REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

CRIMINAL APPEAL NO. 56 OF 2017

PMK.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from Original Conviction and Sentence in **Kyuso Senior Resident Magistrate's Court Criminal Case (S.O.) No. 1 of 2017** by **Hon. J.Aringo (RM)** on **13/4/17)**

J U D G M E N T

1. PMK, the Appellant, was charged with **Incest Contrary to Section 20(1) of the Sexual Offences Act NO. 3 of 2006.** Particulars of the offence being that on diverse dates between **5th** and **15th October 2016** in **Mumoni Sub County** within **Kitui County** intentionally penetrated the vagina of **GM.** with his penis a girl child **aged 14 years old** who was to his knowledge his daughter.

2. In the alternative, he was charged with **committing an indecent Act with a child contrary to section 11 (1) of the Sexual Offences Act NO. 3 of 2006.** Particulars were that on diverse dates between **5th and 15th day of October 2016** in **Mumoni Sub County** within **Kitui County** intentionally touched the vagina of **GM** a child **aged 14 years** with his penis.

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

4. Aggrieved, he appeals on grounds that: the trial Magistrate erred in law and fact by failing to find that elements of incest were not conclusively proved to warrant a conviction; the learned trial Magistrate erred in law and fact by failing to find that the voire dire conducted on PW1 was not well conducted; the learned trial Magistrate erred in law and fact by failing to find that essential witnesses necessary to prove basic facts did not testify; the trial Magistrate erred in law and fact in imposing a life sentence without taking in cognizance of the circumstances of this case and the development of the case law; and that the learned trial Magistrate erred in law and fact by failing to find that there existed a grudge and therefore he was implicated on this case.

5. Facts of the case were that the Appellant, the biological father of the complainant molested her between the **5th day of October and 15th October 2016.** He would go to the house in which she used to sleep and violate her sexually. She ran away from home and went to her uncle's home. Consequently she reported the matter to her mother, who took her back home but she ran away and sought help at a Children's Rescue Centre and subsequently reported to her teacher and the police. Investigations were carried out that culminated into the arrest of the Appellant who was charged.

6. Upon being put on his defence the Appellant denied having defiled the complainant. He denied having been at home on the days it was alleged he committed the offence.

7. The appeal was canvassed by way of written submissions. The Appellant urged that he could not have committed the heinous act without his wife or the complaint's sister who used to sleep with her in the same house which was 50 metres away from the house he used to sleep in with his wife, knowing. That the child was examined a month later a fact considered by the Trial Magistrate.

8. He faulted the trial court for not conducting Voire dire examination properly. He faulted the prosecution for not availing vital witnesses that were informed of the allegations, to testify and the trial court for imposing a sentence that was harsh.

9. The Respondent (State) urged that the evidence of the complainant was not challenged materially; that the voire dire was duly conducted; the court can convict on a single minor's evidence and alleged grudges were an afterthought.

10. This being the 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).**

11. Section 20 (1) of the Sexual Offence 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:**
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> **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".**

To prove the charge the prosecution was required to establish:

i. Either existence of an indecent act or an act that caused penetration

ii. The relationship between the victim and the assailant.

iii. Age of the victim (for purposes of sentence)

12. The complainant herein was examined by PW4 **David Mbiti** a **Clinical Officer** at **Kyuso Hospital.** Her hymen was broken and there was minimal discharge. This was a month after the alleged incident. In the case of **P.K.W. VS. Republic (2012) eKLR** it was stated that the fact of a broken hymen perse is not sufficient to prove the fact of defilement. In the case of **Kassim Ali –VS. Republic, Cr. App. NO. 84 of 2005 (MSA) the court of Appeal held that:**

> **"… [The] absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence."**

13. Evidence of the fact of penetration was adduced by the complainant. Prior to testifying she was subjected to voire dire examination. The trial court carried out a Preliminary examination of the child to establish whether the evidence she was to adduce would be admissible, whether she was competent enough to testify. The court was required to subject the child to basic questions that would make it form the opinion whether she understood the nature of an oath and generally her intellectual capacity. This was well put in the case of **Peter Kanga Kiune V. Republic, Criminal Appeal NO. 77 of 1982 where the court of Appeal stated thus:**

> **"Where, in any proceedings before any court, a child of tender years is called as a witness, the court is required to form an opinion , on a voire dire examination, whether the child understands the nature of an oath in which even his sworn evidence may be received. If the court is not so satisfied his unsworn evidence may be received if in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth. In the latter event an accused person shall not be liable to be convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him (section 19, Oaths and Statutory Declarations Act, cap 15. The Evidence Act (section 124, cap 80).**
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> **It is important to set out the questions and answers when deciding whether a child of tender years understands the nature of an oath so that the appellate court is able to decide whether this important matter was rightly decided, and not be forced to make assumptions".**

14. I wish to emphasize the fact that voire dire is usually conducted in respect of a child of tender years. In the case of **Kibageny Arap Kolil V. Republic (1959) EA 82 the court of Appeal for Eastern Africa held that;**

> **"a child of tender years meant a child under the age of 14 years".**

15. The complainant told the court that she was **14 years old** having been born in **November 2002** and she was in **Standard 7.** The clinical officer who examined her estimated her age to have been between **11-15 years.** That notwithstanding, she was subjected to questions by the court that were recorded. The answers that she gave were also recorded. Questions put to the child are usually basic open ended questions aimed at testing their intellect/competence. The questions the trial court asked made the learned Magistrate form the opinion that the child was competent enough to give sworn evidence. In the premises the voire dire was conducted as required.

16. The relationship between the complainant and Appellant was not in dispute. She was his biological daughter.

17. This was a case where the Appellant had a rented room where the complainant used to sleep with her younger sister, **G** who was in pre-school. Her testimony was that the Appellant used to go to the house at about 1.00 a.m and wake her up. He would undress and insert his penis into her vagina and after the act he would sleep with her until the first cock crowed.

18. After being molested for five (5) nights she ran away from home and went to her uncle's place. Her mother, PW2 **KM** went for her that is when she divulged what was happening to her. She could not stay at home, she ran away and went to **Kirira Child Welfare Organization Rescue Centre.** PW3 **Esther Kangathe,** the Coordinator of the Rescue Centre received her at the centre. She observed her and noted that she was disturbed. That is when she caused her to report the matter to the police and she was taken to hospital for treatment.

19. The learned Trial Magistrate had the opportunity of hearing the complainant testify. He noted that she was candid and honest. On cross-examination she was not shaken, the court believed her.

20. This is a child who ran away from home because of being molested. She went to her uncle's place and when her mother took her back she ran away and sought refuge at a Rescue Centre.

21. In his defence the Appellant stated that he was away from home and when he returned he found the complainant having gone to her grandfather's place. That he told his wife to cause her to return home but she did not return. Thereafter he learnt that she was at the Rescue Centre. Although the defence put up was a denial, the evidence adduced by the complainant and her conduct clearly showed that she was a person to be believed. In the premises, I find and hold that the person who penetrated the complainant's genetalia as correctly found by the trial court was the Appellant.

22. The trial court has been faulted for failing to find that the prosecution did not call essential witnesses. The alluded to witnesses were the sub-chief who received a report from PW2, the head teacher and the complainant's uncle. These were people who were told that the complainant had been defiled. Failure to call them was not detrimental to the prosecution's case.

23. The trial court is also faulted for failing to find that there was a grudge between the Appellant and PW2, his wife. The Appellant urged that PW2 colluded with the complainant so that he could be separated from his second wife. The conduct of the complainant was of a child who had been molested. In his defence the Appellant wondered aloud why he was charged with an offence that he did not commit. He did not allege that the complainant had been influenced to come up with untrue allegations. Therefore the issue of alleged grudges that was brought up at the appellate stage must be dismissed.

24. The Appellant contends that the sentence meted out was harsh. A person who commits the offence of incest is liable to life imprisonment. For a minor the sentence should not be less than ten (10) years imprisonment. In the result, I affirm the conviction, but, set aside the sentence imposed which I substitute with **twenty (20) years imprisonment to be effective from the date of conviction and sentence by the trial court.**

25. It is so ordered.

Dated, Signed and **delivered** at **Kitui** this **20th** day of **September, 2019**

L.N. MUTENDE

JUDGE