



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NUMBER 58 OF 2018

PNM alias M.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal against both the conviction and the sentence of Resident Magistrate Hon. R. AMWAYI delivered on 15th of May 2018 in Molo Sexual Offences Case No. 83 of 2017 Republic v PNM Alias M.)

JUDGMENT

1. The Appellant was charge of **Incest** contrary to **Section 20 (1)** of the **Sexual Offences Act No. 3 of 2006**. The particulars of the offence as per the charge sheet are that, on the 8th May 2017 in Molo Sub-County within Nakuru County, intentionally caused his penis to penetrate the vagina of his niece namely **MMN** a girl aged 9 years.
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 as per the charge sheet being that on the 8th May 2017 in Molo Sub-County within Nakuru County, touched the vagina of **MMN** a girl aged 9 years with his penis.
3. The appellant pleaded not guilty both to the main and alternative charge. The matter proceed on for full trial; the prosecution availed 5 witnesses in support of their case. On being placed on defence, the appellant gave unsworn statement and did not call a witness. The Trial court found the appellant guilty, convicted and sentenced him to life Imprisonment.
4. The Appellant being dissatisfied with the conviction and sentence, filed this appeal dated 25th May 2018. His advocate later sought leave of court to file Petition of Appeal, and filed petition of appeal dated 9th July 2018 and set out the following grounds:-
 - i. That the learned trial magistrate erred in fact and in law by convicting the Appellant when the complainant had initially complained to the police that she had been defiled by Joseph Gitau (PW 3) before suddenly changing the narrative against the appellant on the offence of incest without the benefit of considering the initial report to the police, or what was contained in the occurrence book or in the police investigation diary to establish if the name of the appellant was mentioned to rule out any possibility that the complainant's belated allegation against the appellant was not an afterthought now that the investigating Officer (PW 5) was silent about the nature and date of the initial report to the police whether or not the complainant complained against (PW 3) and only informed the court that she had charged PW 3.
 - ii. That the learned trial magistrate erred both in law and in fact by failing to warn herself against the possibility of a conspiracy between PW 3 (while out on bond), PW 5, PW 2 who might have subsequently influenced PW 1 on the change of mind from her initial complaint against PW 3 to her allegation against the appellant and evaluate the evidence by the Appellant who was unrepresented by an advocate that PW 2 had a grudge against him.
 - iii. That the learned trial magistrate erred both in law and in fact in convicting the appellant when the evidence before her was insufficient and incredible.
 - iv. That the learned trial magistrate imposed a sentence of life imprisonment which was harsh and excessive in the circumstances.
5. The appellant's advocate submitted that the first report of defilement made to the police station was that PW3 had defiled PW1 and following the report, he was charged. He was later released and appellant arrested and charged. He further submitted that the trial magistrate failed to warn herself that there was a conspiracy between PW3 and the Complainant's mother PW2, to convince the complainant to charge her narrative and accuse the appellant.
6. Further that the trial magistrate failed to consider the defence of the appellant to the extent that when he was arrested he was taken for

medical examination but the findings of the same were never produced in court as evidence. The appellant further submitted that the trial court failed to consider that there was a grudge between the victim's mother PW2 and appellant.

7. Further, that broken hymen is not conclusive evidence of penetration and that PW1 stated that was his second time the appellant defiled her but medical doctor did not indicate age of broken hymen; that one cannot tell whether it was old or fresh and therefore there was no enough proof to establish whether there was defilement.

8. That despite the Victim's mother Pw2 testifying that the child was taken to a private health care Hospital and was found to have been defiled and infected, the medical records from the facility were not produced during the trial and according to Pw4's evidence, that prior to filling the P3 form the victim had not received any treatment.

9. The counsel submitted that there were serious contradictions in the prosecution's case as PW1 testified that the appellant took her to his house locked her in and defiled her in his bed but report given to the doctor is that the she was pushed to the floor and defiled. Further in the Post Rape Care form indicated the victim was defiled by a person known to her who was her neighbour and in the testimony of PW2 she confirmed PW3 who had initially been charged was the then neighbour.

10. The appellant submitted that the sentence imposed was harsh in the circumstances owing to the fact that life imprisonment is not mandatory sentence but maximum for incest and relied on two authorities which include **PMM v Republic (2018) eKLR** where **Justice Richard Mwangi** relied on the decision of the Court of Appeal in the case of **M K v Republic [2015] eKLR** where the court stated:

“Guided by the decision in Opoya -v- Uganda (1967) EA 752 and the persuasive dicta of North J. in James -v- Young 27 Ch. D. at p.655; we are satisfied that the sentence stipulated in the proviso to Section 20 (1) of the Sexual Offences Act is not a minimum mandatory sentence of life imprisonment. The proviso simply states that the trial court has discretion to mete out a maximum term of life imprisonment. Read in conjunction with the general provision in Section 20 (1) we hereby state that the correct interpretation of the proviso in Section 20 (1) is that a person convicted of incest when the female victim is under the age of eighteen years is liable to a term of imprisonment between 10 years and life imprisonment.”

11. In conclusion, counsel for the appellant submitted that there was no evidence linking the appellant to the act of incest and prayed for the conviction, sentence be set aside, and the appellant be set free.

12. In response, the state counsel submitted that the complainant in her testimony said that the appellant called her into his house, locked it and defiled her. That after defiling the girl, the appellant threatened her and told her to say it was someone else who defiled her. That her evidence was corroborated by her mother PW2 who said that after arrest of PW3, she found the complainant crying and that is when he told her the appellant had asked her to lie that it is PW3 and that prompted release of PW3.

13. On sentencing, he submitted that **Section 20(1)** of the **Sexual Offences Act** provide that if it is proved that the female person is below the age of 18 years the perpetrator shall be liable to life imprisonment. That the court had the discretion to impose the sentence and using it discretion it imposed the maximum sentence. He submitted that the sentence is not mandatory but the law provides that the accused is liable to life imprisonment. The state urged the court to uphold the conviction and sentence of the trial court.

ANALYSIS AND DETERMINATION

14. This being the first appellate court, I have a duty of reevaluating evidence on record and arrive at an independent determination. This I do knowing that unlike the trial court, this court never got the opportunity to take evidence first hand and observe the demeanour of witnesses. For this reason I will give due allowance. The principles that apply in the first appellate court are set out in 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.)”

15. I have perused the trial court proceedings and wish to consider the following issues:-

- a. **Whether the Prosecution has proved his case beyond reasonable doubt.**
- b. **Whether life imprisonment is a mandatory sentence for offense of incest.**

16. In determining whether the charge was proved beyond reasonable doubt I first wish to look at the Ingredients of the offence of incest. Section 20 (1) of The Sexual Offences Act provided:-

“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.

17. Section 22 of the Sexual Offences Act sets the test of specific relationships which may be considered for an offence of incest. Section 22 (1) and (2) provides:-

1) In cases of the offence of incest, brother and sister includes half-brother, half-sister and adoptive brother and adoptive sister and a father includes a half father and an uncle of the first degree and a mother includes a half mother and an aunt of the first degree whether through lawful wedlock or not.

2) In this Act—

a. “uncle” means the brother of a person’s parent and “aunt” has a corresponding meaning;

b. “nephew” means the child of a person’s brother or sister and “niece” has a corresponding meaning;

c. “half-brother” means a brother who shares only one parent with another;

d. “half-sister” means a sister who shares only one parent with another; and

e. “adoptive brother” means a brother who is related to another through adoption and “adoptive sister” has a corresponding meaning.”

17. PW1 testified that the appellant was his Uncle, a brother to her father PW2 also corroborated the same and PW5 the investigation officer confirmed that indeed the appellant was the complainant’s uncle, a brother to her father and they lived in the same compound.

18. From evidence adduced, there is no doubt that relationship between the appellant and the complainant as set out in Section 20 (1) of the Sexual Offences Act is established. It is evidence that the appellant is an uncle to the complainant.

19. On the issue of age, the complainant produced her birth certificate as exhibit 1 which indicate she was born on 12th July 2006. This was therefore sufficient prove of age.

20. On the issue of Penetration, the P3 form shows that the Complainant had broken hymen but the vagina was intact and no physical injuries on the complainant. Penetration is defined in Section 2 of the Sexual Offences Act as follows-

“Penetration’ means the partial or complete insertion of the genital organs of a person into the genital organs of another person”.

21. The complainant was 9 years at the time of examination. She testified that the appellant had defiled her before. My view is that this could explain why her vagina was intact. The doctor further testified that the complainant had pain while urinating and on her lower abdomen. The broken hymen confirm that there was penetration.

22. From the foregoing, there is no doubt that the complainant was defiled. Appeal on conviction is not therefore merited.

23. On issue of sentence, I wish to consider whether this court should interfere with sentence of life imprisonment imposed. From the wording of section, the offender is liable to life imprisonment.

24. Was the sentence imposed by trial court excessive and harsh in the instant case?

In the case of Francis Karioko Muruatetu & Another vs Republic SC Pet. No. 16 of 2015 the Supreme Court held that the mandatory death sentence prescribed for the offence of murder by Section 204 of the Penal Code was unconstitutional. The Court stated as follows:-

“Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives that the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case. Where a Court listens to mitigating circumstances but has, nevertheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to the accused persons under the Article 25 of the Constitution; an absolute right.”

25. In the case of Christopher Ochieng v Republic [2018] eKLR while the court of appeal was agreeing with the supreme court in Muruatetu cited above case stated 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.”

26. From record, the appellant herein was a first offender. In mitigation, he said he had a family who relied on him. Being guided by the

above authorities by the Supreme Court and the court of appeal, I am inclined to interfere with the life sentence imposed.

27. FINAL ORDERS

1. Appeal on conviction is dismissed
2. Appeal on sentence is allowed. Sentence imposed by trial court is set aside and replaced by imprisonment for a period of 20 years.

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

Ms. Kabalika Counsel for Appellant

Chigiti Counsel for Respondent