IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ASIKE-MAKHANDIA, KIAGE & ODEK, JJ.A)

CRIMINAL APPEAL NO. 35 OF 2016

BETWEEN

LOA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Homa-Bay, (Majanja, J.) dated 15th September, 2014

in

HCCRA NO. 37 OF 2013)

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JUDGMENT OF THE COURT

This is a second appeal and by dint of section 361(1) (a) of the Criminal Procedure Code, our jurisdiction is limited to dealing only with matters of law but not issues of fact that the two courts below may have made findings upon unless it is demonstrated to our satisfaction that there has been a misdirection in the evaluation of facts or findings of fact are not based on evidence at all by the said courts. This principle has been stated and re-stated in a long line of cases emanating from this Court among them, **Njoroge v Republic [1982] KLR** and **Chemagong v Republic [1984] KLR 661**. In these cases, this Court reiterated that, on second appeal the court should focus on points of law accepting and being bound by the concurrent findings of fact by the two courts below, unless those findings were not backed by evidence, or are based on a misapprehension of the evidence, or the two courts are shown demonstrably to have acted on wrong principles in arriving at those findings. No doubt, we shall bear in mind this injunction as we consider this appeal.

On the night of 20th/21st February, 2012 at around midnight, PW1 who was then aged seventeen years old and a secondary school student was sleeping in her mother's bed. Later that night, her step father, the appellant, knocked the door to the house and she opened for him. She then woke up her two sisters who were sleeping in another room so that they could sleep together. During the night however, she heard someone pulling her blanket and removing her biker. She recognized the person as the appellant, courtesy of the flashlight that he had. The appellant immediately ordered her to keep quiet. He then took out a handkerchief and covered her mouth, removed her underpants and had sexual intercourse with her before he left. The following day, PW1 informed her mother, PW2 regarding what had transpired the previous night. They both proceeded to Mbita Children's office as well as Mbita Police Station and reported the incident. PW1 was emphatic that she identified the appellant when he flashed the light in the house and also from his voice. She also confirmed that this was not the first time that the appellant had sexually assaulted her.

PW2 stated that the appellant was her second husband and that before she got married to him she had two children among them, PW1 from the previous marriage. On the night of 20th/21st February, 2012, she had left her children at home to go for overnight prayers. When she returned the following morning, PW1 told her that she had been defiled by the appellant. She together with PW1 immediately reported the matter to the Children's Officer and Mbita Police Station. Thereafter she took PW1 to hospital where she was examined and treated.

PW3, a Police Constable was on duty on 21st February, 2012 at Mbita Police Station, when he received a report of defilement involving the appellant and PW1. He recorded statements from PW1 and PW2 and issued them with a P3 form. He thereafter went to the appellant's home but he did not find him as he had fled. On 20th August, 2012, the appellant was arrested by Administration Police Officers from Lambwe Divisional Headquarters.

PW4, a Clinical Officer from Mbita Hospital confirmed that he had examined PW1 and noted that her biker was torn and that she had bruises

on the right anterior thigh which he classified as harm and which he concluded must have been the result of a struggle. He concluded that PW1 had given birth before and had been sexually assaulted though there was no evidence of penetration and that the blood in PW1's vagina was a result of her menses.

PW5 an Administration Police Officer from Lambwe Divisional Headquarters was responsible for the arrest of the appellant. On 20th August, 2012 while at work, he received an order from Mbita Police Station to arrest the appellant. Accompanied by PW1 and PW2 they proceeded to the Assistant Chief's Office at Lambwe West Sub-location where they found the appellant and had him arrested.

Based on the evidence gathered as aforesaid, PW3 charged the appellant with the offence of incest contrary to section 20(1) of the Sexual Offences act with particulars being that on the night of 20th and 21st February, 2012 at Nyamaji West Sub-location in Lambwe East Location in Mbita District, he caused his penis to penetrate the vagina of PW1, a female child aged seventeen years, who to his knowledge was his daughter. In the alternative, the appellant was charged with committing indecent act with a child contrary to section 11(1) of the Sexual Offences Act. The particulars were that on the same day at place, he intentionally touched the vagina of PW1, a child aged seventeen years with his penis. The appellant denied both counts and his trial ensued.

When placed on his defence, the appellant elected to give unsworn evidence and denied the charges though he conceded that PW1 was his daughter.

He maintained that his wife used PW1 to frame him with the case after receiving information that she had left his home with all his children and property and that she had been married by a pastor. On July, 31st, he went to Rodi area and confirmed that PW2 had indeed been married to a pastor. The appellant's witness DW2, the Chief Lambwe of Lambwe East Location backed up his story. She confirmed that PW1 was the appellant's daughter. That in August, 2012, the appellant reported to her that PW2 and his property were missing. Whilst still in her office the appellant was arrested.

Having considered the entire evidence on record, the trial court was satisfied that the prosecution had proved its case against the appellant of the offence. Upon convicting the appellant the trial court sentenced him to 10 years imprisonment.

Aggrieved by the conviction and sentence, the appellant preferred an appeal in the High Court of Kenya at Homa Bay. The gravamen of the appeal set out in the grounds was that all the charges against him were fabricated by his wife (PW2), who was the mother to PW1. Having heard the appeal, Majanja, J. dismissed it by holding that from the evidence, it was clear that PW1 knew the appellant and the appellant admitted that PW1 was his daughter; that though there was no evidence of penetration, the trial court correctly invoked the provisions of section 20(1) of the sexual offences in finding the appellant guilty of incest as a person who commits an indecent act or act which cause penetration with a female within the degrees of consanguinity is guilty of the offence of incest, that the evidence of PW1 though of a single identifying witness was sufficiently corroborated by medical evidence, that the age of PW1 was proved by her birth certificate and finally that the thrust of the appellant's defence that the charges against him were planted by PW2 so that he does not disrupt the love affair between her and her new found husband were issues not raised in cross-examination and the evidence of PW1 and PW2 remained unshaken in cross-examination.

Undeterred, the appellant has lodged this second and perhaps last appeal to this Court. Through **Messrs. Rodi Orege & Company Advocates**, only one ground of appeal proffered, and this is *"that the honourable Judge erred in law by upholding the decision of the Ag. PM S.O. Ongeri that the prosecution had proved its case beyond reasonable doubt as required in criminal cases…"*

To buttress this ground of appeal, Mr. Rodi, learned counsel through written submissions stated that it was incumbent upon the prosecution to prove the case against the appellant beyond reasonable doubt which it had failed to do in the circumstances of this case. To counsel, the test for establishing incest beyond reasonable doubt entailed the prosecution to prove the following; the sex of the perpetrator, the victim, the relationship between the two, penetration and the age of the victim. It was submitted that though the prosecution proved that the appellant was male while PW1 was female aged seventeen years at the time, it however failed to prove beyond reasonable doubt that the appellant caused penetration of the PW1's vagina with his penis. That the medical evidence adduced by PW4 concluded that there was no penetration and that the blood in her vagina was because of her menses. That failure to prove penetration *ipso facto* meant that the prosecution did not prove incest.

Counsel further submitted that though PW1 and PW2 asserted in their evidence that the appellant had previously defiled PW1 and impregnated her, these allegations were not proved. Relying on the case of FNM v Republic [2016] eKLR, counsel submitted that it is not uncommon nowadays to find a child making false statement against a parent or individual with sole intention of placing them into problems. It was submitted further that there were inconsistencies surrounding PW1's testimony as to how the alleged offence was committed if at all. Those inconsistencies created reasonable doubt in the mind of the trial court which should have been resolved in the appellant's favour. Counsel went on to submit that the appellant did not commit the offence of incest charged as the alleged victim was his step-daughter. A step-daughter according to counsel was not one of the persons with whom sexual intercourse counts for incest in terms of section 22 of the Sexual Offences Act. On the basis of all the foregoing, counsel urged us to allow the appeal, quash the conviction and set aside the sentence imposed on the appellant.

Opposing the appeal, **Mr. Muia**, learned prosecution counsel through his written submissions took the view that this being a second appeal, only matters of law can be canvassed. For this proposition, counsel relied on the case of **Njoroge v Republic [1982] KLR 388**. To counsel the grounds of appeal raised did not qualify as issues of law. Be that as it may, he went on to submit that the prosecution proved all the ingredients of defilement. The age of PW1 was proved by her birth certificate. She identified the appellant as he defiled her by his voice as well as when he flashed his torch. The evidence of PW1 was corroborated by PW2 who also identified PW1's torn biker. Further corroboration of PW1's defilement according to counsel was provided by PW4 who testified and concluded that *"defilement was done…"*
On penetration counsel submitted that section 2 of the Sexual Offences Act provides that the slightest and brief arousal penetration was sufficient to complete the crime. Counsel concluded his submissions by dealing with the sentence imposed on the appellant. He submitted that incest attracts a minimum sentence of 10 years and a maximum of life imprisonment. Accordingly, the sentence imposed on the appellant was within the law and should not be interfered with.

As already stated, this is a second appeal and therefore we can only deal with matters of law. Going through the grounds of appeal and submissions made in support and in opposition thereof, it is very difficult to pin point any issue of law that can form the basis for our interrogation of this appeal. Most of the issues raised are really factual. The matter is further compounded and not made easy by the confusion by both counsel for the appellant and respondent as regards the offence, the appellant was charged, tried, convicted and sentenced on. Their submissions were focused on the offence of defilement whereas the appellant was actually convicted of the offence of incest. In their respective submissions, the appellants and respondents have only made fleeting reference to the offence of incest. In the result, all the submissions with regard to defilement are actually irrelevant to this appeal.

The record shows that the appellant was initially charged with the offence of defilement contrary to section 8(1) as read with section 8(4) of the Sexual Offences Act and in the alternative he was charged with the offence of committing an indecent act with a child contrary to section 11(1) of the same Act. However, on 22nd October, 2012, **Honourable S.O. Ongeri, SRM** allowed the prosecution application to amend the charge sheet to substitute the charge of defilement with incest. At the conclusion of the trial, the trial court held that the prosecution had proved the case of incest against the appellant and convicted him. It would appear to us that the confusion alluded to above may have been as a result of counsel not familiarizing themselves with the proceedings of the trial court as well as the judgment of the two courts below, which is regrettable.

However, to do justice to the appellant we need to revisit whether or not the offence of incest was proved in law. We have no doubt at all that for an offence of incest to be proved, pursuant to section 20 of the Sexual Offences Act, the prosecution need to prove the sex of the victim, the relationship of the victim to the perpetrator, penetration and the age of the victim. The latter requirement is for purposes of sentencing. For avoidance of doubt, section 20(1) of the Sexual Offences Act provides *inter alia:*-

> **"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."**

We deem that the ingredients of the offence of incest above which the prosecution need to prove beyond reasonable doubt are all matters of law. It is on this basis that we assume jurisdiction to interrogate the appeal limited to those issues only.

On the sex of PW1, there is no doubt that she was female. Her birth certificate tendered in evidence confirms that fact. Indeed all the witnesses who testified in the case confirmed that PW1 was a female. In any event the appellant in his own defence conceded to that fact. Finally the two courts below arrived at that concurrent finding and we have no reason to deviate from or disturb the finding.

Was PW1 and PW2 related to the appellant as a daughter in terms of the particulars in the charge sheet? The appellant submits that being a step-daughter, she was not his daughter. That a step-daughter is not one of the persons with whom a male person is guilty of incest if found to have had sexual intercourse with. On the other hand, the respondent takes a contrary view; that a step-daughter is just as good as a daughter as she is among the persons whom a parent is prohibited from having sex with. Section 22 of the Sexual Offences Act, sets out the persons with whom having sex with will amount to incest. These are brother, sister, half-brother, half-sister, adoptive brother and sister, father, half father, uncle of first degree, mother and half mother and an aunt of the first degree. No doubt the appellant was PW1's half father and or stepfather. Therefore the two having sex was incestuous. We note that throughout the proceedings the appellant never disputed the fact that the appellant was his daughter. He is only raising the issue now which is too late in the day. We further note that the two courts below made concurrent findings that PW1 was indeed a daughter of the appellant. We have not been given any justification why we should impugn that concurrent finding.

Was there sexual intercourse between the appellant and PW1? The appellant thinks not on account of the evidence of PW4, that PW1 was at the material time going through her menses and that she had previously indulged in sex any way. It was however the testimony of PW1 that the appellant tore her biker, removed her underpants and inserted his penis into her vagina. Besides, PW4 testified that on his examination of PW1, he noted bruises on her thighs indicative of a struggle between the appellant and PW1. It is instructive however to note that the offence of incest is committed by proof of either penetration or an indecent act in terms of section 20(1) of the Sexual Offences Act.

Section 2(1) of the Act defines indecent act as an intentional act which causes ***(a) any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration. (b) exposure or display of any phonographic material to any person against his or her will…"***

Much as the evidence of penetration was doubtful, the same cannot be said of the indecent act. Having reviewed the evidence on record, we are satisfied just like the two courts below that the offence of incest was committed by the appellant on PW1 by way of indecent act.

The courts have on many occasions pointed out how desirable it is for the prosecution to prove beyond reasonable doubt the age of the victim. It is trite that the prosecution ought to prove the age of the victim either by direct testimony of the parent, guardian, or victim herself, birth certificate, medical assessment or by other expert means. In the case of **Hilary Nyongesa v Republic**, Criminal Appeal No. 123 (ur), the Court stated:-

> **"… In defilement cases medical evidence is paramount in determining the age of the victim and the doctor is the only person who would professionally determine the age of the victim. In the case of any other evidence apart from medical evidence age may also be proved by a birth certificate, the victim's parents or guardian and by observance and common sense…"**

In this case, of PW1's age was proved through the production of her birth certificate. Indeed the appellant in his own submissions concedes that the age of PW1 was ascertained and proved. For all the foregoing reasons, we are satisfied just like the two courts below that the conviction of the appellant was well founded and cannot be impugned.

The appellant was sentenced to 10 years imprisonment. This is the minimum sentence that can be imposed upon conviction for the offence of incest under the Sexual Offences Act. The appellant has not appealed against the sentence imposed, nor has he raised the issue in his written submissions. Therefore, sentence is not an issue we can entertain or interrogate in this appeal.

The appeal being bereft of merit is dismissed in its entirety.

This Judgment is delivered pursuant to rule 32(2) of the Court of Appeal Rules since Odek, JA passed on before the delivery of the judgment.

Dated and delivered at Kisumu this 31st day of January, 2020.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR.