IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: KOOME, WARSAME & SICHALE, JJA]

CRIMINAL APPEAL NO. 68 OF 2019 BETWEEN

SMG..APPELLANT

AND

REPUBLIC..RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Nairobi (Nyakundi, J) dated 30th July, 2015

IN

HC.CRA NO. 30 OF 2015)

****

JUDGMENT OF THE COURT

The appeal herein is against the judgment of **R. Nyakundi, J** dated **30th July, 2015.** A brief background to this appeal is that **SMG** (the appellant herein) was charged with the offence of incest contrary to section 20(1) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on diverse dates between **2010** and **2013** in Kasarani Division within Nairobi County, being a male intentionally caused his penis to penetrate the vagina of **MNG** (name withheld), a female who was to his knowledge, his step daughter aged seventeen (17) years.

He was also charged with an alternative offence of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006. The particulars in the alternative charge being that on diverse dates between **2010 and 2013** in Kasarani Division within Nairobi County, he intentionally touched the buttocks/breasts/anus/vagina of **MNG** (name withheld), a child aged 17 years.

To support the charges, the prosecution called six (6) witnesses. On his part, the appellant elected to make a sworn statement of defence. He had no witnesses to call.

The trial magistrate considered the evidence by the prosecution and the appellant's defence and found the appellant guilty of the main count and sentenced him to life imprisonment.

The appellant was aggrieved with the conviction and sentence of the trial court and filed an appeal to the High Court. In a judgment dated **30th July, 2015, Nyakundi, J** upheld the judgment of the lower court on conviction and sentence.

Undeterred, the appellant moved this Court and in a supplementary grounds of Appeal filed on **28th October, 2019**, the learned judge was faulted for upholding the conviction and sentence of the trial court without considering sections 211, 137 and 214 of the Criminal Procedure Code, Article 50(2)(j)(h) of the Constitution and section 77 (2) of the Evidence Act Chapter 80 of the Laws of Kenya; for failing to consider that the exhibits relied upon were obtained contrary to Article 50(4) of the Constitution of Kenya, 2010; for failing to consider that the witnesses who testified against the appellant were hostile contrary to section 163 (1) of the Evidence Act; for failing to consider that the provisions of sections 213 and 310 of the CPC were breached and finally, for failing to take into consideration the appellant's *"plausible and truthful"* defence. The appellant urged this Court to allow his appeal, quash his conviction and set aside the sentence.

On **5th February, 2020**, the appeal came up for plenary hearing before us. The appellant appeared in person while **Miss Matiru**, learned Senior Public Prosecution Counsel appeared for the respondent. In support of the appeal, the appellant relied on his written submissions that elaborated on the above grounds. He emphasized that, although he was charged with incest, the charge was later changed to defilement and that he was given 2 copies of P.3 forms which bore two different rubber stamps.

In opposing the appeal, **Miss Matiru** stated that the appellant knew that he was charged with the offence of incest; that the appellant is P.W.1's father as evidenced by a birth certificate that was tendered in evidence; that the appellant's trial was fair; that contrary to the appellant's assertion that he did not understand the charges, the record shows that the charges were read to him in Kiswahili language and the appellant responded to them; that the appellant's complaint of non-compliance with Article 50 is baseless as the evidence was obtained in a fair manner and the appellant did not demonstrate any unfairness ; that the sentence of life imprisonment was fair considering the seriousness of the offence and was within the confines of the law and that although the appellant stated that certain witnesses were not called, he did not give their names nor did he point at any gaps that were left for not calling the said witnesses. On the issue of legal representation, counsel pointed out that before the year 2014, there was no probono legal representation available to an appellant, moreover there is no indication on record that he sought legal assistance.

In his brief rejoinder, the appellant contended that he was not given statements of the prosecution witnesses and hence, was ill prepared to conduct his trial.

We have considered the record, the oral and written submissions and the law. This is a second appeal and our mandate is as stipulated in Section 361(I) (a) of the Criminal Procedure Code. It provides:

> ***" 361 (I) 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."***

In so far as case law is concerned, the decision of **David Njoroge Macharia vs. Republic [2011] eKLR** sums up the said mandate. In the said decision, it was

stated:

> ***"Only matters of law fall for consideration and the court will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. (****see also* ***Chemagong vs. Republic [1984] KLR 213)."***

Similarly, in ***Kaingo versus Republic [1982] KLR 213*** it was held 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 could find as it did (Reuben Karoti S/O Karanja versus Republic [1956 17 EALA 146]."***

The evidence that was considered by the two courts below was given by P.W. 1 a girl aged 17 years. She lived with the appellant, (who is her father) and mother, **HWG** (P.W.2). She told the trial court that she was defiled by the appellant on numerous occasions and who at every turn threatened to kill her should she tell anyone of his evil actions. P.W.1 fearing for her life did not tell her mother, **HWG** (P.W.2) who had anyway become suspicious. However, upon prodding her, P.W. 1 told her mother that the appellant was having sex with her; subsequently, a report was made to **CPL Hellen Wambui** (P.W.4) of Kiamumbi Police Station on **27th March, 2013**. On receipt of the report, P.W.4 interrogated P.W.1 who divulged to her (P.W.4) that her step father had been defiling her since she was in class 8; that her step father had threatened to kill her together with her mother if she ever disclosed the information to anyone; that she finally disclosed the information to her mother and aunt because she was feeling mentally tortured and could not hide it anymore; that she issued a P.3 form to P.W.1. She arrested the appellant on **4th August, 2013**.

On **30th July, 2013**, **Dr. Zephania Kamau** (P.W.5), a surgeon in Nairobi examined P.W.1 who had earlier been treated at MSF Hospital by **Dr. Nafisa Bakari** as stated by **Salano Barbara Kere** (P.W.6) who produced the report on behalf of her colleague (**Dr. Nafisa Bakari**) whose whereabouts at the time was unknown. On examination of P.W.1, P.W.5 found no injuries, no blood nor discharge in P.W.1's genital organs. However, her hymen was broken. P.W. 5 filled the P.3 form which he produced in evidence. **Dr.Nafisa Bakari** had also found that P.W.1 was psychologically traumatized and presented suicidal thoughts. P.W.6 produced the report signed on **26th July, 2013** by **Dr. Nafisa Bakari.**

In his defence, the appellant stated that on **8th June, 2013,** he left home and went to his work place; that during the day as he went to buy materials for his work, he found his wife with a man she had had an affair with in the year 2011; that a confrontation ensued after which he left and went to his sister's place in "**Kongo**" area and informed her about his wife's behavior; that he stayed with his sister and did not go back to his home since that day; that on **15th June, 20313,** his children **KM** and **AW** went to his place of work and informed him that their mother had gone home the previous night with a drank man; that on **24th July, 2013**, his wife (P.W.2) called him to ask if he would pay a fee balance of Kshs 2000.00 for P.W.1 but he told her to ask the man whom she had an affair with to pay the fee balance; that on **25th July, 2013** at around 10.00 a.m. P.W.1 went to his place of work in uniform and told him that she had been sent from school for a fee balance of Kshs 2000.00; that he told P.W.1 to ask her mother to pay the fees; that P.W.1 started crying and he decided to give her the money for fees; that on **3rd August, 2013** at 8.30 p.m., his wife (P.W.2) called to inform him that their child (**N**) was sick; that he told her to take the child to hospital and he would pass by the hospital to pay the bill; that the following morning on **4th August, 2013**, he passed by the hospital within

Kongo area to pay bill; that he met P.W.2 at the entrance of the hospital in company of 4 men who attacked him physically and as they struggled, he saw a police land rover approaching. Then he was arrested and taken to Kiamumbi police station. The appellant denied committing the offence and stated that one of his daughters (**W**) told him that their mother (P.W.2) had told them to frame him so that once he is taken away, their mother's lover would buy them a plot.

It is clear to us that the trial court and the 1st appellate court analyzed and re-analyzed the evidence and came to the conclusion, rightly so in our view, that the appellant was guilty of the offence charged. P.W. 1 narrated to the court the numerous occasions when she was defiled by the appellant, her father whom she knew and lived with. P.W.1 kept mum for fear of her life and that of her mother as the appellant had threatened to eliminate both of them from the face of the earth. P.W.5 found that P.W.1's hymen was missing. On the other hand, **Dr. Nafisa Bakari** whose report was produced by P.W.6 found that P.W.1 was psychologically traumatized. Although the appellant tried to frame up his wife for having an extra-marital affair, this is a version that did not pass the test according to the two courts below and we have no reason to accept it either. The appellant would like us to believe that when he found that his wife was promiscuous, he opted to leave his home to live with his sister. Who ever abandons his family including his wife and children, to take up abode at a sister's place? This defence was a figment of the appellant's fertile imagination and is not saleable. The various provisions of the Criminal Procedure Code and the Constitution cited by the appellant in his supplementary grounds of appeal do not avail him.

We have no doubt that the appellant was responsible for the heinous acts against his own daughter, P.W.1.

We agree. The appellant's conviction and sentence were properly founded.

However, the record shows that in sentencing the appellant, the trial court stated:

> ***"Accused is not remorseful. The law does not give room to vary the sentence and it provides for life sentence for an offence of this nature. The accused is sentenced to life imprisonment. Right of appeal 14 days".***

On our part, we are aware of the recent jurisprudence in the case of **Francis Karioko Muruatetu & another vs. Republic SC Petition No. 16 of 2015**, wherein the Supreme Court of Kenya held that the mandatory death sentence for the offence of murder contrary to section 204 of the Penal Code is unconstitutional. This Court has had occasion to apply the dictum in the above case in Sexual Offences. In **Christopher Ochieng vs. Republic [2018] eKLR Kisumu Criminal Appeal No. 202 of 2011**, this Court 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 case 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 vs. 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".***

Given the new circumstances in the law, we hereby set aside the sentence of life imprisonment and substitute the same with a term of twenty (20) years imprisonment from the date of conviction, that is **22nd October, 2014**.

It is so ordered.

Dated and Delivered in Nairobi this 7th Day of August, 2020.

M. KOOME

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JUDGE OF APPEAL

M. WARSAME

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR