IN THE COURT OF APPEAL

AT ELDORET

(CORAM: NAMBUYE, MAKHANDIA & ODEK, JJ.A)

CRIMINAL APPEAL No. 75 of 2018

BETWEEN

J KT.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal against the judgment and sentence of the High Court of Kenya at Eldoret (Kimondo, J.) dated 2nd October 2014

in

H.C Cr. A. No. 214 of 2011)

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JUDGMENT OF THE COURT

1. The appellant, ***JKT***, was charged with eight Counts of incest by male person contrary to **Section 20 (1)** of the **Sexual Offences Act.** He was convicted on Count I and III and acquitted on the other counts.

2. The particulars in support of Count I were that on the 20th day of November 2009 in Nandi South District of the Rift Valley Province, he caused his penis to penetrate the vagina of DC a girl aged nine years old being a person who was known to his knowledge to be his daughter.

3. The particulars in support of Count III were that on the 20th day of November 2009 in Nandi South District of the Rift Valley Province, he did cause his penis to penetrate the vagina of VC a girl aged five years old being a person who to his knowledge he knew to be his daughter.

4. The prosecution case against the appellant was principally founded and grounded upon the testimony of the complainants and their mother and the clinical officer who examined the complainants.

5. ***Martha Chebet*** (PW1) testified that she was a clinical officer at Meteitei Sub-District Hospital. That on 23rd November 2009, she examined DC (a girl aged nine years) the complainant in Count I. The complainant had bruises on her labia minora and the anus. She had no discharge. Her hymen was intact. That urinalysis revealed pus cells. She filled the P3 Form for DC which she produced it in evidence.

6. PW1 further testified that on 23rd November 2009, she examined VC (a girl aged five years old) the complainant in Count III. The complainant had a bruised labia minora and had a whitish vaginal discharge. That pus cells were detected in the urinalysis conducted upon her. She filled the P3 Form which she produced in evidence.

7. ***LCT*** (PW2) testified that the appellant was her husband and the complainants are their children. She testified as follows in regard to the offence in Count I:

> ***"On 20th November 2009 at 7.00 am I was at home. I went on safari to Eldoret with Hellen. I left my children at home with their father (accused). I returned at 10.00 pm. The complainant, DC opened the door for me. She is my daughter aged 11 years. She was aged 9 years old then. She told me that the accused had inserted his penis into her vagina…. The accused has been my husband for 10 years now."***

8. DC,(PW3), the complainant in Count I testified, as follows after *voire dire* examination:

> ***"On 20th November 2009, I went to school. In the evening, I went and cooked ugali. My father (points at accused) told me to cook some stew. I cooked the stew. We ate with other children….. and the accused. After that we slept. The room we live in is divided by a sheet. The accused switched off the tin lamp. After one hour the accused came and held my buttocks and arms. I screamed. The accused took a firewood and hit me on the right leg with it. I kept quiet. The accused told me to sleep where he sleeps. He came after five minutes and removed my under pants. I cried. The accused bit my left hand. The accused inserted his penis into my vagina. It was painful. I screamed. The accused bit my hand. The accused told me "I am opening the way, when you will be married, your husband will do this to you." He released me. I went out. Then my mother came at 10.00 pm. I told her what the accused had done to me. On the following day, my mother took me to Maraba Hospital. I later reported to the police…"***

9. VC, (PW 4), the complainant in Count III, testified by way of affirmation after *voire dire* examination.

> ***"I am VC I am I class one…. On 20th January 2009 (sic) that man (points at the accused) did bad manners to me. I was sleeping with PW3. The accused put off the tin lamp. The accused removed my underwear. He slept on my stomach; he inserted his "thing" into my "thing". It was painful.***
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> ***The accused took a short time. I told my mother. She took us to hospital at Maraba. The doctor examined and treated me. We later told the police."***

10. The prosecution called ***PC Wilson Sambu*** (PW5) who testified that he had investigated the alleged offence and recorded the statements of the complainants. That the appellant was arrested and brought to the Police Station by ***Administration Police Constable Isaac Wafula***. That he took the complainants to Meteitei sub-district hospital where they were examined and P3 Forms filled.

11. The appellant in his defence gave an un-sworn statement. He stated as follows:

> ***"I live in Meteitei. I am a mason. I did not defile my daughters. It is my wife who fabricated these charges. On 20th November 2009, …my wife went to a party. She came home at night while I was asleep. She came with my son CK. When C stepped on me while I was sleeping on the floor, he told me that he had come with my wife. After a short while, my wife knocked the door. I opened for her and asked her why she was remaining outside when C entered the house. I told her she must have been committing adultery. In the morning, my fellow mason came to my home and we went with him to work. After work, I took him in a hotel at 5.00 pm. I went to the Assistant Chief's shop. We agreed that my case with my wife would be heard the following day. I was later informed that the police were looking for me. Later, the administration police arrested me. They took me to Meteitei Sub-District Hospital where I found PW1, PW2, PW3, PW4 and PW5. A sample of my blood was taken.***
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> ***The nurse talked to me. She told me that I would be charged with a serious offence. All the evidence adduced by the prosecution was lied. My children were coached to lie about me."***

12. Upon hearing and evaluating the prosecution and defence evidence, the trial magistrate convicted the appellant and sentenced him to a term of twenty (20) years imprisonment. In convicting the appellant, the magistrate stated:

> ***"PW1 testified that she examined PW3 and found that she was nine years old. She noted that PW3 had bruises in the labia minora and anus. PW3 said that the accused had touched her buttocks and anus. Although PW1 said PW3's hymen was intact at the time of examination, she noted bruises on her labia minora and anus. The accused allegation that PW3 was coached to testify against him is not substantiated… I find that it has been proved beyond reasonable doubt that the accused committed an indecent act with PW3 who is his daughter and who was nine years' old at the time of the offence. … In find that Count I of incest by male has been proved against the accused beyond reasonable doubt……***
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> ***On Count III, the minor was five years old at the time of the event. She testified the accused is her father and he defiled her. Her evidence is corroborated by PW1 and Prosecution Exhibit 2 - the P3 Form…. Count III has been proved beyond reasonable doubt. ….***
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> ***I hereby sentence the accused to twenty (20) years imprisonment on Count I and twenty years on Count III to run concurrently."***

13. Aggrieved by his conviction and sentence, the appellant lodged a first appeal to the High Court. The appeal against conviction and sentence was dismissed. In dismissing the appeal, the learned Judge expressed himself as follows:

> ***"First, the evidence of the two minors was corroborated by the clinical officer. The evidence of their mother also fortifies the narrative of the minors. The minors gave a vivid account of the incidents. The evidence of the minors, their mother and that of the clinical officer was not contradictory or inconsistent as urged by the appellant. The cross-examination by the accused did not establish a plot to fix him with false evidence. … The injuries to PW3's private parts were consistent with partial penetration…….***
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> ***Regarding sentence meted out, I agree with the learned state counsel that the appellant got off with a light sentence. Under both Sections 11 (1) and 20 (1) of the Act, the offences of incest or indecency with a child attract a sentence of not less than ten years. But under the proviso to Section 20 (1), if the victim of incest is under the age of eighteen years, the accused shall be liable to life imprisonment. PW3 was a minor at the time the offence occurred. The appellant was only sentenced to 20 years' imprisonment. In the result, I find that the appeal is devoid of merit. I uphold the conviction and sentence handed down by the learned trial***

magistrate. The entire appeal is accordingly dismissed."

14. Aggrieved by the dismissal of his first appeal, the appellant has lodged the instant second appeal to this Court. The grounds in support of the appeal are that:

> ***"(i) The two courts below ignored the appellants defence that the complainants were coached by their mother and the clinical officer to testify against him.***
>
> ***(ii) The evidence against him is full of lies and contradictions and there is lack of corroboration.***
>
> ***(iii) Penetration was not proved.***
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> ***(iv) Sections 26 and 36 of the Sexual Offences Act were not considered.***
>
> ***(v) A crucial witness, Administration Police Constable Isaac Wafula was not called to testify.***
>
> ***(vi) The appellant was not accorded a fair trial as guaranteed under Article 50 of the Constitution due non-compliance with Section 146 (4) of the Evidence Act on the right to re-call a witness for further cross-examination."***

15. At the hearing of the appeal, the appellant appeared in person. The State was represented by the Prosecution Counsel ***Mr. Mulamula***. Both parties filed written submissions fully adopted, highlighted and cited judicial authorities.

APPELLANT'S SUBMISSIONS

16. The appellant submitted that the prosecution did not prove its case beyond reasonable doubt. That the element of defilement was not proved. That the evidence on penetration was scanty and inconsistent with the claims levelled against the appellant. That the age of the injuries sustained by the complainants was not given. That the medical examination report states that the injuries were hours old yet medical examination was done three days after the alleged incident. That no treatment was administered for the alleged injuries. That there is no weapon known as sexual (sic). That there was no evidence connecting the allegations against the appellant to the date of the alleged injuries. That the evidence of the clinical officer (PW1) did not establish penetration. That the prosecution evidence is wrought with inconsistencies and contradictions.

17. The appellant further submitted that crucial witnesses were not called to testify. That the investigating officer stated that the appellant was brought to the Police Station by ***Administration Police Constable*** (APC) ***Isaac Wafula***. That the said ***APC Isaac Wafula*** was not called to testify. That failure of ***APC Wafula*** to testify violated the right to fair trial as enshrined in **Article 50** of the **Constitution**. In addition, it was submitted that the trial court erred in failing to re-call PW1, the clinical officer, for further cross-examination. That this was contrary to ***Section 146 (4)*** of the **Evidence Act** that guarantees fair trial.

18. It was further urged that the two courts below erred in convicting the appellant based on contradictory and inconsistent evidence that lacked corroboration. That the evidence of PW3 and that of PW1 were contradictory. That PW1, the clinical officer, testified that the appellant is the one who defiled PW3. The appellant asked who gave PW1 the information she recorded in the P3 Forms? That PW1 testified the complainants were defiled by their father; that PW1 further stated that PW3 had injuries on her hand and she was defiled while asleep yet PW3 did not testify that she was asleep when she was defiled. That there was a contradiction in the testimony of PW1 and PW3 and the two courts below ignored the same. That PW1 could not testify as she stated without being coached and her evidence should not therefore have been relied upon.

19. The appellant further submitted that the evidence against him is circumstantial and does not irresistibly point to his guilt. That the urinalysis report in the P3 Forms showed that the children had other infections. That upon medical examination, the appellant did not have infections akin to the ones found in the complainants. Consequently, the appellant pondered and wondered aloud how come he did not have the same infections if he defiled the children? The appellant concluded his submissions by stating that there was no independent witness who testified that he did what he is alleged to have done. He urged us to allow the appeal.

RESPONDENT'S SUBMISSIONS

20. The respondent in opposing the appeal rehashed the facts upon which the prosecution case was grounded. The prosecuting counsel submitted that all the ingredients of the offence of incest as charged were proved beyond reasonable doubt. That the appellant's right to fair trial was not violated. That the allegation of collusion and coaching of the prosecution witnesses was baseless.

21. The State submitted that it was not in dispute that the complainants are the appellant's daughters. That the complainants were nine and five years old respectively at the time of the offence. That there are concurrent findings of facts by the two courts below. That PW1, the clinical officer, testified that she examined the complainants and they had bruises on their genitalia.

That the evidence of PW1, PW2, PW3 and PW4 was consistent and credible.

22. On the issue of failure by the trial magistrate to recall PW1 for further cross-examination, the respondent conceded that the trial magistrate erred in failing to recall PW1. That the right to recall a witness is provided for in ***Section 146 (4)*** of the **Evidence Act** and ***Section 150*** of the **Criminal Procedure Code.** That no prejudice or miscarriage of justice was nonetheless occasioned to the appellant by the failure to recall PW1 for further cross-examination. That in any event, the appellant did not lay any basis for recall of the witness.

23. On the right to fair hearing, the respondent submitted that the appellant's right to fair trial under **Article 50** of the Constitution was not violated. That the allegations of a grudge between the appellant and his wife (PW2) were unfounded. That their marital issues did not dent the cogent and corroborated prosecution evidence. That the prosecution is not bound to call a multitude of witnesses but is duty bound to prove its case beyond reasonable doubt. That in the instant appeal, the prosecution proved all the ingredients for the offence of incest as charged.

24. On sentence, the respondent urged us not to interfere with the twenty-year term of imprisonment meted out to the appellant. That the offence as charged and proved is heinous. That there is no compelling reason for this Court to interfere with the sentence of twenty-years imprisonment meted upon the appellant. That one of the victims of the crime in Count III was a five year old child. That the age of the victims and the fact that the appellant is their father are aggravating factors militating against interference with the sentences as meted out. In any event, it was submitted sentence is a matter of fact and this Court has no jurisdiction in a second appeal to consider matters of fact.

ANALYSIS and DETERMINATION

25. This is a second appeal *and our jurisdiction is confined to* matters of law. This was well explained in **Karani vs. R [2010] 1 KLR 73** where it was stated:

> ***"This is a second appeal. By dint of the provisions of section 361 of the Criminal Procedure Code, we are enjoined to consider only matters of law. We cannot interfere with the decision of the superior court on facts unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law." See also Karingo -vs- R (1982) KLR 213"***

26. The appellant was charged with incest with a child under the provisions of the **Sexual Offences Act.** The particulars of the offence disclosed defilement with two children who were his daughters. In **John Mutua Munyoki vs. Republic [2017] eKLR**, this Court stated under the Sexual Offences Act the main elements of the offence of defilement are as follows:

> ***(i) The victim must be a minor, and***
>
> ***(ii) There must be penetration of the genital organ and such penetration need not be complete or absolute. Partial penetration will suffice***.

27. In the instant matter, the age of the two complainants is not disputed. The complainant in Count I was PW3 a girl child aged nine years at the time of the offence. The complainant in Count III, PW4 was a girl child aged five years at the time of the offence. The appellant is the father to the complainants. He lived with them under one roof. He had opportunity to commit the offence. The testimonies of PW3 and PW4 is one of recognition of the appellant as the person who defiled the complainants. We are thus satisfied that the prosecution evidence through the testimonies of PW3 and PW4 placed the appellant at the scene of crime. In this regard, we are comforted with the dicta in ***Anjononi & others v Republic [1980] KLR 57*** where it was held:

> ***"…recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends on the personal knowledge of the assailant in some form or the other."***

28. In this appeal, the Appellant contends that ***Section 36*** of the **Sexual Offences Act** was not complied with. The Section stipulates that a trial court may order a DNA test to be conducted on an accused person. In this matter, the appellant contends that DNA testing ought to have been done to connect him with the crime. That since no DNA was conducted, there is no evidence linking him to the offence as charged. A ground analogous to the one urged in this matter was considered by this Court in **Evans Wamalwa Simiyu vs. Republic [2016] eKLR** where it was stated:

> ***"[19] Another issue for consideration is the contention by the appellant that the trial Court failed to order a DNA test on him contrary to Section 36 of the Sexual Offences Act which evidence could have exonerated him. In AML v Republic 2012 eKLR (Mombasa), this Court upheld the view that:***
>
> ***"The fact of rape or defilement is not proved by way of a DNA test but by way of evidence."***
>
> ***[20] This was further affirmed in Kassim Ali v Republic Cr Appeal No. 84 of 2005 (Mombasa)(unreported) where this Court stated that:***
>
> ***"The absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence."***
>
> ***[21] Moreover, section 36 of the Sexual Offences Act that gives the trial court powers to order an accused person to undergo DNA testing uses the word "may". Therefore, the power is discretionary and there is no mandatory obligation on the court to order DNA testing in each case."***

29. Persuaded by the merits of the above cited decisions of this Court, we find that failure to conduct a DNA test on the appellant did not dent the prosecution case. This ground of appeal has no merit.

30. Another ground urged in this appeal is that the two courts below erred in ignoring inconsistencies and contradictions in the prosecution case. The appellant contended that the evidence of PW1, the clinical officer, contradicted the evidence of PW3, the complainant in Count I. We have considered the alleged inconsistencies we find that the contradictions are not material and do not dimple, cast doubt or destroy the prosecution case.

31. On the alleged inconsistencies in the testimony of PW3 and the medical report, we find this ground has no merit. The recognition of the appellant and the corroborative evidence overwhelmingly outweigh any inconsistency in the evidence on record. The inconsistencies neither dent, dislodge nor cast doubt on the prosecution case. In arriving at our decision, we are persuaded and guided by the decision of this Court in ***John Nyaga Njuki & 4 others vs. R [2002] eKLR*** *where it was stated:*

> ***"But what is important is whether the discrepancies are of such a nature as would create a doubt as to the guilt of the accused. If so, then the prosecution would not have discharged the burden placed squarely on it to prove the case beyond any reasonable doubt. However, where discrepancies in the evidence do not affect an otherwise proved case against the accused, a court is entitled to overlook those discrepancies and proceed to convict the accused."***

32. The appellant further urged that the two courts below erred in failing to find that the prosecution did not prove that there was penetration of the appellant's genitalia into the female genitalia of the complainants. The pertinent legal issue is whether there was penetration by the appellant into the genital organ of PW3 and PW4. Proof of penetration is established either by the victim's evidence, medical evidence or any other cogent evidence, (See ***Remigious Kiwanuka vs. Uganda; S. C. Crim. Appeal No. 41 of 1995*** *(Unreported).* **The slightest penetration is enough to prove the ingredient of the offence of defilement. In the persuasive case of Michael Kihara Kariuki vs. Republic [2017] eKLR**, it was correctly stated that proof of defilement and the key ingredient of penetration is not dependent on the words used to describe the genital organs but is dependent on whether there was cogent, consistent and reliable evidence adduced by the prosecution witnesses to prove the offence.

33. One of the grounds urged in this appeal is that the prosecution did not prove penetration. Rather the evidence pointed to indecent act. The two courts below made a concurrent finding that there was no evidence to prove full penetration. In this regard, we find it opportune to lay out the definition of "indecent act" within the meaning of **Sexual Offences Act.**

34. ***Section 2*** of the Act defines indecent act to mean:

> ***"any unlawful intentional act which causes:***
>
> ***(a) Any contact between the genital organs of a person, his or her breasts and buttocks with that of another person;***
>
> ***(b) Exposure or display of any pornographic material to any person against his or her will but does not include an act which causes penetration."***

35. In the same vein, ***Section 11 (1)*** of the **Sexual Offences Act** make provision for punishment for indecent act with a child. The Section provides as follows:

> ***"Any person who commits an indecent act with a child is guilty of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years."***

36. We further note that ***Section 20 (2)*** of the **Sexual Offences Act** provides that if any male person attempts to commit incest, he is guilty of the offence of attempted incest and is liable upon conviction to a term of imprisonment of not less than ten years. We observe that the appellant was not charged with attempted incest but there is an alternative charge in Counts I and III of indecent act with a child contrary to ***Section 11 (1)*** of the Act.

37. In the instant matter, the evidence tendered in proof of penetration and or indecent act is the testimonies of PW3 and PW4 who both testified that the appellant removed their underpants and defiled them individually and separately. The medical report shows the hymen of PW3 was intact but she had bruises in her private parts. The medical report in relation to PW4 does not prove penetration. We note that the trial court made a finding that although there was no evidence of full penetration, the elements of indecency were proved. The learned Judge upheld this finding and conclusion of fact. Coupled with the evidence on recognition that it is the appellant who indecently defiled both PW3 and PW4, we are satisfied that the prosecution proved the offence of indecent act with the complainants rather than incest. As it were the prosecution did not prove the offence of incest as charged. For this reason, we find that the two courts below erred in convicting the appellant for incest. The evidence disclosed the offence of indecent act with the complainants. The two courts below correctly held that penetration was not proved but indecent act was proved. For this reason, we set aside the conviction of the appellant for incest contrary to ***Section 20 (1)*** of the **Sexual Offences Act** and convict him of the alternative charges in Counts I and III for the offence of indecent act with a child contrary to ***Section 11 (1)*** of the **Sexual Offences Act.**

38. The appellant urged that the Judge erred in failing to find that crucial witnesses were not called to testify. More importantly, it was contended that ***APC Isaac Wafula*** should have been called to give evidence. This ground of appeal has no merit. We have examined the record of appeal. The appellant has not demonstrated to our satisfaction how he was prejudiced by failure of the prosecution to call ***APC Mr. Wafula***. In any event, the appellant was at liberty to call the witness if he so desired. Further, this Court is alive to the fact there is no legal requirement in law on the number of witnesses to prove a fact. ***Section 143*** of **Evidence Act (Cap 80) Laws of Kenya** provides: -

> ***"143. No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact"***

The testimony of the witness would have been limited to the role he played in arresting the appellant, which is not disputed. Appellant was arrested and arraigned before court. Failure to call the witness caused no miscarriage of justice.

39. In **Keter vs. Republic [2007] 1 EA 135** it was held *inter alia:*

> ***"The prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt."***

40. In penultimate, we now consider the legality of the sentence meted out on the appellant. The appellant was sentenced to a twenty (20) year term of imprisonment. As correctly noted by the learned Judge, if the offence is incest and the victim is under the age of 18 years, then pursuant to the proviso in ***Section 20*** of the **Sexual Offences Act**, an accused person is liable to imprisonment for life. In the instant matter, the appellant was charged with the offence of incest. Incest was not proved and thus the learned judge erred in making reference to incest and the proviso in ***Section 20*** of the **Sexual Offences Act**.

41. The record shows that the appellant was a first offender and in his mitigation he stated that he had children to look after and he did not defile them. We are cognizant of the decision by the Supreme Court in **Francis Karioko Muruatetu & another vs. Republic [2017] eKLR** where it was held that mandatory nature of minimum sentences deprive the Courts of their legitimate jurisdiction to exercise discretion to individualize an appropriate sentence to the relevant aspects of the character and record of each accused person.

42. Bearing in mind the decision in **Francis Karioko Muruatetu & another vs. Republic (supra),** we have taken into account the mitigation by the appellant. We have also considered that the offence as disclosed by evidence on record is indecent act with a child. We note that the victims of the offences were nine and five years old at the time of the offence. We further note that ***Section 11 (1)*** of the **Sexual Offences Act** imposes a minimum sentence of ten (10) years imprisonment. Guided by these facts, we are inclined to interfere with the twenty-year term of imprisonment meted upon the appellant by the trial court and as affirmed by the High Court. (See also **Benard Ombuna vs. Republic [2019] eKLR; Nairobi Criminal Appeal No. 28 of 2018)**

43. The upshot is that we set aside the conviction of the appellant for incest and substitute the same with conviction for the alternative charge for indecent act with a child contrary to ***Section 11 (1)*** of the **Sexual Offences Act.**

We further set aside the sentence of twenty (20) years imprisonment for incest and substitute the same with the minimum sentence of ten years for the offence of indecent act with a child DC and VC as stated in the alternative counts with effect from 21st October 2011 when the trial court passed the sentence.

Dated and delivered at Eldoret this 17th day of October, 2019.

R. N. NAMBUYE

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JUDGE OF APPEAL

ASIKE MAKHANDIA

……..

JUDGE OF APPEAL

J. OTIENO ODEK

…….

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR