REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIMINAL APPEAL NO. 70 OF 2018

JK...APPELLANT

=VRS=

THE REPUBLIC.......................................-RESPONDENT

{Being an appeal against the Judgement of Hon. N. M. Kyanya Nyamori – RM Thika dated and delivered on the 5th day of December 2018 in the original Thika Chief Magistrate's Court Sexual Offence No. 19 of 2018}

JUDGEMENT

The appellant is serving a term of imprisonment for ten (10) years for the offence of attempted incest contrary to Section 20 (2) of the Sexual Offences Act. The particulars of the offence were that on 18th February 2018 at [Particulars Withheld] area in Juja Sub-county within Kiambu County the appellant intentionally and unlawfully attempted to touch the vagina of MM with his penis a person who to his knowledge is his daughter.

The appellant being aggrieved by his conviction and the sentence has urged this court to reconsider and analyse the evidence in the trial court with a view to quash the conviction and set the sentence aside. The appeal is premised on grounds that: -

> **"1. THAT the learned trial magistrate erred in fact and in law when she convicted the accused person on basis of uncorroborated evidence.**
>
> **2. THAT the learned trial magistrate erred in fact and in law when she convicted the accused person on basis of contradicted evidence.**
>
> **3. THAT the learned trial magistrate erred in law and in fact when she held that the charge against the accused person had been proven beyond reasonable doubt and failed to consider the fact that prosecution did not parade the Key witness alleged to have been present when the complainant was being subjected to the ordeal.**
>
> **4. THAT the learned Magistrate erred in law and facts when she convicted the accused person when there was not sufficient evidence and more so when she introduced some statements in her judgement which didn't form part of proceedings since neither the complainant nor the prosecution witnesses testified in that respect.**
>
> **5. The learned Magistrate erred in law and facts when he held that the duly sentence that could be imposed upon the accused person was that of custodial sentence of 10 years when no sufficient proof had been tendered in court to warrant a conviction at all."**

The appeal is vehemently opposed. When Counsel for both parties appeared before the court they consented to canvass the appeal by way of written submissions. The same were duly received and I have considered them fully alongside the grounds of appeal. However, as an appeal is in the nature of a retrial I have a duty to reconsider and evaluate the evidence in the court below so as to arrive at my own independent conclusion while bearing in mind that I did not see or hear the witnesses ***(see Okeno v Republic [1972] EA 32).***

The offence of attempted incest is created by **Section 20 (2)** of the **Sexual Offences Act** and that **Section** states: -

> **"20(1)…………**
>
> **(2) If any male person attempts to commit the offence specified in subsection (1), he is guilty of an offence of attempted incest and is liable upon conviction to a term of imprisonment of not less than ten years………"**

Subsection (1) criminalizes the performance by any male person of an indecent act or acts which cause penetration with any female to whom he is related by consanguinity. The subsection also enhances the punishment for persons who commit such acts with children. The test of relationship is provided for under **Section 22 of the Act**. In the instant case the appellant was the step-father of the complainant so their relationship is covered under **Section 22 (1)** which provides that a father includes a half father. Knowledge that the female person against who the indecent act or act causing penetration is committed is related to the offender in the prohibited degree is a crucial element of the offence. However, **Section 22 (3) of the Act** provides that an accused person is presumed to have had such knowledge and the burden of proof is shifted to him to prove that he did not know that a relationship existed between him and the other party. **Subsection (2) of Section 20** must therefore be read together with **Sub-section (1)** and **(3)** and **Section 22 (1), (2), (3)** and **(4).**

In his submissions Learned Counsel for the appellant stated that the charge sheet was fatally defective because firstly it failed to incorporate the provisions of **Sub-section 20 (1) of the Sexual Offences Act** and secondly because in her testimony the complainant and her mother used the word rape rather than the offence created by the Section under which the appellant was charged. Counsel also submitted that in the judgement the trial Magistrate referred to the offence as attempted defilement rather than attempted incest. Putting reliance on the case of **Sigilani v Republic [2004] KLR 480,** Counsel contended that the charge sheet was not clear and did not give reasonable information to aid the appellant to understand the nature of the offence he was charged with. Counsel also contended that the charge sheet violated **Article 50 (2) (b) of the Constitution.** The other issues raised by Counsel for the appellant were the failure by the prosecution to call one Mr. Gikonyo as a witness. He urged this court to draw an adverse inference from this. Counsel also submitted that there were so many contradictions in the prosecution's case which ought to be resolved in the appellant's favour. He contended that there was no evidence to connect the appellant to this offence and that therefore the conviction was a miscarriage of justice and this court ought to find as much and set him at liberty unconditionally.

Counsel for the State (respondent) however submitted that the law governing the evidence in this case is **Section 124 of the Evidence Act.** Counsel submitted that the evidence of the complainant was consistent even during cross examination and the only omission was that the court below did not record that it believed the testimony of the complainant. On this issue, Counsel relied on the case of **George Muchika Lumbasa, HCCRA 17/2016.** In regard to the omission to call Gitonga as a witness Counsel for the respondent submitted that the witness was not willing to testify and that his evidence would not have been of any benefit as he was not present when the offence was committed. Counsel urged this court to be guided by the observation of the Court of Appeal in the case of **Benjamin Mbugua Gitau v Republic [2011] eKLR** that: -

> ***"The court has stated severally that there is no particular number of witnesses required for proof of any fact."***

Counsel urged this court to uphold the conviction and sentence and dismiss the appeal.

The issues for determination are: -

> **(a) Whether the charge as drafted was fatally defective.**
>
> **(b) Whether the charge against the appellant was proved to the required standard.**

(a) Whether the charge against the appellant was fatally defective for the reasons cited by his Advocate.

As I stated above the Section creating the offence of attempted incest must be read together with **Section 20 (1)** and **(3) of the Sexual Offences Act**. It cannot be read in isolation. **Section 20 (1)** provides: -

> **"(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."**

In the particulars of the offence the impugned act was stated to be "***touched the vagina of MM with his penis."*** This amounts to an indecent act. Indecent Act being defined as: -

"indecent act" means an unlawful intentional act which causes—

> **(a) any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration;**
>
> **(b) exposure or display of any pornographic material to any person against his or her will."**

The act complained of therefore constitutes the offence of incest as provided in **Section 20 (1) of the Sexual Offences Act.** In my view, the offence created under **Subsection (2)** need not be stated with **Subsection (1)** for it to be complete. It is a complete offence by itself. I do not therefore agree with Counsel's submission that failure to cite **Subsection (1)** rendered the charge defective. To the contrary I am satisfied that the same contained a specific offence together with particulars necessary for giving reasonable information as to the nature of the offence the appellant was charged with. That is all that is required under **Sections 134** and **137 of the Criminal Procedure Code.** At no time during the trial did the appellant indicate he was not clear as to what he was charged with.

Counsel submitted that the charge was also defective because the complainant and her mother used the word rape in their evidence. I do not agree with this submission either. What the appellant did was clear from the evidence of the two witnesses and the fact that they mentioned the word rape does not imply that that was the offence the appellant should have been charged with. The decision of the court is arrived at after considering and analysing the evidence as a whole but not isolated words that are used by the witnesses. The evidence of the complainant pointed to an offence of attempted incest because as I have stated the provisions of **Subsections (1), (2)** and **(3) of Section 20 of the Sexual Offences Act** must not be read in isolation. They must also be read together with those of **Section 22**. I am not persuaded that the manner of drafting the charge or the use of the word rape in the proceedings rendered the charge fatally defective. In any event the provisions of **Section 382 of the Criminal Procedure Code** render any defect in the charge sheet curable because even if the objections raised by Learned Counsel rendered the charge defective the same clearly did not occasion a failure of justice and the appellant having been represented at the trial by an Advocate should have raised those objections then. Reference by the trial Magistrate of the offence of attempted defilement cannot also be considered fatal. In my view it could have been a typographical error because in the same sentence the trial Magistrate refers to having made a finding on the main count. The main count was attempted incest. It is also easy for one to confuse the two offences as one must be established to prove the other.

Having made a finding that the charge was not defective, I now proceed to determine the second issue which is **whether the charge against the appellant was proved beyond reasonable doubt.**

On this, I have no doubt in my mind that the charge was proved beyond reasonable doubt. The complainant who was twelve years old at the time struck this court as a very truthful witness. She consistently told the court how the appellant who she referred to as ***"baba"*** found her washing clothes and held her at the back and took her to the house. She stated that he made her lie on the bed and then pinned her to it with his head. Thereafter he pulled up her dress and removed her under pant. He tried to insert his genital organ into hers but she thwarted his effort by crossing her legs. She made it clear that he did not penetrate her although he tried and that while he was at it she felt a warm substance on her thighs. I believed her testimony because she was very consistent and even upon rigorous cross examination by defence Counsel she remained unshaken. Her description of the events and the happenings thereafter were so vivid as to leave no doubt in my mind that she was not making it up. Her mother (Pw2) confirmed that she met her crying and when she asked her what had happened she told her the appellant had attempted to ***"rape"*** her. Contrary to Counsel for the appellant's submission the complainant did not state there was a struggle which would have resulted in her suffering injuries. Her evidence was that the appellant used his head to pin her to the bed. Unlike the trial Magistrate I did not find anything in her evidence under cross examination that would render her evidence shaky. I found nothing in the evidence to suggest she had any reason to lie against the appellant and the appellant has not suggested any even in this appeal. In my view her evidence was consistent throughout and it could be that the trial Magistrate was referring to her demeanour which I did not have the benefit to observe. The complainant was consistent that the appellant tried to insert his genitalia into hers but could not do so because she refused to open her legs and it is evident that he soon thereafter ejaculated on her thighs. **Section 124 of the Evidence Act** removed the requirement for corroboration in sexual offences and the submission by Counsel that the prosecution should have adduced medical evidence to corroborate the complainant's evidence is misplaced. It is sufficient that the court believes the victim and records the reasons for so doing. I have stated that I believed her and given my reasons for doing so.

Counsel also stated that the complainant's evidence that she felt pain is inconsistent with her evidence of what transpired. From my reading of her evidence it was her case that she felt pain when the doctor inserted the instrument he was using to examine her in her genitalia. It was not her evidence that she felt pain when the appellant tried to penetrate her. Evidence that she did not sustain injuries did not in my view water down her evidence. She need not have sustained injuries for this court to believe her. In any event other than stating that the appellant put his head on hers she did not allude to him assaulting or using any form of violence towards her. As for the assertion that the court should draw an adverse impression from the prosecution's failure to call a certain Gitonga, I agree with Learned Prosecution Counsel that it was not fatal. This is because firstly under **Section 124 of the Evidence Act** the evidence of the complainant alone was sufficient to convict the appellant and secondly because under **Section 143 of the Evidence Act** the prosecution does not require any number of witnesses to prove facts such as were laid in this case. Moreover, in the case of **Bukenya & others v Uganda [1972] EA 549** cited with approval by our own Court of Appeal in the case of **John Irungu v Republic [2016] eKLR** the court held that it is only in those cases where the evidence of the prosecution is barely sufficient that an adverse inference will be drawn from the prosecution's failure to call certain witnesses. In the instant case the evidence adduced by the prosecution was overwhelming and the evidence of the said Gitonga would in any case have added no value to the case.

The age of the complainant and her relationship to the appellant were also proved to the standard required hence completing the offence of attempted incest. I am satisfied therefore that the charge against the appellant was proved beyond reasonable doubt.

The sentence meted was the minimum prescribed by the law. I am alive to jurisprudence now exhorting the courts to liberate themselves from mandatory sentences their mandatory nature having been declared unconstitutional in the Supreme Court case of **Francis Karioko Muruatetu & another v Republic [2017] eKLR**. However, I find that in the circumstances of this case the term of imprisonment for ten years was neither harsh nor excessive. I shall therefore uphold it. Accordingly, the appeal is dismissed in its entirety. It is so ordered.

Signed and dated this 28th day of October 2020.

E. N. MAINA

JUDGE

Judgement dated and delivered Electronically via Microsoft Teams on this 9th day of November 2020.

MARY KASANGO

JUDGE