



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: E. M. GITHINJI, HANNAH OKWENGU &

J. MOHAMMED, J.J.A.)

CRIMINAL APPEAL NO. 71 OF 2017

BETWEEN

MK**APPELLANT**

AND

REPUBLIC**RESPONDENT**

(Appeal from the judgment of the High Court of Kenya

at Eldoret (Ochieng, J) dated 1st June, 2012

in

CRA CASE NO. 116 OF 2012)

JUDGMENT OF THE COURT

[1] **MK**, the appellant, is before us in this second appeal in which he is challenging the dismissal of his first appeal by the High Court (Ochieng J). The appellant was tried and convicted in the Magistrate's Court at Kabarnet for the offence of Incest by a male person contrary to **section 20(1)** of the **Sexual Offences Act**. During the trial, six (6) witnesses testified for the prosecution. These included, the minor complainant (minor) who is the appellant's daughter; appellants mother JK (J); the appellant's brother JTK (J), Benjamin Kendagor, a Clinical Officer at Kabarnet District Hospital; an administration police officer who arrested the respondent, and PC Elizabeth Lopetet an officer from Kabarnet Police Station who investigated the case.

[2] In a nutshell, the evidence was that, Jennifer had noticed the minor who was about eight (8) years old, walking with difficulties. Upon inspecting the minor's private parts, she noticed that she had bruises. J called J and upon interrogation, the minor explained that it was her father who had violated her.

[3] The matter was reported to the police and the minor was later examined by the Clinical Officer who noted that she had swellings on both labia majora, and bruises on the labia majora and minora. He concluded that there had been penetration, and that the minor was defiled. The appellant was later arrested by the AP officer, who found him under a bed inside a locked house.

[4] In his defence, the appellant simply denied the offence and claimed to have been framed by his mother whom according to him hates him because he had once told his father about his mother's affair with another man.

[5] In his judgment the trial magistrate found the evidence for the prosecution consistent that, the minor was defiled by the appellant. He therefore rejected his defence, convicted him of the offence, and sentenced him to life imprisonment.

[6] In his first appeal, the appellant faulted the trial judge for failing to allow him access to the statements of prosecution witnesses, convicting him on contradictory and insufficient evidence, and failing to take into account the grudge between him and his mother. The learned judge of the first appellate court having re-considered and re-evaluated the evidence, came to the conclusion that there was sufficient evidence that the minor was defiled, and that the appellant was sufficiently identified as the defiler through the evidence of the minor,

Jennifer and Jackson. The learned judge rejected the appellant's defence as an afterthought.

[7] In this second appeal, the appellant has filed grounds of appeal and supplementary grounds of appeal, mainly canvassing the issue of the age of the minor which he maintains was not ascertained, the sufficiency of the prosecution evidence in supporting his conviction, and the sentence imposed upon him that he contends is excessive.

[8] The appellant has also filed written submissions in support of his appeal. In a nutshell, he submits that the words "*liable to imprisonment for life*" in **section 20(1) of the Sexual Offences Act** provides a maximum sentence and does not mean that the sentence is mandatory. The appellant relied on **MK vs Republic, Nairobi Criminal Appeal No. 248 of 2014, (2015) eKLR**; and **Opoya vs Uganda [1967] EA 752**. He also maintained that the age of the minor was not proved as no age assessment was done nor was any legal document produced to prove the age.

[9] The appellant also argued that the evidence adduced was not sufficient to prove the case against him beyond reasonable doubt. He noted that there were inconsistencies and contradictions in the evidence of the witnesses. He singled out the clinical officer, as a witness whose evidence was not credible or reliable. He faulted the trial court for disregarding his defence and contended that his right to fair trial was compromised because he was unable to get representation nor was he given statements of prosecution witnesses.

[10] **Ms. R. N. Karanja**, a prosecuting counsel who appeared for the State, submitted that the offence of incest was established through the evidence of the minor, Jennifer and Jackson. The evidence of these witnesses was consistent with the evidence of the Clinical Officer who examined the minor, and confirmed that she had bruises and injuries on her private parts. She therefore urged the Court to dismiss this appeal.

[11] We have considered this appeal, the submissions and the authorities cited. The appeal being a second appeal, the jurisdiction of this Court is limited to consideration of matters of law only, and severity of sentence is a matter of fact (**Section 361 Criminal Procedure Code**). In our view, the grounds argued by the appellant raise the following issues of law that require our determination: whether the charge against the appellant was proved to the required standard; and whether the appellant's rights to a fair trial were violated. In regard to the sentence, there is an issue whether the sentence imposed upon the appellant was proper.

[12] In regard to the procedures, the appellant has complained that his rights to a fair trial was infringed by the failure to give him statements of prosecution witnesses. We have perused the record of the trial court nowhere do we find any record of the appellant having sought statements of prosecution witnesses or the same having been denied. Nor do we find any record of the appellant seeking legal aid. Indeed, during the hearing of the first appeal in the High Court, the appellant sought legal representation and was assigned a counsel who represented him in that appeal. Of interest however, is that although there was a ground of appeal regarding denial of access to prosecution statements, this point was not argued by the advocate. We find that this issue was raised as a mere afterthought and the appellant was not in any way prejudiced.

[13] In regard to the particulars of the charge, the appellant having been charged with incest, it was imperative that the prosecution proves the particulars of the charge. Section 20(1) of the Sexual Offences Act states as follows:

"Any male person who commits an indecent act or an act which causes penetration with a female person who to his knowledge is his daughter ... is guilty of an offence termed incest and is liable to imprisonment for a term of not less than 10 years provided that, if it is alleged in the information or charge and proved that the female person is under the age of 18 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 a consent of the female person."

[14] This means that to prove the charge, the following elements had to be established: First, that there was an indecent act or penetration committed on a female person; secondly, that the female person was under the age of 18 years; and thirdly, that the indecent act or penetration was caused by the father of the female person. In this case, there was clear evidence adduced by the minor, J1, J2 and the clinical officer, which showed that the minor was violated, and that she suffered injuries on her private parts which confirmed that there was penetration.

[15] As regards the minor's age, it is evident that she was a very young child. The trial judge observed during the *voire dire* that she was of very tender age. The Clinical Officer estimated her age on the P3 Form as seven (7) years old. Therefore, although there was no document produced in support of the minor's age, there was clear evidence that she was a child whose age was around seven (7) years. Of importance, is that, her age was conclusively determined as under eighteen (18) years, and this is what was material.

[16] On the identity of the person who defiled the minor, the minor stated that it was the appellant, her father, who defiled her. The appellant's mother and brother both confirmed that the minor had repeated this in their presence, and J1 explained how the deceased had had access to the minor. Both the trial court and the 1st appellate court were not impressed with the appellant's allegation that the evidence was a frame up. We have no reason to depart from their findings in this regard. The identity of the person who defiled the minor was clearly established as the appellant who is the father to the minor. Thus, we are satisfied that all the elements of the offence were established.

[17] As regards the sentence, we are in agreement with the appellant that the use of the word "**liable**" in section 20(1) of the Sexual Offences Act, did not connote a minimum sentence, but gave the trial magistrate the discretion to impose a sentence of any period up to a maximum of life imprisonment from the minimum sentence of ten (10) years imprisonment. In sentencing the appellant, the trial magistrate stated as follows:

"I have considered the accused mitigation but I find this act of defiling his seven year old daughter to be beastly, grossly immoral and inhuman. The accused having separated from the mother of the minor was supposed to offer moral and material support to the child. He however, turns against the expectations cast upon him and becomes the one to subject such a child of

tender years to sexual abuse and physical abuse. Accordingly the accused shall serve a life sentence.”

[18] In our view, the trial magistrate exercised his discretion in sentencing and given the circumstances, we cannot fault him in sentencing the appellant to life imprisonment. The sentence was in accordance with the law. Accordingly, we find no substance in this appeal and do therefore, dismiss it in its entirety.

DATED and delivered at Eldoret this 17th day of January, 2019

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR