REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

CRIMINAL APPEAL NO. 14 OF 2015

BETWEEN

J O O ……..……..……APPELLANT

AND

REPUBLIC ……....…… RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 281 of 2013 at the Chief Magistrates Court at Homa Bay, Hon. P. Mayova, SRM dated 27th March 2015)

JUDGMENT

1. The appellant, **J O O**, was charged, convicted and sentenced to life imprisonment for the offence of incest contrary to **section 20(1)** of the ***Sexual Offences Act, 2006***. The particulars of the charge were that on 1st May 2013 at [Particulars Withheld] Estate within Homa Bay District, being a male person caused his penis to penetrate the vagina of C S O who was to his knowledge his daughter. He also faced an alternative charge of committing an indecent act with a child contrary to **section 11(1)** of the ***Sexual Offences Act*** based on the same facts by touching the breasts, buttocks and rubbing his penis against the vagina of C S O.

2. The appellant now appeals against the conviction and sentence on the following grounds set out in the petition of appeal dated 7th April 2015 as follows;

1. *That the learned trial magistrate misdirected himself on several matters of law and fact.*

2. *The learned trial magistrate erred in law of evidence, procedure and practice in deciding the case against the appellant and contrary to the provisions of the Sexual Offences Act.*

3. *The learned trial Magistrate erred in law of evidence in deciding the case against the weight of evidence.*

4. *The learned trial magistrate erred in law in passing a sentence that was excessive in the circumstances of the case.*

3. In support of the appeal, Mr Okoth, counsel for the appellant, submitted that the complainant was aged 16 years old hence it was improper for the trial magistrate to conduct a voire dire. He contended that this was contrary to the provisions of **section 19** of the ***Oaths and Statutory Declarations Act*** as read with **section 2** of the ***Children Act*** as the complainant was not a child of tender years. He contended this fact prejudiced the mind of the learned magistrate who treated her

as a very young person. As regards the evidence, counsel submitted that the complainant (PW 1) was very clear that there was no sexual intercourse between herself and the appellant and the facts of the case when considered as a whole did not implicate the appellant. Moreover, the court failed to consider the fact that the appellant and his wife (PW 2) were estranged and that the court ought to have considered the motive of PW 2. He added that the medical evidence did not support the prosecution case. Counsel urged the court to analyse the evidence and reach a conclusion that the case against the appellant was not proved.

4. Mr Oluoch, the learned Senior Assistant Director of Public Prosecutions, opposed the appeal and submitted that the prosecution proved its case. He contended the fact that the learned magistrate conducted a voire dire did not prejudice the appellant's case. As regards the evidence, he submitted that PW 1 was a willing participant in the sexual act and in light of **section 20(1)** of the ***Sexual Offences Act***, her consent was immaterial since she was below the age of 18 years. He maintained that the willingness of PW 1 to participate in the offence did not negate the offence. As regards the medical evidence, counsel maintained that the same corroborated the testimony of PW 4.

5. As this is a first appeal, I am obliged to review and evaluate the evidence afresh and reach an independent conclusion as whether to uphold the conviction. In so doing an allowance should be made for the fact that I neither heard nor saw the witnesses testify (see ***Pandya v Republic*** **[1957] EA 336** and ***Kariuki Karanja v Republic*** **[1986] KLR 190**). In order to fulfil this mandate it would be useful to set out the facts as they emerged from the trial.

6. PW 1 testified that the appellant was her biological father and that she was 16 years old. She stated that she had dropped out of school due to lack of school fees. On 1st May 2013 at about 7.00pm she had come from the market and as her clothes were wet she went to change in their 3 room house. As she was removing her clothes in the kitchen, her mother (PW 2) came calling for her. PW 2 asked if her father was around. At the time her father was in the bedroom sleeping. When she asked what she was doing, PW 1 responded that she had come to change her clothes as they were wet. She adamantly denied that she had sexual intercourse with the appellant or that PW 2 caught her having sexual intercourse. She denied that that she slept in the house with her father in the absence of her mother. She accused her mother of taking money given by the appellant for her fees and instead starting her business with it.

7. The appellant's wife, PW 2, testified that PW 1 was their daughter and that the two of them had matrimonial problems. She was residing in Kagan while the appellant was residing in Homa Bay where he was a pastor at a local church. After PW 1 finished her examinations in December 2012, she came to live in Homa Bay with the appellant. She testified that when she came to Homa Bay in April 2012, she realized that the appellant would receive special treatment like the appellant would give PW 1 his clothes for her to wash in her presence. He also saw the appellant touching PW 1 on the buttocks. She recalled that on 1st May 2012 at 7.00pm, she came to the house and found PW 1 and the appellant having sexual intercourse. She was shocked by what was happening. She went to report to the elders the next morning. She called the appellant's step-brother who did not intervene. She reported the matter to the Children's Department on 7th May 2015 and to the police on 8th May 2013.

8. PW 3, a medical officer, examined PW 1 at Homa Bay District Hospital on 13th May 2015. He examined her genitalia and confirmed that she was having normal menstrual flow. PW 1 admitted to her that she had been having previous sexual intercourse. He noted that PW 1 was reluctant to divulge any information and the information she gave him was inadequate. PW 1 informed him that she had sexual intercourse a year before and four days prior to the examination. He concluded that she had sexual intercourse.

9. PW 5, a children's officer, testified that on 8th May 2013, PW 2 came and reported the he found the appellant having sexual intercourse with their daughter. He summoned the appellant to appear

in his office and he came on 13th May 2013. The appellant denied the allegations. He referred the matter to Homa Bay Police Station. PW 4, a police officer attached to the Crime Office at Homa Bay Police Station, testified that on 13th May 2013, the appellant presented himself to the Police Station on account of a report made by PW 2 on 8th May 2013 that he had defiled PW 1 whereupon he was re-arrested. PW 4 asked PW 5 why she had not reported the incident earlier and PW 2 responded that she had taken time to consult the appellant's family.

10. When called upon to defend himself, the appellant opted to exercise his right to remain silent. After reviewing the evidence the learned magistrate was convinced that the prosecution had proved its case beyond reasonable doubt.

11. I have evaluated the evidence and I take the following view of the matter. The appellant was charged with incest under **section 20(1)** of ***the Sexual Offences Act, 2006*** which states as follows:

> *20.* (*1) 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 of not less than ten years:*
>
> *Provided that, if it is alleged in the information or charge and proved that the female person is under the age of eighteen years, the accused person 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*. [Emphasis mine]

12. An *"indecent act"* under **section 2(1)** of the ***Act*** is defined as an unlawful intentional act which causes, *"(a) any contact between any part of the body of a person with genital organs, breasts or buttocks of another, but does not include an act that causes penetration." "Penetration"* under **section 2** of the ***Act*** means, *"the partial or complete insertion of the genital organs of a person into the genital organs of another person."* The import of these provisions that the offence of incest is proved either by establishing penetration or an indecent act.

13. There is no dispute that PW 1 was the daughter of the appellant. PW 1 and PW 2 established that fact. Besides nothing emerged from the cross-examination of PW 1 and PW 2 by the appellant to suggest that PW 1 was not his daughter. In this case the evidence of penetration or the indecent act was proved by the testimony of one witness. PW 1 adamantly denied that the appellant sexually assaulted her. The evidence thus rested entire on the testimony of PW 2. **Section 143** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)*** is clear that;

> *No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.*

14. Thus the issue is whether the testimony of PW 2 was credible and believable to sustain a conviction. PW 2 admitted that she had problems marital problems with the appellant but denied that the allegations against the appellant had anything to do with money, school fees or upkeep of the child. Her testimony was not shaken in cross-examination. She also explained that the reason she did not report the case immediately is that those to whom she reported were the appellant's sympathisers and they did not come forward. She was adamant that the elders and in-laws refused to co-operate. Considering that PW 1, as a child, had a reason to protect her father who was taking care of her, I am satisfied that the testimony of PW 2 was credible.

15. The testimony of PW 3 and medical evidence was on only useful to confirm that PW 1 had sexual intercourse in the past but not necessarily with the appellant. PW 1 told him that she had intercourse 4 days before the examination but obviously he could not verify this fact. In any case, such intercourse could only have taken place after the incident subject of this case. The evidence did not undermine the testimony of PW 2.

16. The appellant complains that the learned magistrate conducted a voir dire yet PW 1 was 16 years old. **Section 19** of the ***Oaths and Statutory Declarations Act*** requires that before the evidence of a child of tender years is received, the court must be satisfied that the child is sufficiently intelligent and understands the nature of the oath. In this case voir dire examination conducted by the magistrate was not necessary as PW 1 was not a child of tender years in terms of **section 2** of the ***Children Act*** as she was above 10 years. This did not prejudice the appellant as PW 1 testified on oath and was cross-examined. I therefore affirm the conviction.

17. The appellant was sentenced to life imprisonment. Under **section 20(1)** of the ***Sexual Offences Act***, the accused is liable to life imprisonment if the victim is under the age of 18 years. In ***MK v Republic*** **NRB CA Crim. App. No. 248 of 2014 [2015]eKLR**, the Court of Appeal held, following ***Opoya v Republic*** **[1967]EA 752**, that the meaning of the word *"liable to"* in **section 20(1)** of the ***Sexual Offences Act*** means that the sentence is the maximum and not mandatory.

18. The learned magistrate erred in imposing the maximum sentence without considering any aggravating factors. Since it is not clear whether that there was penetration, I would impose a sentence commensurate with the minimum mandatory sentence for an indecent act under **section 11(1)** of the ***Sexual Offences Act*** which is 10 years imprisonment.

19. The conviction is affirmed and the appeal is dismissed save that the sentence of life imprisonment is set aside and substituted with a sentence of 10 years imprisonment.

DATED and **DELIVERED** at **HOMA BAY** this **5th day of November 2015**.

D.S. MAJANJA

JUDGE

Mr Okoth instructed by G. S. Okoth and Company Advocates for the Appellant.

Mr Oluoch, Senior Assistant Director of Public Prosecutions, instructed by the Office of Director of Public Prosecutions for the respondent.