same report was given to her mother (Pw1) on the same day. Instead of reporting the Appellant and even taking the child to hospital, Pw1 engaged her parents who were of no useful help as they were protecting the family name as M.M suffered.

31. It took the bold step of M.M's elder sister to have this matter brought to light. The moment the children's head teacher (Pw2) got the report on 24th September 2018, she informed the chief and a report was made and that's when M.M was taken for treatment and examination.

The medical documents and report EXB1,2 and 4 confirm that there was penetration. She even had a urinary tract infection. This squarely supports M.M's evidence. I am therefore satisfied that penetration was proved.

32. The last ingredient is whether there was proof that the Appellant was the perpetrator. I start with the evidence of M.M. She said the incident occurred on the evening of 9th September 2018 and her kid brother Muoki saw it as he was also on the bed in her parents' bedroom.

33. Pw1 had left home to go and buy paraffin when this happened. After receiving the report, she came home and found the Appellant lying on her bed with M.M. Both of them were dressed and the Appellant was holding the child telling her not to say and if she did not say he would educate her till she is old and grey. What is it that she was not to say?

34. M.M finally spilled the beans and told the mother (Pw1) the same night what the Appellant had done to her. When no action was taken by Pw1 the head teacher (Pw2) was informed by M.M's elder sister.

35. The Appellant in cross examination asked M.M if Pw1 told her what to say and she responded saying: "*My mother did not tell me what to say"*. Even Muoki saw what you did to me." The Appellant also seemed to accuse his wife (Pw1) of a frame up. What this court has noted from the record is that Pw1 inspite of receiving this report the same evening she tried diplomacy by engaging her parents in-law who did not want the matter reported. She is not the one who raised the flag.

36. The children themselves did this through the school administration. Had Pw1 harbored any ill intentions against him as alleged she could have been the first to report. She did not do that. M.M was a credible witness and there was no reason to make her lie against the Appellant. The Appellant's defence did not therefore raise anything substantive.

37. Upon analysis, of the evidence, I find that the learned trial magistrate arrived at the right in convicting the Appellant and I find no reason to make me interfere with it.

38. Finally on sentence, the Appellant has asked the court to reduce the sentence if there is no acquittal. He has even suggested a sentence of ten (10) years while relying on the **Francis Muruatetu case** (supra.) I have noted that the Appellant did not give any mitigation before the trial court though he was given the opportunity. The prosecution said he had no previous records. M.M is the Appellant's own daughter whom he was duty bound to protect against natural vultures but he became one himself.

39. I associate myself with the opinion of the Court of Appeal in Jared **Koita Injiri –vs- Republic (2019) eKLR** where it held that:

> ***"In this case the Appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by section 8(1) of the Sexual Offences Act an if the reasoning in the Supreme court case was applied to this provision it too should be considered unconstitutional on the same basis. The Appellant was provided an opportunity to mitigate in the trial court where it was stated that he was a first offender. He pleaded for leniency. However, it cannot be overlooked that the Appellant committed a heinous crime, and occasioned severe trauma and suffering to a young girl. His actions have demonstrated that around him young and vulnerable***
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> ***children like the complainant could be in jeopardy. Needless to say, pursuant to the Supreme court decision in Francis Karioko Muruatetu and Anor –vs- Republic (supra) we would set aside the sentence for life imprisonment imposed and substitute it therefore with a sentence of 30 years from the date of sentence by the trial court.***

40. Having found the conviction to be safe and being duly guided by the above decision I set aside the sentence of life imprisonment against the Appellant and substitute it with a sentence of 30 years' imprisonment from the date of sentence by the trial court.

Orders accordingly.

Delivered, signed & dated this 6th day of October 2020, in open court at Makueni.

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H. I. Ong'udi

Judge