REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

HCRA NO. 25 OF 2015

(FORMERLY MERU HCRA NO.12 OF 2013)

I M M …….....……APPELLANT

VERSUS

REPUBLIC……...PROSECUTOR

(An Appeal from the Judgment of Hon. N. N. Murage Ag PM made on 8th February, 2013 in Chuka Principal Magistrate's Court Criminal Case

No.1174 of 2011

J U D G M E N T

1. I M M the Appellant, was on 7th October, 2011 charged before the Principal Magistrate's Court, Chuka with the offence of incest contrary to section 20(1) of the Sexual Offences Act No. 3 of 2006. It was alleged that on an unknown date in the month of February, 2011 in Tharaka Nithi County within Eastern Province, being a male person, the Appellant caused his penis to penetrate the vagina of D K a female person who was to his knowledge his daughter.

2. The Appellant faced an alternative charge of indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006. It was alleged that on an unknown date in the month of February, 2011 at [particulars withheld] Village, in Tharaka Nithi County within Eastern Province, the Appellant committed an act of indecency with D K a child aged 15 years by touching her private part, namely vagina.

3. After trial, the Appellant was found guilty of the offence of incest, was convicted and sentenced to life imprisonment. He has now appealed to this court on eight (8) grounds of appeal set out in his Amended Petition of Appeal dated 15th June, 2015. These grounds were ably argued by Mr Mutani, Learned Counsel for the Appellant who grouped them into three categories as follows;-

a. ground one on paternity; that the trial court erred in failing to find that the offence of incest was not proved beyond reasonable doubt;
b. ground nos.2, 3, 4, 5, 7 and 8 on the burden of proof and fair trial; and
c. ground 6, that the sentence was manifestly excessive.

4. This being a first appellate court, it is incumbent that the court re-examines and re-evaluates the evidence afresh so as to arrive at its own independent findings and conclusions. See **Okeno V Republic (1972) EA**. In so doing, the court must however be alive to the fact that it did not have

the advantage of seeing the witnesses testify in order to assess their demenour.

5. The evidence before the trial court was that D K (PW1), a girl of between 15 and 17 years was the daughter of the Appellant born to him by a woman called K. Pw1 came to live with the Appellant when she was already in class six (6). On an unknown date in the month of February, 2011, while at home, the Appellant sent away his other children to go and cut grass for the cows. He asked PW1 to make him tea. When PW 1 took the tea to the appellant, he pulled her to his bed, undressed her and had sexual intercourse with her. As a result of that act, she became pregnant and later on gave birth to a baby boy who upon DNA being conducted by PW 4, a government analyst, he was confirmed to have been sired by the Appellant.

6. PW 2, the deputy head teacher of the primary school which PW 1 was attending at the time, told the court how the teachers discovered the change in PW 1's health and general conduct. On inquiry, PW 1 told the school administration how the Appellant had sexually assaulted her as a result of which she had become pregnant. The school administration took PW 1 to a nearby clinic whereby upon examination, the pregnancy was confirmed. Because of the difficulties PW1 was facing at the Appellant's home, the children's authorities took her to a rescue centre in Embu. Consequently, the Appellant was arrested and charged with the offence.

7. In his unsworn defence, the Appellant stated that the charges were false; that PW 1 had been told to make up her story and that the charges were meant to spoil the Appellant's name. On the foregoing, the trial court found the Appellant guilty and convicted him of the offence of incest. The trial court sentenced him to life imprisonment.

8. On ground No. 1, Mr Mutani submitted that the paternity of the complainant (PW 1) was not established, that neither DNA was carried out to establish that PW 1 was the Appellant's daughter. Mr Ongige, for the state submitted that the evidence of PW 1 that the Appellant was her biological father remained unchallenged. In his view, the offence of incest had been proved.

9. The offence of incest presupposes sexual intercourse between a biological father and daughter. For that offence to be proved, the prosecution must establish the relationship of the perpetrator and the victim. The mere fact of a man living with a girl child under one roof is no proof of biological parentage. There must be evidence to proof the parentage. Such evidence may be the testimony of the mother of the child, a birth certificate or D.N.A examination results. In the present case, there can be no dispute that the Appellant did actually have canal knowledge with PW 1 as a result of which the later became pregnant and bore a child. The evidence on record shows that PW 1 came to start living with the Appellant when she was in class six (6). Before then, she was living with her maternal grandmother. There was evidence of PW 3 that the Appellant was referring to children belonging to his close relatives as his. Although the evidence of PW 1 was consistent and firm that the Appellant was her biological father, in the circumstances of this case, it would be unsafe to make that conclusion in the absence of corroborative evidence such as birth Certificate, D.N. A. Tests or the mother's evidence. It may well be that the Appellant did not specifically deny the fact of his parentage in his defence, but he stated that the charges were false. That in my view shifted the evidential burden of proof back to the prosecution to proof the element of PW 1's paternity. Such proof must be beyond reasonable doubt. That burden in my view was not discharged. That ground succeeds.

10. On ground Nos. 2, 3, 4, 5, 7 and 8, Mr Mutani submitted that; the Appellant was not accorded a fair trial within the meaning of Article 50 (2) of the Constitution; that the trial court was biased against the Appellant for making a finding that the Appellant had brutally defiled PW 1 yet there was no evidence of brutality; that with such element of bias the trial court shifted the burden of proof and failed to consider the Appellant's defence. Finally Mr. Mutani faulted the trial court for imposing a life sentence on the Appellant yet the age of the complainant was not disclosed in the charge sheet. In his view, the Appellant could only be convicted on the alternative charge whose mandatory sentence is 10 years. On his part, Mr Ongige submitted that there was no evidence of bias on the part of the trial court; that there was evidence of brutality on the part of the Appellant

and that the trial court properly dismissed the appellant's defence. Mr Ongige however, conceded that there was an error in the charge sheet for failure to disclose the age of the complainant in terms of section 20(1) of the Sexual Offences Act.

11. The uncontroverted evidence on record is that before the fateful day, PW 1 had had no sexual relationship with any other man. This is what she told PW2 and was it never challenged. There was evidence that her sexual encounter with the Appellant was a painful experience for her. After the act, there was blood all over her private parts and she had to clean her panty. In this court's view, this was evidence enough of brutality. Pw 1 considered the Appellant to be her biological father. For her to undergo such a hallowing experience in his hands was but traumatizing. There was no evidence that the sexual activity was between two willing participants. The trial court cannot be faulted for having concluded that the defilement was brutal. Accordingly, the complaint of bias is not well founded. It is rejected.

12. I have looked at the Judgment of the trial court. That court properly analysed the evidence presented to it in totality. The Appellant's defence was that the charges were false. The trial court did consider that defence and found it to be wanting when weighed against the evidence presented by the prosecution. In this regard, it is incorrect to state that the Appellant's defence was disregarded. I reject all these grounds.

13. As regards sentence, Mr Ongige quite correctly conceded that in light of the provisions of section 20(1) of the Sexual Offences Act, the sentence of life imprisonment cannot stand. Section 20(1) of the Sexual Offences Act provides: -

> ***"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, <u>if it is alleged in the information or charge and</u> <u>proved</u> 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 provided).***

14. It is clear from the foregoing that where a sentence of life is to be metted out, the age of the complainant is crucial. It must be stated in the charge sheet and be proved before a sentence of life imprisonment can be imposed . In this case, the main charge of incest did not disclose the age of the complainant. Accordingly, the sentence of life cannot stand. Since the Appellant was successful in ground 1, that the parentage of the complainant had not been proved to the required standard and that her age was not stated in the charge sheet both the conviction and sentence on count 1cannot stand. Accordingly, I quash the conviction and set aside the sentence.

15. The evidence on record proved the alternative charge of indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act. Accordingly, I convict the Appellant on that charge. Mr Mutani submitted that a sentence of 10 to 12 years will be adequate.

16. I have considered that submission. I have considered the circumstances of the offence. The Appellant was in the position of father figure to the complainant. The complainant had thought that she had found shelter in Appellant's home. In her testimony, she kept on telling the court that she could not complain to her mother or any other person about the Appellant's act because she did not want to lose a home that she had found. Her trust of the Appellant was not only betrayed but her life was completely shattered. Her childhood and innocence was abruptly disrupted. She became a mother at a tender age and dropped out of school. Her future was effectively compromised. I think a deterrent sentence would suffice. The sentence of 10 years given under the law is the minimum. I therefore sentence the Appellant to twenty (20) years imprisonment.

DATED AND DELIVERED at Chuka this …02nd …day of December, 2015.

A.MABEYA,

JUDGE.