REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

CRIMINAL APPEAL NO. 10 OF 2016

JMK.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in the Principal Magistrate Court at Lamu criminal case 573 of 2014, Hon. J.W Onchuru (PM) dated 18th February 2016)

JUDGMENT

1. The Appellant was charged with incest contrary to section 20(1) as read with section 8(3) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on diverse dates between 17th and 22nd November 2014 at Mpeketoni Division in Lamu West District within Lamu County being a male person caused his penis to penetrate the vagina of MW a female person who was to his knowledge his niece aged 15 years old.

2. The Appellant also faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on diverse dates between 17th and 22nd November 2014 at Mpeketoni Division in Lamu West District within Lamu County intentionally touched the vagina of MW a child aged 15 years old with his penis.

3. The accused persons pleaded not guilty and at the conclusion of the trial, the Appellant was found guilty on the main count and sentenced to imprisonment for 15 years.

4. The Appellant being aggrieved by the conviction and sentence lodged his appeal on the following homemade grounds which as far as I can decipher are to the effect that:-

(i) The Appellant did not live with the complainant but that he lived in Msefuni in his own house where he was arrested;

(ii) The evidence of the medical doctor was contradictory and that he was not the maker of the P3 form

(iii) The complainant was presented as a mental patient without any medical proof.

(iv) That the complainant lied to the court that she did not understand Kiswahili forcing her grandmother to interpret on her behalf.

(v) The case and accusation against him were made up since he had a dispute between the Appellant and the complainant's mother regarding a piece of land

(vi) That the trial magistrate failed to consider his mitigation that his wife was disabled and could not take care of their four children who were at home for lack of school fees.

5. The Appellant filed submissions dated 5thNovember 2018 in support of his appeal. The gist of his submissions is that the complainant's age was not proved. He submitted that the complainant stated that she was 15 years old, while PW3 stated she was below 18 years and that the medical officer did not assess her age. He further submitted that the medical officer contradicted the evidence of PW3 as he claimed that the injuries were fresh while PW3 stated that she had given the complainant first aid. He argued that there were no treatment notes to prove the assertion that there were injuries.

6. The Appellant submitted that there was a grudge between PW3 and himself. He submitted that the claim by the complainant that he defiled

her was false as she could have screamed to alert other people in the compound and further that there was no evidence of how he managed to exit the room.

7. In oral submissions the Appellant added that the grudge between him and PW3 was due to inheritance of land and that they had tried to resolve the issues in three sittings.

8. Mr. Kasyoka learned counsel for the Respondent opposed the appeal in its entirety. He submitted that the prosecution had proved incest and that the relationship fell within the prohibited degree of consanguinity. He submitted that the age of the complainant was only relevant in sentencing which would have been relevant if he was sentenced to life imprisonment.

9. This being a first appeal, this court has a duty to revisit the evidence that was before the trial court, re-evaluate and analyze it and come to its own conclusion. See **Okeno v R (1972) EA 32; Eric Onyango Odeng' v R [2014] eKLR.** Further, I have to caution myself that unlike the trial court, I did not have the benefit of seeing the demeanour of the witnesses and the Appellant during the trial and I can only rely on the evidence on record.

10. Having considered the record, grounds of appeal, and the respective submissions of the parties, I consider the issues in this appeal to be whether the incest was proved beyond reasonable doubt and whether the age of the complainant was proved.

11. The ingredients of an offence of incest are; relationship, within the meaning of the law and indecent act or penetration.

Section 22 of the Sexual Offences Act (SOA) sets the relationships with the prohibited degree of consanguinity that are considered incestuous. Among the said relationships are uncle and nephew.

12. The complainant testified that the Appellant was her uncle and that she lived in the same house although in different rooms. PW3, testified that she was the grandmother to the complainant and step-mother to the Appellant. The Appellant on his part never disputed that the complainant was his niece. The relationship between the complainant and the Appellant was one of a niece and uncle proving the degree of consanguinity.

13. On penetration, it was the testimony of the complainant that on the fateful night, the Appellant came into her room using a rope while she was sleeping. He asked for a matchbox but when she said she did not have one, he asked her to remove her skirt and pant before he inserted his penis into her vagina and warned her not to tell her grandmother, PW3. The complainant testified that she felt a lot of pain and bled. She testified that the next day she had difficulty in walking.

14. Stephen Ewoi Ekale, PW1 who was the clinical officer corroborated the testimony of the complainant. He testified that the he relied on treatment notes to fill the P3 form which he produced (exhibit 1) and that there were injuries of the labia minora and majora and a discharge from the vagina. He testified that the injuries were fresh though he could not state accurately the cause of the injuries as in his views other objects can cause similar injuries.

15. The Appellant in his defence gave a sworn testimony that PW3 had a grudge against him after his father gave him charge over all his property. It was his testimony that he had travelled to Kipini I from 25/10/2014 until 24/11/2014 and he returned home on the 3/12/2014 when he was arrested.

16. It is trite that courts mainly rely on the evidence of the complainant which is corroborated by medical evidence as was held in **Dominic Kibet Mwareng vs. Republic Criminal Appeal No 155 OF 2011 [2013] eKLR** where the court stated that:-

> **"…In cases of defilement, the Court will rely mainly on the evidence of the Complainant which must be corroborated by medical evidence..."**

17. It is further well established, that a court can convict on the sole evidence of a victim of sexual assault under section 124 of the Evidence Act as long as the court is convinced the victim is telling the truth and records reasons for such belief.

The Court of Appeal in **Arthur Mshila Manga v Republic Criminal Appeal No. 24 Of 2014 [2016] eKLR** held that:-

> ***"It is trite that under the proviso to section 124 of the Evidence Act, a trial court can convict on the evidence of the victim of a sexual offence alone. (See MOHAMED V. REPUBLIC [2008] KLR (G&F), 1175 and JACOB ODHIAMBO OMUOMBO V. REPUBLIC (supra). However, before the court can do so, it first must believe or be satisfied that the victim is telling the truth and secondly it must record the reasons for such belief."***

18. Guided by the principles laid by the courts in the cases above, and the evidence on record it is clear that complainant was defiled by the Appellant, which was corroborated by the findings of PW1. Additionally, the trial magistrate believed the complainant was telling the truth and in his judgment stated that he found the complainant to be a credible and reliable witness above her age and had no reason to doubt her.

19. In regard to the Appellant's defence the trial magistrate after considering it found it to be a diversionary defence which was an afterthought and was wanting in credibility and he proceeded to disregard it. I agree with the trial magistrate. The defence was not put to the prosecution witnesses to test its credibility and was as afterthought and it did nothing to weaken the prosecution case. Having considered the above I find that penetration of the complainant was proved.

20. On the age of the complainant, it is trite that in sexual offences the age of the complainant is relevant for two purposes. Firstly, it is meant

to prove that the complainant was below 18 years establishing the offence of defilement, and; secondly it establishes the age of the complainant for purposes of sentencing. See **Moses Nato Raphael v Republic Criminal Appeal No. 169 OF 2014 [2015] eKLR**.

21. However, for the offence of incest involving a child, the actual age of the child does not need to be proved as the penalty is not dependent on the age. Only the apparent age of the victim is to be proved to show that she is under the age of eighteen years and is therefore a child.

22. Section 20 (1) of the SOA provides that:-

> ***(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***.

23. The Appellant contended that the actual age of the complainant was not proved as stated. The complainant in her testimony informed the court that she was 15 years old. PW3, the complainant's grandmother told the court that she was below the age of 18 years. The clinical officer, PW1, who indicated at Part C of the P3 form that the estimated age of the complainant was 15 years. Other than stating the complainant was 15 years, the trial court did not show why it believed that she was that age. There was no indication from the record that the witnesses were cross-examined on the complainant's age. I would therefore find the conclusion on the age to be without basis.

24. Lastly, on the sentence, under section 20(1) of the Sexual Offences Act, the minimum sentence for the offence of incest is 10 years imprisonment, while the maximum sentence is life imprisonment where the victim is aged below eighteen years. The sentence of 15 years imprisonment for the conviction of incest was therefore lawful. However, as the age of the victim was not proved to be below 18 years beyond reasonable doubt. I shall give the Appellant the benefit of doubt.

25. In the upshot, having evaluated all the evidence on record, it is my finding that incest was proved beyond reasonable doubt and I therefore find no merit in the appeal against the conviction. On sentence however, I reduce the sentence to 10 years imprisonment from the date of conviction and sentence.

Orders accordingly.

Judgment dated delivered and signed at Garsen on this 12th day of June, 2019.

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R. LAGAT KORIR

JUDGE

In the presence of:

The Appellant in person

S. Pacho - Court Assistant

Mr. Kasyoka - For Respondent