**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: KOOME, MUSINGA & J. MOHAMMED. JJ.A.)**

**CRIMINAL APPEAL NO. 6 OF 2018**

**BETWEEN**

**CTM.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(Appeal from the Judgment of the High Court of Kenya at Nairobi,**

**(Nyakundi, J.) dated 19th April 2017 in HCCR.A. NO. 25 OF 2015)**

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**JUDGMENT OF THE COURT**

**Background**

**[1]** The appellant, **CTM**, was charged before the Principal Magistrates' Court at Kajiado with two main counts. On the first count, he was charged with the offence of incest by a male person contrary to **Section 20 (1)** of the **Sexual Offences Act**. The particulars of the offence were that between the 1st day of January, 2013 and the 9th day of January, 2014 at [Particulars withheld] Estate in Kajiado District within Kajiado County, he intentionally and unlawfully caused his genital organ (penis) to penetrate the genital organ (vagina) of **GNT** (name withheld), a female person who to his knowledge is his daughter, aged 10 years. The appellant was, in the alternative to the first count, charged with the offence of an indecent act with a child contrary to **Section 11** as read with **Section 11(1)** of the **Sexual Offences Act**.

**[2]** On the second count, the appellant was charged with the offence of defilement contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act**. The particulars were that on diverse dates between the 1st day of January, 2013 and the 9th day of January, 2014 at [Particulars withheld] Estate in Kajiado District within Kajiado County, he intentionally and unlawfully caused his genital organ (penis) to penetrate the genital organ (vagina) of **MN** (name withheld), a girl aged 6 years. In the alternative to the second count, the appellant was charged with the offence of indecent act with a child contrary to **Section 11** as read with

**Section 11(1)** of the **Sexual Offences Act**.

**[3]** The trial court convicted the appellant of the two main counts and sentenced him to life imprisonment on both counts and directed that the sentences run concurrently. Aggrieved by the conviction and sentence, the appellant preferred an appeal to the High Court. The High Court upheld the conviction and sentence on count one on the charge of incest but dismissed the conviction and sentence on count two on the charge of defilement.

**[4]** Undeterred, the appellant who was unrepresented, filed this second appeal against the judgment of the High Court on the grounds: that the prosecution did not prove its case against him beyond all reasonable doubt; that the High Court erred in upholding the conviction which was premised on contradictory evidence; and that the High Court erred in law by shifting the burden of proof from the prosecution to the defence.

**[5]** This being a second appeal, the Court restricts itself to consideration of questions of law by dint of **Section 361(a) of the Criminal Procedure Code** which provides that: -

**"361. (1) A party to an appeal from a subordinate court may, subject to subsection**

**(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."**

[6] In the case of **Chemagong v Republic [1984] KLR 213** this Court enunciated this principle as follows:-

> **"A second appeal must be confined to points of law *and this Court will not interfere with concurrent findings of facts 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 could find as it did. (Reuben Karari s/o Karanja vs. Republic 17 EACA146)" See also Karingo v R. [1982] KLR 213.**

We shall therefore consider the record of appeal and the rival submissions to determine whether there are issues of law in the impugned judgment that warrant our interference as a second appellate court.

[7] In a bid to prove its case, the prosecution called six (6) witnesses including the minor complainant, **GNT (PW1),** who gave sworn evidence that from January, 2013, she and her brother, L, lived with the appellant; that their mother did not live with them; that the appellant often came home drunk; that he would get into the bed that she shared with **MN (PW2)** and put his penis inside her vagina and that he threatened to beat her if she disclosed to anyone what he had done to her.

**[8] MN** gave an unsworn statement that she lived with her mother, one **N**; that the appellant was their neighbour; that sometimes she would go to spend the night at **GNT**'s house and the appellant would put his penis into her vagina. That when the appellant did that **MN** testified that she felt pain; and that the appellant threatened to beat her if she disclosed to anyone what he had done to her.

**[9] Irene Joseph Mariki (PW3),** the appellant's neighbour testified that she had received information that the appellant had defiled **GNT** whereupon she called **GNT** to her grocery stall which was situated near the appellant's home. It was her testimony that she enquired from **GNT** why she was walking with a limp and **GNT** confided in her that the appellant had defiled her. It was **PW3's** further testimony that she relayed this information to one **Akoth**, who was involved in children's rights issues.

**[10] Monicah Nyambura Munio (PW4),** who was the appellant's neighbour testified that on the material day, she saw **GNT** walking toward **PW3's** stall, followed her and enquired why she was limping. **GNT** confided in her that the appellant had defiled her.

**[11] Dr Catherine Chemass (PW5)**, a medical doctor attached to Kajiado District Hospital, examined both **GNT** and **MN** and filled P3 forms which she produced in court. The findings were that **GNT** at the time of examination looked scared and frightened, and that she had multiple bruises on the neck and shoulder, thorax and abdominal bruises which had healed. **Dr Chemass** also noted that there were multiple bruises on **GNT's** right thigh, her hymen was broken and there were whitish substances on her genitalia.

[12] Regarding **MN**, **Dr Chemass** testified that she noted two visible tears and lacerations to her genitalia, the hymen was broken and there was a whitish discharge. **Dr Chemass** also produced age assessment reports on behalf of her colleague, **Mutisya Mailu,** confirming that **GNT** was 9 years and **MN** was 7 years.

**[13] PC Lucy Okumu (PW6)** the investigating officer, testified that on 9th January, 2014, public health workers including **Akoth** reported to her that some children had been neglected at Majengo; that she and the health workers went to the appellant's home where they found **GNT**, her brother, Lewis and **MN**; that upon entering the house they noted that it was in a state of disarray; and when they enquired from the children where their parents were, the children informed them that the appellant had gone to work and that their mother did not live with them.

**[14] PW6** further testified that she took the three children to Kajiado Police Station where **GNT** and **MN** informed her that the appellant had defiled them on several occasions; that she made arrangements for **GNT** and **MN** to be taken to hospital and later that day, the appellant and **MN**'s mother, N, were arrested.

[15] In his defence, the appellant gave unsworn evidence and did not call any witnesses. He denied having committed the alleged offences and claimed that **Akoth** insisted that L should be vaccinated which the appellant objected to as L was above 5 years of age. He further stated that on the material day, **PW6** took the

children away and did not inform him where she was taking them to. The following morning, he followed up on the children's whereabouts and he was informed that they had been taken to a children's home.

**Submissions**

[16] This appeal was heard virtually on 28th April, 2020 by use of technology pursuant to the Practice Directions issued by the Chief Justice on 20th March, 2020 vide **Gazette Notice No. 3137** on 17th April, 2020, for the protection of judges, judicial officers, judiciary staff, other court users and the general public from the risks associated with the COVID-19 pandemic

[17] The appellant relied on the memorandum of appeal and conceded that **GNT** was his daughter. He submitted that the prosecution did not prove its case beyond any reasonable doubt. It was his further submission that the P3 form produced by **Dr. Chemass** did not state that **GNT's** hymen was broken and that it was later altered by **Dr. Chemass** and **PC Okumu** to indicate that the hymen was broken.

**[18] Mr. Obiri**, learned counsel for the respondent, opposed the appeal.He submitted that the prosecution proved all the elements of the office of incest by male person; there were no contradictions and inconsistencies in the prosecution evidence; that the burden of proof was not shifted from the prosecution as contended by the appellant; and that the appellant did not demonstrate how the burden of proof had been shifted to the defence.

**Determination**

[19] We have considered the record of appeal, the rival submissions, the authorities cited and the law. The issues that we have distilled for consideration are: whether the prosecution proved its case to the required standard; whether the prosecution case was contradictory and inconsistent; and whether the prosecution shifted the burden of proof to the defence.

[20] The appellant was charged and convicted for the offence of incest contrary to **Section 20 (1)** of the **Sexual Offences Act** which provides that:

> **" (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, 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).

[21] The prosecution was bound to prove the following ingredients of the offence of incest by male person:

> i. that the complainant was to the knowledge of the appellant, his daughter, granddaughter, sister, mother, niece, aunt or grandmother;
>
> ii. that the female complainant was under the age of eighteen years; and
>
> iii. that the appellant committed an indecent act or an act which caused penetration with a female person.

[22] On the question whether the complainant was the appellant's daughter, from the record, the complainant testified that the appellant was her biological father; **PW3** and **PW4** who knew the appellant and the complainant and had lived in the same neighbourhood for over two years both testified that the complainant was the appellant's daughter. In his submissions, the appellant conceded that **GNT** was his daughter and in his defence, the appellant did not deny that he was the complainant's father.

[23] On the issue of age, the complainant testified that she was 10 years. **Dr. Chemass** produced the age assessment report which indicated that the complainant was 9 years and the P3 Form which indicated that the complainant was 10 years. In the circumstances, the age of the complainant was proved beyond reasonable doubt.

[24] On the question of penetration, the **Sexual Offences Act** defines penetration as "**the partial or complete insertion of the genital organs of another person."** In the instant case, the complainant's testimony was corroborated by medical evidence which confirmed that the complainant's hymen was broken. We are therefore satisfied that the prosecution proved penetration of the complainant by the respondent beyond any reasonable doubt.

[25] It was the appellant's contention that the P3 form produced by **Dr. Chemass** did not indicate that the hymen was broken but was later altered to include the word 'broken'. It was the appellant's submission that it was not clear why the word 'broken' was added to the P3 form.

[26] We note from the record that **Dr. Chemass** testified that she had examined **GNT** and that her findings *inter alia* were that **GNT**'s hymen was broken. It is also evident from the record that **Dr. Chemass** filled the P3 form for **GNT** and produced it in the trial court as Pexh.1. In this respect, the trial court noted as follows:-

> **"Pexh 1, the P3 form filed (sic) by PW5 Dr. Catherine Chemass indicates that PW1's hymen was broken.**
>
> **PW5 was subjected to intense cross examination. I have carefully considered her evidence she stated she filled the P3s on the 11*th* January 2014. There is no discrepancy on the date the said P3 form was filled. I do not see any malice or ill facts she had towards the accused."**

[27] In re-examination, **Dr. Chemass** testified that:

> **"The P3 (form) for GNT had no problem. In part C in MN's P3 (form) I had indicated "hymen". The officer later showed me the place where I wrote hymen. I proceeded to clarify "hymen broken".**

In this respect, the trial magistrate made the following observations:-

> **On count II defilement: PW2 gave an unsworn statement. She was not subjected to cross examination.**
>
> **She stated that the accused took his penis and put it on (sic) her vagina. This is collaborated by Pexh.2. The P3 form filled by PW5 Dr. Catherine Chemass which indicates that the said PW2's hymen was broken. There has been a robust cross examination by the accused on the missing word "broken". PW5 has explained the mishap and how she rectified the said missing word. She testified on oath that she had examined PW3 and made the findings."**

[28] From the above, it is evident that it was the P3 form in respect of **MN** which was later amended and the appellant's contention that there was an irregular amendment of **GNT**'s P3 form is therefore without basis as the appellant's first appeal on the second count in respect of **MN** was allowed and the conviction quashed.

[29] The appellant did not place any material on record or point out any material contradictions or inconsistencies in the prosecution evidence. Further, the appellant did not point out how the prosecution shifted the burden of proof to the defence.

[30] We find that all the ingredients of the offence of incest were present and proved. The learned Judge did not therefore err when he found that the prosecution proved its case to the required legal standard against the appellant for the offence of incest by a male person. We therefore have no basis of faulting the learned Judge for upholding the appellant's conviction. The appellant's appeal against conviction is therefore without merit.

[31] The next issue for our determination is the sentence of life imprisonment that was imposed on the appellant in accordance with **Section 20** of the **Sexual Offences Act**. In his mitigation, the appellant told that trial court that he wished to continue living with his children. We note that although the trial court considered the appellant's mitigation, it sentenced him to life imprisonment.

[32] The learned Judge of the 1st appellate court upheld the sentence of life imprisonment and stated as follows:

> **"…this is an appropriate sentence for courts to send a strong message to the public and society at large to serve as (a) warning that the law shall be enforced to protect the children and women in our midst, who fall victims of sexual assault."**12

[33] In the circumstances of this appeal, the age of the complainant was proved to be under 18 years. The sentence of life imprisonment which was imposed by the trial court and affirmed by the High Court was therefore properly founded in law.

[34] In **JMM V Republic [2020] eKLR** this Court succinctly stated:

> **"Incest sparks strong emotions in many cultures and communities around the world and is largely regarded as taboo; frowned upon, completely reprehensible, unacceptable, disgusting and above all, criminal…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."**

[35] The upshot is that this appeal is devoid of merit and is dismissed in its entirety.

**Dated and delivered at Nairobi this 7th day of August, 2020. M. KOOME**

**.....**

**JUDGE OF APPEAL**

**D. MUSINGA**

**.....**

**JUDGE OF APPEAL**

**J. MOHAMMED**

**.....**

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**