REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

CRIMINAL APPEAL NO. 57 OF 2019

MD.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(From the original conviction and sentence of Hon. N. Ruguru (SRM) in Makueni

Senior Principal Magistrate's Court Criminal Case No. 448 of 2016 delivered on 24th December 2018)

JUDGMENT

1. 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 on diverse dates between February 2016 and 3rd July 2016 at Kathonzweni location, Kathonzweni sub-county within Makueni county, the Appellant being a male person caused his penis to penetrate the Vagina of **IMM** a child aged 9 years who was to his knowledge is niece.

2. There was an alternative charge 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 and unlawfully touched the vagina of **IMM** a child aged 9 years with his penis.

3. After a full trial, the learned trial magistrate convicted him on the main charge and sentenced him to life imprisonment.

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

> ***a) That the trial Magistrate erred in law and fact by holding that Section 20(1) is couched in mandatory terms whereas it is not the case in law.***
>
> ***b) That the trial Magistrate erred in law and fact by failing to find that the reported case initially was that of stealing and not defilement and therefore failed to rule that there was possibility of error.***
>
> ***c) That the learned trial Magistrate erred in law and fact by failing to find that essential witnesses necessary to prove basic facts did not testify.***
>
> ***d) That the prosecution's case fell below the required standard in Law, that of proof beyond reasonable doubt.***

5. Before the trial court, **Pw1 NM** testified that she was 100 years old and the complainant (Pw3) was her great granddaughter. She said that in July 2016, she was bathing when she heard Pw3 crying. She enquired and Pw3 said that she had been touched by a man. Pw1 thought that it was a general touch and did not bother. She bathed and went to church.

6. She later learnt that the complainant had been beaten by T aka M, who is her cousin and the Appellant. Pw3 was school going and lived with her parents but on the same compound with Pw1. **Pw2** was **CMM** Pw3's sister who was declared a hostile witness and her evidence expunged from the record.

7. **Pw3** was the **complainant (IM)** aged 10 years and in class 4 pupil at K HGM while the Appellant was her uncle. She said that in February 2016, she returned from school and changed into home clothes. The Appellant asked her to accompany him to her mother's house so that they could sleep together.

8. They went into the house and he told her to remove her underwear and lie on the bed. She complied and then the Appellant inserted his

urinating organ into hers. She reported the incident to her sister M who in turn told Pw1, who reported to the police. M did not witness it as it was only the two of them inside the house. The Appellant did it on three different occasions and she felt pain.

9. On cross examination, she said that the Appellant was alone and she found him at home. She was taken to hospital by Pw1 and uncle M. That Pw1 and uncle M told her to say that she had been defiled. She denied having been waylaid on the roadside by the Appellant

10. **PW4** was **PC Sussie Chepkemoi Ndiema** the investigating officer. She testified that on 07/07/2016, a report about defilement of a girl was made by N and N. She proceeded to the scene immediately and found the Appellant and another making bricks. She arrested the Appellant and Pw3 who was also there. Pw1 had reported another matter of stealing by the Appellant but she concentrated on the defilement one.

11. Pw4 took Pw3 to Makueni Referral Hospital where she was examined and a P3 form filled. It was confirmed that she had been defiled. Pw3 told her that it was the Appellant who had defiled her on 3 different occasions. That Pw3 had first informed her great grandmother who did nothing. She then informed her grandmother, N. Pw1's age was assessed at 9 years and since the Appellant was the complainant's blood uncle, she charged him with incest. Pw3 was identified to her by N and the late N, who had reported the matter.

12. In cross examination, she confirmed that Pw3 was the Appellant's brother's child hence his niece. She was aware that the Appellant had been arraigned in court for stealing Pw1's maize. She stated that the 1st defilement had occurred in the Appellant's house while the second had been in his mother's house.

13. **PW5 Dr. Alex Makau** produced Pw1's P3 form on behalf of Dr. Munoko. He testified that on general examination Pw3 was in a fair general condition and had been given antibiotics before going to the hospital. She had bruises on the labia minora and vaginal orifice which were bleeding. She had blood discharge from the genitalia. The degree of injury was assessed as grievous harm. She was examined on 8th July, 2016 as per the P3 form (EXB1).

14. The examination confirmed defilement of Pw3. As per the PRC form (EXB2), she had bruises on the outer genitalia, and vagina which was bleeding and her hymen was broken. There was bleeding on the vaginal orifice.

15. When placed on his defence the Appellant elected to remain silent.

16. When the appeal came for hearing, the Appellant relied on his written submissions. On ground **(a)** he submits that section 20(1) of the Sexual Offences Act is not couched in mandatory terms and to support him cites Meru **HCCRA No. 73 of 2010; GM –vs- R (2017) eKLR** where the Court stated as follows;

> *"The term liable does not mean that the life imprisonment sentence is mandatory. It means that the accused can be sentenced to a period of between the minimum of 10 years up to life imprisonment. The trial Court therefore could have sentenced the appellant to a period of imprisonment and not life imprisonment. However, the life imprisonment sentence imposed by the trial Court is not unlawful…."*

17. He also cites the case of **MK –vs- R (2015) eKLR** where the Court of Appeal expressed itself as follows;

> ***"Guided by the decision in Opoya –vs- Uganda (1967) EA 752 and the persuasive dicta of North J. in James –vs- Young Ch.D, 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."***

18. On ground **(b),** he submits that the first report was about stealing and not defilement. He contends that Pw1 had already recorded her statement only for the prosecution to later say that she had not recorded it and summoned her. He submits that Pw1 was stood down to enable her record the statement on defilement.

19. On ground **(c),** he relies on the expunged evidence of Pw2 to submit that there was an uncle who was behind the whole defilement case and who was never called as a witness. He contends that the said uncle was a crucial witness and should have testified in court. He cites inter alia the case of **Juma Ngodia –vs- R (1982-88) (KAR 454)** where the Court of Appeal held;

> *"The prosecutor has in general discretion whether to call or not to call someone as a witness. If he does not call a vital reliable witness without a satisfactory explanation, he runs the risk of the court presuming that his evidence which could be and is not produced would, if produced, have been unfavorable to the prosecution."*

20. On ground **(d),** he submits that all the ingredients of the offence were not established. He contends that the evidence adduced fell short of the standard required in a trial of this magnitude and the circumstantial aspects relied upon were disjointed and incapable of sustaining a conviction. He relies inter alia on the case of **J.O.O –vs- R (2015) eKLR** where it was held that;

> *"Whereas a Court of Law is always called upon to make decisions or inferences on some set of circumstances, such court should endeavour to make such decisions or inferences on the basis of the available evidence as adduced before it and it ought to be slow in making assumptions not supported by facts as tendered before court."*

21. Mrs. Owenga conceded the appeal on sentence and noted that the Appellant was a middle aged 1st offender with a life ahead of him. According to her, the Appellant needs to be given an opportunity to utilize his life well. She however opposed the appeal on conviction and

submitted that the evidence was sufficient to support it.

Analysis and Determination

22. It is now settled that the duty of a first appellate Court is to scrutinize the evidence on record, make it's own findings and draw it's 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 E.A 32; Simiyu & Anor. (2005) I KLR 192.**

23. I have considered the entire record and rival submissions and will deal with the grounds of appeal separately.

24. The Appellant raised issue with Section 20(1) Sexual Offences Act saying it was not mandatory. The section provides as follows;

Incest by male persons

> *(1) "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."*

25. The learned trial magistrate opined that the section provides for a mandatory life sentence and proceeded to sentence the Appellant. I am however inclined to agree with the holdings in **GM –vs- R and MK –vs – R *(supra)*** that indeed the correct interpretation of the section is that a convicted offender can be sentenced to a period of between 10 years and life imprisonment. The life imprisonment sentence is not a mandatory one.

26. It was the Appellant's submission that the complaint was stealing. That the defilement claim was an afterthought. I have read through the submissions of the Appellant *vis a vis* the evidence on record. The prosecution addressed the court at page 8 lines 1-5 as follows:

> *"I am sorry the witness who is in court is the mother to the accused. Her name is JD. She has not written her statement though I had earlier requested the court to summon her. Under the circumstances, I pray for summons to IM, NM (I think it should have been NM) and MM.*
>
> ***Accused:*** *No objection"*

27. It is clear that the sentiments of the prosecution about the unrecorded statement was not in reference to Pw1 but a witness known as JD. Contrary to the Appellant's submissions, Pw1 testified on 17/05/2017 and was never stood down. The only witness who was stood down for being hostile was Pw2, on 06/09/2017. As for the summons to NM *(Pw1)*, my view is that the same was an oversight as the witness had already testified. In any event, the Appellant never opposed the application sought by the prosecution.

28. Further, the evidence of the investigating officer was that apart from the current case, the Appellant was faced with another one of stealing where he had allegedly stolen his grandmother's maize. I find nothing unusual about the two reports as it is possible for one person to be a multiple offender. Further, I find that the evidence led by the prosecution was in line with the charges preferred hence not erroneous as submitted by the Appellant.

On whether essential witnesses were omitted:

29. The Appellant referred to an uncle who was mentioned by PW2. To be specific, Pw2 stated as follows;

> *"In February, M did not tell me anything. My statement is based on what my uncle told me to say."*

30. As stated elsewhere above, Pw2's evidence was expunged from the record and it would be improper for any court to base a decision on expunged evidence. In fact, the Appellant should not have referred to Pw2's 'evidence' in his submissions.

31. The final issue is whether the case was proved beyond reasonable doubt.

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.***

32. It is not in dispute that the complainant (Pw3) is a niece of the Appellant and as such, their relationship is within the prohibited degrees of

consanguinity.

33. On whether there was penetration, I have keenly looked at the medical evidence produced and the same is to the effect that the complainant (Pw3) had bruises on her genitalia as well as a bloody discharge. Her hymen was also broken. The complainant was examined a few days after her last sexual assault encounter which was on 3rd July 2016. The medical examination confirmed Pw3's assertion of having been defiled. She described to the court in her evidence how the penis was inserted in her vagina. I find that she was penetrated

34. As to whether the Appellant was positively identified as the assailant, I have found no reason to make me disbelieve the complainant's account of what had transpired. She reported to her sister M who inturn reported to their mother Pw1. I also find her evidence to have been sufficiently corroborated by the medical evidence. I therefore agree with the learned trial magistrate that indeed the case was proved beyond reasonable doubt.

35. On sentence, the evidence on record confirms that Pw3 was a minor. The Appellant is an uncle to Pw3. He was found to be a 1st offender. It is true the Appellant is in his middle age life and needs to settle in life. The child he defiled is his own brother's daughter. The court cannot overlook that fact. The evidence also revealed that he had done this nasty thing to the child more than once.

36. I have taken into account all the circumstances and I find the life imprisonment sentence to be too harsh on the Appellant. I hereby set it aside and make the following orders:-

i. Conviction is upheld.

ii. Life imprisonment sentence is substituted with a sentence of 12 years' imprisonment.

Orders accordingly.

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

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H. I. Ong'udi

Judge