REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

CRIMINAL APPEAL NO. 28 OF 2017

MT.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from Original Conviction and Sentence in Mwingi Senior

Resident Magistrate's Court Criminal Case No. 511 of 2015

by Hon. G. W. Kirugumi (SRM) on 17/05/17)

J U D G M E N T

1. **MT,** the Appellant, was arraigned in Court and charged with the offence of **Incest** contrary to **Section 20(1)** of the **Sexual Offences Act No. 3 of 2006.** Particulars of the offence were that on the **17th** day of **August, 2015** at [**particulars withheld] Village, Mui Location, Mui Division** in **Mwingi East District** within **Kitui County** intentionally caused the penetration of his male genital organ namely penis into the female genital organ namely vagina of **MM** who to knowledge was her niece.

2. Having been taken through full trial, he was found guilty, convicted and sentenced to **life imprisonment.**

3. Aggrieved, by amended Grounds of Appeal he avers that: The case was not proved beyond reasonable doubt; the trial Magistrate did not adhere to the provisions of **Section 169(1)** of the **Criminal Procedure Code;** the trial was a nullity as it proceeded on a defective charge whereby **Section 214(1)** of the **Criminal Procedure Code** was not complied with; and that the trial Magistrate's consideration of medical evidence left a lot to be desired.

4. Facts of the case were that the Appellant is the Complainant's maternal uncle. On the **17th August, 2015** the Appellant went to his sister's home as usual. The sister left him with the Complainant and her younger sibling. The Appellant told her to go to the bush which was approximately 50 paces away. He made her remove here underpants. He had sexual intercourse with her. In the course of the episode he used condoms. Thereafter the Complainant informed her mother, PW2, **NM** who reported the matter to the police. The scene of the incident was visited and some condoms were recovered. The Complainant was subjected to medical examination and the Appellant was arrested and taken to Court.

5. Upon being put on his defence the Appellant testified to the events of the **16th August, 2015.** He stated that he spent the day preparing bricks and when he ran out of water he went home. He learnt that PW1 and PW2 had been arrested and taken to **Nguni.** The next day, the **17th August, 2015** at **8.00 p.m.,** he was arrested by the village elder and taken to the Chief's office. The following day he was taken to **Nguni.**

6. The Appeal was canvassed by way of written submissions. It was urged for the Appellant that the act of penetration of the Appellant's genital organs into the Complainant's genital organs was not proved beyond reasonable doubt; that the learned Magistrate's findings were not supported by evidence on record; a grudge existed between him and the Complainant's mother such that he was framed up.

7. Further, he urged that it was not proved that he was the person responsible for the act that tore the Complainant's hymen.

8. The State/Respondent opposed the Appeal. It was argued that the case was proved and there was no miscarriage of justice.

9. This being a first Appellate Court, I am duty bound to re-evaluate the evidence that was adduced before the trial Court and come to my

own conclusion bearing in mind that I never saw or heard the witnesses who testified. **(See Okeno vs. Republic (1972) EA 32).**

10. To prove the charge beyond reasonable doubt as contended, the Prosecution was duty bound to prove elements of the offence of incest namely:

(i) Penetration/indecent act that caused penetration.

(ii) The relationship between the Complainant and the Appellant.

(iii) The age of the Complainant (for sentencing purposes).

11. It is not in doubt that the Appellant herein was the Complainant's maternal uncle. Therefore, it was within his knowledge that the Complainant was his niece.

12. The Complainant told the Court that she engaged in coitus. She was examined at **Nguni Health Centre** on the same date. It was established that the external genitalia was reddened, the inner vaginal wall was inflamed and there was presence of whitish discharge. The hymen was broken. Penetration is defined by **Section 2** of the **Sexual Offences Act** thus:

"penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person;"

13. The fact of a broken hymen was proof of penetration into the Complainant's genitalia. She testified that it was not the first episode. From the history presented as captured on the Post Rape Care Form she had engaged in sexual intercourse previously. However, the fact of the genitalia having been inflamed and hyperemic was proof of having engaged in sexual intercourse on the fateful date.

14. As to whether the Appellant was the perpetrator of the act that caused penetration, it was urged that, that particular question was not answered adequately such that evidence presented by the Prosecution left a lot to be desired. He urged that he gave a defence of existence of a grudge between him and the Complainant's mother (PW2).

15. The Complainant identified the Appellant, her uncle as the person who violated her sexually on the fateful date. She testified that it was not the first time. They had engaged in coitus previously. PW2 was not an eye-witness to the act of defilement. However, when she left home the Appellant was already there. The Appellant alleges that there was a grudge between him and PW2, however, in his defence he steered away from the events of **17th August, 2015,** he did not explain what the alleged grudge was all about. On cross examining PW2 he sought to know whether he had asked her to be his lover. He never raised the alleged grudge issue. Therefore, he cannot fault the learned trial Magistrate for disregarding that fact.

16. In the course of investigations, the police collected two (2) condoms and empty condom packets from the scene where they were led by the Complainant. The items were taken to the Government Chemist for analysis for the presence of blood stains and seminal stains but the result came out negative. PW10, **Henry Kiptoo Sang,** a Government Analyst gave a possibility of the items having not been well preserved therefore decomposed hence no results obtained.

17. The trial Magistrate has been faulted for not adhering to **Section 169(1)** of the **Criminal Procedure Code** that provides thus:

"Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it."

18. In her Judgment the trial Magistrate came up with issues for determination which was in compliance with the law.

19. The Appellant's submissions are not clear as to how the charge was defective. In **Sigilani vs. Republic (2004) 2 KLR** it was held that:

"The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence charged should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to a specific charge that he can understand. It will also enable an accused person to prepare his defence."

20. The Appellant was charged with the offence of Incest which is known in law. The elements of the offence are disclosed by the particulars of the offence. Therefore, the charge was not defective. The charge could have been amended if there was a defect which was not the case herein.

21. With regard to the sentence imposed, **Section 20(1)** of the **Sexual Offences Act** provides thus:

"(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."

22. PW2 stated that the Complainant was born in the year **2000.** In the case of **Mwalongo Chichoro Mwajembe vs. Republic Criminal Appeal No. 24 of 2015 (UR)** it was held that:

> ***"….the question of proof of age has finally been settled by recent decisions of this Court to the effect that it can be proved by documentary evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. It has even been held in a long line of decisions from the High Court that age can also be proved by observation and common sense. See Denis Kinywa-Vs- Republic, Criminal Appeal No.19 of 2014 and Omar Uche -Vs- Republic, Criminal Appeal No.11 of 2015. We doubt if the courts are possessed of the requisite expertise to assess age by merely observing the victim since in a criminal trial the threshold is beyond any reasonable doubt. This form of proof is a direct influence by the decision of the Court of Appeal of Uganda in Francis Omuroni -Vs- Uganda, Criminal Appeal No. 2 of 2000. We think that what ought to be stressed is that whatever the nature of evidence presented in proof of the victim's age, it has to be credible and reliable…"***

PW2 was the Complainant's mother who knew when she was born and her evidence was not disputed by the Appellant. Therefore, at the time of the sexual act the Complainant was **fifteen (15) years old.**

23. Principles of interfering with sentence were stated in the case of **Bernard Kimani Gacheru vs. Republic Criminal Appeal No. 188 of 2000** the Court stated as follows:

> ***"It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."***

24. In the case of **Jared Koita vs. Republic (2019) eKLR** the Court of Appeal stated that:

> ***"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. The appellant was provided an opportunity to mitigate in the trial court where it was stated that he was a first offender. He pleaded for leniency. However, it cannot be overlooked that the appellant committed a heinous crime, and occasioned severe trauma and suffering to a young girl. His actions have demonstrated that around him, young and vulnerable children, like the complainant could be in jeopardy. Needless to say, pursuant to the Supreme Court decision inFrancis 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."***

25. In the case of **Evans Wanjala Wanyonyi vs. Republic (2019) eKLR** the Court of Appeal stated thus:

> ***"24. On the enhanced 20 year term of imprisonment meted upon the appellant by the learned judge, we are of the view that, the constitutionality of the mandatory minimum sentence meted out to the appellant raises a question of law. This Court in Christopher Ochieng – v- R [2018] eKLR Kisumu Criminal Appeal No. 202 of 2011 and inJared Koita Injiri – v- R, Kisumu Criminal Appeal No. 93 of 2014 considered legality of minimum mandatory sentences under the Sexual Offences Act. This Court noted that the Supreme Court in Francis Karioko Muruatetu & another – v- Republic SC Petition No. 16 of 2015 held the mandatory death sentence prescribed for the offence of murder by Section 204 of the Penal Code was unconstitutional; that the mandatory nature deprives courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case; that a mandatory sentence fails to conform to the tenets of fair trial that accrue to the accused person under Article 25 of the Constitution. Guided by the aforestated Supreme Court decision, this Court in Christopher Ochieng – v- R (supra) stated:***
>
> ***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. ….. Needless to say, pursuant to the Supreme Court's decision in Francis Karioko Muruatetu & another – v- Republic (supra), we would set aside the sentence for life imprisonment imposed and substitute it therefore with a sentence of 30 years' imprisonment from the date of sentence by the trial court.***
>
> ***25. In this appeal, guided by the merits of the Supreme Court decision in Francis Karioko Muruatetu & another – v- Republic (supra) and persuaded by the decisions of this Court in Christopher Ochieng – v- R(supra) and Jared Koita Injiri – v- R, Kisumu Criminal Appeal NO. 93 of 2014 in relation to sentencing, we are convinced and satisfied that the enhanced mandatory 20 year term of imprisonment meted upon the appellant by the learned judge cannot stand. We are inclined to intervene …"***

26. The Appellant was granted the opportunity of addressing the Court in mitigation. He stated thus:

> ***"I take care of my mother. I provide for her. The Complainant mother doesn't assist my mother. My wife left me. I intended to get her. I spent who years in custody awaiting this case to be concluded."***

27. Having taken into consideration circumstances in which the offence was committed and the nature of the offence, I do set aside the sentence meted out and substitute it with a sentence of **twenty (20) years imprisonment** to be effective from the date of the sentence by the trial Court.

28. It is so ordered.

Dated, Signed and Delivered at Kitui this 18th day of July, 2019.

L. N. MUTENDE

JUDGE