REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 42 OF 2017

PK.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an *Appeal against the judgement and conviction by Hon. I. M. Kahuya (SRM) in Machakos Chief Magistrate's Court Criminal Case No. 1874 of 2014 delivered on 6th October, 2015*)

JUDGEMENT

1. The Appellant herein **PK** had been charged, tried, convicted and sentenced by the Chief Magistrate's Court at Machakos for the offence of incest contrary to Section 20(1) of the Sexual offences Act No.3 of 2006. The particulars being that on the diverse date between April, 2014 and 15th November, 2014 in Machakos District within Machakos County, intentionally and unlawfully caused his penis to penetrate the vagina of CM a child aged 13 years who was to his knowledge his daughter. The Appellant also faced an alternative charge of indecent act with a child contrary to Section 11(1) of the Sexual Offences Act with the particulars being that on the dates between April, 2014 and 15 th November, 2014 in Machakos District within Machakos County, intentionally and unlawfully touched the vagina of CM a child of 13 years with his penis.

2. The Appellant was sentenced to serve 15 years imprisonment. Being aggrieved, he has lodged this appeal and raised the following grounds of appeal:-

> ***(a) That the learned trial Magistrate erred in both law and fact by failing to make specific finding in relation to the burden of proof.***
>
> ***(b) That the learned trial Magistrate erred in both law and fact by failing to make an adverse inference as to the contradictions and inconsistencies of evidence between PW.1 and PW.2 as the two witnesses were not credible in their testimonies.***
>
> ***(c) That the conviction was manifestly unsafe.***

3. This being a first appeal, the duty of this court is well spelt out. This court has to re-evaluate and analyze the evidence afresh and come up with its own independent conclusion bearing in mind that it did not have the advantage of seeing and hearing the witnesses testify. (See **Okeno -Vs - Republic [1972] EA 32).**

4. It was the evidence of the Complainant (PW.1) that Appellant who was her step father sent away her two younger siblings to a nearby shop to purchase candles. The Appellant who was now alone with the complainant proceeded to defile her. This was on the 15/11/2014. Again on the 22/11/2014 the same incident was repeated after the Appellant had persuaded the complainant to imbibe alcohol and was thus intoxicated. During the last incident the Appellant had forgotten to close the door and he was thus discovered by the complainant's younger sister AM (PW.2) who found him fondling the complainant's breasts. Upon learning of the incident the mother of complainant interrogated her and it transpired that the defilement had been ongoing since April, 2014. The complainant was escorted to Machakos Police station from where a P.3 form was issued. She was examined at Machakos level Five Hospital. The Appellant upon learning of the developments fled from the home and was later traced by the clan elder and handed over to the police.

5. **AM (PW.2)** aged 9 years old narrated that on the 15/11/2014 while she slept with the complainant, the Appellant entered the room and touched the complainant's breasts. The witness stated that she waited for some days to gain courage and then informed her mother on what she had seen.

6. **JN (PW.3)** was the mother to the Complainant. She stated that on learning of the incident from PW.2 she confronted the complainant who confirmed that indeed the Appellant had been defiling her in the past. She lodged a complaint with Machakos police station leading to the arrest of the Appellant. She confirmed that her three daughters had not been sired by the Appellant but who had accepted them as his own. She added that she and the Appellant used to quarrel a lot as the Appellant wanted a child of his own but then he was irresponsible for he

could not provide for the family.

7. **Lawrence Musau Musembi (PW.4)** was the area clan elder who received the complaint and alerted the relevant authorities for action.

8. **No.89006 Corporal Wawira (PW.5)** was the investigating officer. She stated that upon receipt of the report she duly issued a P.3 form and recorded statements from witnesses. She later charged the Appellant with the offence. She also produced the treatment card as an exhibit.

9. **Dr. John Mutunga (PW.6)** examined the complainant and found a foul smell and whitish substance emanating from the complainant's vagina. The doctor found the hymen was missing and that there were no fresh bruises on the vagina which implied that the defilement had started much earlier. He produced the P.3 form and post rape care form as exhibits.

10. The trial court found the Appellant with a case to answer and put him on his own defence. The Appellant gave an unsworn statement. He stated that he received a letter from the children offices and did visit the said offices only to be referred to Machakos police station from where he was charged with the offence herein. He denied committing the offence and maintained that his wife had fabricated the case against him as she wanted to get married to another man and then take over the family's finances.

11. I have considered the evidence presented before the trial court by the Respondent and Appellant. It is not in dispute that the Appellant is a step father to the complainant and her two siblings since the Appellant had married their mother. Indeed the mother of the complainant confirmed that the Appellant did not sire the children but had accepted them as his own children. It is also not in dispute that the trial court convicted the Appellant for the main charge of incest contrary to Section 20(1) of the Sexual offences Act. The following issues are necessary for determination namely:-

(a) Whether the Respondent had proved its case against the Appellant beyond reasonable doubt.

(b) Whether the contradictions in the Respondent's evidence warrants an acquittal of the Appellant.

(c) What orders may the court grant?

12. As regards the first issue, it is necessary to find out whether the Respondent had established all the essential ingredients of the offence namely the relationship between the Appellant and the victim, the age of the victim and whether penetration took place. On the aspect of relationship, I note that the Appellant was charged in the main charge with an offence of incest contrary to Section 20(1) of the Sexual Offences Act. There is also an alternative charge of indecent act with a child contrary to Section 11(1) of the Sexual Offences Act. It transpired from the evidence that the Appellant is not the biological father to the victim but had married the victim's mother. In that regard the victim is a step daughter to the Appellant and which falls under the test of relationships provided for under Section 22 of the Sexual offences Act which includes half relationships and hence the victim herein was the Appellant's half daughter. Both the Respondent's and Appellant's evidence left no doubt regarding the issue of the victim being a step daughter to the Appellant. The victim in her testimony kept referring to the Appellant as her father. Hence any sexual relation between the two would amount to incest. On the aspect of age, the investigating officer Corporal Wawira produced the clinic card which indicated the date of birth for the victim as 29/06/2001 thereby placing her age at 13 years old at the time of the alleged commission of the offence.

On the question of whether penetration took place, the victim maintained that the Appellant had been defiling her on some occasions starting in April, 2014 and it was not until her younger sister caught the Appellant red-handed fondling the victim's breasts and who alerted the mother of the victim. Dr. John Mutunga (PW.6) examined the victim and noted some foul smelling discharge from the vagina and further noted that the hymen was missing implying that there had been defilement in the past as there were no fresh bruises on the vagina.

The complainant in her evidence both in chief and cross- examination left no doubt that she and the appellant had been having a hanky panky for quite some time until the complainant's younger sister stumbled upon the Appellant fondling the complainant's breasts. Indeed the complainant confirmed that the appellant used to give her alcohol and cigarettes to take. She also confirmed that the sexual intercourse started way back in April, 2014 and it was only in November, 2014 that the little secret was unearthed by the complainant's younger sister. I note that the trial magistrate conducted a brief voir dire examination on the complainant and her younger sister and found them to understand the meaning of taking an oath and duly directed them to tender sworn testimonies and both were cross – examined by the appellant. Even though the voir dire examination was brief, I find no prejudice was occasioned to the appellant as the trial magistrate satisfied herself that the two young witnesses understood the value of an oath and further the Appellant got an opportunity to cross – examine them. Indeed the two witnesses were key in this case and from their testimonies I am satisfied that they gave an honest view of how the incident transpired. The two girls appeared to have bonded well with the Appellant despite being not their biological father. In fact the witnesses confirmed that it was the Appellant who used to arrive home early to cook for them as their mother usually worked late at her place of work and hence they always looked forward to seeing the Appellant arrive and prepare supper for them. From their testimonies, I am unable to detect any hostility between them and the Appellant. There is no iota of evidence that they had been coached by their mother to fabricate evidence against him so as to enable their mother an opportunity to get married to another man and take over the family's finances as contended by the Appellant in his defence evidence. I am satisfied that the prosecution had established the ingredients of the offence of incest contrary to Section 20(1) of the Sexual Offences Act against the Appellant beyond any reasonable doubt. The conviction arrived at by the trial court was safe.

13. As regards the second issue, the Appellant has attacked the Respondent's case and maintained that there were several contradictions in the testimonies of the witnesses which contradictions should be ruled in his favour. Indeed the issue of contradictions in trials is a common feature the world over for the simple reason that no two witnesses recall exactly the same thing. Each witness perceives things differently as homogeneity in their respective testimonies is not likely to occur. Once such discrepancies occur, then the issue of concern is whether those discrepancies are so fundamental as to cause prejudice to the appellant. I am unable to see any prejudice occasioned to the appellant as a result of these minor discrepancies. In any event the same are curable under Section 382 of the Criminal procedure Code. I find the discrepancies to be minor and did not pose any weight upon the eventual conviction and sentence of the Appellant.

14. On sentence it is noted that the appellant was sentenced to serve 15 years imprisonment on the main count. Under Section 20(1) of the Sexual offences Act a person found guilty is liable to be sentenced to a minimum period of ten years but which can be enhanced to life imprisonment if it is established that the age of the victim was below 18 years of age. The trial magistrate exercised her discretion and ordered the Appellant to serve 15 years imprisonment. The victim was confirmed by the clinic card to be aged 13 years old and hence under and hence under the 18 years provided under the law she was a minor. Ordinarily the Appellant ought to have been sentenced to life imprisonment. However in light of the new jurisprudence on sentencing by the Supreme Court in **Francis Karioko Muruatetu and others =Vs= Republic [2017] eKLR** courts have been given the mandate to interfere with minimum sentences as provided by several statutes all geared towards ensuring that parties in a trial actualize their rights under Article 50 of the Constitution. In the Muruatetu case (supra) it involved a robbery with violence where sentence of death was declared unconstitutional and that the Appellant/Petitioners were to proceed for resentencing hearing before the trial court. Indeed since then several persons have had their sentences reviewed and handed less severe sentences. In the present case the Appellant would have been given a life imprisonment for the offence. However the trial court considered his mitigation and settled on a sentence of 15 years. It is noted that the appellant is a first offender. I find the sentence of 15 years not harsh or excessive. I find no reasons to interfere with the same.

15. In the result, it is my finding that this appeal is devoid of merit. The same is ordered dismissed. The conviction and sentence by the trial court is hereby upheld.

Orders accordingly.

Dated and delivered at **Machakos** this **1st** day of **October, 2019**.

D. K. Kemei

Judge