

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.7 OF 2015

(An Appeal arising out of the conviction and sentence of Hon. C. Oluoch - PM delivered on 25th November 2014 in Kiambu CM.CR. Case No.101 of 2011)

C M K APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

The Appellant, C M K was charged with the offence of **incest** contrary to **Section 20(1)** of the **Sexual Offences Act**. The particulars of the offence were that on diverse dates between April 2013 and December 2013 within Kiambu County, the Appellant caused his penis to penetrate the vagina of R N, a child aged 10 years who was to his knowledge his step-daughter. He was alternatively charged with the offence of **committing an indecent act with a child** contrary to **Section 11(1)** of the **Sexual Offences Act**. The particulars of the offence were that on diverse dates between April 2013 and December 2001 within Kiambu County, the Appellant intentionally and unlawfully touched the vagina of R N, a child aged 10 years with his penis. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was convicted as charged on the main count of **incest**. He was sentenced to life imprisonment. The Appellant was aggrieved by his conviction and sentence and has filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that the trial court relied on unreliable evidence adduced by the prosecution witnesses to convict him. He was aggrieved that he was convicted on the basis of evidence which in his view did not establish his guilt to the required standard of proof on the main charge. He was aggrieved that his defence was never taken into consideration when the trial court reached its decision finding him guilty as charged of the offence. In the premises therefore, he urged the court to allow his appeal, quash his conviction and set aside the sentence that was imposed on him.

At the hearing of the appeal, the Appellant presented to the court written submission in support of his appeal. He urged the court to allow his appeal. On her part, Ms. Atina for the State opposed the appeal. She made an oral submission to the effect that the prosecution proved its case on the charge of incest against the Appellant to the required standard of proof beyond any reasonable doubt. She submitted that the complainant's evidence was corroborated by medical evidence. She submitted that the Appellant was identified as the perpetrator of the offence. According to Ms. Atina, the trial court considered the Appellant's defence before it reached its decision to convict him. For these reasons, Ms. Atina urged the court to dismiss the Appellant's appeal and confirm the conviction and sentence of the trial court.

The facts of this case are rather straight forward. The Appellant is the complainant's step-father. The Appellant and the complainant's mother lived separately at the material time. It was alleged that the

complainant's mother was mentally challenged. The complainant PW1 R N was alleged to have been ten (10) years during trial. According to her testimony, the complainant recalled being sent by her mother to pick vegetables from the Appellant. While at the Appellant's house, the Appellant asked her to spend the night there. She refused. In an effort to have the complainant stay for the night, Appellant promised to buy her a gift. The complainant remained at the Appellant's house. The Appellant asked the complainant to remove her clothes and she tried to run away. The Appellant got hold of her and removed her clothes. He also removed his clothes before having sexual intercourse with her on his bed. The complainant testified that she felt pain in her private parts. The Appellant threatened to cut the complainant with a panga if she ever disclosed what had transpired. The complainant testified that the Appellant had sexually assaulted her severally on previous occasions when she was sent to his house.

A neighbour of the Appellant became suspicious of the Appellant. She asked the complainant whether the Appellant had done bad things to her and she told her that he had. The neighbour took the complainant to Kiambu Police Station where she made a report. The police referred the complainant for medical examination at Kiambu District hospital. The complainant was examined by Dr. Mbatia on 14th January 2014. PW2 Dr. Kimama based at Kiambu District Hospital produced a P3 report which had been filled by his colleague Dr. Mbatia as *prosecution's exhibit No. 1*. According to the said medical report, the complainant's external genitalia was normal but her hymen was not intact. The doctor also noted that the complainant had a foul smelling brownish vaginal discharge. In the doctor's opinion, the brownish vaginal discharge indicated that some sperms had been deposited in the complainant's vagina. She was put on treatment. The treatment notes were produced into evidence as *prosecution's exhibit No.2*. An age assessment was also conducted on the complainant. She was found to be between the age of twelve (12) and 14 (years). The age assessment report was produced as *prosecution's exhibit No.3*. PW3 PC Joan Wang'ayo was assigned to investigate the case. After concluding her investigation, she concluded that indeed a case had been made for the Appellant to be charged with the offence for which he was convicted. When the Appellant was put on his defence, he denied committing the offence. He stated that he was framed with the offence.

This being a first appeal, it is the duty of this court to re-evaluate and to reconsider the evidence adduced before the trial court before reaching its own independent determination whether or not to uphold the decision of the said court. In doing so, this court is required to always keep in mind that it neither saw nor heard the witnesses as they testified and therefore give due regard in that respect (see **Njoroge –vs- Republic (1987) KLR 19**). The issue for determination by this court is whether the prosecution proved its case on the charge brought against the Appellant to the required standard of proof beyond any reasonable doubt.

Upon re-evaluating the evidence adduced by the prosecution witnessed, it was clear to this court that indeed the prosecution had established to the required standard of proof that the Appellant committed the offence of **incest**. Under **Section 8(1)** of the **Sexual Offences Act**, the prosecution was required to establish that there was penetration. And that the penetration was perpetrated on the child. Finally, the prosecution was required to establish the identity of the perpetrator. **Section 2** of the **Sexual Offences Act** defines penetration as ***“the partial or complete insertion of the genital organs of one person into the genital organs of another person”***. In the present case, the prosecution established that indeed the complainant, the victim of the sexual assault, was penetrated. The medical evidence produced by PW2, the doctor, established to the required standard of proof that the complainant was penetrated. Her hymen was broken. The prosecution established that the Appellant was the complainant's father. The Appellant did not dispute this fact.

In the present appeal, the prosecution produced an age assessment report for the complainant which established that the complainant was between the age of twelve (12) and fourteen (14) years at the time of the sexual assault. As regards the identity of the perpetrator, the complainant testified that it was the Appellant who had sexually assaulted her. The Appellant was known to the complainant as he is the complainant's father. There was no doubt that the complainant positively identified the Appellant. The Appellant's culpability was established to the required standard of proof beyond any reasonable doubt.

The appeal on conviction lacks merit and is hereby dismissed. The appeal on sentence similarly fails. The

sentence was legal. It is so ordered.

DATED AT NAIROBI THIS 5TH DAY OF NOVEMBER 2015

L. KIMARU

JUDGE