REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 13 OF 2012

PGK……..…….. ……..…….APPELLANT

-VERSUS-

REPUBLIC…….....…….…….....RESPONDENT

(An appeal from the conviction and sentence of the Senior Principal Magistrate's Court (Ndungu H. N. (Miss)) at Kerugoya, Criminal Case No. 400 of 2011 dated 13h February, 2012)

JUDGMENT

1. **PGK,** the appellant herein had been charged with defilement contrary to ***Section 8 (1) (4)*** of the **Sexual Offences Act** No. 3 of 2006 before **Kerugoya Senior Principal Magistrate's Court Criminal Case No. 400 of 2011.** The Appellant also faced a second count of indecent assault on a female contrary to ***Section 11 (1)*** of the **Sexual Offences Act** No. 3 of 2006. The particulars given on the first count for which he was convicted were that on the 3rd March, 2011 in Kirinyaga County, the Appellant defiled PWG, a child aged 16 years. As indicated above, he was found guilty on the principal count and convicted and sentenced to serve 20 years imprisonment. He was dissatisfied both with the conviction and sentence and preferred this appeal and raised eight grounds.
2. The grounds raised in the petition are as follows:

(i) That he pleaded not guilty.

(ii) That the learned trial magistrate erred in law and facts by relying on evidence of a single witness that she relied on the evidence of P.W.1 which was unreliable as she told the court that he sexually harassed the complainant but the examining medical officer in his evidence said there was no spermatozoa found on the complainant vagina (sic).

(iii) That the learned trial magistrate erred in law and facts by failing to consider that he was not taken for medical check ups to ascertain whether he actually committed the said offence.

(iv) That the learned trial magistrate erred in law and fact by relying on uncorroborated evidence of P.W.1 which was contradicted by P.W.2.

(v) That the learned trial magistrate erred in law and fact by refusing to recall the complainant for further cross examination and thereby denied him a fair trial by being biased (sic)

(vi) That the learned trial magistrate erred in law and fact by failing to consider the

appellant's defence and mitigation which was not shaken by prosecution (sic).

(vii) That the sentence meted out against him was manifestly harsh and excessive.

(viii) That the learned trial magistrate erred in law and fact by not considering the inconsistence on the prosecution who never produced any exhibit concerning the offence.

3. The Appellant's counsel and the learned State counsel for the Respondent agreed to dispose of this appeal vide written submissions and this Court allowed them to do so. I will begin by considering the Appellant's written submissions made on his behalf by his learned counsel Miss Wangechi Munene.
4. The first ground of appeal appears misplaced and baseless. The Appellant pleaded not guilty to charge when it was read over to him when the plea was taken and that is why the case went for trial so for him to come to this Court and say that he ought not to have been convicted on account of his plea is really superfluous and it is no wonder that the Appellant's counsel abandoned it in the written submissions.
5. In his submissions in support of the petition of appeal the Appellant has contended that the prosecution's case at the trial was full of inconsistencies which he submitted casted doubts in the prosecution case. He pointed out that the complainant testified at the trial court that she was defiled on two occasions (3rd March, 2011 and 25th March, 2011) by the Appellant but that the mother never collaborated the evidence especially the fact that she felt sick at school and on coming home to rest she was defiled by the Appellant for the second time. The Appellant further faulted the prosecution for not calling the teacher who noticed that the child was sick to testify at the trial.
6. The Appellant has further pointed out that the mother (P.W.2) to the complainant never noticed anything unusual and only got alarmed when she noticed that the girl (complainant) had not used her sanitary pads.
7. The Appellant has in addition to the above pointed that the complainant had told the Court she had gone to Kiangombe dispensary on 26th March, 2011 where she was treated for malaria but that no treatment card was produced and that P.W.2 did not corroborate the same evidence.
8. On the question of contradiction, the Appellant pointed out that the complainant told the trial court that she was prodded by the mother because she was crying until she confessed what had happened to her. the mother (P.W. 2) had reportedly told the trial court that she prodded the complainant after realizing that she had not used her sanitary pads. He wondered why it took two weeks for the mother to take action.
9. The Appellant's further contention on the question of contradictions and inconsistencies is that P.W. 3 who was the clinical officer who had examined the complainant told the trial court that the observations he made were longstanding and more than 3 weeks old and this according to the Appellant contradicted the treatment note which indicated *inter alia* that there was no tenderness or tears noted.
10. He further raised a new ground different from what was raised in the petition and this is the fact that the pregnancy that resulted from the defilement did not complete full term because the girl allegedly gave birth on 13th October, 2011 instead of sometime in December if the normal gestation period is anything to go by. This ground was raised without leave contrary to ***Section 350 (2)*** of the **Criminal Procedure Code**. I am therefore not inclined to consider it and even if I was to consider it my findings would not have been any different from the finding of this Court in its considered ruling on the issue of bond pending appeal.
11. The Appellant has also raised the question of D.N.A. test which he says he was ready to take to prove his innocence and the fact that the complainant's age was not proved. These grounds were not raised in the petition and were raised at the submission stage without leave of this court as provided by the law as cited above. The same is incompetent and cannot be considered by this Court.
12. The Respondent through the office of Director of Public Prosecution represented by Mr. Omooria, learned principal counsel, opposed this appeal through written submissions dated 5th August, 2015. In his view the evidence adduced by the prosecution against the Appellant at the trial was overwhelming.

13. Mr. Omooria submitted that the evidence adduced at the trial court indicated that the complainant (P.W.1) a child then aged 16 years was defiled on 3rd March, 2011 after leaving school for home by her own father and threatened with death if she revealed the incident. He submitted that on 25th March, 2011 she fell sick and went home from school and on arrival the Appellant defiled her again. He submitted that her attempts to inform her grandfather were futile and eventually she told her mother (P.W.2) who took action by reporting to the Police and upon being taken to hospital for examination she was found to be 2 weeks pregnant as a result of the defilement.
14. The Respondent further submitted that the P3 and treatment notes produced at the trial as exhibits 1 and 2 respectively demonstrated that the offence had been committed coupled with the clinical officer's (P.W.3 Hezron Macharia Maina's) evidence which corroborated the minor's evidence that she had been defiled and pointed out that the age of the pregnancy was consistent with the date of the defilement.
15. On the question of age the State submitted through learned State counsel that P3 established beyond doubt that the minor was aged 16 years old. He further submitted that identification was positive as the complainant found her father alone at home who defiled her.
16. On the submissions that the child, the product of defilement was born before expiry of the normal nine (9) months, Mr. Omooria submitted it was possible for a child to be born before the normal gestation period of nine months and added that the conviction of the Appellant in any event was not based on the pregnancy but other proof that established that defilement had taken place.
17. On the authorities cited, the Respondent submitted that the same were not binding and inapplicable in the present case as the age of the complainant was proved.

On the defence adduced at the trial, the State submitted that the Appellant gave unsworn evidence and called no evidence. The State further submitted that the Appellant did not open himself for cross-examination and the fact of being framed up could not hold any water and urged this Court to disregard the same.

18. On the issue of the charge that faced the Appellant, Mr. Omooria submitted that the Appellant was convicted of defilement but the evidence adduced clearly showed that he was the father which meant that he ought to have been charged with incest and convicted of the same and urged this Court to invoke its powers under ***Section 354*** **Criminal Procedure Code** and amend the charge to reflect incest by male contrary to ***Section 20 (1)*** of the **Sexual Offences Act** No. 3 of 2006 and sentence the Appellant to life imprisonment.
19. I have considered the petition of appeal herein and the written submissions made by the Appellant's counsel. I have considered the written submissions made by the Office of the Director of Public Prosecutions for the Respondent. I have already dwelt on some of the new grounds improperly made by the Appellant at the submissions stage without leave of this Court as aforesaid and in accordance with the law. This appeal has raised the following important issues for consideration and determination by this appellate court. They are as follows:

a. Whether the key ingredient (read penetration) of the offence was established and proved.
b. Whether the identity of the offender was proved.
c. Whether the evidence adduced supported the charge and whether the conviction was correct.
d. Whether the sentence meted out was excessive.

a. **<u>Whether penetration was established and proved at the trial</u>**.

20. I have looked at the proceedings of the trial court and in particular the evidence adduced by the prosecution before the said trial court.
21. The work of an appellate court in a first appeal is to re-evaluate the evidence tendered and determine if the trial court was correct in making the findings and the conclusions made based on what was adduced during trial taking cognizance of the fact that the trial court normally has the benefit of seeing the witnesses first hand and able to observe their demeanor as they testify. It is important to take note of this in regard to finding of facts such as a finding that a witness is found to be truthful, upright, unmoved or shaky etc. These findings especially in regard to demeanor of witnesses as they testified is normally a challenge to be dispelled unless an appellant is able to

demonstrate that the finding is inconsistent with the evidence tendered thereof. Now to go back to the issue at hand, the Appellant contended in his submission that the offence was not proved beyond reasonable doubt. I have looked at the evidence of P.W.1 PWG or the complainant at the trial court. She gave a graphic details of what happened to her on the sofa at their home at the hands of the Appellant when she went back home from school on 3rd March, 2011. She told the trial court that she was all alone with the Appellant at the material time as her siblings were still away at school. After the act, she told the trial court that she was threatened with death if she revealed to anyone what had happened but she eventually did as a result of which a report was made to the Police and the eventual examination at Kerugoya District Hospital where it was revealed that she was indeed pregnant. The examination was done on 16th April, 2011 as per the evidence of the clinical officer (P.W.3) Mr. Hezron Macharia Maina. This is what he told the trial court in part;

> ***"On examination she had distended abdomen and was pregnant. Offence was defilement. Patient aged 16 years. On examination hymen absent……..…injuries were long standing consistent with more than 3 weeks."***

22. The clinical officer further produced P3 form as exhibit No. 2 which indicated that the child was defiled on two occasions on 3rd March, 2011 and 25th March, 2011. So it is clear that the evidence of the minor (P.W.1) got more weight from the medical evidence which was consistent with what she said happened to her. It is also important to note that in sexual offences, conception is not one of the requisite elements required in law. As submitted by Omooria, the key ingredient to be established and proved is penetration. Penetration is a key ingredient in establishing a sexual offence. Furthermore ***Section 124*** of **Evidence Act** provides that the evidence of the victim even on its own can lead to a conviction so long as the trial court has basis to be recorded that the minor/victim is telling the truth. Such is the standard of proof required and it is for good reason because in normal circumstances such incidences occur in private or enclosures where there may be no eye witnesses so the bar had to be lowered by statute for the interest of justice.
23. I have however, carefully considered the evidence adduced at the trial court in this case and find that the evidence of the minor was well corroborated by medical evidence adduced in addition to the evidence of the mother (P.W.2). In my view the trial court was correct in the assessment of evidence adduced and the conclusion arrived at which was the fact that penetration had been proved. The learned trial magistrate found the complainant to be honest and truthful and had reason to believe her and given the circumstances of this case the trial court cannot be faulted.

b. **Whether the identity of the offender was proved**

24. The complainant told the trial court that her own father turned on her and defiled her on 2 different occasions that is on 3rd March, 2011 and on 25th March, 2011. The Appellant told the trial court in his unsworn testimony that he was framed but the learned trial magistrate was not convinced. Though the Appellant has stated in his Petition that his defence was not shaken by prosecution, he actually made sure that the veracity of his defence was not opened for test by giving unsworn defence. I find that the evidence given in defence at the trial was shaky and could not stand the weight of evidence given by the prosecution. The complainant was the daughter of the offender and it was highly unlikely that a girl of that age could lie about something so grave as to what happened to her not once but twice. This Court finds that the trial court was correct based on the evidence adduced that the Appellant was positively identified. He had the means and the opportunity to commit the heinous and despicable act as he was home alone with her daughter who got pregnant as a result.
25. **(c) Whether the evidence adduced supported the charge**

that faced the Appellant.

I have looked at the Charge Sheet and note that the Appellant was charged with defilement as aforesaid contrary to ***Section 8(1) (4)*** of the Sexual Offences Act. The particulars that were given however,

showed that the offence occurred on 3rd March, 2011 while the evidence adduced actually demonstrated that the offender was the father and that the girl was defiled on two different occasions as aforesaid that is 3rd March, 2011 and 25th March, 2011.

26. This Court finds that the prosecution and the trial court should have done better than what they did for the interest of justice. This Court finds that the evidence adduced actually disclosed a more serious offence other than the one that the Appellant was charged with. The relationship between the offender and the victim showed that incest had happened. ***Section 20 (1)*** of the **Sexual Offences Act** defines this offence 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 not less than 10 years……..***

27. The learned Senior State counsel for the Respondent submitted that the Appellant ought to have been charged with incest and urged me to correct the anomaly by invoking my inherent power under ***Section 354*** of the **Criminal Procedure Code** by having the charge amended to reflect incest and impose the right sentence of life imprisonment but amending the charge at this stage is not tenable in law. I have however, looked at the provisions of ***Section 184*** and ***186*** of the **Criminal Procedure Code** and note that the spirit of the law shows that where a person is charged with either rape or defilement but the trial court is of the opinion that the person is guilty of any other offence under the **Sexual Offences Act**, he can be convicted of that offence even if he was not charged with it in the first place. On the strength of evidence adduced, I do find that the trial court ought to have invoked those provisions of the law to correctly convict the Appellant at the trial and I do find that the trial magistrate fell into error when he convicted the Appellant on defilement when the evidence adduced by the prosecution glaringly demonstrated that the Appellant was guilty of incest. This is where the law under ***Section 354 (3) (ii)*** and ***(iii)*** comes into play. I am satisfied that based on the evidence adduced by the prosecution at the trial, it is proper and right for this Court to not only dismiss this appeal for lack of merit but to invoke the said provisions and set aside the conviction and sentence passed against the Appellant. In its place I substitute the conviction with that under ***Section 20 (1)*** of the **Sexual Offences Act** for which the Appellant should have been found guilty of though not charged with the offence. The conviction of the Appellant is accordingly altered by this Court. He was guilty of incest by defiling his own daughter and ruining her life and perhaps career. He opined in his petition that the sentence of 20 years was harsh and excessive but I disagree. He is convicted for the offence of incest and given the age of the complainant, the only sentence prescribed by law is life which the Appellant actually deserves for what he did. He is therefore sentenced to life imprisonment. It is so ordered.

Dated and delivered at Kerugoya this 13th day of October, 2015.

R. K. LIMO

JUDGE

13.10.2015

Before Hon. Justice R. Limo

Court Assistant Willy Mwangi

Appellant present

Miss Magara for Appellant present

Omayo for State present

COURT: Judgment signed, dated and delivered in the presence of Miss Magara holding brief for Wangechi for appellant and Mr. Omayo for Respondent.

R. K. LIMO

JUDGE