**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MURANG'A**

**CRIMINAL CASE NO. 61 OF 2018**

**BETWEEN**

**AMG………..…………………….............APPELLANT**

**AND**

**REPUBLIC............................................RESPONDENT**

***(An appeal from the original conviction and sentence in the Senior Principal Magistrate's Court at Kangema Cr. case No. 336 of 2011 delivered by Hon. D. A. Orimba (PM) on 5th January, 2012)***

**JUDGMENT**

1. The Appellant, **AMG**, 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 were that on the 29th day of September, 2011 at [particulars withheld] sub-location in Murang'a County, being a male person, intentionally caused his penis to penetrate the vagina of **LWM**, a child aged six (6) years, who was to his knowledge was his daughter.

2. In the alternative, he was charged with indecent act with a child contrary to **Section 11(1)** of the **Sexual Offences Act No. 3 of 2006** in that he intentionally touched the buttocks, anus and vagina of **LWM**, a child aged six (6) years, with his penis.

3. He pleaded not guilty to both charges. Upon trial, he was convicted of the main count and sentenced to serve life imprisonment. Aggrieved by both his conviction and sentence, he preferred the instant appeal.

**Grounds of Appeal**

4. The Appellant raised the following (5) grounds of appeal in his Amended Petition of Appeal filed contemporaneously with written submissions on 31st August 2020:

> ***a. That the case for the prosecution was not proved to the required standard needed in law hence his conviction was manifestly unsafe.***
>
> ***b. That the entire trial process is invalid and a nullity as the same proceeded on a defective charge sheet.***
>
> ***c. That he was substantially prejudiced and unable to prepare for a proper defence due to the prosecution's failure to summon SW who was with PW1 in the house during the commission of the offence and the failure to invoke the provisions of Section 214(1) of the Criminal Procedure Code in view of PW1's disclosure to have been penetrated (her vagina) six times prior to 29th September 2011.***
>
> ***d. That the court be pleased to observe that on sentence, the mandatory nature of sentence has been declared unconstitutional by the Supreme Court in Petition No. 15 and 16 of 2015 and the same reasoning has been applied to sexual offences by the Court of Appeal in Evans Wanjala Wanyonyi v Republic CA No. 312 of 2018 (Eldoret).***
>
> ***e. That the provisions of Section 169(1) of the Criminal Procedure Code were not adequately complied with in relation to his defence statement.***

***Summary of Evidence***

5. It is now the duty of this court as a first appellate court to reconsider and re-evaluate the evidence adduced in the trial court before arriving

at its own independent conclusion. The court must however have regard to the fact that it neither saw nor heard the witnesses and give due allowance for that. (See **Okeno v Republic (1972) EA 32).** I thus summarize the prosecution's case as under:

6. On 29th September, 2011, six-year old **PW1, LNM,** then a standard 1 pupil at [particulars withheld] Primary School was sleeping with her elder brother SW in their room when her father, the Appellant herein, woke her up. He carried her to his room and placed her on his bed then removed her clothes and inserted his penis into her vagina. It was painful and she cried. It was not the first time that the Appellant was defiling her as he had defiled her six other times before then. Her mother, **PW3, TNM** had spent the night at their grandmother's house where she was temporarily staying because she had just given birth and their house was too cold.

7. Come morning when PW3 returned to prepare tea for the children, PW1 told her what the Appellant had done to her. PW3 advised PW1 to go and inform their grandmother who was the Appellant's mother. Their grandmother then informed the Appellant's father **PW4, PG**. PW4 interrogated PW1 and confirmed the said information from her. He also confronted the Appellant but the Appellant denied the allegations.

8. PW4 reported the incident to the assistant chief of [particulars withheld] sub-location **PW6, Charles Maina Mwangi**. PW6 in turn immediately informed **PW7, APC Stanley Kariuki** of [particulars withheld] Administration Police Post and asked them to accompany him to go and arrest the Appellant.

9. In the meantime, PW4 also informed his neighbour **PW5, Charles Kamau Gichure** about the incident and asked him to go to his home and guard the Appellant so that he does not escape. PW5 left his home and stood by the Appellant's homestead. When the Appellant saw him, he started running away but PW5 pursued him and managed to catch him with the help of other members of the public. Immediately thereafter, PW7 and his colleagues from the Administration Police Post arrived and arrested the Appellant then escorted him to Kangema Police Post.

10. The investigating officer **PW8, CPL Philip Nzomo** of Kangema Police Post was at the station day when PW4 and PW6 went to report the incident. He escorted PW1 to Kangema District Hospital. PW1 had no physical injuries. Her genitalia was normal. Her hymen was broken but there was no discharge of any kind. HIV test was negative. The conclusion was that there was vaginal penetration.

11. On 5th October, 2011, **PW2, Zakayo Mwangi Gatheru,** a Clinical Officer from Kanyenyaini Sub-District Hospital examined both PW1 and the Appellant and filled their respective P3 Forms. He produced both P3 forms in evidence.

12. Upon being placed on his defence, the Appellant elected to give an unsworn testimony in which he denied committing the offence. He admitted that his wife, PW2, spent the night at his mother's house on 28th September, 2011. The following morning as he was going to the toilet, he heard PW2 talking about him with his mother. He asked her what she was saying but PW2 kept quiet. As he was preparing for tea, he saw his father PW4 talking to PW5 while showing him some signs using hands. Thereafter, PW5 tried to arrest him but he escaped. They chased him and arrested him then called the police. His father claimed that he was using bhang. He was later charged with the offence in question and taken to hospital for examination.

***Analysis and determination***

13. The Appeal was canvassed by way of both written and oral submissions. The Appellant filed his written submissions on 31st August, 2020 and appeared in person during the oral highlighting of the same. The Respondent on the other hand was represented by the learned State Counsel, Ms. Gicheru who only tendered oral submissions. Upon carefully re-evaluating the evidence on record and considering the parties' respective submissions, I find that the following are the issues for determination: whether the prosecution proved its case beyond a reasonable doubt and whether the sentence was proper.

***Whether the prosecution proved its case beyond a reasonable doubt***

14. On this, the Appellant submitted that the burden of proof was not discharged to the requisite standard hence his conviction was manifestly unsafe. In response, Ms. Gichuru for the Respondent submitted that all the elements of the offence were established thus the case was proved beyond all reasonable doubt. She stated that the Appellant's defence was a mere denial and urged that his conviction and sentence be upheld.

15. **Section 20(1)** of the **Sexual Offences Act** provides as follows:

> ***"(1) Any male person who commits an indecent act <u>or an act which causes penetration</u> with <u>a female person who is to his knowledge his daughter</u>, 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 <u>is under the age of eighteen years</u>, the accused person <u>shall be liable to imprisonment for life</u> and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person." (*** *Emphasis mine* ***).***

16. In order to discharge its burden, it was incumbent upon the prosecution to prove three things namely: that the relationship between the Appellant and PW1 was that of father and daughter; that the Appellant committed an act which caused penetration of PW1's genitals; and that PW1 was below eighteen years.

17. On the first ingredient, PW1 testified that the Appellant was her father. This was confirmed by PW3 who testified that the Appellant was her husband and they had stayed together for about a year prior to the incident. PW4 also stated that the Appellant was his son.

18. **Section 22(1)** of the **Sexual Offences Act** provides as follows regarding the test of relationship:

> ***(1) In cases of the offence of incest, brother and sister includes half brother, half sister and adoptive brother and adoptive sister and <u>a father includes a half father and an uncle of the first degree a</u>nd a mother includes a half mother and an aunt of the first degree whether through lawful wedlock or not.( Emphasis added).***

19. In the instant case, it did not matter that the Appellant was not PW1's biological father. The fact that he was married to PW3 shows that he was PW1's half father which meets the test above. In the premises, there is no doubt that the Appellant was indeed PW1's father.

20. As regards penetration, it was the evidence of PW1 that the Appellant went to their room and carried her to his bed where he removed her clothes and defiled her. Her evidence was corroborated by the medical evidence which showed that PW1's hymen was broken thus confirming that indeed there was an act which caused the penetration of PW1's genitals.

21. As for PW1's age, there is no doubt that she was below eighteen years of age. She stated on *voire dire* that she was six years old. This was supported by documentary evidence in her P3 form which indicates that she was six (6) years old when the offence was committed. Furthermore, the fact that a *voire dire* examination was carried out was a clear testimony that the Victim was of tender age.

22. In my considered view, all this evidence coupled with the fact that the Appellant attempted to flee when he saw PW5 show that he had a guilty conscience. In addition, I have not seen any evidence of bad blood between the Appellant and PW4 that would have made him report the matter upon being informed about the same by the Appellant's mother. I am therefore satisfied that all the elements of the offence were proved.

23. Further, the Appellant faulted the prosecution for failing to call SW who was allegedly in the house at the time the offence was committed, to corroborate PW1's testimony. He submitted that Simon was an essential witness and thus the presumption that can be drawn from the failure to call him is that his evidence would have been adverse to the prosecution's case. He relied on the case of **<u>Bukenya v Uganda (1972) EA 549</u>** in support of this position. He argued that his fundamental right to cross examine the said witness was violated.

24. In this case, PW1 testified that the Appellant woke her up when they were sleeping, carried her to his room where he put her on his bed and defiled her. There was therefore no eye witness where the offence took place just as in most sexual assault cases which are normally committed discreetly. In the circumstances, the evidence of the said Samuel would not have added value to this case hence I cannot fault the prosecution for failing to call the said witness to testify. In any event, the proviso to **Section 124** of the **Evidence Act** recognizes that sexual offences against minors can be proved by the testimony of the victim without any requirement for corroboration so long as the court believes in the evidence of the minor. This is a case that casts no doubt that the minor did not speak the truth. Furthermore, her evidence was corroborated by the medical examination.

25. The Appellant further complained that there was a variance between the particulars of the charge sheet and the evidence tendered. He submitted that on the charge sheet, it was alleged that he penetrated PW1's vagina with his penis on 29$^{th}$ September, 2011 but PW1 testified that he had penetrated her six other times prior to the said date. He argued that the provisions of **Section 214(1)** of the **Criminal Procedure Code** ought to have been applied to amend the charge sheet to reflect the real situation. He contended that in the absence of such an amendment then the entire trial process was a nullity and the prosecution cannot be said to have proved the case to the requisite standard. He relied on the case of **<u>Yongo v Republic [1983] eKLR.</u>** It was also his submission that the failure to amend the charge sheet to reflect PW1's said evidence substantially prejudiced him as he was unable to prepare a proper defence.

26. Indeed, the charge sheet only makes reference to the incident of 29$^{th}$ September, 2011 and not the six other times that PW1 alluded to. However, that omission did not render the charge defective or the Appellant's trial and subsequent conviction a nullity. I say so because it is clear from the record that the Appellant knew the charge he was facing and was able to cross examine the witnesses as well as defend himself accordingly against the same. Again, since the prosecution elected to charge him with the offence committed on only one date means that they were only obligated to prove that the Appellant was culpable on this date. He was not prejudiced in any manner whatsoever.

27. In any case, under **Section 214(2)** of the **Criminal Procedure Code** such a minor variance is regarded as immaterial. The said section provides thus:

> **"*(2) Variance between the charge and the evidence adduced in support of it <u>with respect to the time at which the alleged offence was committed</u> is not material and the charge need not be amended for the variance if it is proved that the proceedings were in fact instituted within the time (if any) limited by law for the institution thereof*."**

28. In the premises, I find that the prosecution proved the offence against the Appellant beyond all reasonable doubt. His conviction was therefore safe and is accordingly upheld.

***Whether the sentence was proper***

29. The Appellant urged the court to consider the emerging jurisprudence in the Supreme Court decision of **<u>Francis Karioko Muruatetu & Another v Republic [2017] eKLR</u>** which declared mandatory sentences unconstitutional. He also relied on the case of **<u>Musee Wambua v Republic [2020] eKLR</u> (Cr.Appeal No. 94 of 2018)** where the Court of Appeal substituted a sentence of life imprisonment in a defilement case with ten (10) years imprisonment.

30. I am alive to the seriousness of the offence. However, the Appellant was a first offender. The only aggravating factor was that he had assaulted PW1 six other times before he was finally caught. The life sentence imposed was therefore not justifiable. Of paramount importance is that the sentence should serve as deterrence. I therefore set aside the sentence of life imprisonment and substitute it with a

sentence of thirty (30) years imprisonment from the date of sentence which was 5th January, 2012. It is so ordered.

**DATED AT MURANG'A THIS 3RD DAY OF DECEMBER, 2020.**

**G.W.NGENYE-MACHARIA**

**JUDGE**

**In the presence of:**

*1. Appellant in person.*

*2. Mr. Waweru for the Respondent.*