IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, SICHALE & J. MOHAMMED, JJ.A)

CRIMINAL APPEAL NO 140 OF 2015

BETWEEN

CMM.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(*An appeal from the judgment of the High Court of Kenya*

at Garissa (S.N. Mutuku, J) dated 11th October 2016

in

H.C.Cr. A. No 61 of 2013)

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JUDGMENT OF THE COURT

BACKGROUND

1. This is a second appeal by **CMM** (the appellant) against his conviction and sentence for the offence of incest by male contrary to **Section 20(1)** of the ***Sexual Offences Act.*** The particulars of the charge against the appellant were that on diverse dates between 15th September, 2010 and 15th October, 2010 at Mwingi Township, Mwingi Location, in Mwingi Central District within Kitui County, he unlawfully and intentionally committed an act which caused the penetration of his male genital organ into the female genital organ of ***MM*** (name withheld), a child of 13 years, who to his knowledge was his daughter.

2. It is on the basis of the above particulars and the evidence on record that the Senior Resident Magistrate's Court at Mwingi convicted the appellant for the offence of incest and sentenced him to life imprisonment. Subsequently, the High Court (**S.N. Mutuku, J**) concluded as follows:-

> ***"…The defence of the appellant is not credible and has not raised any doubts in my mind that he defiled the complainant. Consequently, I find the petition of appeal filed by the appellant lacking in merit and it must fail. I hereby dismiss the appeal and uphold the conviction and sentence of the trial court."***

3. Undeterred, the appellant filed this appeal premised on seven (7) grounds contained in a supplementary memorandum faulting the learned Judge for: failing to conduct *voire dire* examination on the complainant; confirming the appellant's conviction based on contradictory and insufficient evidence; finding that the elements of the charge of incest were proved beyond reasonable doubt; failing to analyze and re-evaluate the entire record; and confirming a sentence that is unconstitutional.

4. A brief background will suffice to place the appeal in perspective. The prosecution evidence was that on 15th October, 2010, the complainant, **MM**, then aged 13 years old, travelled to Mwingi Town to visit the appellant, who was her father. The appellant took her to his home which he shared with his second wife, also abbreviated as **MM (PW2)** and her children. The appellant left the complainant at his home and returned later that night while drunk. The complainant slept on the sofa while the appellant and **PW2** slept on the bed. In the course of the night, the appellant complained that he was feeling hot and placed a mattress on the floor to sleep. Subsequently, the appellant snuck up on the complainant, took off her clothes and lay on top of her. The complainant screamed waking up **PW2**. A fight ensued between the

appellant and **PW2**, whereupon **PW2** fled the house locking the door of the house from outside. The appellant pounced on the complainant and defiled her. A neighbour, **Christine Kalikaldna (Christine) (PW5)** heard the commotion and notified the Children's officer, **Jacinta Mwinzi (Jacinta) (PW4),** attached to Kitui Children's Office. **Jacinta** went to Mwingi District Hospital and found the complainant, **Christine**, and the Assistant Chief, Mwingi Sublocation, **Philiph Samuel Muriungi (Philiph)(PW3).**

They confirmed the incident and police arrested the appellant.

5. In her sworn testimony, the complainant testified that the appellant had defiled her three (3) times previously. The medical evidence produced by **Dr. Philemon Ogeto Nyambati (Dr Nyambati) (PW6),** a medical officer at Mwingi District Hospital showed that the complainant's hymen was broken, and there were traces of blood on the vaginal canal. An examination of the appellant showed that he had scratch marks on the chest and neck, acquired approximately 24 hours prior to the examination and that he smelt of alcohol.

6. In his defence, the appellant gave a sworn statement and denied defiling the complainant. He maintained that the allegations were made by **PW2** as she did not like the complainant staying with them. The appellant also stated that the complainant had mental problems and was therefore an unreliable witness.

7. Both courts below found that incest took place taking into account the provisions of **Section 124 of the Evidence Act** on the issue of corroboration of evidence of a child victim of a sexual offence. Upholding the conviction and life sentence, the High Court stated;

> ***"…I have found sufficient evidence to support the charge and prove the same beyond reasonable doubt. All the ingredients of the offence have been proved as shown in this judgment…"***

SUBMISSIONS

8. At the hearing of the appeal, the appellant appeared in person and relied on his written submissions. He contended that the medical evidence adduced by the prosecution failed to prove that penetration had occurred, and if it had occurred, that he was the perpetrator. It was the appellant's further contention that the trial court and the 1st appellate court failed to take into account that the complainant's evidence was irregularly received and admitted without subjecting it to *voire dire* examination.

9. On sentencing, the appellant urged the Court to take cognizance of the Supreme Court of Kenya's decision in **Francis Karioko Muruatetu & another v Republic Petition No. 15 of 2015** and review the mandatory sentence imposed on him by the trial court as prescribed by **Section 20(1)** of the **Sexual Offences Act**.

10. **Mr. Muriuki**, the learned Senior Public Prosecution Counsel (SPPC) for the State, opposed the appeal arguing that the act of penetration was proved by the complainant's evidence which was further corroborated by the medical evidence produced by **Dr. Nyambati (PW6).** On the issue of identity, the evidence before the two courts below was that the offence took place in the appellant's house in Mwingi and that the appellant was caught in the act when neighbours responded to a commotion in the house on the material night. Counsel further submitted that the complainant's mother, **MK (PW7**) testified that the complainant's stepmother, **(PW2**) informed her that the appellant defiled the complainant. On the particulars of the offence of incest, counsel submitted that it was proved that the appellant was the complainant's father, which fact the appellant admitted in his sworn testimony. Counsel urged us to dismiss the appeal.

DETERMINATION

11. This being a second appeal, our mandate is provided under ***Section 361*** of the ***Criminal Procedure Code,*** as follows:

> ***"361 (1) A party to an appeal from a subordinate court may, subject to sub-section (8) appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section:-***
>
> ***(a) on a matter of fact, and severity of sentence is a matter of fact; or***
>
> ***(b) against sentence, except where a sentence has been enhanced by the High Court, unless the subordinate court had no power under section 7 to pass that sentence".***
>
> (See **Karingo v Republic (1982) KLR 213**)

12. We have considered the record of appeal, the respective submissions, the authorities cited and the law.

Three issues arise for our determination:

a) Whether the ingredients of the offence of incest were proved to the required standard; and

b) Whether the absence of *voire dire* examination vitiated the prosecution case;

c) Whether the inconsistencies and contradictions in the prosecution evidence vitiated the prosecution case.

13. The appellant was charged with the offence of incest contrary to **Section 20(1)** of the **Sexual Offences Act** which provides as follows:

> ***" 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 supplied].

14. In the circumstances of this case, the prosecution was therefore required to prove that the appellant was below the age of 18 years at the time of the commission of the offence; and that the appellant committed an act which caused penetration with a female person who is to his knowledge, his daughter.

15. The question of age is a question of law under the **Sexual Offences Act**, to prove that the victim was a child at the time of defilement and also for purposes of sentence. **Section 20(1)** of the **Sexual Offences Act** requires that the victim is a child aged 18 years or less.

16. From the record, the testimony of the complainant was to the effect that at the time of the incident on 15th October, 2010 she was a Standard 6 pupil at Ngueni Primary School. It was the complainant's further testimony that at the time she testified, she was aged 14 years. Further, the medical evidence of **Dr**. **Allan Barongo (Dr Barongo)** who examined the complainant in connection to the defilement assessed her age at 13 years. The medical evidence was produced by **Dr**. **Nyambati (PW6)** as **Dr Barongo** was not available to testify. The trial Magistrate who had the opportunity to observe the demeanor of the appellant and on the evidence before him, stated that:

> ***"There is no dispute that the complainant is a daughter of the accused. Although the prosecution did not tender a birth certificate or notification of birth to ascertain the complainant (sic) age, it is clear from her P3 form and treatment notes that her age at the time of the commission of the offence was 13 years. She also gave sworn evidence and stated that she was 14 years and a class 6 pupil."***

17. Having made a definite factual finding that all the ingredients of the offence of incest were present, the trial court was satisfied beyond any reasonable doubt that the appellant was guilty as charged and convicted him accordingly under **Section 215** of the **Criminal Procedure Code**.

18. On its part, the High Court re-evaluated the prosecution evidence and stated as follows:

> ***"I have given all the evidence due consideration and subjected it to critical analysis I have considered the sole ground of appeal by learned counsel for the appellant and I do not agree with him that the conviction of the trial court was against the weight of the evidence. On the contrary, I have found sufficient evidence to support the charge and prove the same beyond reasonable doubt. All the ingredients of the offence have been proved as shown in this judgment."***

19. We turn to consider the issue of credibility of evidence given by a child whose competence to give evidence was not tested by the trial magistrate through *voire dire* examination. It was the appellant's contention that the evidence of the complainant was improperly admitted as the trial court failed to conduct *voire dire* examination on the complainant. The record confirms that the trial court did not conduct *voire dire* examination on the complainant. We observe that this issue was not raised before the 1st appellate court, but being an issue of law, we shall consider and determine the ground on its merits. [20] The basis of subjecting a child of tender years to *voire dire* examination is found in **Section 125(1)** of the **Evidence Act** which provides as follows:

> ***"All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease (whether of body or mind) or any similar cause".***

21. The basis for the administration of *voire dire* on a child of tender years before reception of his or her testimony is entrenched in **Section 19** of the **Oaths and Statutory Declarations Act** which provides that:

> ***"Where in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth."***

22. In **Johnson Muiruri V. Republic [1983] KLR 447,** this Court set out the proper procedure to be followed when children are tendered as witnesses:

> **"In *Peter Kariga Kiune, Criminal Appeal No 77 of 1982** (unreported) we said:*
>
> ***'Where, in any proceedings before any court, a child of tender years is called as a witness, the court is required to form an opinion, on a voire dire examination, whether the child understands the nature of an oath in which event his sworn evidence may be received. If the court is not so satisfied his unsworn evidence may be received if in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth. In the latter event an accused person shall not be liable to***

be convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him (section 19, Oaths and Statutory Declarations Act, cap

15. The Evidence Act (section 124, cap 80). It is important to set out the questions and answers when deciding whether a child of tender years understands the nature of an oath so that the appellate court is able to decide whether this important matter was rightly decided, and not be forced to make assumptions".

23. What is the effect of failure by the trial court to conduct *voire dire* examination on the complainant? In **Maripett Loonkomok v Republic** [**2016**] **eKLR**, this Court stated as follows: -

"It is firmly settled that not in all cases that voir dire is not administered or is not administered properly the entire trial would be vitiated. This Court sitting at Nyeri has recently reiterated what has been said many times before that that question will depend on the peculiar circumstances and particular facts of each case. See James Mwangi Muriithi V R, Criminal Appeal No. 10 of 2014…It follows from a long line of decisions that voir dire examination on children of tender years must be conducted and that failure to do so does not per se vitiate the entire prosecution case. But the evidence taken without examination of a child of tender years to determine the child's intelligence or understanding of the nature of the oath cannot be used to convict an accused person. But it is equally true, as this Court recently found that;

'In appropriate case where voir dire is not conducted, but there is sufficient independent evidence to support the charge… the court may still be able to uphold the conviction. See Athumani Ali Mwinyi v R Cr. Appeal No. 11 of 2015." [Emphasis supplied].

24. It therefore follows from the above decisions that *voire dire* examination of a child witness must be conducted, but failure to do so does not *per se* vitiate the entire prosecution case.

25. Further, this Court in **Patrick Kathurima v Republic** [**2015**] **eKLR** stated as follows:

"We take the view that this approach resonates with the need to preserve the integrity of the viva voce evidence of young children, especially in criminal proceedings. It implicates the right to a fair trial and should always be followed. The age of fourteen years remains a reasonable indicative age for purposes of Section 19 of Cap 15. We are aware that Section 2 of the Children's Act defines a child of tender years to be one under the age of ten years. The definition has not been applied to the Oaths and Statutory Declarations Act, Cap 15. We have no reason to import it thereto in the absence of express statutory direction given the different contexts of the two statutes."

26. Accordingly, in the facts and circumstances of this case, the complainant was fourteen (14) years when she testified, her evidence was cogent, she was cross-examined and medical evidence confirmed penetration. Of utmost significance is that there was ample and sufficient independent prosecution and defence evidence to support the charge against the appellant. This evidence included the evidence of the complainant and the admitted fact that the appellant took the complainant to his house where **PW2** was staying on the material night. **(PW2)** confirmed that the appellant was drunk on the material night and that she and the appellant fought before she fled and locked him inside the house with the complainant. While inside the house, the appellant defiled the complainant. Medical evidence adduced by **Dr. Nyambati (PW6)** confirmed that the complainant was defiled. Further, a medical examination of the appellant indicated that he had been involved in a fight as he had scratch marks on his neck and chest.

27. In the circumstances of this case based on the totality of the evidence adduced by the prosecution, we find that notwithstanding that *voire dire* examination of the complainant was not conducted, that did not vitiate the prosecution case as there was sufficient independent evidence to support the charge against the appellant. It is also notable that the complainant testified that she was 14 years old when she testified and she was therefore not a child of tender years.

28. We, therefore, find no basis for interfering with the trial court's finding that the complainant was a credible witness as it had the advantage of observing her demeanor. (See **Martin Nyongesa Wanyonyi vs. R [2015] eKLR).**

29. Did the inconsistencies and/or contradictions alluded to by the appellant affect the weight of the prosecution's evidence? **Dr**. **Nyambati (PW6)** testified that the complainant was examined on 15th October, 2010 while the complainant stated she was examined on 15th September, 2010.

30. This Court in **Joseph Maina Mwangi vs. R - Criminal Appeal No. 73 of 1993 (ur)** stated as follows:

"In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the wording of section 382 of Criminal Procedure Code viz whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentences."

31. It is not in dispute that the charge against the appellant was in respect of the defilement which occurred on 25th October, 2010. The fact is that the appellant was positively identified as the person who defiled the complainant on 25th October, 2010. We find that the contradiction by the prosecution witnesses on when the complainant was examined is minor and immaterial and curable under ***Section 382*** of the ***Criminal Procedure Code***.

32. Consequently, we find that the prosecution proved its case against the appellant to the required standard and we find no basis to interfere with the concurrent findings of the two courts below. The appeal on conviction lacks merit and is hereby dismissed.

33. Regarding sentence, the issue of mandatory sentences *vis a vis* the discretion of the trial court was considered by the Supreme Court of Kenya in **Francis Karioko Muruatetu & Anor vs Republic, [2017] eKLR** (**the Muruatetu decision**) where the Court stated as follows regarding the mandatory nature of the death sentence under

Section 204 of the **Penal Code:**

> ***"Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Articles 25 of the Constitution; an absolute right."***

34. This Court in **Evans Wanjala Wanyonyi vs Republic [2019] eKLR** stated *inter alia* as follows:

> ***"On the enhanced 20 year term of imprisonment meted upon the appellant by the learned judge, we are of the view that, the constitutionality of the mandatory minimum sentence meted out to the appellant raises a question of law. This Court in Christopher Ochieng v R [2018] eKLR Kisumu Criminal Appeal No. 202 of 2011 and in Jared Koita Injiri v R Kisumu Criminal Appeal No. 93 of 2014 considered legality of minimum mandatory sentences under the Sexual Offences Act. This Court noted that the Supreme Court in Francis Karioko Muruatetu & another v Republic SC Petition No. 16 of 2015 held the mandatory death prescribed for the offence of murder by Section 204 of the Penal Code was unconstitutional; that the mandatory nature deprives courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case; that a mandatory sentence fails to conform to the tenets of fair trail that accrue to the accused person under Article 25 of the Constitution.***

35. Guided by the **Muruatetu decision**, this Court in **Christopher Ochieng v R** (supra) stated:

> ***"In this case, the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by Section 8(1) of the Sexual Offences Act, and if the reasoning in the Supreme Court was applied to this provision, it too should be considered unconstitutional on the same basis…Needless to say, pursuant to the Supreme Court's decision in Francis Karioko Muruatetu & another v Republic (supra), we would set aside the sentence for life imprisonment imposed and substitute it therefore with a sentence of 30 years' imprisonment from the date of sentence by the trial court."***

36. In the circumstances of this case, we observe that the appellant was a first offender and that in mitigation stated that he was the sole breadwinner of his family. In sentencing the appellant, the trial Magistrate while noting the appellant's mitigation, deplored the inhuman act that the appellant had done against his own daughter. We take cognizance of the fact that the **Muruatetu Decision** did not outlaw minimum sentences in circumstances where they may, in the court's discretion be deserved.

37. The appellant, as the complainant's father, had a duty to protect her but he instead abused her trust in him. In the circumstances of this case, we decline to interfere with the sentence imposed on the appellant by the trial court and upheld by the 1st appellate court.

38. The appeal lacks merit and is dismissed in its entirety.

Dated and delivered at Nairobi this 19th day of June, 2020.

W. KARANJA

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JUDGE OF APPEAL

F. SICHALE

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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