REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

CRIMINAL APPEAL NO. 22 OF 2018

KN……...……..……. APPELLANT

VERSUS

REPUBLIC…….……..RESPONDENT

(From the original conviction and sentence of Hon. C.A Mayamba (SRM) in Kilungu Senior Resident Magistrate's Court Sexual Offence Case No. 23 of 2018)

JUDGMENT

1. **KN** the Appellant was charged with the offence of **Incest contrary to section 20(1) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence were that in December 2017 at Malili township, Mukaa Sub-county within Makueni county, the Appellant intentionally and unlawfully caused his penis to penetrate the Vagina of **M.I.N**, a child aged 5 years who was to his knowledge his daughter.

2. He also faced an alternative count of **committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006**. The particulars were that during the same period and at the same place, the Appellant intentionally touched the vagina of **M.I.N**, a child aged 5 years with his penis.

3. After a full trial, the learned trial magistrate convicted him on the main count and sentenced him to 80 years' imprisonment.

4. Aggrieved by that decision, the Appellant filed this appeal and listed 6 grounds as follows;

a) The trial Magistrate erred in law and fact by convicting the Appellant without sufficient evidence.

b) The learned trial Magistrate erred in law and fact by convicting the Appellant without taking into consideration the fact that the complainant's testimony was uncorroborated.

c) The learned trial Magistrate erred in law and fact by convicting the Appellant without taking into consideration the fact that the offence was never reported immediately after the alleged commission.

d) The decision of the learned trial Magistrate was against the weight of the evidence adduced before him and crucial evidence was not properly admitted in Court.

e) The learned Magistrate erred in law and fact in sentencing the Appellant to serve 80 years imprisonment without taking into consideration the Appellant's mitigation.

f) The accused was not accorded a fair hearing in that he was not afforded adequate time to prepare for his defence.

5. A summary of the case before the court was to the effect that Pw1 (**M.I.N**.) who was the complainant gave unsworn evidence and stated that she knew the Appellant as baba M. M was her brother. She testified that the Appellant did bad things to her by inserting his *'mdudu'* in her genitals which she uses to *'kususu'*. That the Appellant's *'mdudu'* is used to *'kukojoa'*.

6. She felt pain when this was done to her. She explained that she was with the Appellant because her mother had gone to collect firewood. She informed her mother upon her return and they went to hospital. On cross examination, she insisted that the Appellant inserted his *'mdudu'* in hers and also beat her mother.

7. **Pw2 MK,** is Pw1's mother and Appellant's wife. She testified that she had a child called M with the Appellant but Pw1 was his step daughter. It was her evidence that in December 2017, she left the children and went to fetch water. She returned to find Pw1 crying and after enquiring, she informed her that the Appellant had done bad things to her.

8. She was bleeding and blood was trickling on her feet. Pw2 wanted to inform Mama R *(Pw3)* immediately but the Appellant threatened to kill her. She however informed Pw3 despite the threats. She was not able to take Pw1 to the hospital immediately due to lack of money.

9. **Pw3 C M M** aka Mama R testified that PW2 was the Appellant's wife and a neighbor, and she knew their children Pw1 and Mwanzia. She told the court of the challenges Pw2's family had even in terms of food. She assisted them alot. She said that PW2 confided in her in January 2018 about Pw1 being sick and having been taken to the hospital in Nairobi where she was found with a urinary tract infection. Pw2 also told her that the Appellant had defiled Pw1 and she had been warned against informing anyone. That he even locked them in the house for 3 days.

10. PW3 went on to testify that she reported the matter at salama police station and caused the Appellant's arrest by tricking him. She identified the treatment notes, P3 and PRC forms.

11. **PW4 Eric Kasiamani**, a clinical officer based at Kilungu sub county hospital, testified that Pw1 complained of being sexually assaulted by someone known to her in the month of December 2017. At the time of examination, Pw1 had pain while passing urine and an infection in her genitals. Upon examination, her hymen was found broken and she had also sustained a sexually transmitted disease (UTI).

12. His conclusion was that Pw1 had been defiled. He also examined the Appellant but nothing conclusive was found. Further, he testified that age assessment was conducted and it revealed that Pw1 was 5 years old. He produced the P3 form (Exb 1), Pw1's treatment notes (Exb 2), Appellant's treatment notes (Exb 4) and age assessment report (Exb 5).

13. The Appellant in his unsworn statement of defence testified that he was a resident of Malili town and a casual labourer. He told the court that the case was fabricated and that his wife should have informed him if she wanted a divorce. He denied the charge.

14. When the appeal came for hearing, the Appellant through his advocate Mr. Kamanda relied on his written submissions. On the issue of penetration, he submits that the trial magistrate made imaginations and conclusions from Pw1's evidence. He contends that the medical evidence from the Nairobi hospital was never produced, hence non proof of penetration. To support his argument, he relied on the case of **Salim Hamisi Kiswere –vs- R (2018) eKLR** where it was held that;

> *"..there was no specific evidence given by the said witness as to any penetration by the appellant of his genital organ in any part of the complainant's genital organ, which is key to a determination as to whether defilement occurred or not."*

15. The Appellant wondered how and when the disease of Urinary Tract Infection (UTI) changed to penetration and defilement considering the fact that he was arrested in January 2018 and arraigned in court in May 2018.

16. He contends that Pw1's evidence was not corroborated and submits that the trial Magistrate erred by finding that the venereal disease found in Pw1 was sufficient corroboration. He submits that the sexually transmitted disease found on Pw1 was not found on him after examination. He also contends that the bleeding seen by Pw2 was not observed by Pw4.

17. He went on to submit that owing to the length of time which passed before plea taking, the testimonies of the Nairobi doctor, arresting and investigating officers was important, yet they were not called. He relies on the case of **Bukenya –vs- Uganda (1972) EA, 349** where it was held that;

> *"The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent. Where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witness would have tended to be adverse to the prosecution."*

18. According to the Appellant, the learned trial Magistrate dismissed his defence as mere denials without considering that there existed bad blood between him and Pw2 and with Pw3 by extension. He thought that the learned trial magistrate demonstrated a closed minded analysis of the evidence leading to an unfair conviction.

19. In opposing the appeal, Mrs. Owenga for the State through her written submissions states that the trial court was right in convicting the Appellant as the evidence tendered overwhelmingly linked him to the offence.

20. On the issue of corroboration, she submits that Pw1's evidence was persuasive enough to convince the court that her testimony was truthful. She cites section 124 of the Evidence Act which provides that a trial court can convict on the single evidence of the complainant if in it's assessment, the same is credible and truthful.

21. She submits that failure to call the witnesses indicated by the Appellant was not fatal to the case as the evidence on record was still sufficient without them. She cites the case of **Uche –vs R Criminal Appeal No.11 of 2015** where the Court stated that;

> *"Whether a witness should be called by the prosecution is a matter within the discretion of the prosecutor and a court will not interfere with that discretion unless it may be shown that the prosecutor was influenced by some oblique motive"*

22. On the contention that the Appellant was not accorded ample time to prepare for his defence, the State submits that there is nothing in the proceedings to suggest that the trial court denied the Appellant an opportunity to prepare for his defence. She also submits that there is no evidence to suggest that the Appellant was framed with the charges and that he did not raise any such issue during cross examination of the witnesses.

23. Learned counsel also submits that failure to make a report to the police immediately could not affect the Appellant's preparedness as he

had been made aware of the charges facing him during the arrest. She contends that such delay would actually work in the Appellant's favour as it would afford him an opportunity to formulate a possible defence.

24. With regard to the sentence, she submits that the sentence imposed was lawful as the complainant was 6 years old. She cites the case of **MMM-vs- R; Voi H/C Criminal Appeal No. 55 of 2015** where the Court stated that;

> *"…irrespective of the age of the victim, a trial magistrate can met upon an accused person a minimum sentence and if the circumstances so require, up to life imprisonment in a case where the victim is below 18 years."*

Analysis and Determination

25. This is a first appeal and it is now settled that the duty of a first appellate court is to scrutinize the evidence on record, make its own findings and draw its own conclusions giving due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses. See **Okeno –vs- R 1972, Simiyu & Another –vs- R (2005) I KLR 192.**

26. Having considered the entire record and rival submissions, I find the following issues falling for determination;

a) Whether the Appellant was given ample time to prepare his defence.

b) Whether the offence was proved beyond reasonable doubt.

Issue no. (a) Whether the Appellant was given ample time to prepare his defence

27. As rightly submitted by the State, the record shows that when the Appellant was placed on his defence, he indicated his readiness to proceed. He expressed himself as follows: *"Unsworn testimony and no witness. I am ready"*. There is nobody who forced him to proceed with his defence that day. Nothing stopped him from seeking for more time to prepare for his defence if he wanted to. I find no merit in this ground.

Issue no. (b) Whether the offence was proved beyond reasonable doubt.

28. The ingredients for the offence of incest are;

a) Whether the relationship between the Appellant and complainant is within the prohibited degrees of consanguinity.

b) Whether the complainant was penetrated.

c) Whether it was the Appellant who penetrated the complainant.

29. With regard to the relationship, it is not in dispute that the complainant was the Appellant's step daughter and as such, the relationship was within the prohibited degrees of consanguinity as per the provisions of **section 22** of the **Sexual Offences Act** which provides that;

> *"In cases of the offence of incest, brother or sister includes half-brother 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 mother and an aunt of the first degree whether through lawful wedlock or not."*

30. On whether penetration occurred, the medical evidence shows that Pw1's hymen was broken by the time of examination. The treatment notes EXb2 show that Pw1 was seen at Kilungu sub county hospital on 2nd May, 2018. The vagina had no bruises but the hymen was missing and she had candida discharge. She was examined by Pw4 on 21st May, 2018. She was feeling pain while passing urine which she passed frequently. She was found to have an infection in her genitals (EXb1). The evidence on medical examination corroborates that of Pw1 that she was sexually penetrated.

31. On whether it was the Appellant who penetrated Pw1, the complainant's evidence was that the Appellant inserted his *'mdudu'* in her genitals. According to her, *'mdudu'* is the organ that the Appellant uses to urinate. I appreciate the provisions of section 124 of the Evidence Act that indeed, a trial court can convict on the sole evidence of a complainant where it is convinced that the same is truthful. I am also alive to the requirement that the evidence tabled should leave no doubt in the mind of the court that indeed the offence was committed by the accused person.

32. In this case, the prosecution's evidence is that the offence was committed on an unknown date in December 2017. According to the complainant's mother (Pw2), she did not report immediately due to threats from the Appellant and did not take the child to hospital immediately due to lack of money. However, the evidence on record is that the child was eventually taken to a Nairobi hospital in January 2018. In my view, the evidence from the Nairobi hospital was crucial as it would have revealed whether the child had a venereal disease in January 2018.

33. Further, both Pw3 and Pw4 talked about a UTI and as much as I am not a medic, it was paramount for the prosecution to establish that a UTI could not be caused by anything else apart from sexual contact. This revelation on a UTI only came out through the examination conducted in May 2018. Was she never treated in January, 2018?

34. I have also noted a contradiction in the prosecution's position that the date of the offence was unknown. The Post rape care form (PRC)- exhibit 4- indicates that the offence was committed on 26/12/2017 at 8.00am. On the section of *'Indicate what was reported'*, the content filled is *"she reports she was sleeping at night and the alleged inserted his penis into her vagina"*. Further, the form indicates the date and time of report as 17/05/2018 at 17:15pm.

35. The intricate details such as the date of offence and report were obviously furnished by the complainant's guardian as the complainant herself was of tender years. This form was filled on 21/05/2018, approximately 4 days after the report was made. It therefore beats logic that the date of offence was known at the time of filling the PRC form and unknown at the time of reporting.

36. Further, the complainant's report in the PRC form is very different from her account in court. Did the offence occur when she was sleeping at night or during the day when her mother had gone to collect firewood? In my view, this disparity removes her evidence from the realm of section 124 of the Evidence Act and makes it unsafe to solely rely on it to convict. There was no eye witness and the medical evidence did not corroborate her evidence.

37. Further, it is my considered view that if indeed the offence had been reported in January 2018 as per PW3's evidence, the January date is the one that should have been indicated in the PRC form as the *'report date'* otherwise it beats logic as to why immediate action was not taken for such a serious offence. On the flipside, it still defies logic as to why PW2 had to wait for five months to report yet she had an opportunity to do so in January, 2018. Could this child have been continuously defiled up to May 2018 and if so by who?

38. That cannot be the position as the child aged 5-6 years is a small child of tender years. Such action would have revealed more serious inquires during examination. What is not clear is what she was being treated for in Nairobi in January 2018 and what the results were. The fact that Pw1 was still having a venereal disease in May, 2018 means she was never treated or she was not responding to treatment. It's for that reason that the prosecution was expected to avail the medical report from the hospital where she was treated (Pw1) in Nairobi. Failure to avail such evidence created a gap in the prosecution case

39. Having considered the totality of the evidence on record, the submissions and the law, I find that Pw1's evidence required corroboration. The availed medical evidence did not offer the required corroboration as it raised more questions than answers. The failure to report immediately was a factor that should have been considered.

40. According to Pw3, the complainant and mum (Pw1 and Pw2) were only locked up in the house for three (3) days. The child was taken to hospital in Nairobi in January, 2018. There is no reason why no report was made at that time and had to wait up to 18th May, 2018 (see P3 Exb1). Failure to produce the evidence on the first treatment in a Nairobi hospital is a fatal omission.

41. What happened to Pw1 is very unfortunate and morally wrong. It was the duty of the prosecution to avail sufficient evidence inorder to pin down the Appellant as the perpetrator of this crime. The Appellant had no burden of proving his innocence before the trial court. The trial court should take note of that.

42. **The upshot is that the appeal has merit and is allowed. The conviction is quashed and sentence set aside**.

Delivered, Signed and Dated this 1st Day of November, 2019 in Open Court at Makueni.

……..

H. I. Ongu'di

Judge