



REPUBLIC OF KENYA

CORAM: R.E. OUGO J

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL NO. 36 OF 2016

PM.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. **PM**, the appellant was charged with two counts of incest contrary to **Section 20(1)** of the *Sexual Offences Act No. 3 of 2006* ('the Act').

Count I: The particulars were that 8th August, 2014 at [Particulars withheld] sub-location within Narok County being a male person, caused his penis to penetrate the vagina of FC, a female person aged 14 years who to his knowledge was his daughter. The alternative charge was committing an indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act No. 3 of 2016. The particulars were that 8th August, 2014 at [Particulars withheld] sub-location within Narok County intentionally touched the vagina of FC, a child aged 14 years with his penis.

Count II: The particulars were that 8th November, 2014 at [Particulars withheld] sub-location within Narok County being a male person, caused his penis to penetrate the vagina of FC, a female person aged 14 years who to his knowledge was his daughter. The alternative charge was committing an indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act No. 3 of 2016. The particulars were that 8th November, 2014 at [Particulars withheld] sub-location within Narok County intentionally touched the vagina of FC, a child aged 14 years with his penis

2. The appellant pleaded not guilty to the charges and the prosecution called 5 witnesses. The appellant was found guilty on both the principal counts and sentenced to serve life imprisonment.

3. Before I proceed to consider the grounds of appeal, I remind myself the duty of the first appellate court. It is to reevaluate the evidence afresh and reach an independent decision as to whether to uphold the conviction. The court must bear in mind that it neither heard nor saw the witnesses testify. (see **Okeno vs. R 1972**)

4. The appellant has appealed against the conviction and sentence on the grounds that the prosecution did not prove its case beyond reasonable doubt, he was not accorded a fair trial, there were contradictions in the prosecution case and that the trial magistrate misdirected herself in convicting him to life imprisonment without considering the age of the complainant since she was 14 years old.

5. FC (**PW1**) testified on oath after a *voire dire* that on 8th August 2014 at 8:00 p.m. her father beat her with a nut head *rungu* claiming she was sleeping in the school field with boys. She testified that her father demanded that she sleeps on his bed if she wanted his forgiveness. She laid down on his bed her father, removed her pant and defiled her. She spent the rest of the school holiday with her maternal grandmother. When schools opened she went back home. On 8th November 2011 she recalled that her mother had gone to fetch charcoal. The appellant picked a fight with her and told her to lie on his bed so that he could forgive her. The appellant beat her using a cane and also beat her hand with a *rungu*. She recalled that during this second incident the appellant defiled her at around 7:00 p.m. She testified that she proceeded to her auntie's house and told her grandmother of the incident. She was taken to the chief and to the hospital where she was examined by a doctor.

6. JK (**PW2**) testified that he is a village elder and a farmer. He recalled that on 8th November 2014 he was at home when he got information that the appellant had defiled his daughter. The following morning he interrogated PW1 who admitted the offence took place but did not report it for fear of being beaten by her parents. PW2 testified that he informed the chief who took no action. He testified that later the appellant threatened that he would kill somebody and a baraza was called, and in the meeting it was resolved that the appellant had wronged his child thus the matter should be handled by the police. PW3, LM, is the appellant person's mother, she recalled that on a certain date the mother of PW1 was away looking for charcoal and had left the children with the accused. She told court that PW1 was crying as she could not understand why the appellant had beaten her. After a few days PW1 went to her maternal grandmother. She told court that she later came

to learn about the alleged offence.

7. IM (PW4) testified that she is a senior clinical officer working at Trans-Mara Sub-County Hospital. She testified that upon examination of Pw1 there were no vaginal tears, but there were bruises on labia majora which was red. There was white discharge, the hymen was not freshly broken and she concluded that there had been penetration. The discharge was a sign that Pw1 had a sexually transmitted infection as sign of sexual exposure.

8. The investigating officer (PW5) testified that PW1 accompanied by her uncle filed a report against the appellant. He received the report and recorded the statements and PW1 was taken to Trans-Mara Sub-County Hospital for examination.

9. When put on his defense the appellant gave sworn evidence. He testified that there was a land dispute between him and a village elder and had informed the chief on the matter. He testified that one of the village elders had taken his daughter who was no longer at her grandmother's. That he was told by the elders that the matter was already taken to Kilgoris Police Station. He testified that it was the elders who were trying to destroy his family.

10. The appellant was charged with the offence of incest under **Section 20(1)** of the Sexual Offences Act (the Act) states as follows:

“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 appellant 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.” [Emphasis added]

11. The prosecution's duty is to prove either an indecent act or an act of penetration. Indecent act under **Section 2(1)** of the Act is defined as an unlawful intentional act which causes, *any contact between any part of the body of a person with genital organs, breasts or buttocks of another, but does not include an act that causes penetration.* Penetration under **Section 2** of the Act means, *the partial or complete insertion of the genital organs of a person into the genital organs of another person.* Finally the prosecution also has to prove the relationship between the parties.

12. On the issue of penetration, Pw1 narrated what happened to her on the nights of 8th August 2014 and 8th November 2014 as follows:

“I recall on 08/08/2014, my father had started beating me all the time. He would find any smallest reason to beat me. On 08/08/2014, my father beat me, he said I was sleeping in school field with boys. He beat me with a nut head rungu. He told me to sleep in his bed, before he could forgive me. I slept down, he removed my pant then did bad manners to me. He made me lie down. He removed his thing and put it in me. I lay on the ground facing up. The accused lay on me. He put his thing inside my vagina. He lay on me for about three minutes. I told him it was painful. He told me I will get used to the pain. He then told me to go and sleep. It was about 8 p.m.

...it was on 08/11/2014, my father asked me to sleep with him..He was quarrelling me. He told me to sleep in his bed so that he could forgive me. He beat me using a cane and I went to sleep in his bed. He also beat me with a rungu on my hand. He then lay me down, he slept on top of me. He removed his pant and did bad manners again to me. He spread out my legs. He inserted his thing into my vagina. On this second time it was 7:00 p.m. I went to my auntie's place and told my paternal grandmother.”

13. Pw1 is the only prosecution witness who gave evidence on the offence. The proviso of **Section 124** of the **Evidence Act (Chapter 80 of the Laws of Kenya)** dispenses with corroboration if the trial Magistrate believes that the child was telling the truth and records the reasons for her belief. After evaluating the evidence of Pw1 I find it was clear and she remained unshaken during cross examination. I am constrained to agree with the trial magistrate who observed as follows:

“In light of provisions 124 of the Evidence Act, I find that even if there were no witnesses, I was persuaded that the child was telling the truth. I find it difficult to believe that a girl of 14 years can magnify incidents which happen to her or invent them completely bearing in mind that the appellant was her father.”

14. PW4 gave evidence that upon examination of Pw1 she found the Hymen broken, the labia minora had bruises and she also had a discharge a sign of a sexually transmitted disease. PW3 also testified that the appellant told her that her father did bad manners to her. Looking at totality of the evidence my conclusion is that the prosecution proved beyond reasonable doubt that there was penetration.

15. Next I am to consider whether the appellant was properly identified by PW1. PW1 testified that the both offences happened at night, one at 8:00 p.m. and the other at 7:00 p.m. The perpetrator of the offence was her father, a person well known to her. As a matter of fact Pw1 testified that they had argued before the appellant committed the offence. Though both incidents occurred in the night and the prosecution has not shed light on whether there was any source of light, the appellant was a person well known to Pw1. However even where the appellant is known to the complainant, the court is bound to exercise caution when admitting such evidence. The Court of Appeal in the case of **Wamunga vs. Republic (1989) KLR 426** stated as follows;

“It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favorable and free from possibility of error before it can safely make it the basis of conviction.”

16. Though the circumstances were not favorable for visual identification, I find and hold that PW1 was able to recognize the appellant person who was her father. On both occasions he told her to sleep in his bed. Her evidence was that the appellant made her lie down she lay facing upwards and he lay on her, he inserted his thing into her vagina.

17. For the crime of incest to be proved it must be established that the appellant and the complainant have family ties. It must be established that the complainant was a daughter, granddaughter, sister, mother, niece, aunt or grandmother of the one accused. It was uncontroverted that the appellant and PW1 were father and daughter respectively. This was also the evidence of Pw2 and Pw3. Pw1 told her Pw2, Pw3 and Pw4 that it was her father who had defiled her. I find and hold that the prosecution has proved the relationship envisaged by **section 20(1)** of the Act to the required standard.

18. I have considered the appellant's defense appellant and I find that it does not hold when considered alongside with the prosecution evidence. The appellant's defense that there was a land dispute and that the elders were out to destroy his family was nothing but an afterthought. I find no contradiction in the evidence adduced by the prosecution. The appellant was given a fair trial during the proceedings.

19. Under section 20 (1) of the Act the age of the complainant is not an element/or an ingredient of the offence of incest, however it must be considered when imposing the sentence. According to the age assessment report by PW4 it was established that the child was 14 years hence the sentence of life imprisonment was within law. I affirm the conviction. I set aside the life imprisonment and sentence and the appellant to 10 years imprisonment on each count as convicted from 28/8/2015. The sentences to run concurrently.

Dated, Signed and Delivered at KISII this 3rd day of April 2019.

R. E. OUGO

JUDGE

In the presence of;

Appellant In person

Mr. Otieno Senior Counsel Prosecution Office of the DPP

Rael Court clerk