REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NUMBER 247 OF 2014

MLN.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal against both the conviction and the sentence of Resident Magistrate Hon. Kelly E.

delivered on 24th of September in NAKURU CM Criminal Case No. 34 of 2014

Republic v Michael Lesenik Ndagani.)

JUDGMENT

1. The Appellant was charged with the offence of **Incest** by a male contrary to **Section 20 (1)** of the **Sexual Offences Act No. 3 of 2006**. The particulars of the offence as per the charge sheet were that on the 31st of January 2014 in Subukia District of the Nakuru County intentionally and unlawfully committed an act by inserting a male genital organ (penis) into a female genital organ (vagina) of a child namely **AN** aged 15 years knowingly to be your granddaughter which cause penetration.

2. In the alternative, the appellant was charged with the offence of **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 the 31st of January 2014 in Subukia District of the Nakuru County intentionally and unlawfully committed an act by touching a female genital organ (vagina) of a child namely AN aged 15 years knowingly to be your granddaughter which cause penetration.

3. After trial, the appellant was convicted of the main charge and sentenced to life Imprisonment. The Appellant being dissatisfied with the conviction and sentence and have appealed to this court on the following grounds:-

> i. The Learned Trial Magistrate erred in law and in fact by acting on the wrong principles and gave unlawful sentence. The Proviso to Section 20 (1) of the Sexual Offences Act uses the words that the Accused shall be liable to imprisonment for life. It was an error to hold that this sentence is a mandatory sentence while it was meant to be a maximum sentence. This was an error in law.
>
> ii. The Learned Trial Magistrate erred in law and fact by relying on evidence of penetration but did not consider, the evidence before him was not prove that the Appellant caused penetration. It was an error to rely on presumption without looking at the .real evidence. This prejudiced the Appellant.
>
> iii. The Learned Trial Magistrate erred in law and in fact in convicting the Appellant, but failed to note that Age of the Complainant was not proved and very essential witnesses were not called.

SUBMISSIONS BY THE APPELLANT

4. Appellant submitted that the trial magistrate failed to exercise her discretion and awarded a life sentence to the Appellant. Among the authorities he cited is the case of **M. K. Vs. Republic [2015] eKLR** where the Appellant was charged under **Section 20 (1)** of the **Sexual Offences Act No. 3 of 2006** and the sentence imposed was 10 years**.**

5. He further states that the phrase 'not less than' has not been used. In his view this does not create a minimum sentence and cited the case of **Opoya v Uganda (1967) EA 752** where the court held that, the words '*shall be liable on conviction to suffer death* 'provided a maximum sentence only and the courts have the discretion to impose sentences of death or life imprisonment.

6. He further states that shall be liable on conviction to suffer death especially when contrasted with the words in **Section 184** guided by the cases above the correct interpretation of the proviso is liable to imprisonment of a term between 10 years to life imprisonment. He concludes that it was wrong for the Learned Trial Magistrate to hold that life imprisonment was the only sentence applicable for the offence. He invites the court to find that the sentence was excessive according to the circumstances and the age of the Complainant.

7. On the second ground, the Appellant submitted that the evidence before the court is not conclusive in that the appellant did not explain the act done by the Appellant. He further states that the doctor did not corroborate the evidence of PW 1.

8. He submitted that medical evidence could not be useful to prove penetration since time had elapsed from 31st of January 2014 to 5th of February 2014 and that nothing could be concluded after taking a bath and taking long before going for medical examination**.** He concludes that had the Trial Magistrate attached undue and undeserved weight to the state of the hymen, the court would have found out that the evidence of penetration was weak. Therefore, the failure to prove penetration could not be said to have been proved.

9. On the issue of age, the appellant submitted that the medical officer who filled P3 did not assess the age of the complainant. He states that the the only evidence that comes near to proving the age of the Complainant is the mother who states that she is 14 years having been born in 1992.

SUBMISSIONS BY THE RESPONDENT

10. The state counsel submitted that he was positively identified by the complainant since it happened at 4.00pm and the appellant was the complainant's father; he was therefore known to the child.

11. On age**,** the Respondent submitted that a birth certificate was produced which shows that the Complainant was born in 1999; the offence was committed on the 13th of January 2014 which confirm that the Complainant was 15 years old.

12. The Appellant confirmed that the Complainant is his sister's daughter meaning his niece. He said being the first-born in his family, he had gone to ask for payment of dowry his sister had passed away. He stated that she died on the 5th of February 2019 and was buried on the 8th of February 2019. The incident is said to have occurred on the 3rd of March 2014. Appellant alleged that the girl planned with her grandfather to have him charged because he had come to ask for dowry.

ANALYSIS AND DETERMINATION

13. This being the first appellate court, I am obligated to re-evaluate evidence adduced in the lower court and arrive at an independent determination. This I do with the knowledge that unlike the lower court, I never got the opportunity to take evidence first hand and observe demeanour of witnesses. For that account I will give due allowance. I refer to the case of ***OKENO VS REPUBLIC [1972] EA 32*** where it was stated as follows:-

> **"The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala v. Republic [1957] EA 570.) It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (See Peters v. Sunday Post, [1958] EA 424.)"**

14. I have perused the court record and wish to consider whether the charge against the appellant was sufficiently proved and two, if conviction is confirmed, whether this court should interfere with the sentence.

15. Ingredients of the offence of incest are set out in Section 20 (1) of The Sexual Offences Act as follows:-

> **"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:**

16. On the issue of relationship between the appellant and the complainant, the appellant confirmed that the complainant's mother was his sister's child. There is therefore no doubt that the complainant is the appellant's niece and therefore fits in the description of female person referred to in Section 20 (1) above.

17. On the issue of penetration, the P3 form shows that the Complainant's hymen was broken. History the medical officer was given was that the girl had been defiled 5 days prior to examination by 2 people. Both her labia majora and labia minora were normal; the cervix was also normal; there were no obvious tears or bruises on her external genitalia.

18. From the child's Child Health Card she was born on the 23rd of September 1999, which confirmed that the complainant was 15 years old. In her evidence, she said that the appellant and his friend forcefully defiled her in turns.

19. What I find curious is how her genitalia would remain intact without any bruises and tears after forceful penetration by two adults. The appellant talked of bad blood between the child's paternal grandparents and the appellant due to unpaid dowry. There was need to rule out issue of frame up of charges by proving that the breakage of the heymen was as a result of defilement by the appellant.

20. There is no doubt that at the time of examination by medical officer, the child's vagina had been penetrated as shown by the broken heymen, but in view of the fact that her genitalia was normal 5 days after alleged gang defilement and in the presence of bad blood between the appellant and the child's paternal grandparents, doubt arise as to whether the defilement occurred at the time alleged and by two people as alleged.

21. From the foregoing ,I find that it was not safe to convict the appellant on the evidence on record

22. FINAL ORDER

1. The appeal is allowed

2. Conviction and sentence imposed are set aside

3. Appellant set at liberty unless lawfully held.

Judgment dated, signed and delivered at Nakuru this 9th day of October, 2019.

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RACHEL NGETICH

JUDGE

IN THE PRESENCE OF:-

Schola/Jenifer - Court Assistant

Appellant in person

Chigiti Counsel for Respondent