REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.99 OF 2016

(An Appeal arising out of the conviction and sentence of Hon. E.S. Olwande – PM delivered on 26th April 2016 in Makadara CMC. CR. Case No.2617 of 2014)

P W K…….....…….APPELLANT

VERSUS

REPUBLIC……RESPONDENT

JUDGMENT

The Appellant, PWK was charged with **incest** contrary to **Section 20(1)** of the **Sexual Offences Act**. The particulars of the offence were that on diverse dates between the year 2012 and 27th December 2013 at Njiru Estate in Nairobi County, the Appellant caused his penis to penetrate the vagina of E M K (the complainant), a child aged fifteen (15) years and who to his knowledge is his daughter. He was alternatively charged with **committing an indecent act with a child** contrary to **Section 11(1)** of the **Sexual Offences Act.** The particulars of the offence were that between the same dates and in the same place, the Appellant unlawfully and intentionally touched the vagina of the complainant. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was convicted as charged on the main count. He was sentenced to life imprisonment. The Appellant was aggrieved by his conviction and sentence. He has filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted in the absence of a P3 form which was not produced during trial. He faulted the trial magistrate for convicting him without the benefit of documentary evidence to support the age of the complainant. The Appellant took issue with the fact that the trial court had relied on the evidence of a single identifying witness to convict him without the benefit of corroborative evidence. The Appellant questioned why DNA test was not undertaken on the foetus that was miscarried by the complainant to determine the paternity and thus confirm the identity of the person that committed the crime. The Appellant was aggrieved that the trial magistrate convicted him despite several crucial witnesses, including the investigating and arresting officers not testifying in the case. In essence, the Appellant faulted the entire evidence adduced by the prosecution which in his view did not establish his guilt to the required standard of proof beyond any reasonable doubt. The Appellant was aggrieved that his defence had not been considered before the trial court reached the decision to convict him. He was of the view that the custodial sentence imposed on him was unlawful and therefore ought to be reviewed. In the premises therefore, the Appellant urged the court to allow the appeal, quash the conviction and set aside the sentence that was imposed on him.

During the hearing of the appeal, the Appellant was represented by Mr. Nyaberi. He submitted that the charge sheet upon which the trial court relied on to convict the Appellant was defective in that the medical evidence adduced did not support the assertion made by the prosecution that the Appellant had committed the offence on the dates mentioned in the charge sheet. He explained that the medical evidence adduced did not support the particulars of the charge sheet particularly the allegation that the complainant had been sexually assaulted on 12th March 2014. He submitted that the medical report produced was thus not relevant to the charge that was brought against the Appellant. Learned counsel submitted that a P3 form, which is a relevant medical document, was not produced in evidence. Neither was the birth certificate of the complainant nor any document supporting the complainant's claim that she was aged fourteen (14) years at the time of the alleged sexual assault. Ms. Nyaberi pointed out that the arresting officer and the investigating officer did not testify in the case neither did one Linda and one B M (uncle of the complainant) testify in the case. Learned counsel seemed to imply that these were necessary witnesses who ought to have been called by the prosecution since they were mentioned by the other witnesses. He further argued that the Appellant's defence was not considered by the trial court before arriving at the decision to convict him. It was his submission that the said defence raised weighty issue of existence of a grudge between the Appellant and his wife (PW2) which was motivated by malice. Learned counsel was of the view that the trial court should have treated the prosecution's evidence with circumspection and thereby arrived at a decision that the prosecution did not establish its case against the Appellant to the required standard of proof.

Ms. Atina for the State opposed the appeal. On the issue of the defect in the charge sheet, she submitted that the Appellant had sexual intercourse with the complainant between the years 2012 and 2014. He was discovered on 27th December 2013. He continued having intercourse with the complainant until 20th March 2014 when PW2, the mother of the complainant was informed. At that time, the

complainant was pregnant. She however lost the pregnancy at five months. The complainant was taken to hospital where she was examined by PW3 and PW4 who produced into evidence the medical treatment notes and the post-rape care form. In her opinion, it was not necessary for the P3 form to be produced where the issue relates to a sexual offence. As regard the age of the complainant, she submitted that the prosecution established that the complainant was 16 years old at the time she testified in court. She was born on 12th September 1998. The complainant's testimony and that of her mother PW2, regarding the age of the complainant, corroborated each other and was not challenged on cross-examination. In her view, there was no requirement for age assessment. On the issue of the absence of some of the prosecution witnesses during the hearing of the case, learned prosecutor relied on **Section 143** of the **Evidence Act** that mandates the prosecution to bring forward only essential witnesses to establish its case. The absence of the said witnesses did not hamper the prosecution in establishing its case to the required standard of proof beyond any reasonable doubt. Ms. Atina reiterated that the trial court duly considered the Appellant's defence before arriving at the decision to convict him. She urged the court to dismiss the appeal and uphold the decision of the trial court.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced so as to reach its own independent determination whether or not to uphold the conviction of the Appellant. As was held by the Court of Appeal in **Njoroge –Vs- Republic [1987] KLR 19 at P.22**:

> ***"As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect (see Pandya v R [1957] EA 336, Ruwalla v R [1957] EA 570)".***

In the present appeal, the issue for determination by this court is whether the prosecution adduced sufficient evidence to establish the guilt of the Appellant to the required standard of proof on the charge of **incest** contrary to **Section 20(1)** of the **Sexual Offences Act.**

In order to establish the charge of incest, the prosecution was supposed to establish the following ingredients: that the Appellant penetrated the complainant, that the Appellant was related to the complainant, and where the age of the complainant is an issue, that age. In the present appeal, the complainant, at the time she testified in court stated that she was aged 16 years old. Her mother J M who testified as PW2 stated that the complainant was born on 12th September 1998. The birth certificate was marked for identification but was not produced. Although the Appellant disputes that the prosecution produced evidence to establish the age of the complainant, this court upon re-evaluation of the evidence adduced, formed the view that indeed the prosecution had established that the complainant was aged 15 years at the time the alleged offence took place.

According to the complainant, who testified as PW1, the Appellant, her father, in 2012 accused her of having sexual intercourse with an unnamed man. He demanded to confirm that indeed the complainant had not had any such sexual intercourse. The confirmation involved the Appellant having sexual intercourse with the complainant. The complainant testified that the Appellant broke her virginity and for a period of two (2) years had sexual intercourse with her more than twenty (20) times. On 27th December 2013, the complainant missed her menses. She informed the Appellant. The Appellant advised her to see a neighbour called Linda to assist her procure an abortion. When the complainant informed Linda, Linda informed PW2, the complainant's mother. The complainant was taken to MSF France at Mathare where she was examined by a clinical officer, PW4 Irene Nyangwache. This was on 22nd March 2014. The examination confirmed that indeed the complainant had been sexually assaulted. The Post Rape Care form was produced as an exhibit in the case. The complainant testified that tests confirmed that she was pregnant. She however lost her pregnancy after five (5) months. The complainant had no doubt that it was the Appellant who had sexual intercourse with her.

When he was put on his defence, the Appellant denied that he had committed the offence. He attributed his troubles to a difference he had with his wife and his brother in-law. He testified that his wife had influenced his children to give false accounts about him to the police. He swore that he could not do anything to harm his children.

On re-evaluation of the evidence, it was clear to this court that the prosecution did indeed prove that the Appellant and the complainant were related. Indeed the Appellant himself confirmed that he was the father of the complainant. The identity of the Appellant as the father of the complainant was therefore not in dispute. The issue for determination is whether the complainant's testimony should be believed in the circumstances of this case. The complainant testified that the Appellant had sexual intercourse with her more than twenty occasions before she discovered that she was pregnant. This court has no doubt the complainant was telling the truth when she testified that it was the Appellant who had sexual intercourse with her. At the time, the complainant was 15 years old. Under the proviso of **Section 124** of the **Evidence Act**, a court can convict an accused person on the basis of the evidence of a single witness in sexual offences if it formed the opinion that the witness is telling the truth. This proviso addresses the circumstances peculiar to sexual offences i.e. it occurs with some element of privacy where the perpetrator and the victim may be the only persons present. In the present appeal, this court has no doubt that the complainant was telling the truth. She had no reason to adduce false evidence against her father. Her testimony was corroborated by medical evidence which confirmed that indeed she was sexually assaulted and even became pregnant as a result of the sexual assault. The Appellant's explanation in his defence to the effect that he had been framed by his wife and his brother in-law was not sufficiently substantiated and was, to all intent and purpose, brought up by the Appellant in a desperate attempt to escape criminal liability.

As regard the other grounds of appeal put forward by the Appellant to the effect that critical witnesses were not called to testify in the case, this court, upon re-evaluation of the evidence adduced, formed the view that the evidence adduced by the prosecution witnesses established the guilt of the Appellant to the required standard of proof. The absence of the witnesses who ought to have been called to testify did not in any way diminish the strength of the prosecution's case. This court finds no merit with this ground of appeal. In the premises therefore, this court holds that the prosecution did establish the charge of incest brought against the Appellant to the required standard of proof. The appeal against conviction is hereby dismissed.

On sentence, this court has taken into account the sentiments that were expressed by the complainant in court to the effect that she had forgiven the Appellant. However, this court notes that the offence that the Appellant committed is a heinous one and deserves judicial

condemnation. In the premises therefore, this court sets aside the sentence of life imprisonment and substitutes it with a sentence of twenty (20) years imprisonment with effect from the date that the Appellant was convicted i.e. 26th April 2016. It is so ordered.

DATED AT NAIROBI THIS 1ST DAY OF FEBRUARY 2018

L. KIMARU

JUDGE