REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CORAM: D. S. MAJANJA J.

CRIMINAL APPEAL NO. 25 OF 2015

BETWEEN

B N M…….. APPELLANT

AND

REPUBLIC ……..……. RESPONDENT

(Appeal from the original conviction and sentence of Hon. E. Nyutu, PM dated 11th December 2015 at the Principal Magistrate's Court at Nyamira in Criminal Case No. 548 of 2013)

JUDGMENT

1. The appellant, **B N M**, was charged, convicted and sentenced to life imprisonment for the offence of incest contrary to **section 20** of the ***Sexual Offences Act***, ("the ***SOA***"). The particulars were that on 27th July 2013 at [particulars withheld] village in Nyamira District of Nyamira County, being a male person, he caused his penis to penetrate the vagina of JCN, a female person who was to his knowledge his daughter.

2. The appellant attacked the conviction on the grounds set out in the petition of appeal dated 28th December 2015 and the written submissions filed by his advocate. The thrust of his case was that the prosecution failed to prove its case beyond reasonable doubt and that the evidence was contradictory, unreliable and was not corroborated and that his defence was not considered.

3. Before I proceed to consider the grounds of appeal, I remind myself the duty of the first appellate court. It is to re-appraise the evidence afresh and reach an independent decision as to whether to uphold the conviction bearing in mind that I neither heard or saw the witnesses testify (see ***Okeno v Republic* [1972] EA 32**). In doing so, I shall outline the evidence before the trial court.

4. The complainant (PW 1) testified on oath after a *voire dire* that the appellant was her father and that on 27th July 2013 he came home and they went together to the nearby shop and as they were coming back, they went to a nearby shamba where he asked her to lie down but she refused but she remained sitting. She narrated what happened as follow;

> *He removed all his clothes and then began to rape me. He had placed me on the ground. He held me and removed my clothes. I did not lie willingly but he held me and forced me down. He removed his coat, shirt, trouser, jeans short. He did not have an inner pant. He removed my clothes. He lifted up my skirt and also removed my inner pant. He inserted his penis into my vagina. He did not rape me for long – about 30 minutes. I then saw blood. He told me to wipe myself. He told me to tell my mum that it pains. There was blood on my legs and skirt. He finished and put on his clothes and went the different direction.*

5. PW 1 went home and told her mother, PW 2, that she was having her monthly periods. PW 2 told to go and bath and change her clothes. PW 1 further testified PW 2 noticed that the blood was not ceasing so she called her aunt, PW 4, and they took her to Nyamusi Hospital. When she was at the hospital she told the doctor that the she had been sexually assaulted by the appellant. She was later taken to Nyamira Hospital where she was admitted for treatment.

6. Although PW 2, was initially declared a hostile witness, she recalled that the on the material morning, the appellant and PW 1 left together to go to the shop. PW 1 then came back and told her that she was having heavy periods. PW 2 told her to take a bath. Since PW 1 could not bath one her own she called the child's grandmother, PW 5, who came and told her to take the child to hospital. She stated that PW 5 advised her take the child to hospital. PW 2 took the child to Nyamusi Hospital as the appellant followed them. PW 2 told the court that PW 1 told the doctor that the appellant defiled her.

7. The kiosk owner, PW 3, recalled that on the material morning PW 1 had come to her shop and had left. As she was going to church, she

heard PW 2 screaming and when she went to the home, she found PW 1, who was bleeding profusely, covered in blankets. She did not see where the blood was coming from but she left going to hospital.

8. On the material morning, PW 4, recalled that she heard PW 2 screaming. She went near the road and found PW 1 and PW 2. PW 2 was screaming and when she inquired from her why, PW 2 told her that PW 1 was having heavy periods. She observed that PW 1 was bleeding heavily and was convulsing while wrapped in a blanket. PW 4 assisted them to go to Nyamusi Hospital. The child was later taken to Nyamira Hospital. PW 4 also recalled that the appellant had followed them on a motorbike after he had been called by PW 2.

9. PW 5, who was also a neighbour, testified that that on the material morning as she was preparing to go to Church, she saw PW 2 running with PW 1. PW 2 told her that PW 1 was having heavy periods. She went to their home and found PW 1 being cleaned and she asked whether PW 1 had been defiled. PW 2 told her that she had not. She told them to take the child to the hospital after the child fainted.

10. The investigating officer, PW 6, testified that on 27th July 2013, administration police officers passed by on the way to Nyamira Hospital. They were with the appellant and PW 1. He re-arrested the appellant while PW 1 was rushed to hospital. She gave the P3 form to PW 2. It was filled on 20th August 2018. The P3 form was produced by PW 8 as the doctor who prepared the report had been transferred. The P3 form recorded that PW 1 alleged that she had been defiled by the appellant. She looked pale, frail and was anemic. PW 1's hymen was torn into the posterior was and was still bleeding from the vagina and she had been stitched to repaired her genitals. The doctor concluded that there was evidence of penetration.

11. A nursing officer who was working at Nyamusi Hospital on 27th July 2013, PW 7, testified that PW 1 was brought to the hospital by PW 2. She was bleeding from her private parts and when he questioned her, she told him that her father had defiled her. He examined her and noted a cervical and perennial tear. She was bleeding from the vagina and her clothes were blood soaked. He informed the police to take her to Nyamira. He filled in the PRC Form and signed it.

12. In his sworn testimony, the appellant denied the offence and stated that on the material day he was working at a construction site. He was away during that time and that he went home when he received a call from his brother that one of his daughters who was under the care of an older nephew had been defiled. On his way home, he was called by his wife and told to proceed to hospital where they were. He found them at the hospital in the company of Administration police officers who arrested him.

13. After reviewing the evidence, the trial magistrate was satisfied that the offence was proved. The appellant was charged with the offence of incest under **section 20(1)** of the ***SOA*** which provides that:

> *20.(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.*[Emphasis mine]

14. From the definition, the prosecution may either prove an indecent act or an act of penetration. An *"indecent act"* under **section 2(1)** of the ***Act*** is defined as an unlawful intentional act which causes, *"(a) any contact between any part of the body of a person with genital organs, breasts or buttocks of another, but does not include an act that causes penetration."* While *"Penetration"* under **section 2** of the ***Act*** means, *"the partial or complete insertion of the genital organs of a person into the genital organs of another person."*

15. The first element of the offence of incest I will deal with concerns the relationship between the parties. In this case, the father-daughter relationship is part of the kind of relationship that is prohibited under **section 22** of the ***SOA***. PW 1 was testified that the appellant was her father. PW 2 also confirmed as much and so did the other witnesses. Contrary to the submissions by the appellant's counsel, this fact did not require any other proof given that the appellant also admitted that PW 1 was his daughter and that fact confirmed by the birth certificate which was produced without any objection.

16. The next issue is whether there was penetration or an indecent act. The evidence of PW 2 was clear on how the appellant proceeded to sexually assault her by putting his penis in her vagina. That evidence, which I have set out was clear as day and remained unshaken even in cross examination. Her testimony was corroborated by the testimony of the other witnesses who saw her in a state of distress including PW 2, PW 3, PW 4 and PW 5 who saw her bleeding. That her genitalia had suffered injury was confirmed by PW 7 who examined her on the day she was taken to hospital and recorded the finding in the PRC form. Those findings were consistent with when those recorded in the P3 form after PW 1 was examined about a month later. All this evidence points to and confirms that there was an act of penetration.

17. The next question is whether the appellant committed the felonious act. Although, PW 1 did not disclose to PW 2 or the people who saw her after the incident that the appellant had defiled her. This is understandable given the relationship between the appellant and PW 1. PW 1 was however able to the disclose the fact that it was the appellant who committed the felonious act to the clinician, PW 7, who first examined her when she was taken to hospital. PW 7 was an independent witness and a person who PW 1 could safely inform. PW 7 stated in cross-examination that PW 1 was afraid of revealing the culprit and after he was informed he reported to the police.

18. The appellant raised an alibi defence. An accused person who raises the defence of alibi does not assume the burden of proving it. It is sufficient if the alibi raises reasonable doubt as to whether or not the accused was at the scene of the crime (see ***Kiarie v Republic*** **[1984] KLR 739).** This means that the burden always remains with the prosecution to prove that the accused committed the crime under trial.

19. When viewed alongside the prosecution evidence, the alibi clearly lacks any basis. PW 1 and PW 2 are clear that the appellant was at home and he left together with PW 1 to go to the shop. PW 3 recalled that PW 1 told her that she had been sent by the appellant. Although he

suggested to the witnesses that he was not in the area at the time, the other aspect of his alibi was that he was informed that his nephew had committed the felonious act. He did not suggest this to any of the witnesses. He did not name the said nephew and I can only conclude that his defence was an afterthought.

20. The totality of the evidence is that it is the appellant who committed an act of penetration. I therefore affirm the conviction for the offence of incest.

21. The appellant raised a procedural issue regarding the application of **section 200** of the ***Criminal Procedure Code (Chapter 75 of the Laws of Kenya)***. After the appellant had been put on his defence, the new magistrate took over the conduct of the matter and explained to him his rights. The appellant explained to the court that he wanted the matter to start afresh because it was heard *in camera* and he wanted it heard in open court. The prosecution opposed the application on the ground that the prosecution case had been closed and that the some of the witnesses could not be traced.

22. The trial magistrate declined to order that the trial start afresh on the ground that the given that the complainant was still living with the appellant there was likehood of tampering with evidence and that the issue of having a fair trial was never raised during the trial. In the circumstances, the court directed that the matter proceeds with liberty of the appellant to call PW 2.

23. The material part of **section 200** of the ***Criminal Procedure Code*** provides as follows;

> *200. (1) Subject to sub-section (3), where a magistrate, after having heard and recorded the whole or part of the evidence in a trial, ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and exercises that jurisdiction, the succeeding magistrate may—*
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> *(3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be re-summoned and re-heard and the succeeding magistrate shall inform the accused person of that right. [Emphasis mine]*

24. The import of **section 200(3)** aforesaid is that an accused must be informed of his right. The Court of Appeal in ***Ndegwa v. Republic* [1985] KLR 535** held that the provision should be resorted to sparingly and only in cases where the exigencies of the case require. The purpose of the re-summoning of a witness or witnesses and re-hearing of the case is intended to ensure that the succeeding magistrate is able to assess personally and independently the demeanour and credibility of the particular witness or witnesses and to weigh their evidence bearing in mind the overall duty of the court to ensure that rights of the accused are not prejudiced (see also ***Abdi Adan Mohamed v Republic* MLD CA Criminal Appeal No. 1 of 2017 [2017]eKLR**). To buttress the importance of having a trial conducted by the same judge or magistrate **section 200(4)** provides that;

> *Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the High Court may, if it is of the opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial.*

25. **Section 200** therefore bestows on the trial court discretion which must be exercised judiciously in ensuring the rights of the accused are protected. In this case the appellant desire to start the matter afresh was because the trial was held in camera. Under **section 75** of the ***Children Act, 2001***, the court has power to clear the court and hold *in camera* proceedings. It provides that:

> *Where in any proceedings in relation to an offence against or by a child, or any conduct contrary to decency or morality, a person who, in the opinion of the court, is under eighteen years of age is called as a witness, the court may direct that all or any persons, not being members or officers of the court, or parties to the case or their advocates, shall be excluded from the court.*

26. Although the record does not show why the proceedings were held *in camera*, it is obvious that the proceedings related incest concerning a child. Such proceedings may be held *in camera* due to the nature of the case and the need to protect the child. The appellant did not point to any other defect in the proceedings. The trial magistrate also took into account the fact that it would not be in the interests of justice to subject the child to a further rehearing. Considering the circumstances of this case, I am not satisfied that the appellant was prejudiced in any event.

27. The offence of incest is committed irrespective of the age of the victim. The age of the victim only comes in play in considering the sentence. Under the proviso to **section 20** of the ***SOA***, the mandatory minimum sentence is 10 years' imprisonment and may be increased to life imprisonment if the child is under 18 years. In this case, the appellant was sentence to life imprisonment. **Section 8(3)** of the ***SOA*** provides a mandatory minimum sentence of 15 years' imprisonment where the age of the child is aged between 12 and 15 years. Since PW 1 age was 13 years old, I reduce the sentence to 15 years' imprisonment.

28. The appeal is allowed only to the extent that the sentence of life imprisonment is quashed and substituted with that of 15 years' imprisonment to run from the date of arraignment, that is 29th July 2013.

DATED and DELIVERED at KISII on this 12th day of NOVEMBER 2018

D.S MAJANJA

JUDGE

Mr Obure, Advocate for the Appellant.

Mr. Otieno, Senior Prosecution Counsel, instructed by Office of Director of Prosecutions.