REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

HCCRA NO. 1 OF 2018

PMK.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being appeal from original conviction and sentence in the Principal

Magistrate's Court atMarimanti in Criminal Case SOA NO. 12 of

2017 delivered by S.M NYAGA - (Resident Magistrate (R.M) on 9th January, 2018).

J U D G M E N T

1. **PMK,** the Appellant herein was charged with the offence of incest by a male person contrary to **Section 20(1)** of the **Sexual Offences Act** and attempted defilement contrary to **Section 9(1) (2)** of the **Sexual Offences Act No. 3 of 2006.** The particulars of the charge were that on 6th August 2017 in Tharaka North within Tharaka Nithi County, the Appellant intentionally attempted to have his penis penetrate to the vagina of a minor (name withheld) aged 8 years who was his daughter.

2. The Appellant denied committing the offence but after trial, he was found guilty on the main charge and convicted. He was sentenced to serve 50 years imprisonment. The Appellant was aggrieved by both the conviction and the sentence and preferred this appeal.

3. A brief summary of the case before trial court shows that the minor testifying on 16th November, 2017 almost a year after the incident told the trial court that she was nine years old and that her own father, the Appellant herein defiled her by force when her mother was away but just as he was defiling her, her mother suddenly arrived making the Appellant to jump out of bed before dressing up. The minor told the trial court that her mother screamed and the Appellant got hold of a panga and began chasing the mother. The victim further stated that the Appellant had defiled her before.

4. The evidence of the minor was corroborated by her mother- JK (PW2) who told the trial court that she had gone for a women group meeting on that material day and that on coming back at around 6 pm, he met this son who informed her that the father (Appellant) had sent him with Kshs.10 coin to buy biscuits. She further added that when she entered her house she found the Appellant lying on her daughter (PW1) and out of shock she screamed. She further stated that the Appellant picked a machete and hit her forcing her to run away for her safety. It was her evidence that both the Appellant and the minor were naked when she found them and that she then reported the incident at police who escorted her back home where the Appellant was arrested. She told the trial court that when she checked her daughter's private parts she found it okay but wet, she also affirmed that her daughter previously complained to her that the Appellant had asked for sex and was a bit suspicious.

5. P.C (W) Beatrice Mbivu (PW3), the investigating officer in the case told the trial court that a report about the defilement of the minor was made at around 8.39 pm on 7th August 2017 at Gatunga Police Station and that she escorted the minor to Marimanti District Hospital for treatment, medical checkup and filling of P3 which was done. The police officer was however not sure about the date of the alleged offence as she at one time stated that it was 7th and then stated that the offence was committed on 6th August 2017. She also stated that she personally examined the victim's genitalia and found that there was no complete penetration and in her opinion there was an attempted defilement.

6. Benard Mwenda (PW4) a clinical officer from Marimanti Level 4 Hospital requested to testify and testified on behalf of his colleague one Andrew Kinyua. His evidence was that penetration was not established as the hymen was intact with no lacerations or bruises noted on the genitals of minor. He tendered P3 as P. Exhibit 2 which clearly stated that there was no evidence of penetration.

7. When placed on his defence the Appellant stated that he was framed because of a quarrel he had picked with his wife when she arrived home late.

8. The trial court upon evaluation of evidence tendered found that the prosecution had proved its case on indecent act beyond doubt. The trial court found that though the minor was not very clear on whether the Appellant penetrated, he found her truthful and found that she may not have been precise due to her age . On medical finding, the court find that though the hymen was found intact, **Section 2** of **Sexual Offences Act** define penetration as partial or complete insertion of the genital organs of a person into the genital organs of another. The trial court found that there was no evidence of penetration but evidence of indecent act under **Section 20(1)** of **Sexual Offences Act** had been proved beyond doubt. The Appellant was therefore convicted and sentenced to serve 50 years imprisonment.

9. The Appellant, as I have observed above was dissatisfied with both conviction and sentence, and filed this appeal raising four grounds though he later amended to six grounds without first seeking from this court as provided under **Section 350** of the **Criminal Procedure Code**. The four grounds are as follows:-

i. That he Appellant was not subjected to DNA to confirm that he had committed the offence.

ii. That the trial learned magistrate erred in law by failing to consider that the age of the victim was not proved beyond reasonable doubt.

iii. That the learned trial magistrate erred in law and fact by failing to note that the child was forced to testify against her father.

iv. That the Appellant's defence was rejected without cogent reasons.

10. In his written submissions the Appellant has contended that the evidence tendered did not link him to the offence. He further contends that the minor was coached to fix him. He has averred that no piece of clothing from the minor was recovered or taken for DNA analysis to connect him with the offence. He has faulted the investigating officer for taking the role of a medical officer by examining the victim.

11. It is the Appellant's contention that the prosecution's case was based on lies and opines that the confusion on the dates on when the incident took place shows that the witnesses were lying. He has urged this court to scrutinize the entire evidence and come up with a better conclusion.

12. The Respondent has opposed this appeal and asserted that the prosecution's case was proved beyond reasonable doubt. They have relied on the decision of ***JMN -vs- Republic [2019] eKLR*** where the court held that in order to prove incest, the evidence must prove that the accused committed an indecent act or an act which causes penetration. In other instances once there is evidence of an incident act, penetration is not necessary.

13. The State/Respondent has pointed out the trial court was guided by the definition of ***"penetration"*** as per **Section 2** of the **Sexual Offences Act** and the definition of ***"indecent act".*** The Respondents submits that the second ingredient of incest is for the relationship to be established and that the last ingredient is to prove that the indecent act was caused by the accused.

14. It is the view of the Respondent that the prosecution witnesses were consistent, candid and clear and that all the above elements of the offences were proved. The Respondent points out that the Appellant set out and created a chance to commit the offence by sending his young son away to buy biscuits in order to get the opportunity knowing that his wife was away. According to the Respondent, DNA test and analysis was not necessary and that for an offence of incest to be established and/or proved penetration is not necessary ingredient. The Respondent has urged this court to find that the elements of the charge of incest by male were sufficiently proved to the required standard.

15. On sentence, the Respondent has urged this court to enhance the sentence to life imprisonment because the law provides for a mandatory sentence of life imprisonment for a person who commits incest with a minor. It is the view of the State that the sentence of 50 years was illegal and has urged this court to set it aside and substitute it with lawful sentence of life's imprisonment.

16. This court has considered this appeal and the grounds upon which it has been preferred. I have also considered the opposition by State. This court agrees that in a charge of incest by male contrary to **Section 20(1), Sexual Offences Act** to be sustained either of two distinct elements must be clearly be disclosed by a charge under that section which are;

i. Indecent act or

ii. Penetration

Section 20(1) of Sexual Offences Act states as follows:-

"Any 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 ....." (emphasis added).

17. The first element of indecent act is clearly defined under **Section 2** of the **Sexual Offences Act** and the trial court captured it well by relating and correcting it correctly to the evidence placed before him. **Section 2** of the Act defines ***"indecent act as "unlawful intentional act"*** which causes;

a) any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration.

b) exposure or display of any pornographic material to any person against his or her will (emphasis added). A prove of either of the two ingredient will suffice in establishing an offence of incest.

18. Having set out the position of the law before I even analys the facts, a look at the charge sheet reveals that while the Appellant faced 2 counts;

(i) Incest by male contrary to **Section 20(1)** of Sexual Offences Act.

(ii) Attempted defilement contrary to **Section 9(1)** of the Sexual Offences Act.

The trial court evaluated the evidence tendered by the prosecution and found at the close of prosecution's case that the prosecution had established a *prima facie* case but fell short when it failed to specifically tell the Appellant whether he was being called upon to defend himself on the 1st, the 2nd or both counts. This issue was never canvassed in this appeal but it is a critical issue because it has a correlation with a fair trial which is a right to every person charged or facing trial in Kenya. Under **Article 50(2) (b)** of the **Constitution** the Constitution provides that an accused person a right to be informed of the charge with sufficient detail to answer to it.

This court find that the provisions of **Article 50(2) (b)** not only applies at plea stage, (where an accused should be clearly told of the charge facing him) but also at close of prosecution's case where he is found to have a case to answer particularly where the accused faces more than one count. It is a travesty of justice and unfair, if say an accused person has five counts and at the close of prosecution's case he is informed that he generally has a case to answer without specifying which count must he/she direct his defence to. The question therefore posed is whether the Appellant herein was subjected to a fair trial when the trial court casually told him that he had a case to answer and proceeded to explain to him the options open for him to defend himself as provided by **Section 211** of **Criminal Procedure Code.** Which count was he going to defend himself against given that the trial court never specifically stated whether the prosecution's case had established count one, count two or both? The answer to this clearly shows that there was a misdirection by the learned trial magistrate which I must say is not an isolated case as more often a trial court out of aridity for quick/dispensation of justice often overlook the significance of the provision of **Section 211 Criminal Procedure Code** and the need to clearly make a finding on whether or not an accused has a case to answer by considering all aspects of the trial that is the evidence tendered visa viz the charge or counts facing an accused person. Failure to do so can result in compromising the rights of the accused and subjecting him to mistrial as it happened in this instance. Looking at the grounds of appeal herein one cannot fail to see that the Appellant upto now seems unsure of what he was convicted of and sentenced to serve 50 years in jail.

19. This court finds that in view of my finding it may not be fair or in the interest of justice to delve onto the other grounds raised in this appeal. I find that the Appellant was subjected to unfair trial when the trial court failed to inform him with sufficient detail which count was he required to defend himself in respect of which the prosecution's case had established a prima facie case. As a consequence, I find that he was subjected to unfair trial and to that extent I allow this appeal by setting aside the conviction in order to protect the interest of the victim and the interest of justice, I find that this is a matter where this court in exercise of its power under **Section 354 (3) (a) (1)** of **Criminal Procedure Code** should order for a retrial which I hereby do order for a retrial before another court of competent jurisdiction be conducted. The lower court file shall be referred back together with the Appellant to the Subordinate Court in Marimanti and the matter shall be mentioned before the Principal Magistrate of that court for further orders and retrial.

Dated, signed and delivered at Chuka this 16th day of July, 2019.

R.K. LIMO

JUDGE

16/7/2019

Court:

Judgment, dated signed and delivered in the open court in presence of Appellant in person and Maari for Respondent.

R. K. LIMO

JUDGE

16/7/2019