REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

CRIMINAL APPEAL NO. 5 OF 2018

IMA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

(From the original conviction and sentence in the Principal Magistrate Court at Hola criminal case 240 of 2016, Hon. M. D. Kiprono (SRM) dated 16th December 2016)

1. The Appellant was charged with incest contrary to section 20(1) as read with section 8(3) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on diverse dates between the year 2011 and 2016 in Tana North Sub-County within Tana River County intentionally caused his penis to penetrate the vagina of MIM alias HIM a female person who was to his knowledge his daughter.

2. The Appellant also faced an alternative charge of committing an indecent act with an adult contrary to section 11(A) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on diverse dates between the year 2011 and 2016 in Tana North Sub-County within Tana River County intentionally touched the vagina of MIM alia HIM with his penis against her will.

3. The prosecution called four witnesses in support of its case. PW1, MIM alias HIM , the complainant told the court that the Appellant was his biological father and that they lived together. That when she was 12 years old her father defiled her and threatened to kill her if she told anyone. That at 16 years old, the Appellant defiled her again and impregnated her and threatened to slaughter her. She told the court that when she was about 7 months pregnant, her father sold a cow and went to Garissa and bought abortion tablets and gave her to take. That after she took the tablets she felt pain and bled for two days during which time her father would leave her in the bush during the day and she would return home at night. She aborted and the Appellant took the foetus. She never told anyone what had happened as she was afraid.

4. The complainant told the court that her father continued to have sex with her and she got pregnant again. Fearing for her life, she ran away to Madogo to Mohammed Jelle, her in-law who subsequently took her to Madogo police station where she reported the matter. She was then taken to Garissa Hospital. Later she was taken to a children's home but was kicked out after being told that she was an adult and she went back to the police station. She informed the court that she had never had sexual intercourse with any other person and that she never had any other quarrel with her father on any matter.

5. During cross-examination by the Appellant, she told the court that MIM and HIM both referred to her and that her sister was called KIM. She said that the Appellant is the one who facilitated the acquisition of her identification card and that she did not know the age that it indicated. She testified that she never told anyone else about the pregnancy because the Appellant had threatened her and all the neighbours knew that he was violent. The Appellant used to assault her mother until she ran away and that he had once stabbed his brother. She testified that the Appellant assaulted her the day before she ran away beating her with a stick until she was injured.

6. The Complainant denied assaulting the Appellant and stated that he was injured when she fought with another man after she had ran away from home. She rejected the Appellant's attempts to reconcile with her and she admitted that the Appellant had traced her to Bangale where he gave her Ksh. 200/- to buy soap but she used it as fare to go to Madogo. She told the court that Mohammed was her in-law and that his brother had married the complainant's sister.

7. PW2, Abdi Hajir Sugal, told the court that on 28th May, 2016 PW1 was brought to his house by Mohammed Hassan for assistance. That PW1 told him that she had been abused by her father. He consulted a Non-Government Organisation (NGO) he worked for namely JT, which advised him to take her to the police. He took her to Madogo police station where they gave the police their statements. He told the court that PW1 informed him that she was 17 years and he therefore took her to a rescue centre but she was discharged when they found out she was overage. PW1 was taken back to the police station and later on went to live with her sister.

8. PW3, Coporal Onesmus Kenga from Bura police station was the investigating officer. He told the court that the matter was initially reported at Madogo police station but was later referred to Bura police station where the offence took place. He informed the court that he carried out his investigations and discovered that the Appellant had forced PW1 into a sexual relationship. That in 2015 PW1 got pregnant but the Appellant procured an abortion and buried the foetus in the bush. In 2016, she got pregnant again but she ran away and was referred to Madogo police station. She was taken to Garissa Provisional General Hospital where she was examined and found that she was pregnant. PW3 produced the complainant's identification card (Exh 4) which indicated that she was born in 1996 and was therefore 20 years old at the time.

9. PW 4, Macdonald Kidambi was the clinical officer from Garissa County Referral Hospital who filled the P3 form. He told the court that on examining PW1, there were no tears or bruises on her genitalia. That laboratory test showed that PW1 was 20 weeks pregnant and that there were pus cells an indication of an infection. He produced the P3 form (Exh 1) as well as the outpatient card which had the test results (Exh 2). Mr. Kidambi informed the court that an age assessment test was carried out on PW1 and it indicated that the complainant was about 18 years. He produced the age assessment report (Exh 3).

10. At the end of the prosecution case, the Appellant was found to have a case to answer and was put on his defence. He chose to give a sworn statement and called three witnesses in his defence. He told the court that he was 60 years old.

11. The Appellant admitted that the complainant was his biological daughter. He denied the charge and stated that she had fabricated the case against him. He told the court that PW1 was of bad behaviour and a prostitute and that she got pregnant while in Garissa where she also procured abortions. He claimed that her current pregnancy was the fourth. That PW1 first got pregnant in 2013 when the Appellant was in Bangale and PW1's mother had gone to visit her parents. That it was PW1's mother who informed him of the pregnancy but when PW1 heard that he (the Appellant) was coming home, she ran away and procured an abortion. That he disagreed with his wife and other women who had confirmed the pregnancy and they attacked him injuring him on the head and the hands. He said that he reported the attack to the chief and that the complainant and the mother ran away.

12. The Appellant further stated that he tracked PW1 to Bangale and gave her money to buy milk but she ran away. That he later tracked her to Garissa where she waited for him in a house with other men but they left at around 3:00am by taxi. He went back home and that after four months he was arrested. He told the court that he was arrested and taken to Bura police station where his fingerprints were taken and he was detained for seven nights.

13. The Appellant further stated that he was released on the ground that there was no evidence but was arrested again after five days and released after a day. That he was taken to Garissa Law Courts where he saw the complainant with a police officer of Somali descent called Aisha whom he claimed coached the complainant on what to say and the names to use. That the case against him was a set up by the his daughter (PW1), PW2 and the police.

14. The Appellant called Matano Roble (DW2), who was the Assistant Chief of Charidende since 2011. DW2 told the court that he had known the Appellant for over 20 years. That HIM and MIM were different people but both were the Appellant's daughters. He said that HIM was older that MIM and she was about 20 years old and married with children. That MIM was also an adult holder of ID no [xxxx] and having been born on 1st July 1996 and was also known as "Sango". He said that he never saw PW1 pregnant and that he would have known if PW1 was 6 months pregnant.

15. DW3, HHIM , was the sister to PW1 and the Appellant's daughter. She said that PW1 was her younger sister and that she was MIM and not HIM . That HIM referred to her. She told the court that PW1 used to live in [*particulars withheld*] but moved to Bangale to their relatives. PW1 then moved to Garissa and lived with unknown people. After PW1 reported the Appellant, she went to live with DW2 and that she was pregnant at the time. DW2 told the court that they disagreed with PW1 and she called PW2 and she went with him. DW2 testified that PW1 had never told her that she was pregnant before or that she had been defiled nor did anyone ever mention to her that PW1 was ever pregnant. She told the court that the Appellant was not violent and that he was assaulted in a family fight with PW1, her mother and another person.

16. At the conclusion of the trial, the Appellant was found guilty on the main count and sentenced to imprisonment for 10 years.

17. The Appellant was aggrieved by the conviction and sentence and lodged his home made appeal on the 12th June 2019 on three grounds reproduced here verbatim that:-

> **i. The learned trial magistrate erred in both law and facts by relying on the evidence of a single witness which was insufficient to warrant a safe conviction;**
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> **ii. That the learned trail magistrate grossly erred in both law and facts by failing to consider that there was no cogent evidence to link the Appellant to the commission of the alleged offence in that no DNA test was conducted in contravention of section 36 of the Sexual Offences Act No. 3 of 2006 Law of Kenya.**
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> **iii. That the trial magistrate erred in law and facts by failing to adequately consider my defence which was unrebutted by the prosecution evidence on record thereby creating doubt on the prosecution case."**

18. The Appellant filed his submissions on 12th June 2019 in support of his appeal. The gist of his submissions was that the trial magistrate relied on the evidence of the complainant who was of doubtful integrity and not a credible witness. He faulted the trial magistrate's failure to record the complainant's demeanour and the reason he believed that she was telling the truth as required by section 124 of the Evidence Act. He relied on **Ndungu Kimani vs Rep (1979) KLR 28; Denkeri Ram Kishan Pandya vs Rep App 106 of 1959 EACA 93,** and; **Fuad Dumila Mohammed vs Rep cr. App. No. 210 of 2003.**

19. Secondly, the Appellant submitted that the prosecution failed to prove that he was the one who impregnated the complainant. He submitted that the complainant had engaged in sexual relations before with other men and the medical evidence was not conclusive proof that he was the culprit. He faulted the prosecution for failing to conduct a DNA test in accordance with section 36 of the Sexual Offence Act to link him to the offence. He submitted that the prosecution had failed to prove its case making the conviction unsafe. He relied on the case of **Rose Auma Otawa vs Republic (2011) eKLR**

20. On the third ground, the Appellant submitted that the trail court failed to consider his defence, which was unshaken and which created doubt in the prosecution case. Finally, during the hearing of the appeal, he told the court that he was an old man and his health was deteriorating. He pleaded with the court for mercy saying that he had children who depended on him.

21. Mr. Kasyoka learned counsel for the Respondent opposed the appeal in its entirety through oral submissions. Counsel submitted that the prosecution had proved every element of the offence. That the relationship between the victim and the Appellant fell within the prohibited degree of consanguinity under section 20 of the SOA and, that penetration had been proved. He asked the court to dismiss the appeal.

22. This being a first appeal, this court has a duty to revisit the evidence that was before the trial court, re-evaluate and analyse it and come to its own conclusions. Further, I have to caution myself that unlike the trial court, I did not have the benefit of seeing the demeanour of the witnesses and the Appellant during the trial and I can only rely on the evidence that is on record. See **Okeno v R (1972) EA 32.** See also **Eric Onyango Odeng' v R [2014] eKLR.**

23. Having considered the grounds of appeal, the record and the respective submissions of the parties, I consider the issues in this appeal to be whether the offence of incest was proved against the Appellant beyond reasonable doubt.

24. The ingredients of the offence of incest are the relationship between the parties and; an indecent act or penetration.

25. On the relationship between the Appellant and the complainant, Section 20 (1) of the Sexual Offences Act (SOA) outlines relationships that are considered incestuous and includes between a father and a daughter. In the present case, the relationship between PW1 and the Appellant is not in dispute. PW1 who is the complainant claimed that the Appellant was her father while the Appellant admitted that she was his biological daughter. Their relationship therefore was one within the prohibited degree of consanguinity.

26. On the element of penetration, it is trite that courts mainly rely on the evidence of the complainant corroborated by medical evidence to prove penetration. See **Dominic Kibet Mwareng vs. Republic [2013] eKLR.**

27. In this case, I have already reproduced the complainant's (PW1) evidence in which she told the court how her father first defiled her when she was around 12 years old of age and repeatedly raped her on various occasions and that the Appellant forced her to abort when and she became pregnant at 16.

28. The medical evidence was adduced by PW4, the clinical officer. He produced the complainant's P3 form (Ex1) which indicated there were no tears or bruises on her genitalia but laboratory tests confirmed that she was five months pregnant and that she had pus cells an indication of infection. The medical evidence corroborated PW1's testimony that she was defiled and as a result she got pregnant. I find that penetration was conclusively proved.

29. The other issue for determination is whether the Appellant is the one who penetrated the complainant. The Appellant denied having sexual relations with the complainant and went on to attack the character of the complainant stating that she was a prostitute. He also faulted the prosecution's failure to conduct a DNA test under section 36 of the SOA linking him to the offence.

30. There are clear guiding principles upon which the court must analyse evidence of identification. As a rule, the best evidence of identification is that of recognition. See **Francis Muchiri Joseph – V- Republic [2014] eKLR.**

31. The physical identification of the Appellant is not in doubt as he was the father of the complainant. The only issue is whether he committed incest with the complainant. In this respect, he claimed that DNA was not done to establish the paternity of the child so as to conclusively prove whether he defiled the complainant.

32. It is well established principle of law that a DNA test is not necessary to establish the offence of defilement or rape. In **AML v Republic [2012] eKLR** the Court of Appeal succinctly held that:-

> **"The fact of rape or defilement is not proved by way of a DNA test but by way of evidence."**

33. Further, the court in the case of **Kassim Ali v Republic Cr. App. No. 84 of 2005 (Mombasa)** affirmed the decision and stated that:-

> **"… [The] absence of medical examination 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."**

34. In addition, Section 36 of the SOA is not mandatory as it is couched in permissive terms. Faced with a similar argument, in **Williamson Sowa Mbwanga v Republic [2016] eKLR,** the Court of Appeal pronounced itself thus:

> **"...it is patently clear to us that whilst paternity of PM's child may prove that the father of the child had defiled PM, that is not the only evidence by which defilement of PM can be proved. The fact, as happens in many cases, that a pregnancy does not result from conduct that would otherwise constitute a sexual offence does not mean that the sexual offence has not been**

committed. In this case, there does not have to be a pregnancy to prove defilement. A DNA test of the appellant would at most determine whether he was the father of PM's child, which is a different question from whether the appellant had defiled PM. As the Court of Appeal of Uganda rightly stated, in the sexual offence of defilement, the slightest penetration of the female sex organ by the male sex organ is sufficient to constitute the offence and that it is not necessary that the hymen be ruptured. (See TWEHANGANE ALFRED V. UGANDA, CR. APP. NO. 139 OF 2001)."

It is partly for this reason that section 36(1) of the Sexual Offences Act is couched in permissive rather than mandatory terms, allowing the court, if it deems it necessary for purposes of gathering evidence to determine whether or not the accused person committed the offence, to order that samples be taken from him for forensic, scientific, or DNA testing."

35. I am guided by the above authority to find that it was not necessary in this case for the court to order a DNA test as the same was not necessary to prove penetration. The Appellant's contention in this regard therefore fails.

36. In addition, it is trite courts can convict on the sole evidence of a victim under section 124 of the Evidence Act as long as the court is convinced the victim is telling the truth and records reasons for such belief. In **Arthur Mshila Manga v Republic, Criminal Appeal No. 24 Of 2014 [2016] eKLR,** the court of appeal held that:-

"It is trite that under the proviso to *section 124* of the *Evidence Act*, a trial court can convict on the evidence of the victim of a sexual offence alone. (See MOHAMED V. REPUBLIC [2008] KLR (G&F), 1175 and *JACOB ODHIAMBO OMUOMBO V. REPUBLIC (supra)*. However, before the court can do so, it first must believe or be satisfied that the victim is telling the truth and secondly it must record the reasons for such belief."

37. In the present case, the trial magistrate in his judgement believed that the complainant was telling the truth. He found that complainant had no motive in telling lies and that her credibility and that of her witnesses were beyond doubt. I have looked at the record; the complainant was clear in her testimony as to what happened. She testified that she did not inform anyone because she had been threatened by the Appellant who had assaulted her and her mother previously. The complainant was also steadfast during cross-examination by the Appellant and was not shaken. There was no motive against the Appellant. I find, as the trial court did, that the complainant was telling the truth and that the Appellant committed the offence.

38. The Appellant contended that his defence was not considered. The trial magistrate in his judgment considered the defence and found it to be a lie aimed at blaming the complainant and that the attack on her character was meant to discredit her.

39. I have looked at the defence put up by the Appellant. The defence that the complainant had engaged in sexual relationships with other people was not put to her during cross-examination to test its credibility. I must also add that even if the Appellant's claim was true, it would not give him the licence to have sexual relations with his daughter. Having considered the Appellant's defence, I find, as the trial court did, that the same was an afterthought and did not cast any doubt on the prosecution case.

40. It is my conclusion therefore that having evaluated the evidence that the case against the Appellant was proved beyond reasonable doubt. I uphold the conviction.

41. Section 20(1) of the SOA provides that the minimum sentence for the offence of incest is 10 years imprisonment, while the maximum sentence is life imprisonment where the victim is aged below eighteen years. I therefore confirm that the 10 year sentence meted out to the Appellant was lawful. In this court, the Appellant prayed for mercy on the account that he was an old man and that his health was deteriorating. He also pleaded that he had children who depended on him.

42. At the sentence hearing in the lower court, the learned magistrate acknowledged that the Appellant was elderly and would have served a lesser term than provided had the law not set a mandatory minimum sentence.

43. In **Jared Koita Injiri vs. Republic [2019] eKLR** the Court of Appeal addressed itself to the issue of mandatory sentences in the SOA and had this to say:-

"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. The appellant was provided an opportunity to mitigate in the trial court where it was stated that he was a first offender. He pleaded for leniency. However, it cannot be overlooked that the appellant committed a heinous crime, and occasioned severe trauma and suffering to a young girl. His actions have demonstrated that around him, young and vulnerable children, like the complainant could be in jeopardy. Needless to say, pursuant to the Supreme Court decision in Francis Karioko Muruatetu & Another vs Republic (supra), we would set aside the sentence for life imposed and substitute it therefore with a sentence of 30 years from the date of sentence by the trial court."

44. In addition, the Judiciary's Sentencing Policy Guidelines has set out factors to be considered in sentencing elderly offenders by providing that:-

20.28 When imposing sentencing orders against terminally ill and elderly offenders, a court should be mindful to ensure that the sentence imposed does not amount to an excessive punishment in view of the extent of illness and age as well as in light of the offence committed. In particular, the court should ensure that the sentence imposed does not amount to cruel, inhuman or degrading treatment in view of the extent of illness and age of the offender.

20.29 Non-custodial sentences should be considered unless, in light of the offence committed and other factors, justice would

demand the imposition of a custodial sentence.

45. I am guided by the authority above and policy guidelines, to find that the Appellant could possibly benefit from a non- custodial sentence owing to his advanced age. I have also anxiously considered the nature of the offence and the fact that the Appellant had defiled the complainant several times, threatened her with violence and caused her to abort. I have come to the conclusion that the Appellant does not deserve a non-custodial sentence. However, considering the Appellant's advanced age estimated at 65 years old and his visibly failing health, I reduce his sentence to 5 years imprisonment from the date of conviction. He is released from prison custody to serve the remainder part of the 5 year term on probation.

46. Orders accordingly.

Judgment dated delivered and signed at Garsen on this 13th day of November, 2019.

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R. LAGAT KORIR

JUDGE

In the presence of:

S. Pacho Court Assistant

Appellant in person

Mr. Mwangi for Respondent