REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO. 42 OF 2017

ANN.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(Being an Appeal from Original Conviction and Sentence in **Nakuru Chief Magistrate's Criminal Case No. 64 of 2015** by **Hon. J.N. Nthuku S. R. M** on **05/05/17).***

J U D G M E N T

1. **ANN**, the Appellant, was charged with the offence of **Incest** contrary to **Section 20 (1)** of the **Sexual Offences Act.**

2. Particulars of the offence were that on diverse dates between the year **2006** and **2013** in [particulars withheld] within Nakuru County willfully and unlawfully committed an act by inserting his male genital organ namely vagina of **WM** a child aged **14 years** which caused penetration and knowing her to be his daughter.

3. In the alternative he was charged with committing an **Indecent Act** with a child Contrary to **Section 11 (1)** of the **Sexual Offences Act** No. 3 of 2006.

4. Particulars were that on diverse dates between the year **2006** and **2013** in [particulars withheld] within Nakuru County intentionally and unlawfully touched the buttocks, breasts and vagina of **WM** a child aged **14 years.**

5. Facts of the case were that the Appellant herein is the biological father of the Complainant. In March 2013, **PW2 JM**, the mother of the Complainant and wife of the Appellant noted a change in the Appellant's mannerism. He became unusually harsh, he would stay up in the sitting room as his wife went to bed. His behaviour made her investigate him One day she tiptoed to the sitting room but failed to find him; with aid of a torch on her cell phone she saw him in the Complainant's room allegedly adjusting his trousers. She went into prayers. A few hours later she got into bed and on calling him he came out of the Complainant's room. When she confronted him he became violent. She moved out of the matrimonial home but the Appellant would follow them and instructed the Complainant to be sleeping at the neighbour's place. This elicited complaints from the Appellant. That is when the Complainant disclosed that the Appellant had been violating her sexually from the time she was five (5) years old. In January 2015, one of the Complainant's siblings had pain in her gluteal region, PW2 became suspicious. In the meantime the Appellant became hostile to the Complainant. He would assault her for no apparent reason. They reported the matter to the police. The Complainant was subjected to medical examination where she was found with an old torn hymen and whitish vaginal discharge. Investigations were concluded and the Appellant was arrested and charged.

6. When put on his defence the Appellant stated that he was released from prison on the 14th August 2015 to find his mother having passed on and buried. In September 2005 he went home to see his mother's grave. Three months later, December, 2005, he went in search of his family and traced them in Kuresoi. In 2006 the Complainant was 4 years old and she had (3) siblings. He earned a living by doing casual work. He also worked with O for a certain lady, N. O stole some money from the lady and disappeared. His father confronted him and alleged he had assaulted him. He (Appellant) was arrested and charged with assault. He returned home in 2007. When Post Election Violence erupted he moved his family to Muchome. He left his family at the church, then moved to the [particulars withheld] where they became IDPs and lived until 2009 when they moved to another camp in Molo. He enrolled his children in a school in [particulars withheld] where they lived till 2011 when they returned home. In the course of *"Operation Rudi Nyumbani"* He enrolled his son M and the Complainant in school. He worked at a saw mill and paid fees for M who was in secondary school. In 2013 his wife who was asthmatic was delivered of twins and had to stay in hospital for 3 weeks. They even renewed their vows in church. In 2014 she moved to stay at Ngata a place that was warmer and left him with the children. Later, the children joined her. In 2015 when he went to see them the wife complained about the Complainant who was becoming delinquent. On the material date she returned home at 7.30 p.m. and he disciplined her by beating her. After two (2) days he went back to his place of work. He returned home two (2) weeks later. When the Complainant was sent to the shop she took many hours. On returning he disciplined her. On 5th March 2015, he visited his family as usual only to be arrested at 9.00p.m following allegations that he had defiled the Complainant.

7. The learned trial magistrate considered evidence adduced and found that the Complainant's mother prayed over the matter until she realized that the Appellant would not change. That she was incapable of framing her husband. That the Appellant did not give any reason why his wife would frame him. She was satisfied that it was the Appellant who penetrated his daughter, convicted and sentenced him to twenty (20) years imprisonment.

8. Aggrieved, the appellant appealed on grounds that: medical evidence adduced contradicted the charge; the magistrate appreciated a substituted report from the prosecution and lying witnesses which was erroneous and failed to appreciate that these were a matrimonial and family misunderstanding that escalated into a vendetta.

9. The Appellant canvassed the appeal by way of written submissions. He argued that it was not possible that the Complainant was being defiled for a period of seven (7) years but failed to report to any person. That **PW1** and **PW2** conspired to implicate him. That the medical officer who examined the Complainant found that the torn hymen was more than 3 days old and not months or years as alleged. That the hymen could be torn by other activities. He urged that the first report the Complainant made to the police was of assault but it was substituted by another of defilement which was not the first report made. That there were two (2) reports made. That the investigation officer told the court that the Complainant was defiled after investigations were carried out.

10. That when it was alleged that he defiled the Complainant he was not in Ngata where his family lived but in Molo; and that crucial witnesses were not called to testify.

11. The State through the Senior Assistant Director of Prosecutions, **Mr. Kemo** opposed the appeal. He argued that the Appellant defiled the complainant on several occasions from the time she was 5 years old. When her mother was hospitalized in 2012 he defiled her but she was embarrassed until 2013 when she got courage and revealed to her mother. That when the mother of the Complainant discovered what was happening she moved out of the matrimonial home. The Appellant however followed them and after her other children had pain on the buttocks she reported the matter to the police. On examination the Complainant had an old torn hymen. Her age was proved. The Appellant was properly identified hence proof of the case of incest.

12. This being the first appellate court I am duty bound to re-evaluate and reconsider all evidence adduced at trial afresh bearing in mind that I had no opportunity of seeing or hearing witnesses who testified. I must therefore come to my own conclusions with that in mind ***(see Okeno –vs- Republic [973] E.A. 32).***

13. It is not in dispute that the Appellant was the Complainant's biological father. To prove the age of the Complainant, a child health card was adduced in evidence that was issued to the Complainant at birth. Her date of birth is indicated as 16th January 2002. Further, an age assessment was done by **Dr. Mwathi Edwin** who found the Complainant to be approximately 14 years of as at the 11th day of May 2015.

14. The child was examined by a medical officer on the 19th day of February 2015. She had an old torn hymen and whitish vaginal discharge. This was evidence of her genital organs having been penetrated.

15. It was the prosecution's case that the perpetrator of the act of penetration into the Complainant's genitalia was her biological father, the Appellant, and it was done severally from the time the Complainant was a child of tender years.

16. The Appellant faults the complainant for failure to disclose the information regarding being violated sexually which he viewed as a lie. I do note that at the outset the child of tender age if traumatized and timid may not have been courageous enough to divulge what had befallen her. It would also depend on whether the penetration was partial or complete.

17. It was urged that on being examined the Complainant was not found with any masculine penile discharge (spermatozoa) or seminal fluid which was evidence that the complainant had not come into contact with a male person.

18. In the Case of **Mark Oiruri Mose Vs Republic (2013) eKLR** the Court of Appeal stated as follows:

> ***"….Many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed so long as there was penetration whether only on surface the ingredient of the offence is demonstrated and penetration need not be deep inside the girls organ….."***

To prove penetration evidence of the presence of spermatozoa is not important, all that has to be proved is the insertion of the male genitalia into the female genital organs.

19. I have re-analyzed the Occurrence Book Excerpt – OB No.3/17/2/2015. The initial report was of defilement. According to the testimony of **PW5, No. xxxxxx I.P. Michael Mbithi** he was assigned duties of attending to the reportee on the material date and he acted accordingly. A substitution of the charge that was done later on after the relationship between the Complainant and Appellant was established. This was procedural.

20. The Appellant urged further that crucial witnesses, close neighbours were not called to testify. Section 143 of the Evidence Act Provides thus:

> "***No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."***

In the case of **Keter V. Republic (2007) EA 135**, it was stated that*:*

> **"*The prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt.*"**

21. The Complainant testified of instances when the Appellant violated her sexually. She stated on oath that the Appellant would take her to the shop and buy her buns then take her back home to defile her. That he would remove her clothes, then his trouser and lie on her tummy then insert his private parts into hers and on completion he would ask her not to tell anyone; she felt pain. Subsequently when they moved to stay at the IDP camp, when her mother was admitted in hospital her father repeated the act, when she started crying he abandoned the act and left the room. In 2013, when her mother travelled she invited her to sleep at a neighbour's place. Her action angered the Appellant who became hostile to her. That is when the Complainant disclosed to her mother how she was traumatized following the Appellant's act.

22. PW2 the mother of the Complainant who described herself as a committed Christian noticed the bizarre behaviour of the Appellant in 2013. She alluded to a day when she saw the Appellant in the room of the complainant adjusting his trouser. On another occasion she found him in the room and he alleged that he was looking for a bible, but when she checked the child, her pant was pulled down and was on one leg. He confronted the Appellant who became hostile. It was soon after that the child confided in her of the ordeal.

23. PW2 out of ignorance and peculiar belief in Christianity did not act immediately.

24. There was however no evidence adduced that she found them in the act. Therefore the evidence that the Appellant was the perpetrator of the act was that of the Complainant.

25. Section 124 of the Evidence Act provides that:

> **"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15)…** ***Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."***

The learned trial magistrate had the opportunity of observing the child's demeanour. She believed her testimony. I have also considered the answers that the Complainant gave on cross-examination. The Complainant was credible and hence truthful. This was a child to be believed. Therefore I find the learned trial magistrate having not fallen into error in reaching the finding that the Appellant was the perpetrator of the act that caused penetration into the genitalia of the complainant knowing very well that she was his daughter. Accordingly, I affirm the conviction.

26. Regarding sentence, a sentence imposed of twenty (20) years imprisonment following the conduct of the Appellant is not excessive. In the premises I confirm it.

27. From the foregoing, I find the appeal lacking merit and I dismiss it in its entirety.

Dated, Signed and Delivered at Nakuru this 13th day of December, 2018.

L.N. MUTENDE

JUDGE