IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), MAKHANDIA & J. MOHAMMED, JJ.A)

CRIMINAL APPEAL NO. 82 OF 2017

BETWEEN

JMM.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a Judgment of the High Court at Machakos (L.N. Mutende, J.)

dated 15th January, 2015 in H.C.CR.A 32 OF 2012)

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JUDGMENT OF THE COURT

Incest sparks strong emotions in many cultures and communities around the world and is largely regarded as a taboo; frowned upon, completely reprehensible, unacceptable, disgusting and above all, criminal. Though viewed this way, familial sexual relationships continues to be a relatively frequent phenomenon as demonstrated by the number of such cases registered in various courts in the country, like the present one.

The appellant before us was convicted of the offence of incest by male person contrary to **section 20 (1)** of the Sexual Offences Act. The trial court having found overwhelming evidence that on 27th June, 2012 he unlawfully defiled the complainant, who is his niece, aged 8 years at the time, convicted him and sentenced him to life in prison. The court was persuaded from the totality of the evidence that he followed the complainant into the thicket and offered to help her fetch firewood. While there he, forcefully undressed the complainant, removed his trousers and underpants and defiled her; that he was interrupted by the complainant's mother who had gone in the thicket to look for the complainant. The appellant rose, zipped up his trousers and fled. Shortly, the complainant also emerged from the bush and explained to her mother what had happened. The mother noticed some discharge on the pair of shorts that she was wearing.

The matter was reported to the assistant chief and the police, while the complainant was escorted to the hospital for examination. Through medical evidence, it was confirmed that she had been defiled. Accordingly, the trial court, being satisfied as to the appellant's relationship with the victim, being his niece and her age, established as 8 years, found him guilty of incest and sentenced him to life imprisonment. His first appeal to the High Court was unsuccessful and both the conviction and sentence were confirmed.

Once again aggrieved by the decision, he has proffered this second appeal on four grounds that: the prosecution failed to prove its case against him to the required standard; the High Court failed to observe that the medical evidence of the clinical officers who had examined the complainant prior to PW3, who only filled the P3 form, was not produced in court; the High Court erred in its application of **section 124** of the Evidence Act and; that the provisions of **section 169(1)** of the Criminal Procedure Code were not adequately complied with in relation to his defence.

The appellant appearing in person before us fully relied on his written submissions, and maintained that the medical officer (PW3) in his testimony had alluded to the fact that the complainant had previously been examined by her colleagues yet the prosecution failed to summon these other medical officers; that these were crucial witnesses who would have testified on the presence of spermatozoa on the complainant's body which was allegedly seen by her mother; and that this raises doubt in the medical evidence, hence, relying on the English case of **Woolmington vs. D.P.P** (1935) AC 642, he prayed that we allow the appeal.

On the second ground, it was his submission that the learned Judge misapplied **section 124** of the Evidence Act; that she relied on uncorroborated evidence that was also contradictory; that the learned Judge found that the complainant did not possess sufficient intelligence to understand the nature of the oath and her evidence ought to have been considered with much caution. On account of these, it was submitted that **section 124** of the Evidence Act did not apply in the circumstances, as the complainant was not truthful. The appellant further complained that the learned Judge did not consider the defence case in the judgment.

Finally, the appellant asked us to find that at the time the offence is alleged to have been committed, he was a minor because he was 17 years old, having being born in 1994.

Ms. Wang'ele, learned counsel for the respondent opposed the appeal submitting that the ingredients of the offence were proved; and that the prosecution did not have to produce any other medical evidence apart from that presented by PW3.

Counsel urged us to ignore the appellant's submissions alleging that there were contradictions on the evidence regarding what the complainant's mother saw on her clothes; whether it was spermatozoa or just some other creamy substance. She also submitted that upon examination through *voir dire,* the complainant was found to be a truthful witness.

This being a second appeal, by **section 361** of the Criminal Procedure Code we can only deal with matters of law. See **M'riungu vs. Republic** (1983) KLR 455. The only broad issue before us, is whether the prosecution proved its case to the required standard.

The offence of incest by male person is committed when;

> **"20. (1) Any male person ….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).

To secure a conviction, the prosecution was bound to prove the elements of penetration and filial relationship between the appellant and the complainant, and the age of the victim.

On our part, based on the victim's own testimony, which was lent support by her mother's account, as well as medical evidence which confirmed that the victim's hymen was broken, we are convinced that the prosecution proved penetration of the complainant by the appellant beyond any reasonable doubt. It was unnecessary, therefore to call any other evidence to support the fact of penetration as demanded by the appellant. Whether the creamy substance seen on the complainant's clothes was spermatozoa or something else, is immaterial as what concerned the two courts below was whether penetration was proved. Both courts were unanimous that this aspect of the trial was satisfied. The appellant has not presented before us any material to warrant our interference with the concurrent finding of the two courts. We set out below the learned Judge's evaluation of the evidence of penetration;

> **"21. According to the Sexual Offences Act, penetration means partial or complete insertion of the genital organ of a person into the genital organ of another person.**
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> **22. PW1 testified that soon after the appellant inserted his private part into hers, PW2 called her out and the appellant ran away. His act of penetration was interrupted. There was no presence of spermatozoa as a result. The presence of spermatozoa is not a pre-requisite ingredient in such an offence."**

That is the correct expression of the law; that the presence of spermatozoa cannot in itself be proof of penetration, and that penetration can either be partial or complete insertion of the genital organ of a person into the genital organ of another person. Here penetration was complete, according to the complainant's testimony and medical evidence.

The procedural prerequisite before reception of evidence of a child of tender years under **section 19** of the **Oaths and Statutory Declarations Act** is that if, after the *voire dire* examination, the trial court is satisfied that the child understands the nature of the oath, the court proceeds to swear the child and receives the evidence on oath. However, if the court is not so satisfied, the unsworn evidence of the child may nonetheless be received if, in the opinion of the court, the child is possessed of sufficient intelligence and understands the duty of speaking the truth. See: **Johnson Muiruri vs. Republic** (1983) KLR 445. Reading that provision with the proviso to **section 124** of the Evidence Act, it is settled that in sexual offences where the only evidence available is that of the victim, the court has the competence to receive and rely on that evidence to convict if, for reasons to be recorded, the court is satisfied that the victim is a witness of truth. That assessment is the sole province and preserve of the trial court which always has the advantage of seeing and hearing the witnesses. Indeed, the learned magistrate was satisfied that the complainant was **"truthful and courageous as she narrated what transpired without fear"**.

The fact that the complainant was a niece to the appellant, as well as the complainant's age were proved.

The courts below considered and properly rejected the appellant's defence. Regarding his age, we do not think it was open to the appellant at this late stage to claim, for the first time, that he was a minor when the events giving rise to this appeal took place. He ought to have raised this claim before the two courts below.

We end as we started; that sexual relations between an adult and a child is perverted and wrong, no matter the circumstance. And if the child is a family member, the psychological consequences are even more damaging. There are some lines that should never be crossed.

In the result, this appeal is devoid of any merit and is accordingly dismissed in its entirety.

Dated and delivered at Nairobi this 5th day of June, 2020.

W. OUKO, (P)

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JUDGE OF APPEAL

ASIKE – MAKHANDIA

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR