IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: NAMBUYE, M'INOTI & KANTAI, JJA)

CRIMINAL APPEAL NO. 62 OF 2019

BETWEEN

ANN ………...........................……....……. APPELLANT

AND

REPUBLIC ……………….....................….. RESPONDENT

(An Appeal from a Judgment of the High Court of Kenya at Kiambu (Ongundi, J) dated 3rd August, 2018 in **HC. CR. CASE. NO. 11 OF 2014)**

JUDGMENT OF THE COURT

This appeal arises from the judgment of the High Court of Kenya at Kiambu (**Hedwig I. Ong'udi**, J) dated 3rd August, 2018.

The background to the appeal is that the appellant was arraigned before the Principal Magistrates' Court at Kikuyu for the offence of incest contrary to **Section 20 (1)** of **the Sexual Offences Act, No. 3 of 2006 (the Act)**. The particulars of the offence were that on 25th and 26th September, 2014 in **Kiambu County** within Central Region, intentionally caused his penis to penetrate the vagina of DN a child aged eleven (11) years old who was to his knowledge his daughter. The appellant denied the offence prompting a trial in which the prosecution called four (4) witnesses to prove the charge, while the appellant who gave sworn evidence was the sole witness for his defence.

The facts are that on 25th September 2014, the appellant who is father to DN fought with his wife, the mother to DN and she went away in a huff, leaving behind DN and her four (4) siblings. On that same night the appellant invited DN to share his bed but she declined. The next night of 26th September 2014, the appellant came to her bed at night, removed her clothes, forced her legs apart and defiled her the whole night, threatening her with death if she screamed. The next day she reported the incident to a neighbor named **Baba T**, who reported the incident to **Regen** Police Post, which in turn contacted Esther **Wairimu (PW2)**, a volunteer Children's Officer. PW2 visited appellant's home where she found four (4) young children left alone in the home. She examined PW1's private parts and noted bruises. PW2 took the children to a children's home for safety and care. In the company of the police, PW2 escorted PW1 to Wangige Hospital for examination and treatment. **Shadrack Ngatia (PW3)** a Clinical Officer at Wangige Hospital examined PW1 and found the hymen absent indicating that PW1 had sexual contact before examination. Upon his arrest, the appellant was escorted to Kikuyu Police Station by **P.C. Julius Kaimenyi,** and subsequently to Wangige Hospital for medical examination which revealed he was HIV positive and also had syphilis. In his sworn defence, he stated that on 25th September, 2014 he quarreled with his wife but she did not run away. On 26th September, 2014 he came home from work at night and missed both his wife and children. He slept and the next day reported the matter to Magana Police Post. He was later arrested and charged with the offence of defiling his daughter, who though a normal child was couched by the mother to fabricate the charge against him.

The trial court analyzed the evidence, identified issues for determination and made findings thereon *inter alia* that the PRC form and the P3 form indicated that there was penetration; that PW3, the clinical officer, found PW's hymen absent; that PW1s' own testimony as confirmed by the sworn testimony of the appellant was sufficient proof that PW1 was the appellant's daughter and upon considering **Section 20 (1)** of the Act in light of the evidence on the record, there was no doubt that the charge was proved.

The trial court rejected appellant's assertion that PW1 had been couched to fabricate the case against him. It found PW1consistent and direct in her testimony which was truthful and reliable to safely support a conviction. As regards PW1's age of 11 years at the time of commission of the offence, the court found it proved by PW1's own evidence as corroborated by medical evidence and the court's own assessment of her age. The trial court therefore found the charge against the appellant proved to the required threshold, found him guilty as charged, convicted him and sentenced him to the mandatory sentence of life imprisonment.

The appellant was aggrieved and appealed to the High Court raising various grounds. The High Court re-analyzed the evidence, reminded

itself of the role of a first appellate court as set out in the case of **Okeno v Republic [1972] EA 32, Pandya v Republic [1957] EA 336** and **Kariuki Karanja v Republic [1986] 1 KLR 190,** considered **Section 20 (1)** of the Act and was satisfied that PW1 was a minor daughter of the appellant at the material time. As regards penetration, the court found the evidence of PW3 reliable in that regard. The court further held that the proviso to **section 124** of the **Evidence Act** allowed the trial court to convict on the basis of the sole evidence of a victim of a sexual offence if it was satisfied that the victim was truthful and that in this case the trial court saw and heard PW1 testify and found her evidence consistent and reliable.

Regarding the appellant's contention that he could not have defiled PW1 because she did not test HIV positive and did not have syphilis, the court reasoned that only a period of four days had lapsed from the date of defilement to the date of examination, which in its view was not sufficient to establish infection. The court further found that the presence of pus and epithelial cells in PW1 was sufficient proof of defilement. It therefore dismissed the appeal and affirmed both the conviction and sentence.

Undeterred, the appellant is now before this Court on a second appeal, initially raising six (6) grounds of appeal, subsequently supplemented with eight grounds of appeal, which were later condensed into four grounds of appeal as submitted upon in his written submissions filed on 19th November, 2019. These may be paraphrased that the High Court erred in law:

(1) In failing to properly discharge its mandate as a first appellate Court.

(2) In failing to appreciate that the voire dire conducted on PW1 was not done in accordance with the prerequisites set out in Section 19 of the Oaths and Statutory Declarations Act Cap 15 Laws of Kenya.

(3) In failing to appreciate that the mandatory minimum sentence is unconstitutional.

The appeal was canvassed by way of written submissions filed, adopted and not orally highlighted by the appellant; and oral submissions by **Mr. O'mirera Moses**, learned Senior Assistant Director of Public Prosecution (SADDP) on behalf of the State.

On the mandate of the High Court as a first appellate court, the appellant faulted the High Court for the failure to re-analyze and re-evaluate the evidence afresh as it was bound by law to do and thereby arrived at a wrong verdict which should not be sustained. On *voire dire* the appellant submitted that all that the trial court did was to put a question to PW1 which in his view was to test if PW1 understood the nature of the oath. It was therefore not sufficient for the High Court to draw a conclusion that the pre-requisite for *voire dire* which were a mandatory requirement in this appeal had been complied with by the trial court. The appellant asserted that the one question put by the trial court was not sufficient to establish that PW1 understood the nature of the oath, and that she was possessed of sufficient intelligence to comprehend the proceedings. The trial in the circumstances amounted to a mistrial and therefore a nullity.

On proof of age of the victim, the appellant submitted that the burden of proof lay on the prosecution to prove the age of the victim which was a key element of the offence. According to him, PW1's age was not properly determined as it was merely approximated to be between eleven to twelve (11-12) years. On proof of penetration, the appellant faulted the High Court for failure to appreciate that: the appellant was unrepresented at the trial and therefore disadvantaged when it came to posing the right questions in cross-examination; there are many causes for broken hymen especially when PW1's broken hymen was not accompanied by other injuries consistent with a sexual assault; the prosecution failed to produce the OB the appellant intended to use to prove existence of a grudge responsible for the fabrication of the charge against him ; the failure to draw an inference that had the OB been produced, its contents would have been adverse to the prosecution's case; and lastly, the prosecution case was poorly investigated and full of inconsistencies.

On the sentence, the appellant submitted that the same was unconstitutional and urged us to adopt the current jurisprudential trend on mandatory minimum sentences as enunciated by the Supreme Court in **Francis Kariokor Muruatetu & 2 others v Republic [2017] eKLR** and as adopted and applied in numerous decisions of this Court.

Opposing the appeal against both conviction and sentence, **Mr. O'mirera** submitted that appellant's major complaint that PW1 had been coached was rejected by the two courts below, on sound reasoning especially when PW1 gave evidence on oath, was cross-examined and was not shaken. PW2, the social worker, examined PW1 and noted injuries on her private parts whilst PW 3, the clinical officer, corroborated PW1's evidence that she had been penetrated and defiled. The appellant admitted that PW1 was his daughter and therefore the offence of incest was proved. Counsel further submitted that the two courts below believed that PW1 spoke the truth and that it was safe to act on her testimony as corroborated by medical evidence. He added that the issue of the discrepancy on the date of offence was addressed by the first appellate court which found it to be inconsequential because no prejudice was caused to the appellant. On account of the above submissions, counsel urged us to uphold the findings of the two Court's below and dismiss the appeal in its entirety.

In reply, the appellant stated that what is on record is that the incident occurred on 26th and if the evidence indicated that nothing occurred on 26th then he was arrested and arraigned for an offence he did not commit on 26th and should therefore be set free. He also reiterated his earlier submissions that the prosecution's failure to produce the OB he had requested for was prejudicial to his defence.

This is a second appeal and by dint of the provision of **Section 361** of the **Criminal Procedure Code**, only points of law fall for our consideration. In **Karingo v Republic [1982] KLR 213**, the Court stated as follows:

> ***"A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two Courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court …….. find as it did (Reuben karari c/o karanja v R [1958] 17 EACA 146."***

We have considered the record in light of the rival submissions set out above. The issues that fall for our consideration are the same as those condensed by the appellant in his written submissions.

On the alleged failure by the High Court to discharge its mandate the position in law and which we fully adopt is as was set out in the case of **Okeno v Republic [1972] EA 32** namely that:

> ***"It is the duty of the first appellate Court to reconsider the evidence evaluate it and draw its own conclusion in deciding whether the judgment of the trial Court should be upheld."***

Applying the above threshold to the High Courts' judgment, we find no error in the discharge of its mandate as we have already demonstrated above that the High Court summarized the case for either side, identified issues for determination in light of the grounds of appeal the appellant had raised before it, considered each of the identified issues in light of the evidence on record, applied the relevant principles of law thereto before drawing conclusion thereon as already highlighted above. We therefore find no merit in this complaint. It is rejected.

On the conduct of *voire dire*, all that the trial court did was to put just one question to PW1 if she knew the nature of an oath and upon replying in the affirmative, the trial Court ruled that PW1 was possessed of sufficient intelligence and on that account allowed her to give sworn evidence. **Section 19 (1)** of the Oaths and Statutory Declarations Act Cap 15 Laws of Kenya provides for voice dire and the guidelines for its conduct are succinctly set out in **Johnson Muiruri v Republic [1983] KLR 445.** Although **section 2** of the **Children Act** defines a child of tender years to mean a child of below ten years, this Court has held that the definition in the Children Act is for the purposes of that Act and that for purposes of voire dire, a child of tender years still means a child of 14 years as explained in **Kibageny arap Kilil v Republic [1959] EA 92.** See **Patrick Kathurima v Republic, Cr App No. 131 of 2014** and **Samuel Wahini Ngugi v Republic, Cr App. No. 218 of 2007)**.

While it is important to set out the questions put to the child and the answers thereto in determining whether a child understands the nature of an oath and the duty to tell the truth, this Court has held that whether the manner in which the voire dire examination was recorded would vitiate the conviction depends on the facts of each case. See **James Mwangi Muriithi v Republi, Cr App No. 10 of 2014**. In the instant appeal, both courts below made concurrent findings of fact that PW1 understood the nature of an oath and the importance of telling the truth. In those circumstances we are not persuaded that we can disagree with their conclusion.

On the elements of the offence of incest, **Section 20 (1)** of the Act provides as follows:

> ***"A male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge, his daughter, grand-daughter, sister, mother, niece, aunt or grand-mother."***

The proviso to Section 20(1) provides that if the victim is under the age of 18, the accused person shall, upon conviction ***"be liable"*** to be sentenced to life imprisonment and that it is immaterial that the offence was committed with the consent of the victim.

From the above provision, the prosecution was obliged to prove, in order to sustain a conviction against the appellant, that the victim was within the prohibited degrees of consanguinity specified above. Both PW1 and the appellant gave evidence that they are related as daughter and father. Regarding proof of an indecent act, we find this immaterial as the appellant was not charged with an offence in relation to commission of an indecent act. As for penetration, it is defined in **Section 2** of the Act to mean *"the partial or complete insertion of the genital organ of a person into a genital organ of another person."* The two courts below concurrently found that penetration as defined above was proved by the testimony of PW1 which both courts believed as truthful. They also found corroboration for PW1's evidence in the testimony of PW2 who examined PW1 the next day and observed injuries on her private parts which according to PW2 was evidence of a sexual assault. The two courts also found corroboration in medical evidence tendered by PW3 who upon examination of PW1's private parts found the hymen missing which was proofof a sexual contact prior to the examination.

The appellant contended that a broken hymen could have been caused by some other factors, but that was not put to the witness and was not raised in the two courts below. Being raised for the first time on a second appeal, it amounts to an invitation for us to re-evaluate the evidence and make findings of fact contrary to those made by the two courts below. In any event, it is a hypothetical supposition which we cannot sustain in view of the evidence which was accepted by the two courts below. As regards lack of injuries on the victim, it is also our view that lack of such injuries is immaterial to proof of penetration. It is sufficient that penetration was partial.

Regarding proof of the age of PW1, we think this issue is a red herring because the appellant was charged with the offence of incest and not defilement. Once the court was satisfied that the prosecution had proved beyond reasonable doubt that the appellant and PW1 were father and daughter, the only question touching on the age of PW1 was whether she was below the age of 18 years. From the testimony of PW1, the age assessment done by PW3, and the trial court's own assessment, PW1 was 11 or 12 years old, which was clearly well below the age of 18 years. There is no evidence on record on the basis of which we can conclude that the PW1 was 18 years old. This ground of appeal has absolutely no merit and we also reject it.

On the constitutionality of the mandatory life imprisonment sentence, we do not think it is necessary for us to venture into that question for the simple reason that the proviso to **section 20(1)** of the Act provides that the accused person who is convicted of the offence of incest ***"shall be liable to imprisonment for life"*** if the victim is below 18 years of age. This Court has consistently held that the phrase ***"shall be liable to imprisonment for Life"*** does not import a mandatory sentence. Thus for example, in **Caroline Auma Majabu v Republic, Cr App No. 65 of 2015**, the Court explained that the

words "shall be guilty of an offence and liable" in **section 4** of the **Narcotic Drugs and Psychotropic Substances (Control) Act** does not prescribe mandatory sentences. All it does is to prescribe a maximum sentence and leave the court the discretion to impose a sentence less than the maximum if it deems it necessary. See also. **Kabibi Kalume Katsui v Republic, Cr App No. 90 of 2014; Daniel Kyalo Muema v Republic, Cr App No. 479 of 2007** and **Moses Banda Daniel v Republic [2016] eKLR**.

We agree that to the extent that the two courts below interpreted the proviso to section 21 (1) of the Act as imposing a mandatory sentence,

the issue the appellant has raised is not merely about severity of sentence, but the legality of the sentence, which we are entitled to consider. Taking into account the appellant's mitigation, the age of the victim and the fact that appellant who is the victim's father abused his position of trust, we find that a sentence of twenty (20) years imprisonment would serve ends of justice.

For all the above reasons, the appellant's appeal against conviction is hereby dismissed. The appeal against sentence partially succeeds to the extent that the mandatory sentence of life imprisonment is set hereby aside and substituted with a sentence of twenty years 'imprisonment from the date of conviction.

Dated and Delivered at Nairobi this 24th day of April, 2020.

R. N. NAMBUYE

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPTY REGISTRAR