REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

CRIMINAL APPEAL NO 49 OF 2016

S M…..……..…….APPELLANT

VERSUS

REPUBLIC…….…… RESPONDENT

(From original conviction and sentence in Criminal Case Number 449of 2015 in the Senior Principal Magistrate's Court at Voi delivered by Hon E. G.Nderitu(SPM) on 9th June 2016)

JUDGMENT

INTRODUCTION

1. The Appellant, S M, was tried and convicted by Hon E. G.Nderitu, Senior Principal Magistrate for the offence of incest by male contrary to Section 20(1) of the Sexual Offences Act No 3 of 2006.He was sentenced to serve life imprisonment.

2. He had also been charged with the offence of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No 3 of 2006 The particulars of the charges were as follows :-

> **"On the diverse dates between the month of August 2014 and April 2015 at [particulars withheld] in Voi area within Taita Taveta County, intentionally caused your male genital organ (penis) to penetrate the female genital organ (vagina) of D W a girl aged 16 years who is to your knowledge your daughter.**
>
> **ALTERNATIVE CHARGE**
>
> **"On the diverse dates between the month of August 2014 and April 2015 at [particulars withheld] in Voi area within Taita Taveta County, intentionally touched the vagina of D W a child aged 16 years with his penis."**

3. Being dissatisfied with the said judgment, on 19th September 2016, the Appellant filed a Notice of Motion application seeking leave to file his Appeal out of time which was allowed and the Petition deemed to have been duly filed and served. He relied on four (4) grounds of appeal. On 12th April 2017, he further relied on seven (7) Amended Grounds of Appeal when he filed his Written Submissions.

4. This being a first appeal, this court is mandated to analyse and re-evaluate the evidence afresh in line with the holding in the case of **Odhiambo vs Republic Cr. App No. 280 of 2004 (2005) 1 KLR** where the Court of Appeal held that:-

"**On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour".**

5. Having considered the submissions that had been filed by both the State and the Appellant and the pleadings herein, this court found the following to have been the issues that had been placed before it for determination:-

a. Whether or not the Learned Trial Magistrate erred by convicting the Appellant before he was supplied with the Witness Statements;

b. Whether or not the Learned Trial Magistrate conducted a proper *voire dire* examination;

c. Whether or not the Prosecution proved its case beyond reasonable doubt;

d. Whether or not the Learned Trial Magistrate failed to consider the Appellant's defence;

e. Whether or not the sentence was manifestly excessive, harsh and severe in the circumstances herein.

6. The circumstances of the case herein were that on diverse dates between August 2014 and April 2015, the Appellant would go to the bed of the Complainant, DW (hereinafter referred to as "PW 1")who was his step-daughter and have sex with her. As a result of which, conceived and gave birth to a child. A DNA test was conducted and it confirmed that the Appellant was the father of that child. On his part, the Appellant denied ever having committed the offence as there was no evidence of spermatozoa when PW 1 was examined.

7. The Appellant was categorical that he was not accorded a fair trial in line with Article 50 of the Constitution of Kenya, 2010 as he was not furnished with Witness statements. The State was emphatic that the Appellant was supplied with all the Witness statements and that he indicated to the court that he was ready to proceed with the hearing.

8. On the 28th July 2015, the Learned Trial Magistrate directed that the Appellant be furnished with the Statements after he took his plea. A perusal of the proceedings showed that before the trial commenced on 15th September 2015, the Appellant informed the court that he was seeking witness statements. The Prosecutor indicated that he had furnished the Appellant with the witness statements of the PW 1 and her sister, C M (hereinafter referred to as "PW 2").

9. It appeared to this court that the Prosecution was furnishing the Appellant with documents in instalments and that the Appellant requested to be furnished with witness statements almost all the times he appeared in court. In particular, on 26th January 2016, the Appellant was furnished with the P3 Form on the morning of the taking of the evidence of Dr Walid Marei (hereinafter referred to as "PW 5").

10. This mode of furnishing the Appellant the evidence the Prosecution was relying upon on piecemeal was completely unfair and prejudicial to him notwithstanding that he never protested when the matter first proceeded and that he Cross-examined PW 1 and PW 2 or when he was granted an adjournment before the taking of PW 5's evidence. This *modus operandi*by the Prosecution was a sufficient ground for an appellate court to order a Re-trial of this matter.

11. Turning to the issue of the *voire dire* examination, the Appellant did not submit on the same. This court nonetheless agreed with the State that the Learned Trial Magistrate erred when she failed to conduct the *voire dire* examination of PW 2 as she was aged twelve (12) years at the time she adduced her evidence. It was not necessary for the Learned Trial Magistrate to have conducted a *voire dire* examination in respect of PW 1 as she was aged fifteen (15) years at the time of the trial.

12. Indeed in the case of **Patrick Kathurima vs Republic [2015] eKLR,** THE Court of Appeal rendered itself as follows:-

> **"…The age of fourteen (14) years remains a reasonable indicative age for purposes of Section 19 of Cap 15."**

13. However, the failure by the Learned Trial Magistrate to have conducted a *voire dire* examination of PW 2 was not fatal to the case as PW 1 was herself over the age of fourteen (14) years and there was also other oral and documentary evidence that was presented before the Trial Court to prove the case against the Appellant herein.

14. As regards the P3 Form, the Appellant stated that it contained contradictory evidence and that although it was prepared by Dr Wamuyu Gitau, it was adduced in evidence by PW 5. He contended that PW 5 stated that the said P3 Form was filled on 23rd June 2015 yet it was dated 26th June 2015. The State submitted that the Appellant did not seek clarifications from PW 5 on the names of the author of the P3 Form.

15. A perusal of the P3 Form shows that it was filled on 26th June 2015 and it was in respect of defilement on various dates between October 2014 and May 2015. It was this court's view that the discrepancy in PW 5's evidence and the P3 Form relating to when the said P3 Form was completed was not a material contradiction as it was evident from the said P3 Form that it was completed on 26th June 2015.

16. Since the P3 Form was public document, PW 5 was permitted by the law to adduce the said P3 Form on Dr Gitau's behalf. In any event, the Appellant indicated that he had no objection to PW 5 presenting the said P3 Form before the Trial Court. The Appellant's arguments regarding contradictions in the P3 Form were therefore not merited.

17. On the issue of the DNA test, the Appellant contended that the same did not prove the Prosecution's case beyond reasonable doubt because the document indicated that the test was conducted in Nairobi yet the Report showed that it was prepared in Mombasa. He added that the specimens were only collected from the child who was said to have been born out of his union with PW 1. He had also contended that no photographs were produced to show that indeed PW 1 was pregnant.

18. The State pointed out that the Government Chemist, Lawrence Ogunda (hereinafter referred to as "PW 6") clarified that the indication of "Nairobi" in the DNA was a typographical error.

19. A perusal of the DNA Report of 26th October 2015 showed that PW 6 collected specimen from PW 1, her child and the Appellant. In his conclusion, he wrote as follows:-

> **"Based on the above findings there are 99.99+% more chances that S M** (emphasis court) **is the biological father of J M, D W daughter."**

20. It was clear from the above evidence that it was not necessary to have photographic evidence of PW 1's pregnancy as the DNA Report was clear there were 99.99+% more chances that the Appellant was the father to PW 1's child. The Appellant's assertions of where the said Report emanated from were immaterial as PW 6 was emphatic that he prepared the said DNA Report at Mombasa.

21. Notably, the evidence of PW 1's mother, C W M (hereinafter referred to as "PW 3") and her uncle, J M (hereinafter referred to as "PW 4") as well the DNA Results corroborated PW 1's evidence that she was indeed defiled by the Appellant herein.

22. The conditions under which the Appellant could be convicted under the provisions of Section 124 of the Evidence Act Cap 80 (Laws of Kenya) were satisfied as could be seen in the holding in the case of **Musikiri vs Republic (1987) KLR 69** where it was held as follows:-

"The necessity of **material corroboration of the evidence of a child of tender years is, under Section 124 of the Evidence Act (Cap 80), an indispensable condition to a conviction of a person charged with an offence."**

23. Having considered the evidence that was adduced by the Prosecution witnesses in its entirety, it was the considered view of this court that the irregularities regarding the *voire dire* examination of PW 2 or the furnishing of witness statements in instalments or piece meal were fa outweighed by the results of the DNA test that scientifically proved that the Appellant committed incest with his step daughter as a result of which a child was born.

24. In respect of the sentence, the Trial Magistrate found that the Appellant to have been guilty of the charge of incest by male contrary to Section 20(1) of the Sexual Offences Act Cap 62A (Laws of Kenya) and sentenced him to life imprisonment. The said Section stipulates as follows:-

"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."

25. The phrase **"shall be liable to imprisonment for life"**does not, however, connote a mandatory sentence but rather a maximum sentence. In the case of **Daniel Kyalo Muema vs Republic [2009] eKLR,** the Court of Appeal observed as follows:-

"The last observation we want to make is that the phrase as used in Penal statutes was judicially construed by the predecessor of this Court in Opoya vs. Uganda [1967] EA 752 where the Court said at page 754 paragraph B:

"It seems to us beyond argument the words "shall be liable to" do not in their ordinary meaning require the imposition of the stated penalty but merely express the stated penalty which may be imposed at the discretion of the court. In other words they are not mandatory but provide a maximum sentence only and while the liability existed the court might not see fit to impose it".

26. Section 20(3) of the Sexual Offences Act does, however, prescribe a minimum sentence of ten (10) years. This is the minimum sentence that a person ought to be sentenced. Section 8(3) of the Sexual Offences Act provides a minimum sentence of fifteen (15) years where a person has been found guilty for having defiled a child between sixteen (16) and fifteen (18) years.

27. Bearing in mind that there were aggravating circumstances that the offence was incest and that the Appellant impregnated PW 1, this court was of the considered view that a sentence of twenty five (25) years imprisonment for the offence the Appellant was charged with would be reasonable in the circumstances of the case herein.

28. Indeed, Section 20(1) of the Sexual Offences Act stipulates that a person who has been convicted of having committed the offence of incest with a relative who is below eighteen (18) years is liable for life imprisonment. Notably, PW 1 was the Appellant's step-daughter and having been sixteen (16) years at the material time, the Appellant was liable to life imprisonment. Impregnating PW 1 was an aggravating factor but not sufficient to warrant the Appellant being imprisoned for life.

29. In the circumstances foregoing, this court found the Appellant's Ground of Appeal on the severity of the sentence that was meted upon him by the Learned Trial Magistrate to have been merited as the said

sentence was manifestly excessive, harsh and severe.

DISPOSITION

30. As the court found that the Prosecution had proved its case beyond reasonable doubt, it found the Appellant's Petition of Appeal that was lodged on 19th September 2016 not to have been merited and the same is hereby dismissed. Accordingly, this court therefore affirms the conviction herein.

31. For the foregoing reasons, the sentence of imprisonment for life that was imposed upon the Appellant by the Trial Court is hereby set aside and instead replaced with a sentence of twenty five(25) years imprisonment which is to run from the date he was convicted by the Trial Court for the offence of incest by male.

32. It is so ordered.

DATED and **DELIVERED** at **VOI** this **20th** day of **July** 2017

J. KAMAU

JUDGE

In the presence of:-

S M - Appellant

Miss Anyumba - for State

Josephat Mavu– Court Clerk