REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

CRIMINAL APPEAL NO. 28 OF 2015

T P.....APPELLANT

Versus

REPUBLIC.....RESPONDENT

(Appeal from a conviction and sentence of the Principal Magistrate

at Kajiado Hon. M. O. Okuche in a Judgement dated 18/11/15)

JUDGEMENT

T P, the appellant herein, was convicted of two counts of the offence of incest by a male person contrary to Section 20(1) of the Sexual Offences Act No. 3 of 2006 by the Magistrate's Court at Kajiado. He was sentenced to serve life imprisonment on each count and an order for the sentences to run concurrently. He has appealed to this court against both conviction and sentence.

Facts and evidence at the trial

The facts of this case as found by the trial magistrate were that the appellant was indicted of two counts of incest by a male person contrary to Section 20(1) of the Sexual Offences Act No. 3 of 2006. In the alternative, he was further indicted 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 charge being that between the 10th day of December 2012 and 12th day of December 2012 at [particulars withheld] in Loitokitok District within Kajiado County appellant being a male person caused his penis to penetrate the vagina of S T and T N both of whom were to his knowledge his daughters aged fourteen (14) and twelve (12) years old.

The prosecution called five witnesses at the trial whose evidence was as follows:

PW1 S T and PW2 T N were the victims of the defilement. The victims led evidence that they were biological daughters of the appellant. Their mother had passed on sometime back leaving them in the care and custody of their father, the appellant.

PW1 S T testified that appellant was her father and as the time of the offence she was 14 years old. It was her testimony that on 10.12.2012 at 3.00 pm she went to visit the appellant. While at home together with other siblings, appellant sent them to go and look after livestock (cows) in the field. She was left behind in company of the appellant. It was this opportunity that appellant took. He locked the main house and

ordered her to remove her clothes so that they could have sex. She was not able to resist according to her testimony because appellant was in possession of a club. The appellant then removed his trouser and inserted his penis into the vagina of the complainant (PW1).

She did not find anybody to immediately make the complaint about appellant's action. Whilst previously unknown to her, she however learnt that appellant had also been defiling her young sister PW2. PW2 had reported the incident to the police. PW1 further testified that on 12.12.2012 a report on their defilement was made to PW5 PC Wallace Njoroge of Imbirikani Patrol Base.

PW5 in his testimony acted on the report by PW1 and PW2 to trace the appellant and effected arrest. The matter was investigated by PW4 PC Evelyn Mwambala. In her testimony PW4 issued the P3 forms to PW1 and PW2. She also gave evidence as having recorded statements from the witnesses and compiled the information which led to the indictment of the appellant.

PW2 was T N the victim aged 12 years. She testified that her mother passed away and that she has been in the custody of the appellant who is her father. She further adduced evidence that on the night of 12/12/2012 while at home with other siblings namely E, T and S, the appellant came and caused them to flee. She was therefore left alone with the appellant. The appellant who was armed with a club ordered PW2 to lie down in a mattress and he had sex with her. It was her testimony that after this incident they sought assistance at the police station as confirmed by PW5.

PW3 was Dr. Isaia Mohamed. He testified that he examined PW1 and PW2 at Loitokitok Hospital on request by the investigating officer PW4. On examination and findings in respect of PW1 it was his testimony that her private parts were injured, she had lower abdominal pain and laceration of the hymen.

He further testified that PW1 had a discharge and sticky substance as proof of penetration. It was also confirmed that PW1 had contracted a sexually transmitted infection. The P3 on findings and opinion was produced as exhibit 3.

As regards PW2 Dr. Mohamed confirmed in his evidence as having examined her on request by PW4 regarding an alleged sexual assault of defilement. On examination Dr. Mohamed (PW3) confirmed that PW2 had sticky white discharge, a painful anus to touch, and tender pelvic area. He further testified that examination and tests conducted confirmed a sexually transmitted infection. The P3 for PW2 was produced as exhibit 6.

PW3 further examined the appellant who on tests conducted revealed that he had contracted syphilis a sexually transmitted infection. He produced the P3 as exhibit 7.

The appellant testified and gave unsworn defence. He testified that on the material day he arrived home at 4.00 am and found his son and wife not there. When he looked around he saw the complainant (PW1) with same boy. He beat all of them cautioning her not to be interacting with boys. In the morning he left for work and on coming back at 4.00 pm his children PW1 and PW2 were not at home. He denied the charge of incest against PW1 and PW2.

The learned trial magistrate after analysing the evidence said:

> **"The court did examine the two complainants to test their intelligence before undertaking to give evidence. This court found out that they were intelligent and they gave evidence on oath. Their evidence was tested on**
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> **cross-examination by the accused, but remained unshaken. Further the evidence of PW1 and PW2 was corroborated by that of PW3 the Medical Officer who examined them. The accused was also examined and tests confirmed that he was infected with sexually transmitted disease. PW1 and PW2 were also examined and found to have contracted a sexually transmitted infection. The logical answer therefore is that two complainants had sexual contact with the same person who was infected with this S.T.I. This further points to a conclusive fact that it is**

the accused who had a penetrative sexual contact with the two minors…….

The gist therefore is that the prosecution has proved their case beyond reasonable doubt against the accused in both Count 1 and Count 2. He is guilty as charged and I shall proceed to convict him accordingly."

The appellant aggrieved by the verdict of the trial magistrate appealed to this court to set aside the conviction and sentence. He relied on the following grounds in his memorandum of appeal and further supplementary grounds crafted as follows:

1. **That the evidence relied upon by the learned trial magistrate as a basis for my conviction was not sufficient to have sustained a conviction.**

2. **That the sentence imposed is rather too harsh and excessive.**

3. **That my fundamental rights to a fair trial as enshrined in Article 25(c) of the Constitution was violated and I pray for the case to be heard denovo.**

4. **That the provisions of Section 169(1) of the CPC was not complied with in relation to my defence.**

5. **That the medical evidence in relation to PW2 as per the P3 form is at variance with the particulars of the charge share in that exhibit 6 was in respect of one TT whereas the complainant in Count 2 is indicated as T N hence thus violation of Section 214(1) of the CPC.**

6. **That the medical evidence in respect of PW1 was doubtful and unreliable in view of the fact that PW1 was examined after lapse of 7 days yet no explanation was offered in this regard.**

7. **That the learned trial magistrate made an error in both law and facts by failing to consider that my subsequent implication to the offence might have been caused by my belongs to both PW1 and PW2.**

Appellant's submissions

At the hearing of the appeal the appellant filed and relied on his written submissions served upon the prosecution. The learned prosecution counsel Mr. Akula represented the state. The appellant argued all the grounds together under the main title the burden of proof not discharged.

It was his strong contention that the evidence by the prosecution did not establish the ingredients of the offence in both Count 1 and 2 of the charge sheet. The arguments and submissions were that according to the prosecution evidence in respect of Count 2 he is alleged to have penetrated the complainant's (PW2) private parts by his penis on 12.12.2012. His contention was that the medical evidence by PW3 found that the external genitalia of PW2 was intact together with the hymen. He therefore contested the findings of the learned trial magistrate that there was penetration or partial penetration of the complainant (PW2) organ as alleged in the judgement.

It was his further submission that the testimony of PW1 and PW2 was not corroborated by any evidence let alone the medical evidence in respect of the P3s produced. He submitted that the prosecution had failed to prove that he was the one who sexually assaulted the complainants.

In support of this argument appellant relied on the following authorities:

1. **CHARLES WAMUKOYA KARANI V REPUBLIC CR. APP. NO. 72 OF 2013** which deals with the critical elements of the offence of defilement.

2. **RAMADHAN AHMED V REPUBLIC EACA [1955] VOL. 22 AT pg 395** on the issue that

the appellant has discharged the burden that the findings of the trial court were not supported by credible evidence.

The appellant further attacked the medical evidence P3 filed in respect of PW2. He submitted that the P3 exhibit 6 was referring to ***"T T"*** whereas the particulars of the charge has the complainant as one ***"T N."*** He argued that there was no amendment of the charge as required under Section 214 (1) of the Criminal Procedure Code. That error on the part of the trial court according to the appellant occasioned a miscarriage of justice.

The appellant dismissed the findings by the trial court that the sexual transmitted infection found with PW1 and PW2 and himself was a result of sexual intercourse. He argued that no similarity of infection was given by the medical doctor to create a link between the S.T.I. detected with the complainants and the one detected with him.

He relied on the case of **BURUNYI & ANOTHER V UGANDA CR. APPEAL NO. 1968 EA 123** the court held interalia:

> **"That in a criminal case, the court cannot enter into arena. The only duty of the court is to hold the scale to see that justice is done according to the law on the evidence before it."**

The appellant challenged the manner in which the learned trial magistrate handled the evidence and defence. He denied the allegations and reiterated that the trial court shifted the burden of proof thereby erring in fact and law to find that the case against him was proved beyond reasonable doubt.

Respondent's Submissions

The learned Senior Prosecution Counsel for the respondent vehemently submitted and opposed the appeal on both conviction and sentence. He contended that the evidence of PW1 and PW2 who gave the chronology of events regarding commission of the offence by applicant remained watertight.

It was learned respondent's counsel submission that the two witnesses at the trial remained steadfast and no discrepancies noted. According to the respondent's counsel the evidence of PW1 and PW2 at the trial was credible and cogent as to the essential elements of the offence of defilement. He contended and submitted that the evidence by PW1 and PW2 placed the appellant at the scene.

As for the earlier defence by the appellant on how he came to be arrested and charged the same did not rebut the testimony of PW1 and PW2. The evidence according to the respondent's counsel was consistent with the evidence in cross-examination in which the appellant did not controvert direct evidence against him.

Learned Prosecution Counsel further submitted the elements of the offence that were proved beyond reasonable doubt being:

a. Penetration

b. The age of the complainant

c. That the accused was the perpetrator of the crime.

He relied on the cases of **NTOOKI LOLONTARE v REPUBLIC eKLR 2016, JOSEPH KITHI SELF v REPUBLIC 2014 eKLR** for the holding that age of a victim can be proved by medical evidence and other cogent evidence and on the case **GEORGE OWITI RAYA v REPUBLIC eKLR 2013** for the proposition on corroboration of medical evidence.

Learned counsel further submitted that besides the testimony of PW1 and PW2 the medical evidence of Dr. Issa Mohammed PW3 corroborated and fortified the position of the two key prosecution witnesses. In

discharging the burden of proof by the prosecution, counsel invoked the provisions of section 107 of the Evidence Act.

It was also submitted that the reliance of the evidence by the prosecution and the P3 form and findings by Dr. Mohammed PW3, regarding PW1 and PW3 affirms the conviction and sentence of the appellant by the trial court.

The learned prosecution counsel for the respondent submitted that appellant has not tendered another P3 to counter one exhibited by the prosecution at the trial. The production of the P3 at the trial was not challenged and the same was admitted into evidence.

According to learned prosecution counsel there is ample evidence adduced to prove the incest charge against the appellant. The victims, who were found to be minors, established existence of a biological relationship with the appellant as their father. The victims were treated and examined at Loitokitok District Hospital. The learned counsel submitted that Dr. Mohammed PW3, indicated the nature of treatment received for injuries sustained from the appellant's act of defilement.

Learned counsel further submitted that both the victims PW1 and PW2 together with the appellant were medically examined. Learned counsel reiterated the medical evidence and findings by PW3 that the victims were found to have a sexually transmitted disease. The same bacteria trichomorias vaginalis was confirmed with the appellant. The inference drawn by learned counsel in absence of any other evidence the sexual transmitted disease was passed on by the appellant during sexual intercourse. The learned counsel for the respondent submitted that in view of the evidence by PW1, PW2, PW3, PW4 and PW5 the trial magistrate conviction of the appellant was proper and safe.

Concerning sentence, it was learned counsel for the respondent that appellant was the principal offender who knew the victims to be his biological daughters and yet went ahead to have sexual intercourse with them. Hence he concluded by saying that the appellant's sentence ought not to be interfered with. In conclusion he urged this court to find the entire appeal unmeritorious.

Learned counsel reiterated that indeed from the medical examination of the victims and also appellant a nexus of the sexual intercourse between two persons exists. He pointed out clearly as to the positive findings of the sexual transmitted infection on both the victims and the appellant.

Analysis and Resolution

It was now settled in our jurisdiction that the first appellate court's duty is to subject the entire evidence to a fresh look on record and make its own findings of facts and draw its conclusions. Having considered the record and evidence at the trial court I bear in mind the duty of the first appellate court in cases of this nature like this one before me.

The duty of the first appellate court was stated by the Court of Appeal in the cases of **JOSEPH NJUGUNA MWAURA & 2 OTHERS v REPUBLIC [2013] eKLR** where the court also cited the case of **OKENO v REPUBLIC [1972] EA 370** where the court held:

> **"The duty of the first appellate court is to analyse and re-evaluate evidence which was before the trial court and itself come to its conclusions on that evidence without overlooking the conclusions of the trial court."**

In discharging this duty this court must nonetheless not lose sight of the fact that the trial court had the advantage of hearing and seeing witnesses.

Being guided by the above principles, I now proceed to consider the merits of the appeal.

The main ground the appellant has raised is to the effect that the prosecution evidence did not prove the charge of incest on the two counts of which he was convicted and sentenced.

In order to sustain charge of incest, the prosecution needs to prove the following elements as outlined under section 20(1) of the Sexual Offences act:

a. **Commission of an indecency, or an act which causes penetration with a female.**

b. **The female subjected to penetration sexual intercourse was to the knowledge of the accused a daughter/sister/niece/aunt or related in close consequently.**

c. **That it was the accused who had sexual intercourse with the female as defined under section 22(1) of the Act.**

The record reveals that the learned trial magistrate conducted a voire dire on PW1 and PW2 who were victims of the alleged incest. The court inquired whether the two children understood the nature of an oath and ordered that they be sworn in an ordinary way. Their evidence was received on the same basis as that of an adult witness.

The complainants PW1 and PW2 gave evidence that on the material date they were at the appellant's house. They had paid the appellant a visit from their uncle's home where they normally reside. PW1 narrated how the appellant while in his house ordered her to remove her clothes, locked the door and had sexual intercourse with her. During this time the other siblings were away in the fields from the house where the incident took place.

PW2 also gave a chronology on how appellant on the material day in the night forced her to have sexual intercourse. They both reported the matter to the police station as confirmed by PW3. PW1 and PW2 were taken to Loitokitok Hospital where Dr. Mohammed PW3 examined them. His findings were recorded in the police P3 form which was admitted in evidence as exhibit 3 and 6 respectively.

PW3 confirmed right lower quadrant abdominal tenderness, healed hymenal lacerations and discharge of labia minora. He opinioned that PW1 had been defiled and infected with a sexually transmitted infection. It was further the medical diagnosis by PW3 on the complaints by PW2 at the Loitokitok Hospital that PW2 had severe tenderness of the pelvic area. She also suffered pain in the anus which was evidence of sodomy.

The appellant during his testimony and cross examination denied any act of indecency or incest against PW1 and PW2. He said the case was framed up because he had earlier on disciplined them for being in company of other boys in the village.

There is no dispute that PW1 and PW2 are biological daughters to the appellant considering the record. The prosecution presented evidence that PW1 and PW2 were at the house of the appellant. The act of incest as per the testimony of PW1 and PW2 took place at the appellant's house. The two complainants reported the matter to the police. They were taken to Loitokitok Hospital where they were examined by PW3.

The findings by Dr. Mohammed (PW3) on both PW1 and PW2 are positive as to the act of defilement. The identity of the appellant cannot be mistaken as to the commission of the offence. The medical reports produced by the prosecution corroborated the evidence of PW1 and PW2 that they were defiled by complainants' father, the appellant herein.

The appellant seemed to have been aware that after the incident PW1 and PW2 had gone to the police station to lodge a complaint. There is evidence from PW4 and appellant's own admission that he went to the police station to report on the disappearance PW1 and PW2 from home. The appellant appeared to have knowledge that PW1 and PW2 had gone to the police station. In his sworn defence there is no indication why he rushed to the police station. The instigation appellant is referring to may be something to do with the defilement. In absence of any cogent evidence as to his presence at the police station therefore he had the opportunity to defile the complainants.

In the instant case the prosecution caused the appellant to be medically examined by PW3. The lab tests conducted revealed that appellant suffered from syphilis, a sexually transmitted infection. The same infection was also confirmed with PW1 and PW2. The same viruses were detected during examination upon PW1 and PW2. The medical P3 form was produced to support evidence on infection. Therefore, the existence of a sexual transmitted infection on both complainants and appellant in the appropriate case constitute corroboration. See **REPUBLIC v BASKER VILLE [1916] KB 658** the House of Lords in the case of **DPP v HESSER [1972] WLR 910 – 919, 920** expressed itself as per the statement by ***Lord Morris of Bothygest*** on corroborative evidence as thus:

> **"Corroborative evidence in the sense of some other material evidence in support implicating the accused furnishes a safeguard which makes a conclusion more sure than it would be without that evidence. But to rule it out on the basis that there is some mutuality between that which confirms and that which is confirmed would be to rule it out because if it's essential nature and indeed because of its virtue. The purpose of corroboration is not to give validity or credence to evidence which is deficient or suspect or incredible but only to confirm and support that which as evidence is sufficient and satisfactory and credible and corroborative evidence will only fill its role if itself is completely credible evidence."**

The law on corroboration in Kenya in sexual offences stems from the 1967 case of **CLIA V REPUBLIC [1967] EA**. The court stated thus:

> **"The law of East Africa on corroboration in sexual cases is as follows; the judge should warn assessors and himself of the danger of acting on the uncorroborated testimony of the complainant but having done so he may convict in the absence of corroboration if he is satisfied that their evidence is truthful if no such warning is given, then the conviction will normally be set aside unless the appellate court is satisfied that there has been no failure of justice."**

This 1967 legal position of the law was legislated in 2003 via an amendment to section 124 of the Evidence Act to provide as follows:

> **"Notwithstanding the provision of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him. Provided 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."**

On scrutiny evaluation of the evidence by the trial magistrate particularly on PW1 and PW2 is key. He stated that he had the opportunity to listen to both their testimony and watched their demeanor as they gave evidence in court.

In his judgement both complainants impressed him as truthful witnesses who had no reason to give a fabricated allegation against the appellant. The evidence by the prosecution witnesses PW1, PW2 and PW3 established the ingredient of penetration of female persons. Under Section 32 of the Sexual Offences Act there is undisputed evidence from PW1 and PW2 together with admission by the appellant that he was their biological father.

I find no reason to disagree with the trial magistrate's finding. I further concur with the trial magistrate that at the time of the incest act PW1 and PW2 were aged 14 and 12 years respectively. This was proved by the age assessment report admitted as exhibit 1 and 4 dated 7/1/2013. The law is clear on how age can be proved. See the case of **ELIAS KASOMO v REPUBLIC CR. APPEAL MALINDI 504 OF 2010.** The Court of Appeal held interalia that:

> **"The age of the minor is an element of a charge of defilement which ought to be proved by medical evidence."**

The court further held that:

> **"Documents such as baptism cards, school leaving certificates would also be useful in this regard."**

The court also promised itself on this issue in the case of **FAPPYTON MUTUKU NGUI v REPUBLIC HCRA NO. 296 OF 2010** at **MACHAKOS**. The court stated thus:

> **"Proof of age is critically important in proving offences of defilement or attempted defilement as it is the age of the victim that determines the amount of sentence to be imposed on conviction."**

In the circumstances of the case before the trial court the charge sheet indicates PW1 complainant was aged 14 years while PW2 was 12 years old.

The medical officer at Loitokitok Hospital who examined and assessed their age confirmed them as such.

On the medical evidence the appellant contended that the trial magistrate erred in both law and fact in relying on the contradictions and in circumstances in the evidence. He further contended that the charge sheet was at variance with P3 in respect of one T N. He invited the court to invoke section 214 of the Criminal Procedure Code for noncompliance by the trial magistrate and rule the charge to be defective.

I have perused the evidence being impugned by the appellant. In my considered view the testimony of PW1 shows how the appellant pushed his penis to the genital organs and on finishing left for work. She suffered pain. She was examined on 17/12/2013. The P3 from the doctor PW3 confirmed that she had been defiled a week back and established signs of penetration due to healed hymenal lacerations. It was PW3's evidence that PW1 had sexually transmitted infection. The infections of a similar nature were found with the appellant when examined by the medical doctor. As regards PW3 evidence it shows that there was the act of penetrative sexual intercourse which took place. I find no reason to discredit the trial magistrate on this issue.

Secondly, the appellant submitted that PW2's name in the charge sheet and P3 was at variance. I have considered and read both the charge sheet and P3 in respect to the second count and the evidence at trial in which the appellant participated. There is no cogent evidence both in the lower court and before this court that TT and T N is not one and the same person. This can best be described as a typographical error which does not affect the substance of the charge.

It is inconceivable upon the appellant as a biological father to PW2 to tell this court that the victim is not his daughter by virtue only that the drafters of the charge sheet did not spell her name correctly.

I have considered the legal issue raised under Section 214 of Criminal Procedure Code in regard the particulars of the name in the charge sheet and the P3 form. According to the appellant the charge sheet contains the name **T N** while the P3 has **T T**.

In his submissions the variance in names in the two documents occasioned a defective charge against him. Perusal of the record of the trial, there is no variance on the particulars of the charge, in respect to name of PW2 to that given the doctor who filled the P3. PW2 remains to be same victim in Count 2 and one who is a daughter to the appellant.

At best the variance being referred to by appellant can be described as a type or error which did not occasion any injustice to the appellant. This was never a contested issue at the trial and on the facts of the case. It does not arise in this appeal. There is no evidence to show that the learned trial magistrate required the prosecution to amend the charge as urged by the appellant. The attempt by appellant to

introduce a defect in the charge as to the correct name of his daughter is of no substance. I dismiss the claim by appellant that the charge as filed was defective.

I have perused the evidence being impugned by the appellant on both the medical evidence and variance of the name of PW2 in the P3 and the one in the charge sheet. From the record PW1 testimony demonstrates how the appellant went about defiling her severally. PW2 confirmed at the trial that when appellant accomplished his penetrative acts to her genitalia he left for work. The acts as explained by PW1 occasioned pain which on fact was confirmed by PW3 on examination at Loitokitok Hospital on the 17.12.2013.

In law, the slightest penetration to do with rapture of the hymen or injuries aimed at the vagina are not necessary. Besides, I note from exhibit 3 and 6 the medical examination of the victims was done a week from the date of defilement. It is enough time for any bruises or inflammations to have healed if at all any were occasioned.

I accept the submissions by the prosecution counsel. It is also my considered view that in line with section 124 of the Evidence Act Cap 50 and the decision in **KABURA v REPUBLIC [1974] EA** where the court held that:

> **"It is now settled law that the sworn evidence of a child of tender years requires no corroboration as a matter of law provided the trial judge warns himself and the assessors of the dangers of convicting on such uncorroborated evidence and ask himself whether in the circumstances such illegalities have occasioned a miscarriage of justice."**

In the judgement of the lower court the trial magistrate addressed himself as follows:

> **"I examined the complainants to test their intelligence. The court found they were intelligent and they gave their evidence on oath. That evidence was tested in cross examination but it remained unshaken."**

Considering what the trial magistrate stated in his judgement on the demeanor, truthfulness and credibility of the victims I find no evidence to dismiss that position at the appellate level.

The appellant has not disputed that he is biological father to the complainants PW1 and PW2. The complainants testified that they had paid the appellant a visit on diverse dates of 10/12/2012 and 12/12/2012. As at the time when the act of defilement took place all the other siblings were not in the house. The appellant was the only male in the house. There were no circumstances impairing a positive recognition of the assailant.

In the result I agree with the trial magistrate judgement that the prosecution proved its case beyond reasonable doubt. There was sufficient evidence touching on each element of the offence of incest. I accordingly affirm the trial court judgement on conviction.

ON SENTENCE

There is a plethora of cases on this issue regarding appellate jurisdiction on sentencing. This issue was deliberated way back in 1954 in the celebrated case of **OGOLLA S/O OWUOR V REPUBLIC [1954] 24 EACA 270.** The court stated as follows:

> **"An appellate court will only alter a sentence imposed by the trial court if it is evident it acted on a wrong principle or overlooked some material factor, or if the sentence is manifestly excessive in view of the circumstances of the case."**

The appellant was convicted of two counts of incest by a male person contrary to section 20 (1) of the Sexual Offences Act No. 3 of 2006.

The prescribed penalties upon found guilty is:

> **"A sentence of not less than ten years imprisonment**
>
> **or**
>
> **If the female person is under the age of 18 years the accused shall be liable to imprisonment of life."**

Sentencing is the discretion of the trial judge. The general approach of appellate court in sentencing is as set out in **OGOLLA's Case (Supra)**.

Applying the principles in that case the appellate court should ask itself the following questions before interfering with the discretion:

> i. **Is the sentence wrong in principles?**
>
> ii. **Is the sentence so manifestly excessive?**
>
> iii. **Did the trial magistrate overlook some material fact; or**
>
> iv. **Are there exceptional circumstances which would render it unjust if the sentence was not reduced?**
>
> v. **If the appellant was in custody, did the court take into account period the appellant spent in remand?**

It is only if the above questions are answered in the affirmative that the appellate court can interfere with the discretion of the sentencing trial magistrate.

I have considered both the arguments by the appellant and respondent counsel on this issue. It is clear that the trial magistrate passed the sentence provided for under Section 20 (1) of the Sexual Offences Act.

The victims in this case were aged below 18 (eighteen) years old. The sentence for this category is life imprisonment. This is a case were the appellant was a biological father to the complainants. They trusted the appellant to provide that parental security and safety. The appellant abused that trust and forcibly dragged them to his bedroom and defiled them. That is reflected in the evidence of the victims of this crime.

I consider the offence in which appellant chose to defile his underage children as grave. There is a need for the appellant to be incarcerated for long periods for the safety of his children and in the best interest of their welfare. On this premise I confirm the sentence of life imprisonment imposed by the trial court.

Having addressed myself to the core issues raised in the memorandum of appeal I find no reason to venture into the application of Article 159 (2) of the Constitution 2010 on alternative dispute resolution.

The application of Section 137 of the Criminal Procedure Code is inapplicable for the reason that appellant is serving sentence for an offence that he underwent a full trial.

DECISION

In a nutshell any decision by this court should always be made to safeguard and protect the right of the child to ensure it is for her/his best interest. All the factors and circumstances of this case do not favour the appellant to invoke Article 159 (2) of the Constitution. Article 159 (2) deals with alternative dispute resolution mechanism. The dispute between the victim and appellant has been determined through the due process of the law. The trial court decided on the issues by convicting and sentencing the appellant. The

appellant is serving sentence. Article 159 (2) is not available to aid the appellant at this stage. The application lacks merit. It is summarily dismissed.

In the result this appeal is dismissed. I uphold both conviction and sentence of the trial court.

Dated, delivered in open court at Kajiado on 12th day of July, 2016.

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R. NYAKUNDI

JUDGE

Representation

Appellant - present

Mr. Akula Senior Prosecution Counsel

Mr. Mateli Court Assistant