REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CORAM: D. S. MAJANJA J.

CRIMINAL APPEAL NO. 39 OF 2018

BETWEEN

GEOFFREY OMWOYO ANGAGA...........................APPELLANT

AND

REPUBLIC...RESPONDENT

(Being an appeal from the original conviction and sentence of Hon.G. N. Barasah, RM

delivered on 11th April 2019 at the Magistrates Court at Ogembo

in Criminal Case No.1388 of 2013)

JUDGMENT

1. The appellant, **GEOFFREY OMWOYO ANGAGA**, was charged, convicted and sentenced to life imprisonment for the offence of incest contrary to **section 20 (1)** of the **Sexual Offences Act,** ("the ***SOA"***). The particulars were that on 14th December 2012 at about 1000Hrs at [particulars withheld] in Gucha South District within Kisii County, being a male person, he caused his penis to penetrate the vagina of SKA, a female person aged 5 years who was to his knowledge his niece.

2. The appellant has now appealed against the conviction and sentence on the grounds set out in his petition of appeal and written submissions. He contended that the prosecution did not prove the case beyond reasonable doubt. He submitted that the charge sheet was defective as the age of the complainant was 7 years and not 5 years as described in the charge sheet. He also urged court to find that there was insufficient evidence to prove defilement and that the prosecution case was a scheme to fix him for the offence. The respondent case was that the prosecution proved all the elements of the offence beyond reasonable doubt.

3. It is the duty of this court, being a first appellate court, to subject the evidence on record to a fresh review and scrutiny and come to its own conclusions all the time bearing in mind that it did not see the witnesses testify as to form its own opinion on their demeanour (***see Okeno v Republic [1972] EA 32***).

4. The facts of the case before the trial court were as follows. A Clinical officer from Bomachoge Chache Sub-County Hospital, PW 1, produced the P3 medical form and Post Rape Care (PRC) form on behalf of his colleague who had examined the complainant. He testified that physical examination of the genitalia revealed normal external genitalia but the complainant had bruises on the vaginal walls and the hymen was broken. He told court that the complainant had reported that the appellant had sexually assaulted her two weeks prior to the examination.

5. The complainant, PW 2, gave unsworn testimony after a *voire dire*. She recalled that on 14th December 2012 she told her mother, PW 3, that the appellant had sent her to get his phone. The appellant followed her to the maize farm, told her to remove her clothes and instructed her to lie down. PW 2 testified that the accused did to her *'bad manners'* and that *'alinidunga na kitu chake'*". PW 2 added that the appellant threatened to beat her if she told anyone. She testified that when she started feeling pain, she told PW 3 that it was the appellant who had done '*bad manners'* to her whereupon she was taken to the hospital.

6. The complainant's mother, PW 3, recalled that on 20th December she was with PW 2 who complained of pain while urinating. She examined her and found her private parts were very red and thought that she had been probably washed herself too aggressively. On 23rd

December 2012, PW 2 told her that the appellant had defiled her. PW 3 recalled that on 14th December 2012 she had gone with her husband to cut trees when the incident took place. She testified that they lived with the appellant in the same compound and the appellant was her brother in law.

7. PW 4, the complainant's father, recalled that on 20th December 2012 he went to cut trees and left his two children home and when he returned, PW 2 looked distressed and had stopped talking. When PW 4 learnt from PW 3 what the appellant had done, he reported the matter to Etago Police station and took the child to hospital. The investigating officer, PW 5, testified that on 24th December 2012 he received a report from PW 3 that PW 2 had been defiled. He told court that when the appellant heard that the matter had been reported to the police he fled to Sirare and was later arrested on 2nd September 2013. He told court that he visited the scene and was informed by PW 2 that the appellant had defiled her when her parents were away. He issued a P3 Form after conducting his investigations.

8. The appellant was put on his defence but before he could give his defence he made an application to have the officer who examined PW 2 to be re-called for cross-examination. The trial magistrate, directed that the prosecution to reopen its case and ordered the officer to be recalled. However, when the matter came up before the court for mention, the appellant applied to have the matter start afresh on the ground that he was unwell but the court declined his application and ordered that the matter to proceed from where it had reached. The accused declined to give his defence and the trial court proceeded to convict and sentence him to 15 years' imprisonment on 12th May 2016. The appellant appealed to the High Court vide **Kisii HCCRA No. 8 of 2017**. By a judgment dated 11th October 2018, the High Court ordered that the matter be reopened and the defence case be heard. It was at this point that PW 1 was recalled to testify and the prosecution case closed.

9. In his defence, the appellant made an unsworn statement in which he denied the offence and stated that he was framed over a land dispute. He admitted that PW 2 was his niece and that on 2nd April 2013 he was staying with his cousin after being kicked out of their home for being a child born out of wedlock. He told court he could not remember where he was on 14th December 2012 and did not have any issue with PW 2.

10. The appellant's witnesses, DW 1 and DW 3 both testified that the appellant was born out of wedlock and there was a dispute as to whether he was entitled to a share of the land. The mother to appellant and PW 4, DW 3, testified that they fight over land and that the appellant had been staying with DW 3 from 2009 until he was arrested.

11. The offence of incest under **section 20** of the ***SOA*** is proved by either an indecent act or by penetration of a person who is related to the child. **Section 20(1)** of the ***SOA*** provides as follows:

> *20. (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.* [Emphasis mine]

12. The fact that the appellant was the complainant's uncle was admitted by the appellant. As regards the act of penetration, the only direct witness was PW 2 who gave clear evidence of how the appellant, '*alinidunga na kitu chake*' and threatened to beat her in the event she told anyone what had happened. She later told PW 3 that the appellant is the one who had sexually assaulted her. The *proviso* to **Section 124** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)*** states that:

> *Provided that where in criminal cases involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."*

13. The magistrate who delivered the judgment is not the one who had the case and hence did not have the advantage of assessing the complainant's demenour in order to arrive at the conclusion that the she was telling the truth. Nevertheless, the was sufficient corroborative evidence confirming that the appellant committed an act of penetration. PW 2 knew the appellant very well, her testimony was straightforward and was not shaken in cross-examination. She denied that she was coached to implicate the appellant.

14. PW 2's testimony was corroborated by the medical evidence led by PW 1 who testified that though she was taken to hospital 10 days after the incident, physical examination revealed that she had vaginal wall bruises and that her hymen was broken consistent with penetration. The reason that PW 2 was not taken to hospital immediately after the incident was clearly explained by the fact that she had been threatened with violence by the appellant. Moreover, both PW 3 and PW 4 testified that they had seen her in a state of distress after the incident and it is only because of the threat that PW 2 did not inform them.

15. The appellant's defence was a bare denial and an assertion that he was framed as a result of a land dispute. In light of the clear evidence of PW 2, I reject this line of defence. His conduct of disappearing from the locality after incident was reported is an act inconsistent with his innocence. I therefore find and hold that from the totality of the evidence, the prosecution discharged its burden of proof.

16. Since the complainant was under the age of eighteen years, the accused person was sentenced to imprisonment for life as **section 8 (2)** of ***the SOA*** provides that a person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life. PW 2, according to her birth certificate, was 5 years at the time of the offence.

17. I am aware that the Court of Appeal in ***Jared Koita Injiri v Republic*** **KSM CA CRA No. 93 of 2014 [2019] eKLR** considered the Supreme Court decision in ***Francis Karioko Muruatetu & Another vs Republic*****, SC Pet. No. 16 of 2015 [2017] eKLR** in reducing the

sentence of the appellant who defiled a girl aged 9 when it observed 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.*
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> > *Needless to say, pursuant to the Supreme Court decision in* ***Francis Karioko Muruatetu & Another vs Republic (supra)****, we would set aside the sentence for life imposed and substitute it therefore with a sentence of 30 years from the date of sentence by the trial court."*

18. In light of the aforesaid holding, I allow the appeal only to the extent that I quash the sentence of life imprisonment and substitute it with a sentence of **thirty (30) years' imprisonment** to run from the date of arraignment, that is, 3rd September 2013.

19. Save for the sentence, the conviction is affirmed and the appeal thereon dismissed.

DATED and DELIVERED at KISII on this 1st day of JULY 2019.

D.S. MAJANJA

JUDGE

Appellant in person.

Mr Otieno, Senior Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.