REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CORAM: R MWONGO, J

CRIMINAL APPEAL NO. 15 OF 2017

(Being an Appeal from the Original Conviction and Sentence in Criminal Case No 47 of 2016 in the Chief Magistrate's Court, Naivasha, (Z. Abdul - RM)

T M M.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

Background

1. The appellant, the father of the then six year old complainant, was charged with incest contrary to **section 20 (1)** of the **Sexual Offences Act, 2006**. The alternative offence with which he is charged is that he committed an indecent act with a child contrary to **section 11 (1)** the **Sexual Offences Act**. On 31st of March 2017, he was convicted of the offence of incest and sentenced to life imprisonment.

2. Dissatisfied with the judgement the appellant filed an appeal, which he amended in his written submissions. He is unrepresented. In my understanding of the appeal, the key grounds are as follows:

a) That the learned Magistrate erred in convicting when there was no proof of penetration;

b) That the learned Magistrate erred in convicting when there was no proof of the age of the complainant;

c) That the learned Magistrate failed to properly take into account the defence evidence;

d) That the learned Magistrate erred in meting out a life sentence as though that was a mandatory sentence.

3. Issues a) and b), above, were part of the issues identified by the learned Magistrate for determination at the trial. The brief facts of the case are that the appellant was alone in his house when his six year old daughter entered. She is a pupil at [particulars withheld] school, in pre-unit class. Seeing her, the appellant told her to return a cup into the cupboard, which she did. He then told her to climb onto the bed. When she did, he removed her clothes and his own, and had sexual intercourse with her. According to the complainant this happened two other times on different occasions: once in Kangemi and once in Maai Mahiu.

Whether Penetration was proved

4. Penetration of the male penis into the vagina of the female is the key ingredient in the offence of incest as provided for under **Section 20(1)** of the **Sexual Offences Act**. In her judgment, the learned Magistrate found as follows:

> ***"The Clinical Officer (PW3) stated that upon physical examination, PW1 was found to have a bruised and swollen vagina, hymen was broken and there were blood clots and had a foul discharge. This was consistent to the girl's evidence. Therefore, it was proved that penetration had taken place."***

5. By and large, the learned Magistrate got the evidential assessment correct, but in her findings, she failed to tie up the loose ends regarding corroboration. I have perused the record of proceedings and note that the evidence of the child would have specifically required corroboration, as it was unsworn and she was six years old.

6. It is clear that the trial magistrate undertook a *voire dire* examination of the complainant, and was satisfied that she had an idea about telling the truth although not possessed of sufficient self-knowledge. She took the witness stand without a being sworn.

7. The evidence of a child under the age of 14 may be received even if it is not on oath, provided that the court is satisfied, after conducting a *voir dire* examination, that the child possesses sufficient intelligence and understands the duty to tell the truth. In the present case the child was six years old. Such a child is defined in **Section 2** of the **Children's Act** as a child of tender years, that is, a child under the age of ten years.

8. In **Oloo v R (2009) KLR**, the Court of Appeal held that:

> ***"In our view, corroboration of evidence of a child of tender years is only necessary where such a gives child unsworn evidence. (See Johnson Muiruri v Republic (1983) KLR)…..***
>
> ***….in law evidence of a child given on oath after voire dire examination requires no corroboration in law but the court must warn itself that it should in practice not base a conviction on it without looking and finding corroboration of it".*** (Emphasis supplied)

9. The evidence the child, PW1, concerning penetration was as follows:

> ***" He took off my clothes and took off his. I was wearing a skirt… He was wearing black trousers. He is the one who took off my clothes and did bad manners. Where susu from. He put his 'dudu' there. Dudu is the one used to susu. He put in here (touching her private parts with one finger after wringing her hands for more than 5 minutes) he said if I say he will slaughter me. I did not scream. I felt pain and blood came out…."***

10. This evidence was corroborated by the evidence of the child's mother PW2, who said that as she was taking her daughter to bed she noticed blood on her leg. She also noticed blood on her pants, and decided to tell a neighbour. When the child was interrogated, she said that her father had done a bad act to her; that he did what they did to women and that he slept with her.

11. **Section 2** of the **Sexual Offences Act** defines penetration as follows:

> ***"'penetration' means the partial or complete insertion of the genital organs of a person into the genital organs of another person"***

Thus, all that is required is proof that there was partial penetration, not full deep penetration.

12. The evidence of PW3 the clinical Officer at Naivasha District Hospital was that the hospital received a P3 form filled two days after the incident. It was produced as exhibit 3. When the child was examined, the following was reported:

> ***"The vagina was swollen and bruised. Hymen was broken and there were blood clots***

The ultimate opinion of the doctor as stated in the P3 report was that the girl had been defiled. A Post Rape Report was also completed and produced as Exhibit 2. It records that the child was not able to walk well, and that:

> ***"…the vagina vestibule was swollen and bruised, Hymen broken and clotted blood"***

13. In light of all this overwhelming evidence, I am of the view that the learned Magistrate was obliged to find that there had been penetration, and that the appellant was the proximate person to have done it having been with the child, and there being fresh swelling of the vagina and blood clots.

Whether the Age of the complainant was proved

14. The role of the court upon an appeal is to re-evaluate the evidence and come to its own conclusions carefully taking into account that the appellate court did not see or hear the witnesses itself or observe their demeanour. (See **Okeno v Republic (1972) EA 32.**

15. The appellant was charged under **section 20(1)** of the **Sexual Offences Act**. which provides as follows:

> ***"(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 if it is alleged in the information or charge and proved that the female person is under the age of eighteen years of not less than ten years:***
>
> ***Provided that, 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."***

16. In the present case what must be proved for the offence of incest is that: there must be penetration and that the victim is the appellant's

daughter. If the victim can be shown to be under the age of eighteen years, then the penalty is up to a life sentence.

17. The first thing to note is that the trial court observed the complainant and her demeanour. It noted that she was a child, and therefore conducted a *voire dire* examination. The court, seeing that the child, PW 1, asserted that she was in pre-unit class, and being satisfied that she was able to be a witness but did not understand an oath, gave unsworn evidence. This is the first level of evidence that the complainant was a child.

18. Next, the child's mother, PW 2, gave evidence stating that the child was six years old, and she was surprised that the child was bleeding:

> ***"I asked my husband why our daughter would have blood on her pants yet she hasn't reached puberty; she is six years old."***

19. Finally, the doctor who examined the child estimated her to be six years, and indicated so in Exhibit 3, and the P3 Form. The Post Rape Care Form Exhibit 2 indicated her date of birth as 9th May, 2010.

20. Overall, even without the actual proof of age of the complainant, it is clear beyond reasonable doubt that the complainant had not even nearly approached the age of eighteen years, and is therefore legally a child.

21. Further, the child's fatherhood was admitted by the appellant who stated in his unsworn statement that:

> ***"It was on1/8/2016 when I went to PW4's homestead with <u>my wife and three children J S</u> (the complainant) S and R….."***

22. The trial Magistrate therefore, correctly, found that there was overwhelming evidence that the complainant was a child and was the daughter of the appellant.

Whether Defence Evidence was taken into account by the trial court

23. In his defence, the appellant gave an unsworn statement. That is his right in law. However, such unsworn evidence is incapable of being tested through cross examination for veracity, and accordingly has low probative value.

24. The law relating to unsworn statements is well expressed by Emukule, J in the case of **Mercy Kajuju & 4 Others v Republic [2009] eKLR** where he stated as follows:

> ***"I also discussed at some length the nature and value of unsworn statement, and on authorities held that unsworn statements have no probative or evidential value unsworn statements are not in evidential sense, facts which either go prove or disprove a point alleged by one party and disputed by another. Facts in issue must be proved and unsworn statements are inappropriate subject of evidence.***
>
> **……..**
>
> ***There are of course constitutional issues to overcome for instance Section 77 of the Constitution on fundamental rights and compulsion to give evidence. There is need to study these provisions and ss.211 and 306 of the Criminal Procedure Code, for the better enforcement of the law in relation to the criminal justice system and eliminate these unsworn statements as they add no value to the system and if any they confuse the accused who are mostly ignorant of their effect, and thereby obfuscate the system all together….***
>
> ***"Although it is an accused person's right to remain silent, or not to give a statement, or evidence on oath, but whenever an accused persons elects to make an unsworn statement he gains one major advantage over the prosecution, his statement cannot be tested as to its veracity or truthfulness by way of cross examination whose purpose directed-***
>
> ***(1) to test the credibility of the witness;***
>
> ***(2) to the facts to which he has deposed in-chief including the cross examiners version thereof, and***
>
> ***(3) the facts to which the witness has not deposed but to which the cross-examiner thinks he is able to depose,***
>
> ***(4) failure to cross examine a witness on some material part of his evidence, or at all, may be treated as an acceptance of the truth of that part or the whole of his evidence.***
>
> ***In addition the estimation of the value of evidence in ordinary cases, the testimony of a witness who swears positively to a fact may receive credit in preference to one who testifies to the negative. For instance evidence as to what has not been seen would not carry the same weight as evidence as to what has been seen. Little weight will consequently be given to an unsworn statement. That is the disadvantage in an accused person electing to make an unsworn statement. A few cases will illustrate the point.***
>
> **In** ***AMBER MAY VS THE REPUBLIC [1999] K.L.R.*** **38,** ***the High Court held that unsworn statement has no probative value notwithstanding the provisions Section 211(1) of the Criminal Procedure Code. On Appeal against that decision and reported as***

MAY VS THE REPUBLIC [1981] KLR. 129, the court of Appeal inter alia held-

> ***1.That unsworn statement is not, strictly speaking evidence and the rules of evidence, cannot be applied to unsworn statement. It has no probative value, but it should be considered in relation to the whole of the evidence. Its potential is persuasive rather than evidential. For it to have value it must be supported by evidence recorded in the case.***
>
> ***2. No adverse inference can be drawn against the appellant for electing to make an unsworn statement as she was exercising her right conferred by Section 211 (1) of the Criminal Procedure Code (Cap 75, Laws of Kenya)"***

25. The trial magistrate did not discuss the appellant's unsworn statement at any length, and there is no legal obligation to do so. However, the trial magistrate referred to or assessed the appellant's evidence as follows in her judgment:

> At pg 4 -5 – the accused's story as stated in his unsworn statement is summarised;
>
> At pg 5 –his evidence that he was the father of the complainant is noted
>
> At pg 6 the accused's evidence as to how he ended up working at Maai Mahiu and his duties there, is set out. So also is his denial of having defiled his daughter; his evidence of collusion between his wife and employer to frame him.

The trial magistrate was persuaded by the evidence of the prosecution having taken into account the unsworn statement.

26. In light of the foregoing, I am satisfied that the trial magistrate did in fact take into account the appellants evidence before reaching her determination.

Whether a life sentence was mandatory

27. The appellant has impugned the judgment of the trial court in imposing a sentence of twenty years' imprisonment. He argues that there is no mandatory requirement to mete out a sentence of twenty years.

28. The role of this court in an appeal is not to interfere with the discretion of the trial court on the sole ground that the sentence meted out is severe, unless it was manifestly excessive. The Court of Appeal of East Africa stated in **Wanjema v Republic [1971]EA 494** that:

> ***'An appellate court should not interfere with the discretion which a trial court extended as to sentence unless it is evident that it overlooked some material factors, too into account some immaterial factors, acted on the wrong principle or the sentence is manifestly excessive in the circumstances of the case"***

29. The sentence provided for under **section 8 (2)** of the **Sexual Offences Act** is as follows:

> ***" A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction to imprisonment for life"***

30. The sentence is mandatory if a child is aged eleven years or less, and in this case, the child was found to be a six year old kindergarten child. Accordingly the learned Magistrate was entitled and obliged to mete out the sentence given. I would not interfere with the same.

Disposition

31. In conclusion, having considered the appellant's grounds of appeal, and also having carefully reviewed the evidence on record, there is nothing that suggests that the learned magistrate was in error in convicting the appellant. Indeed, the evidence of the prosecution relative to the charges was spot on.

32. In light of all the foregoing, I am satisfied that the learned Magistrate properly, reached the correct decision on good evidence. Accordingly, this appeal is hereby dismissed.

33. Orders accordingly.

Dated and Delivered at Naivasha this 6th Day of November, 2018

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RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. T M M – Appellant in person

2. Mr. Koima for the State

3. Court Clerk – Quinter Ogutu