REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

H.C.CR.A171 OF 2012

J M M ...……..…….....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(Being an appeal from theoriginal conviction and Sentence of the Resident Magistrate's Court at Machakos by Hon. E.K. Too (RM)) in CriminalCase No. 1909 of2012 dated2nd November 2012)

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(Before E. Ogola J)

JUDGMENT OF THE COURT

1. The Appellant, J M M**,** was charged and convicted with the offence of **defilement** contrary to **Section 8 (1)** as read with **Section 8 (2)** of the **Sexual Offences Act No. 3 of 2006**. The particulars of the charge were that on the 14th day of November 2011, in **Athi River District** within **Machakos County** in **Eastern Province**, the Appellant intentionally and willfully caused his penis to penetrate the vagina of the Complainant a girl aged 9 years and who was to his knowledge his niece. The trial court convicted the Appellant and sentenced him to life imprisonment. Being dissatisfied with the conviction and sentencing, the Appellant has filed this appeal, based on the grounds that:-

i. The conviction is bad in law and manifestly unsafe.

ii. Burden of proof not discharged.

2. The Appellant's case is that the conviction was bad in law and manifestly unsafe in that the same was based under the provisions of **Section 8 (1)** as read with **Section 8 (2)** of the **Sexual Offences Act No. 3 of 2006**, whereas the charge was substituted pursuant to **Section 214 (1)** of the **Criminal Procedure Code** to read **incest** under **Section 20 (1)** of the **SexualOffences Act No. 3 of 2006**. The Appellant's case is that he was substantially prejudiced in that he was convicted without knowledge or unreasonable expectation that he would be convicted under the initial charge amended or under a different section than the one upon which he gave his defence contrary to **Section 20 (1)** of the **Sexual Offences Act No. 3 of 2006**. The Appellant further states that the provisions of **Section 150** of the **Criminal Procedure Code** was violated in that a crucial witness namely **R** who was on the same bed where the complainant was allegedly defiled was not summoned. Lastly, the Appellant's case is that the burden of proof was not discharged.

3. With regard to the burden of proof, the Applicant relied on the several cases attached, and submitted

that the same was not discharged. The Applicant submitted that PW3 informed the court that on the 14/11/2011 at 2 a.m. she was at the Appellant's house having gone there since she was afraid of her father. It was the Complainant's evidence that she slept with the Appellant and her aunt in the same bed. The Appellant submitted that it is a matter of grave concern that the trial magistrate sought not to enquire as to why the prosecution opted not to call the third person to give evidence as a corroboration of Complainant's claim. In her evidence, the Complainant stated that:-

> ***"On 14/11/12 at 2 a.m. I was at the accused's home. I had gone there because I was afraid of being beaten by my father and I slept there with his wife R, myself and him. We slept on the same bed and he opened my clothes and removed my underpants. I did not hear the accused removing his underpants. I did feel when he put his penis into my vagina."....***(Pg. 19 line 7-11.)

4. According to the above testimony, it is the Appellant's case that his wife **R** ought to have been summoned to give evidence in court more so given that it defeats reasons as to how a man can defile a minor while sleeping with the wife. The Appellant submitted that **Section 150** of the **Criminal Procedure Code** demands for the summoning of such vital witnesses, and that in this case **R** was an essential witness and her evidence was of crucial importance for the just decision of the case. The Appellant's case was that failure to call the said R was not only prejudicial to the Appellant but was detrimental to the prosecution's case. The Appellant cited the case of **John Kenga –vs Republic, Criminal Appeal No. 1126 of 1984 (CA)** at **Nairobi**in which the Appellant was acquitted because some of the witnesses were not summoned to clear doubt of their arrest especially those who arrested him. The rule with regard to non-summoning of a crucial witness was quoted in the **Case of Bukenya& Others –vs- Uganda (1972) E.A 549** thus:-

> ***"The law as it presently stands is that prosecution is obliged to call all witnesses who are necessary to establish the truth in a case, even though some of those witnesses' evidence may be adverse to the prosecution case. However, the prosecution is not bound to call a plurality of witnesses to establish a fact where, however the evidence adduced barely establishes the prosecution case and the prosecution withholds a witness, the court, in an appropriate case is entitled to infer that had this witness been called his evidence would have been adverse to the prosecution's case."***

5. The Appellant further submitted that the doctor established that the Complainant was infected with a sexually transmitted disease but the prosecution did not establish as to the origin of that infection.

6. The Appellant's case is that the prosecution was duty bound to establish the origin of the said sexually transmitted infection referred to as urethritis. PW1 was called as an expert on medical evidence and disclosed to the court that whoever broke the complainant's hymen infected her with a sexually transmitted disease known as urethritis. It is the Appellant's case that the trial magistrate ought to have required the prosecution to prove the origin of the disease.

7. Further, the Appellant submitted that the complainant was allegedly defiled on 14/11/2011 whereas she was examined on 1/12/2011. The Appellant submitted that the lapse between 14/11/11 to 1/12/2011 created another doubt on the prosecution's case. The victim might have been defiled within that period otherwise why wasn't she examined soon after the commission of the incident? The Appellant submitted that the case was not proved beyond reasonable doubt and so the appeal should be allowed.

8. The prosecution opposed the appeal, citing provisions of the law, and submitting that the conviction was based on evidence proved beyond any reasonable doubt. The prosecution further stated that the original charges of defilement contrary to **Section 8 (1)** as read with **Section 8 (2)** of the **Sexual Offences Act No. 3 of 2006** were later amended to incest contrary to **Section 20 (1)** of the said **Act**, and that the said amendment did not occasion any miscarriage of justice.

9. I have carefully considered the appeal and the grounds of the same. This being the first appeal I have also reviewed and re-evaluated the evidence. In my view, the following issues are relevant for determination:-

i. Was it lawful to convict the Appellant of a Sexual Offence even though he was not charged with it in the first place?

ii. Was the conviction based on evidence procured beyond reasonable doubt?

10. I will determine the said two issues together. In his first ground of appeal, the Appellant contends that his conviction was bad in law and manifestly unsafe since he was convicted on an offence of defilement instead of incest. **Section 179** of the **Criminal Procedure Code** provides for convictions of offences other than those charged. Section 179 (2) states:-

"When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it".

Further **Section 186** of the **Criminal Procedure Code** with regard to offences under **Sexual Offences Act** allows court to convict a person charged with a sexual offence even though he was not charged with it if the court is of the opinion that he is not guilty of the offence but that he is guilty of another offence under the **Sexual Offences Act**.

11. Based on the above reasons the conviction was not bad in law, the trial magistrate acted within the law by convicting the Appellant on the offence of defilement even though he had been charged with incest. Further, even if there were any discrepancies on the judgment and conviction of the Appellant, it is not fundamental as to cause prejudice to the Appellant or to alter the conviction.

12. The Appellant also contends that provisions of **Section 150 CPC** was violated by failing to summon a witness (Rose) who is the Appellant's wife. It is safe to convict on single witness evidence as long as the evidence is not inconsistent. In this case there was not only a single witness but prosecution called several witnesses who corroborated the evidence of the complainant and there was no inconsistency. It is the prosecution to call witnesses necessary to establish the truth in a case; however, the prosecution is not bound to call a plurality of witnesses to establish a fact. Further the witness in question was asleep and did not hear or witness anything at the time of commission of the offence. The Appellant was given the chance to prepare for his defence and call witnesses. He could have called the witness in question (his wife) to testify to his advantage if he believed her testimony would have absolved him of the offence. He cannot now turn around and blame the prosecution. The said witness is his wife and nothing stopped him from calling her to testify on his behalf. Therefore, **Section 150** aforesaid, which is a discretion on the part of the court, cannot assist the Appellant.

13. Further the Appellant contends that the burden of proof was not discharged and that the prosecution did not prove its case beyond reasonable doubt on the basis that the prosecution failed to establish the cause or origin of the sexually transmitted disease. However, proof of the origin of the disease was not relevant. The issue was penetration of the Appellant's penis into the Complainant's vagina. The same reasoning applies to the allegations that the case was not proved beyond reasonable doubt because the Complainant was examined several days after the commission of the alleged offence. The ingredient to be proved here is the act of penial vaginal penetration on the alleged date. Prosecution proved its case beyond reasonable doubt.Medical examination on the Complainant which was proven by P3 form (Pex 1) proved penetration occurred as the hymen was broken, an age assessment report (Pex.4) showed the complainant was 8 and a half years old.An age assessment report (Pex 7) and Child Welfare Clinic Card (Pex 1) showed the Complainant was 12 years old.

14. Pursuant to the foregoing paragraphs of this judgment, it is the finding of this court the said conviction was safe and that the appeal herein lacks merit. On the issue of sentence the law provides for a minimum of 20 years imprisonment. The Accused was sentenced to life imprisonment.

15. In my considered view, the minimum sentence of 20 years is adequate punishment for the offence. So, while I dismiss the appeal, I herewith substitute the **life sentence** with an **imprisonment term of 20 years**. The appeal is dismissed. The life sentence is replaced with imprisonment for **twenty (20) years**.

That is the Judgment of the court.

Dated and **delivered** at **Machakos** this **14th**day of **September20**16.

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E. OGOLA

JUDGE