REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL CASE NO. 2 OF 2014

SMK…….....…APPELLANT

AND

REPUBLIC……..….RESPONDENT

Being an appeal from the judgment of the Principal Magistrate's Court (M. Onkoba), Gichugu Sexual Offence Case Number 10 of 2013 delivered on 27th December, 2013)

JUDGMENT

1. **SMK** , the appellant in this appeal was charged with the offence of incest contrary to ***Section 20 (1)*** of the **Sexual Offences Act No. 3 of 2006** before Principal Magistrate's Court at Gichugu Sexual Offence Case No. 10 of 2013. He also faced an alternative charge of committing an indecent act with a child contrary to ***Section 11(1)*** of the **Sexual Offences Act No. 3 of 2006**. Of relevance to this appeal however, is the principle charge of incest whose particulars as per the Charge Sheet presented at the trial court were that on the 6th day of May, 2013 at [particulars withheld] Village Kirinyaga East within Kirinyaga County being a male person caused his penis to penetrate the vagina of (name withheld) a female who was to his knowledge his grand daughter.

2. The prosecution called a total of 4 witnesses to prove its case while the Appellant called one witness in his defence. The trial court upon assessing evidence tendered found the appellant guilty of the offence of incest contrary to ***Section 20 (1)*** of the **Sexual Offences Act** and convicted him sentencing him to life imprisonment.

3. In summary the prosecution case against the Appellant rested on the evidence of the four witnesses summoned to testify at the trial. The trial court was told by P.W. 1 – **JMM** an aunt to the victim that on 6th May, 2013, the complainant, a child aged 2 ½ years went to her crying complaining of pain and pointing to her private parts. She told the trial magistrate that upon examining her she noticed that her genitalia was covered with whitish substance and discharge which she found quite abnormal for a child of that age. She sought help from other women in the neighbourhood and told the trial court that when they asked the child what had happened, she told them that her grandfather, the Appellant herein had committed the act that caused her much pain and discomfort. A report was made the following day on 7th May, 2013 at Kianyaga Police Station after which she added that the child was taken for treatment at Kianyaga sub district Hospital where the medical officer confirmed that the minor had been defiled. The witness also added that the minor later refused to go back to her grandfather (the appellant herein) where she used to stay.

4. The evidence of P.W.1 (JMM) was corroborated and confirmed by the victim (P.W.2) (name withheld) who told the trial court that she felt pain when the appellant put something she could not quite describe into her private part. The evidence of defilement was further corroborated by the clinical officer, **Stephen Ngige** (P.W.4) who treated the victim and filled the P3 form (Prosecution Exhibit 1) the treatment card (Prosecution Exhibit 2) and also produced laboratory form (Prosecution Exhibit 3). He told the trial court that he found the child victim to be aged about 2 ½ years which he indicated on the P3 form. He further added that upon examination he found that the clitoris was torn and oedematous. In his opinion there was penetration and hence defilement of the minor. The evidence of the investigating officer **Naomi Ndawa** (P.W. 3) explained the steps taken by the said officer after receiving the report on sexual assault of the minor. She dispelled the Appellant's contention that the minor had been defiled by the Appellant's son telling the trial court that the minor clearly implicated him (the appellant) at the Police Station where the Appellant had taken his son after the report had been made.

5. When put to his defence, the Appellant denied on oath of committing the offence. He told the trial court that he was the one who took the child to Police Station when he heard that she had been defiled. He further added that he could not do such a heinous act and that he was staying with the child and other children as their grandfather because their parents were not there and that his wife had died in the year 2005. He further added that owing to his HIV status, he had decided not touch any woman and had abstained from any sexual activity. He expressed surprise why his son, Murimi was released by the Police. He opined that the child may have mentioned him because he was the only person whom she knew because he was staying with her.

6. The only witness called by the Appellant **C K C** (D.W.2), told the trial court that the victim used to stay with the Appellant as the grandfather, after the child's father was jailed for five years in addition to the child's mother taking off as a result. He further told the trial court that he was aware that the Appellant was sick and HIV positive and that the minor could have been infected if it was true that she had been defiled by the Appellant. He further confirmed that he was a brother to the Appellant but that each lived in separate houses and could not recall where he was on 6th May, 2013 when the incident took place.

7. The trial court on the basis of the evidence tendered found the Appellant guilty of committing the offence and dismissed the Appellant's defence as a mere denial "of an offence he so callously and insensitively committed against his own grandchild". He then convicted him and sentenced him to life imprisonment as provided by law.

8. The Appellant felt aggrieved by both the conviction and sentence meted out against him and filed this appeal raising the following 8 grounds namely:-

(i) That he pleaded not guilty.

(ii) That the learned trial magistrate erred by law and fact by basing his judgment on the evidence of the minor (P.W.2) and failed to consider that she was coached by P.W.1.

(iii) That the learned trial magistrate erred in law and facts by basing his judgment on weight of P.W.2 (minor) who was not able to speak properly but could only mention the name "GUKA".

(iv) That the learned magistrate erred in law by basing his judgment on the evidence of P.W. 1 who was not an eye witness.

(v) That the learned trial magistrate erred in law and facts by failing to find out that the evidence adduced by the medical officer had actually absolved the Appellant from wrong doing.

(vi) That the learned trial magistrate erred in law and fact by failing to find that the conviction was against the weight of the evidence adduced.

(vii) That the trial magistrate erred in law and facts by handing him a harsh sentence given that

he was a first offender.

(viii) That the learned trial magistrate erred in law and fact by not considering his defence and his advanced age of 69 years.

9. The Appellant also added some additional grounds of appeal with the leave of this Court which were as follows:

(ix) That the trial magistrate erred by misdirecting himself on the fact that the victim was found to be HIV negative while the Appellant was HIV positive.

(x) That the trial magistrate erred in law and fact by not considering that the evidence of P.W.1 and P.W. 3 were inconsistent in so far as the place where a report about the incident was made.

(xi) That the learned magistrate erred in law and fact by finding that penetration had been proved when there were doubts especially given the medical evidence tendered at the trial.

10. In his hand written submissions the Appellant submitted that the charge against him was wrongly framed and that the same was not proved beyond reasonable doubt as required by law. He has contended that he is the one who took the child to the Police Station and could not have done so if he was responsible for the incest. It has been further contended that the Appellant was framed up. He further contended that there was no proof of penetration.

11. The Respondent through Mr. Sitati learned counsel for the Director of Public Prosecutions opposed this appeal and supported the finding of the trial court on the guilt of the Appellant and the sentence meted out submitting that ***Section 20 (1)*** of the **Sexual Offences Act No. 3 of 2006** provides for life imprisonment as a minimum sentence. On the question of proof of penetration, the Respondent responded that there was proof of penetration and pointed out that the evidence of the complainant (P.W.2) and the clinical officer (P.W.4) who produced the P3 (Prosecution Exhibit 1) and treatment chit (Prosecution Exhibit 2) established and proved that there was penetration. This court has considered the evidence tendered by P.W. 1, (JMM) an aunt of the complainant and the evidence of the minor or the victim and the evidence of P.W.4 (Stephen Ngige) the clinical officer. The evidence were well assessed by the learned trial magistrate in his judgment and I find sufficient basis for the conclusion made by the learned trial magistrate that penetration had indeed been proved. Although P.W.1 told the trial court that she washed away the whitish substances she noticed on the child's genitalia, the clinical officer was able to notice "foul smell from the vaginal discharge" from the complainant besides the findings observed from the victim's genitalia; "clitoris was torn and oedematous". These findings by the witness (P.W.4) corroborated the evidence of P.W.1 and P.W.2 and in my view proved that there was penetration. The ground by the Appellant that penetration was not proved in my considered view lacks any merit. In fact at the trial, the Appellant did not challenge the fact that the minor had been sexually molested. He only denied that he was involved so the issue of penetration was clearly established and proved at the trial without any challenge by the Appellant.

12. The Appellant has raised the fact that he could not have been involved with the offence in view of the laboratory results which showed that the child was found to be HIV negative when he himself was HIV positive. I have looked at the laboratory test results (Prosecution Exhibit 3) which showed that the test on the minor/victim was done one day after the incident (7th May, 2013) and the fact that the child was found to be HIV negative in my view does not negate the fact that she had been sexually assaulted. Chances are (despite the lack of medical evidence adduced) that the virus had not yet manifested itself in the blood samples taken from the victim that is why the medical officer put the victim on post exposure prophylaxis to protect the minor from any infection. That however, is besides the necessary ingredients required inestablishing the offence that the Appellant was charged with.

13. The Appellant has also contended that the minor was coached on how to testify at the trial court saying that the minor could not properly speak but could only mention the name "GUKA". I have considered the unsworn evidence taken from the minor indicated to be aged 2 years old or thereabout. It

is true that the record shows that the child had difficulties in speaking as per the record of proceedings at the trial, but the same is not unexpected of a toddler that age. The trial court in its judgment observed that she "was simply a tiny child who could hardly describe her body parts. The only way she could identify her genitalia was by simply pointing at it." The trial court nonetheless found useful evidence from the minor linking the appellant with the offence and the same is well captured in its judgment. The trial court in my view cannot be faulted for placing weight on the evidence of the minor. The evidence of the minor was corroborative to what the child's aunt (P.W.1 – JMM) had already told the trial court. It is also true and expected that the minor could not have called the Appellant by any other name but "GUKA" because that is what he was to the minor – the grandfather. The minor knew who had defiled her and told the trial magistrate who the culprit was and that in my considered view clearly and positively identified the Appellant as the person responsible for the offence committed against a hapless toddler – the complainant at the trial.

14. It is true that JMM (P.W. 1) was not present when the incest took place but that ground on its own cannot absorb the Appellant from blame. Crimes of this nature are normally committed in secrecy and the law does not require that an eye witness must be present for a conviction to be found. The provisions of ***Section 124*** of the **Evidence Act**, clearly requires no corroboration in sexual offences which is desirable. I have considered evidence tendered including that of P.W.1 and the clinical officer (P.W.4) clearly corroborated the evidence of the minor. Penetration, which is a key ingredient in sexual offences, was established and proved at the trial. I agree with the Respondent that it is immaterial whether or not the minor contracted HIV from the culprit (the Appellant in this case) what is material in law is that there was penetration. The Appellant has acknowledged voluntarily about his HIV status and if he actually knew that he was sick and proceeded to deliberately defile the minor knowing that the child would get infected, then it would mean that he was equally guilty of the offence defined under ***Section 26 (1)*** of the **Sexual Offences Act** and should have been charged and tried for that offence as well.

15. On the issue of contradictions by the witnesses particularly on where the incident was first reported, I find that there was no material contradiction between what P.W. 1 (JMM) told the trial court and what P.W. 3 (Naomi Ndawa the investigating officer) stated in evidence. This is because P.W. 1 told the trial court that they first went to Gichonjo Administration Police Camp where they were referred to Kianyaga Police Station where they found P.W.3 and reported the incident. P.W. 3 then took action by booking the report and escorting the witness and the child to Kianyaga sub-District Hospital for examination and treatment. I find the evidence of the 2 witnesses consistent contrary to the submissions by the Appellant.

16. The Appellant has also contended that the trial court never considered his defence but I have looked at the judgment of the learned trial magistrate and noted that the learned magistrate considered each and every aspect of the defence raised including the evidence of his witness. His attempt to pass the buck to his son called Murimi, at the Police Station and at the trial could not hold any water because the minor clearly pointed at him (appellant) as the culprit. The evidence of D.W. 2 (CKC) his brother could not assist him because he clearly told the trial court that each person (Appellant and the witness) stayed in their own different houses and could not tell where he was on 6th May, 2013 when the incident took place. The trial court clearly weighed the defence tendered on the scales of justice and found that the prosecution case was overwhelming. P.W. 1 told the trial court that when she tried to tell the minor to go back to the Appellant's house, the child refused and this in my view suggests that the child was traumatised by the episode perpetrated by the Appellant. The child obviously could not have been coached to fear the Appellant if he was a good grandfather to the minor as has submitted. The appellant was fully responsible and his actions were clearly and aptly described by the learned trial magistrate – rude, shocking, despicable and heinous. There is no other way to describe the said actions and I find the descriptions and the adjectives used correct and appropriate in the circumstances.

17. The Appellant has also contended that the sentence meted out against him was too harsh given his age and the fact that he is a first offender. It is true that he was a first offender but he was a worst possible one at that defiling a 2 ½ year old when he knew about his HIV status. Besides this, ***Section 20 (1)*** of **Sexual Offences Act** provides as follows:

> ***"If it is alleged in the information or charge and proved that the female person is under the age***

of 18 years, the accused 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."

The child in this case was aged 2 ½ years as per the evidence tendered by the clinical officer and observations made by the trial court. The age of the minor was not a contested issue or in this appeal and therefore there is no contest that the child was of tender years or below 18 years as provided in the above cited section. The learned trial magistrate had discretion to hand the Appellant the penalty as prescribed by law upon the guilty verdict. The Appellant has said that the trial court never made any finding on the alternative charge of indecent assault but the magistrate was perfectly in order to make a finding only in the principle charge of incest. There was no need or any obligation to make any other finding on the alternative charge in count II on the charge sheet.

The trial court exercised its discretion in handing the Appellant the life sentence which is the maximum sentence provided by the law as cited above but this Court being an appellate court can only interfere with the exercise of the said discretion if material factors were overlooked or that the sentence was excessive and founded on erroneous principles. The Appellant has not pointed out any material factors overlooked by the learned trial magistrate. The Appellant herein having conceded that he knew his HIV status and having deliberately risked infecting a 2 ½ year old child must have mitigated against him being given a lesser sentence. I find no basis as well given the circumstances to interfere with the harsh sentence meted out against the Appellant. I find the sentence justified in the circumstances.

In the premises, this Court finds no merit in this appeal. The same is dismissed. Conviction and sentence are upheld.

Dated and delivered at Kerugoya this 4th day of October, 2016.

R. K. LIMO

JUDGE

4.10.2016

Before Hon. Justice R. K. Limo J.,

Court Assistant Naomi Murage

State Counsel Mr. Omayo

Appellant present

Interpretation English/Kikuyu

Omayo for State

Simon Muthike Kimani appellant in person present.

COURT: Judgment signed, dated and delivered in open court in the presence of appellant Simon Muthike Kimani in person and Omayo for respondent.

R. K. LIMO

JUDGE

4.10.2016