REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT VOI

CRIMINAL APPEAL NO. 10 OF 2019

(From the original Conviction and Sentence of the Appellant by Hon. D.M. Ndungi SRM,

in the Senior Resident Magistrate's Court at Wundanyi sexual offence No. 19 of 2018)

ABDALLA MAGHANGA SHARIFF.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Appellant was charged and convicted for the offence of incest Contrary to **Section 20(1)** of the Sexual Offences Act No. 3 of 2006, with an alternative charge of indecent act to a child contrary to **Section 11(1)** of the said Act. He was convicted for the offence of incest and sentenced to life imprisonment on the 23/7/2019.

2. Aggrieved by the conviction and sentence, the appellant preferred an appeal against both the conviction and the sentence vide Petition of Appeal dated 5/8/2019.

The case that was before the trial Court

3. **PW1,** a ten (10) year old girl at date of trial was put through a voire dire examination and the trial Magistrate made a finding that she did not appreciate the nature of an oath and therefore gave unsworn evidence. It was her evidence that her mother had already left for work on that day at 4 am in the morning leaving the Appellant behind. PW1 states that the Appellant was wearing an apron when he forced himself on her, removed his underpants, and she could see the Appellant's male organ, which was erect and was big. She testified that the Appellant went ahead to remove her underwear, covered her mouth with a piece of cloth and inserted his private organ to the part she uses to urinate making her feel a lot of pain and she saw a yellowish discharge coming from her private part but not from the Appellant's private part.

4. PW1 further testified that after the incident the Appellant warned her not to inform her mother of the incident and threatened to stamp her with a knife if she informed anybody. The Appellant then took a shower, dressed and went to work. However, it was not the first time for the Appellant to do the bad thing to her

5. Upon cross examination by the Appellant, PW1 stated that nobody told her to testify against the Appellant, and that she did not remember the exact date of the defilement but it was her brother PW2 who witnessed the defilement and went ahead to inform their mother. Pw1 further confirmed that the Appellant defiled her at 6 am after her mother had left for work at about 4 am and that she did share the room with her brother but they did not share the same bed.

6. The victim's brother **PW2** was put through a voire dire examination and the trial Magistrate made a finding that he did not appreciate the nature of an oath and therefore gave unsworn evidence. He confirmed that the appellant was their father, and that the Appellant went to the complainant's bed and asked her the name of the person who was a friend to their mother. The Appellant then removed the complainant's clothes and used his private organ for urinating to do "tabia mbaya" to PW1 while he laid on top of her. When the complainant screamed, the Appellant covered her mouth with a lesso completely stopping her from screaming.

7. Upon cross-examination, PW2 confirmed that the house they live in has two rooms and that they have two beds, one for his parents, and the other one for PW1 and himself. PW2 further confirmed that he was asleep when he heard and saw his father talk to the complainant while he was on their bed and later on PW1 had injuries between her legs when she went to school. After school, PW2 confirmed that he was the one who informed his mother of the incident while the Appellant was talking with other people.

8. PW3 testified that on the 25/8/2018 at 5 am in the morning, she left her house to work and on returning home in the evening and when she was preparing supper, her son informed her that her husband left his bed for that of her children, and when she confronted her daughter, she confirmed that what PW2 said was the truth and that the Appellant had been laying on top of her and doing her "tabia Mbaya" whenever she goes to work. PW3 further testified that she reported the incident to Nyumba Kumi and the village elders and a decision was made to report the incident to the police. PW1 was then escorted to Moi Voi General Hospital, and it is at the hospital that it was confirmed that PW1 had been defiled.

9. Upon cross-examination PW3 confirmed that the complainantt had informed her that the Appellant used to defile her, *"do tabia mbaya"* with her whenever she used to leave for work and leave him behind. She further confirmed that she did not remember when she reported the incident to the police as she was shocked by what her husband had done. She was also pregnant and worried. She also confirmed that the statement made to the police was a narration of events and that she reported the incident after about 5 days.

10. **PW4 Dr. Shem Okoth** produced the Post Rape Care (PRC) form and P3 form filled by Dr. Winnie Nyabuto who examined the victim on 3/9/2018. The examination showed that the child's external genitalia was normal, labia majora was normal, the labia minora was erythema, meaning that there was increased blood flow on the covering of the vaginal wall. There was a whitish discharge from her vagina, but there was no vaginal bleeding. PW1's hymen was however torn because it had been interfered with. PW4 further testified that the victim was examined one week after the incident, after she had changed clothes and already showered, and the clothes were never brought to the hospital. PW4 further stated that the whitish discharge was common in females and it can be caused by a yeast infection since there were no spermatozoa seen.

11. Upon cross-examination, PW4 confirmed it was not possible on examination to know the person who had defiled the child without DNA test and that the child should have been taken to hospital within 24 hours.

12. On re-examination, PW4 stated that the probable cause for broken hymen was penetration. However, the hymen can also break due to natural causes like ridding of bicycles.

13. Upon closure of the prosecution case, it is evident that **Section 211 of Criminal Procedure Code** was complied with. The appellant stated that he would tender sworn evidence and that he would call two witnesses. However, on the date for the defence hearing, the witnesses were not present and the Appellant opted to proceed on his own without calling his witnesses. It was his defence that he did not commit the crime because on the date of the alleged defilement, the 25/8/2018, he had escorted the body of one of his village mate to Kasigau and he returned home on the 29/8/2018 and returned to work at Teita Sisal Estate for a whole week before he was arrested on the 5/9/2018 and later charged.

14. The appellant further stated that there had been a disagreement between his wife and him concerning mistreatment of his son from his past marriage and a dispute relating to land where his mother in law wanted to grab his property. He further stated that his wife had framed him and his children had been coached to give false evidence. He concluded by stating that he is not a drug addict and he did not take alcohol. Therefore, he could not commit such an offence.

15. Upon cross-examination, the Appellant confirmed that from Kirongwe to Mwatate is about 3 hours and that he parted with his family on 24/8/2018 and returned home on 30/8/2018.

16. It was upon the above evidence that the trial Magistrate, basing conviction under Section 215 of the criminal code, found the Appellant guilty of incest.

17. On the issues framed for determination, the trial court made findings that there was overwhelming evidence stated in the PRC and P3 form that penetration was committed on the complainant in that the complainant's hymen was torn and there was a whitish vaginal discharge, which was evidence of penetration. Further, the two children PW1 and PW2 were categorical that it is the Appellant who defiled the complainant. Further, the complainant even described how the male private organs of the Appellant looked like, that she felt a lot of pain, and that the Appellant covered her mouth.

18. During the hearing of the appeal, **Mr. Motuka** Learned Counsel for the Appellant presented to court written submissions in support of his appeal. He isolated three issues for determination which were as follows:

a) Whether the Respondent proved their case beyond reasonable doubt.

b) Whether the evidence on record was sufficient to establish the crime of incest.

c) Whether the evidence on record was sufficient to warrant a conviction and consequently a sentence.

19. Counsel submitted the prosecution has the legal burden of proof in criminal matters throughout the trial process and the burden does not shift. Therefore, the Appellant was not obligated at any point to help the prosecution discharge its mandate. Counsel cited the case of **Republic v Ismail Hussein Ibrahim [2018] eKLR** in support of his submission on the burden on the prosecution.

20. Counsel further submitted that during trial, PW1 and PW2 gave totally different narrations of what occurred before and immediately after the alleged offence. Therefore, the testimonies of PW1 and PW2 lacked consistency, and were contradictory. PW1 in her testimony stated that PW2 was sleeping on another bed in the same room and after the incident, the Appellant took a shower, dressed and went to work and that it was not the first time the for the Appellant to defile PW1. However, on cross-examination, PW1 confirmed that PW2 was sleeping in a separate room on a separate bed and that after the incident PW1 went to school with PW2.

21. PW2 in his testimony stated that after the incident the Appellant put on his trouser and went outside to meet other people, who later came to their house and asked the appellant many questions and it was the first time he saw the Appellant defile PW1. Upon cross-examination, PW2 confirmed that he slept in the same bed with PW1 and that PW1 had injuries between her legs when she went to school. Mr. Motuka further submitted that the prosecution did not call an independent witness to corroborate the evidence of PW1 and PW2 since many people outside the house asked the Appellant many questions.

22. **Mr. Motuka** also submitted that if indeed PW1 was defiled then the teachers, fellow students, and even the mother to PW1 would have noticed something was amiss with her daughter if indeed it was not the first time she was allegedly defiled. However, PW1 in all material days was in good health and carried on with all her chores without any pain and discomfort.

23. Counsel submitted that the doctor who examined PW1 found that the external genitalia was normal, the labia majora was normal, the labia minora was erythema meaning that there was increased blood flow on the covering of the vaginal wall. Further, that during cross-examination it was confirmed that it was not possible to establish who defiled PW1, and during re-examination of the doctor by the prosecution, it was stated that the hymen could also break due to natural causes like ridding bicycle, but sexual intercourse can be one of the causes. Mr. **Motuka** urged the court to allow his appeal.

24. **Ms. Mukangu,** Learned Counsel for the State opposed the Appeal vide written submissions filed on 1/7/2020 to the effect that the prosecution had established all the ingredients of the offence of incest against the Appellant to the required standard of proof beyond any reasonable doubt. The complainant was nine (9) years of age at the time of the incident as she was born on 19/3/2009 according to her birth certificate, which was adduced in evidence. The Appellant was well known to the complainant and was even identified from the dock by PW1 and PW2 as their father. The identification was therefore not an issue of debate.

25. With regard to the consistent and corroborative evidence, **Ms. Mukangu** submitted that bearing in mind that PW1 and PW2 are both minors and gave truthful evidence, the trial Court had no reason to doubt the same since upon cross-examination their testimony remained unshaken and that PW2 being the only sole witness corroborated PW1 evidence and **PW2**'s testimony was never shaken during cross examination.

26. **Ms. Mukangu** on the issue of penetration submitted that the medical evidence presented before the trial court proved the ingredient of penetration as the complainant's hymen was not intact and there was a whitish discharge in the complainant's vagina. In the premises therefore, she urged this court to dismiss the Appellant's appeal.

27. As the first appeal court, my duty is to re-consider and re-evaluate the evidence adduced before the trial court and come up with my own conclusion as to whether the evidence was sufficient to sustain a conviction Okeno **–vs- R (1972) EA 32.**

28. I have perused the trial court proceedings, the Petition of Appeal, and the submissions by the parties. The main issues for determination are:

a) Whether the prosecution proved its case beyond reasonable doubt.

b) Whether the sentence was harsh and excessive.

a) Whether the prosecution proved its case beyond reasonable doubt.

29. The Appellant was charged with the offence of incest contrary to section 20(1) of the Sexual Offences Act. It provides:

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.

(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.

(3) Upon conviction in any court of any male person for an offence under this section, or of an attempt to commit such an offence, it within shall be the power of the court to issue orders referred to as "section 114 orders" under the Children's Act (Cap. 141) and in addition divest the offender of all authority over such female, remove the offender from such guardianship and in such case to appoint any person or persons to be the guardian or guardians of any such female during her minority or less period.

30. For the prosecution to establish an offence of incest they must produce evidence to prove "relationship, within the meaning of the law and penetration"

31. Section 22 of the Sexual Offences Act sets the test of specific relationships that may be considered for an offence of incest. Section 22 (1) and (2) provides: -

"(1) In cases of the offence of incest, brother and sister includes half brother, half sister and adoptive brother and adoptive sister and a father includes a half father and an uncle of the first degree and a mother includes a half mother and an aunt of the first degree whether through lawful wedlock or not.

(2) In this Act—

(a) "uncle" means the brother of a person's parent and "aunt" has a corresponding meaning;

(b) "nephew" means the child of a person's brother or sister and "niece" has a corresponding meaning;

(c) "half-brother" means a brother who shares only one parent with another;

(d) "half-sister" means a sister who shares only one parent with another; and

(e) "adoptive brother" means a brother who is related to another through adoption and "adoptive sister" has a corresponding meaning."

32. To establish a case under the above Sections, the prosecution must prove the elements of the offence which are:

There must be:

1. ***An indecent act or an act that causes penetration;***

2. ***The victim must be a female person who is related to the perpetrator in the degrees set out in Section 22 of the Act***.

Relationship and age of victim

33. The age of the complainant and the relationship of the accused and the victim is not in dispute since it was established by the testimonies of the Pw, PW2 and the mother of the complainant PW3 and a Birth Certificate was produced as evidence to that effect. The victim's minor age was also proved by the said birth certificate that she was 9 years at the time of the alleged incident. Therefore, the ingredient of the offence under the Proviso of section 20 (1) of the Sexual Offences Act, being filial relationship and minor age of the victim are established.

Defilement

34. The victim testified that the Appellant went ahead to remove her underwear, covered her mouth with a piece of cloth and inserted his private organ to the part she uses to urinate making her feel a lot of pain and she saw a yellowish discharge coming from her private part but not from the Appellant's private part. After the incident, the Appellant warned her not to inform her mother of the incident. He then took a shower, dressed and went to work and that was not the first time he had defiled her.

35. Upon cross-examination, PW1 stated that PW2 was the one who witnessed the defilement and went ahead to inform PW3 who is their mother. Pw1 further confirmed that the Appellant defiled her at 6 am after her mother had left for work at about 4 am. PW1 also described the Appellant's sexual organ as being red at the head, in the middle it was black, it had hair surrounding it and that the Appellant's sexual organ was wet after he defiled her.

36. PW2 corroborated PW1's testimony, stating that the Appellant went to the complainant's bed and asked her the name of the person who was a friend to their mother. The Appellant then forcefully removed the complainant's clothes and used his private organ to do "tabia mbaya" as he laid on top of PW1, and when the PW1 screamed, the Appellant covered her mouth with a lesso completely stopping her from screaming and after the incident the Appellant put on his clothes and went outside to meet people.

37. Upon cross-examination, PW2 confirmed that the house they live in has two rooms and that they have two beds, one for his parents, and the other one for PW1 and himself. PW2 further confirmed that he was asleep when he heard and saw his father talk to the complainant while he was on their bed and later on PW1 had injuries between her legs when she went to school.

38. PW4 **Dr. Shem Okoth** produced the Post Rape Care (PRC) form and P3 form filled by Dr. Winnie Nyabuto who examined the victim on 3/9/2018. The examination showed that the child's external genitalia was normal, labia majora was normal, the labia minora was erythema, meaning that there was increased blood flow on the covering of the vaginal walls. There was a whitish discharge from her vagina, but there was no vaginal bleeding. PW1's hymen was however torn because it had been interfered with. PW4 further testified that the victim was examined one week after the incident. She had changed clothes and already showered, and the clothes were never brought to the hospital. PW4 further stated that the whitish discharge was common in females and it can be caused by a yeast infection since there were no spermatozoa seen.

39. Upon cross-examination, PW4 confirmed it was not possible on examination to know the person who had defiled the child without DNA test and that the child should have been taken to hospital within 24 hours.

40. On re-examination, PW4 stated that the probable cause of breaking the hymen was penetration. However, the hymen can also break due to natural causes like ridding of bicycles.

Conclusion

41. Weighing the evidence of the prosecution against the sworn statement of the defence and bearing in mind the standard of proof of beyond reasonable doubt, I find that the defilement of PW1 by her father was corroborated by the evidence of her brother PW2 who slept on the same bed as PW1 and testified that he witnessed the Appellant defile PW1. It is noteworthy that PW2's evidence even though had some minor contradiction on what happened before and after the fact, the said testimony was never shaken on cross-examination and the contradiction was not substantial that it would sway the trial Court's findings.

42. The medical evidence by PW4 Dr. **Shem Okoth** further confirmed that the complainant's hymen had been interfered with since it was torn. PW4 further stated that the probable cause of the breaking of the hymen was penetration.

43. The alibi defence of the Appellant is rejected because it was not proved as no witness was called to corroborate the same. In view of the consistent evidence of the complainant (Pw1) and the brother (Pw2) as confirmed by the medical evidence of Pw4, this Court rejects the allegation that there was a disagreement between the Appellant and the mother of complainant because of his other child born out of wedlock and a land dispute with his mother in law. The Appellant did not call any witness or produce evidence to prove any of the disagreements. There is no explanation why a ten (10) year-old and a 7 year old should lie about their father having defiled PW1, and in this case, PW1 stated that it was not the first time the defilement had occurred. Furthermore, PW1 made a detailed description of the act, the circumstances surrounding the defilement, which have been corroborated by PW2.

44. The appellant also stated in his petition of Appeal that there were contradictions in the testimonies of PW1, PW2 and PW3. Mr. Motuka submitted that PW1 and PW2 gave totally different narrations of what occurred before and immediately after the alleged incident. Therefore, Counsel argued that the testimonies of PW1 and PW2 lacked consistency and were contradictory. Therefore, they should not have been relied on by the trial Court. After considering the Appellant's argument advanced through his Counsel on record, this Court finds no major contradictions in the evidence of the three witnesses on what occurred before and after the incident. Furthermore, in **Richard Munene v Republic [2018] eKLR** it was stated:

> ***"It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it."***

45. Accordingly, I find that there was no contradiction during the trial to prejudice the appellant. Consequently, this ground fails.

b) Whether the sentence was harsh and excessive.

46. The appellant was sentenced to serve life imprisonment. A proper reading of section 20 (1) does not provide for minimum sentence of life imprisonment. In fact, it states "liable" to life imprisonment. The phrase "shall be liable to imprisonment for life" does not however connote a mandatory sentence but rather a maximum sentence.

47. The Court of Appeal in the case of **Daniel Kyalo Muema vs Republic [2009] eKLR**, the observed as follows: -

> ***"The last observation we want to make is that the phrase as used in Penal statutes was judicially construed by the predecessor of this Court in Opoya vs. Uganda [1967] EA 752 where the Court said at page 754 paragraph B:***
>
> ***"It seems to us beyond argument the words "shall be liable to" do not in their ordinary meaning require the imposition of the stated penalty but merely express the stated penalty which may be imposed at the discretion of the court. In other words they are not mandatory but provide a maximum sentence only and while the liability existed the court might not see fit to impose it".***

48. Similarly, In the case of **Christopher Ochieng v Republic [2018] eKLR** while the Court of Appeal was agreeing with the Supreme Court in **Francis Karioko Muruatetu & Another vs Republic SC Pet. No. 16 of 2015** it stated as follows: -

> ***"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, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis."***

49. From the record, the appellant herein was a first offender. Innmitigation, he said he had a family who relied on him. Being guided by the above authorities by the Supreme Court and the Court of Appeal, I am inclined to interfere with the life sentence imposed.

50. From the totality of the evidence on record, there is no doubt it was appellant who engaged in sexual intercourse with the complainant. Complainant was aged 9 years and was his daughter. The appellant's conduct was shameful and unlawful. The prosecution proved its case beyond reasonable doubt. This appeal therefore has no merits, and is dismissed with the following orders:

> ***a) The appeal is dismissed, conviction is affirmed.***
>
> ***b) Appeal on sentence is allowed. Sentence imposed by trial court is set aside and replaced by imprisonment for a period of 20 years from the date of sentence 23/7/2019.***

DATED, SIGNED, and DELIVERED at VOI this 10th Day of December, 2020.

E. K. OGOLA

JUDGE

Judgment delivered in Chambers via MS Teams in the presence of:

Mr. Fedha for Respondent

Appellant in person

Ms. Peris - Court Assistant

NOTE: This ruling was delivered by video-conference pursuant to various Practice Directives by the Honourable Chief Justice authorizing the appropriate use of technology to conduct proceedings and deliver rulings in response to the COVID-19 Pandemic.