REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 37 OF 2017

P M K.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From Original Conviction and Sentence in Criminal Case No. 56 of 2016 of the Senior Principal Magistrate's Court at Kilifi – R.K. Ondieki, SPM)

JUDGEMENT

1. The Appellant, P M K was in the main count charged with incest contrary to Section 20(1) of the Sexual Offences Act, 2006. The particulars being that on 4th October, 2015 within Kilifi County the Appellant intentionally and unlawfully penetrated K K K a child aged 17 years who was to his knowledge his step-daughter.

2. In the alternative the Appellant was charged with committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act, 2006.

3. At the conclusion of the trial, the Appellant was convicted in respect of the main count and sentenced to forty years imprisonment.

4. Aggrieved by both the conviction and sentence, he has now appealed to this court on the grounds that there was non-compliance with Section 36(1) of the Sexual Offences Act, 2006; the conviction was based on contradictory evidence adduced by the prosecution witnesses; the age of the complainant was not proved; failure by the trial court to consider his defence; and that the offence of incest was not proved.

5. As a first appellate court I have a responsibility to look at the evidence afresh in order to reach my own independent conclusion. In doing so I must remember that, unlike the trial court, I did not have the opportunity of observing the demeanour of the witnesses as they testified.

6. Without disclosing the date of her alleged defilement, the complainant who testified as PW1 stated that on the material day she was at home when the Appellant who is her father called her to take a panga to him in the farm. When she reached where he was, he pulled her into a bush, stuffed her mouth with pieces of a mattress, removed her clothes and defiled her. He then picked his panga and walked away. After he left she removed the mattress from her mouth and started crying. Her sister Z went and assisted her to dress. She remained there until her mother came back from a chama meeting. She reported the incident to her. They then proceeded home and when her mother confronted the Appellant, he threatened to kill both of them.

7. The complainant stated that the second incident was when the Appellant attempted to defile her in their room at night. His actions were thwarted after her sister Z went out screaming and opened the door for their mother's room. The door had been locked from outside. Their mother found the Appellant stark naked and he asked for forgiveness. At that time their sister S had just been born.

8. The third incident was when there brother M was about two years of age. The Appellant attempted to defile the complainant but she managed to escape after a piece of wood fell on the Appellant. As she was running away she met Nyumba Kumi elders and reported the incident to them. The matter ended up with the police. Examination of the complainant at Vitengeni Hospital revealed that she was pregnant. At the time she testified in court she had already given birth to a male child. She gave the date of birth as 2nd May, 2016.

9. K G Z, the mother of the complainant testified as PW2 and told the court that the complainant was born on 6th January, 1999. Her evidence was that she got married to the Appellant in 2007. She stated that she gave birth to her third child S with the Appellant in 2009. That is when the Appellant would leave their house and lock it from outside. He would stay out for long. One night he did not lock the door from outside. When she went out she found the Appellant stark naked in the children's room. She did not see any evidence of defilement. She was angry and the Appellant asked for forgiveness.

10. PW2 testified about a second incident. On that day their children had gone to the bush to cut grass as she wanted to burn charcoal. The Appellant had gone to herd cattle. She had remained at home to wash clothes. The Appellant followed the children to the bush. When she went to where the children were, she found the complainant crying. The complainant told her she had been defiled by the Appellant. There was sperm on the complainant's genitalia.

11. When she confronted the Appellant in the evening he threatened to kill them. She reported the incident to her sister who advised that she should discuss the matter with the Appellant. As such, she did not report the incident to the police and only took action after the complainant became pregnant. She stated that the second incident happened in 2011 when she had given birth to their son called J.

12. PW2 testified that in November, 2015 she noticed that the complainant was pregnant. At that time the complainant had been sent away and was living with PW2's brother as she had differed with the Appellant.

13. The mother of the complainant also talked of another incident when she had left the complainant with M. The Appellant attempted to defile the complainant and was not successful.

14. PW3 Dr. Sheila Mukari produced a P3 form and a post rape care form filled for the complainant in November, 2015. The complainant's hymen was broken. A pregnancy test conducted was positive. When cross-examined, the witness stated that the defilement was not recent. She stated that it was indicated that the complainant had been defiled three times.

15. In a charge of incest the prosecution has to prove that there was sexual intercourse between the accused and a relative within the category prohibited by the Sexual Offences Act, 2006. The prosecution must also establish that the accused knew that the person he/she had sex with was within the prohibited category. In a case of incest, prove that the sexual partner of an accused was a child is only relevant for purposes of determining the sentence to be imposed.

16. The Appellant submitted that there was no evidence adduced that he was the biological father of the victim. He pointed to the evidence on record, showing that he started living with the mother of the complainant almost nine years after the birth of the complainant, to demonstrate that he was not the biological father of the complainant.

17. The Respondent did not make any submissions on this issue as the same was raised through amended grounds of appeal after the Respondent had filed submissions. An opportunity given to the Respondent to file supplementary submissions was never utilized.

18. The undisputed evidence adduced points to the fact that the Appellant married the mother of the complainant long after the complainant was born. As correctly stated in the charge sheet, the complainant is a stepdaughter of the Appellant having been sired in a previous relationship between her mother and another man. The term step-daughter has the same meaning with the word half-daughter used in Section 22 of the Sexual Offences Act, 2006.

19. Section 20(1) of the Sexual Offences Act, 2006 creates an offence known as incest by male persons. The offence prohibits an indecent act or penetration with a female person who is to the knowledge of an accused his daughter, granddaughter, sister, mother, niece, aunt or grandmother. Section 22(1) provides the test of relationship thus:

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

20. The Appellant being a partner of the mother of the complainant was thus her half-father and is ensnared by Section 22.

21. The trial magistrate extensively dealt with the issue of the relationship between the complainant and the Appellant and reached the correct decision that the relationship between the Appellant and the complainant prohibited them from having any sexual contact. The Appellant's claim that the offence of incest was not proved is therefore without merit and this ground of appeal fails.

22. The other grounds of appeal are related and will be dealt with together. The Appellant submitted that the prosecution did not prove the age of the complainant as required by the law in defilement cases. He stated that although the complainant testified that she was 16 years at the time of the alleged offence, her evidence would place her at 18 years at the time of the alleged offence. Stating that the evidence on record shows that the complainant was nine years old in 2007 when her mother met him, the Appellant submitted that by 2016 the complainant was 18 years.

23. The Respondent's reply was that the mother of the complainant had testified that the complainant was born on 6th January, 1999 meaning that she was 16 years at the time of the alleged offence. Further, that the offence of incest is not dependent on the age of the victim. The decision in **M.M.M. v Republic [2017] eKLR** is cited in support of the assertion.

24. It is indeed a correct statement of the law by the Respondent that the sexual liaisons prohibited by sections 20 and 21 of the Sexual Offences Act are not dependent on age. Age only plays a role during sentencing so that if the victim is a child the perpetrator is liable to imprisonment for life. Consent is also immaterial and an accused cannot be heard to say that the sex was between consenting adults.

25. In the case at hand, the trial magistrate made a finding that the complainant was a child. Was there evidence to support such a finding? The evidence of PW1 and PW2 clearly showed that PW1 was sixteen years on the date of the alleged offence being 4th October, 2015. This evidence is also found in the P3 form. The age of PW1 was therefore proved to the required standards.

26. The Appellant faulted the trial court for failing to order for DNA test as by the requirements of Section 36 of the Sexual Offences Act. The Respondent's case was that compliance with Section 36 is not mandatory as the offence of defilement can be proved through oral evidence.

27. Many appellants before this Court usually allege that there was failure to comply with Section 36 of the Sexual Offences Act, 2006. Even with the guidance of the Court of Appeal in **AML v Republic [2012] eKLR (Mombasa)** that **"the fact of rape or defilement is not proved by way of a DNA test but by way of evidence"**, this ground of appeal is still a key ground of most appeals.

28. I think the Court of Appeal firmly put this ground of appeal in its proper place in **Evans Wamalwa Simiyu v Republic [2016] eKLR** when it held that:

> **"Moreover, section 36 of the Sexual Offences Act that gives the trial court powers to order an Accused Person to undergo DNA testing uses the word "may". Therefore the power is discretionary and there is no mandatory obligation on the court to order DNA testing in each case. In our view, in the case of the appellant DNA testing was not necessary."**

29. The question would then be whether DNA testing was necessary in the case of the appellant before me? The answer will be apparent as I tackle the other issues raised by the Appellant.

30. The Appellant points to contradictory evidence by the prosecution witnesses and failure to consider what he refers to as his alibi defence. Of course he did not offer an alibi. An alibi is a claim by an accused person that he was elsewhere when the crime was said to have taken place. This is not the kind of defence offered by the Appellant. He simply told the court that he had problems with the mother of the complainant who was a drunkard. He also stated that he had been framed. He did not tell the court he was not at the scene of crime at the time of the alleged offence.

31. The question is whether the prosecution marshalled sufficient evidence to warrant the conviction of the Appellant for the offence charged.

32. The complainant talked of three encounters with the Appellant. Two were attempts and one was allegedly successful. The successful incident appear to have happened way back in 2009. This was confirmed by PW2 who stated that the incident in the bush was in 2009 when she had a young child called S.

33. The evidence of the complainant and PW2 indicate that there was no penetration after the incident in 2009. However, they give the impression that the child born by the complainant in May 2016 belongs to the Appellant. There is, however, no testimony either from the complainant or PW2 about any penetration of the complainant by the Appellant in October 2015 as stated in the charge sheet. All that PW2 stated is that in November, 2015 she noticed that the complainant was pregnant. She at the same time stated that by that time the complainant was living with her (PW2's) brother.

34 The complainant never testified of any sexual liaison between her and the Appellant apart from the incident in the bush which allegedly took place way back in 2009.

35. The evidence therefore does not support the charge which alleges the Appellant penetrated the complainant on 4th October, 2015. I am perplexed that the investigating officer never found it necessary to organize for a DNA test on the child in order to establish that the complainant's child does indeed belong to the Appellant.

36. Looking at the kind of evidence that was placed before the trial court, it was necessary for the investigating officer to attend court and tell the court why she decided to charge the Appellant. Although failure by an investigating officer to testify is not fatal to the prosecution's case, the failure by the investigating officer to testify in this case weakened the prosecution's case beyond salvage. The evidence that was adduced by the prosecution witnesses was contradictory. It was dangerous to lock away the Appellant for 40 years based on such evidence.

37. Considering the evidence that was adduced before the trial court, I find that both the main charge and the alternative charge were not proved to the required standards. This appeal has merit and it is allowed. Consequently the conviction is quashed and the sentence set aside. The Appellant shall be set free forthwith unless otherwise lawfully held.

Dated, signed and delivered at Malindi this 19th day of July, 2018.

KORIR,

JUDGE OF THE HIGH COURT