IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: P. KIHARA KARIUKI, (PCA), OUKO & MURGOR JJ.A)

CRIMINAL APPEAL NO. 276 OF 2011

BETWEEN

D W G ……. APPELLANT

AND

REPUBLIC ……..…… RESPONDENT

(Appeal from the Judgment and sentence of the High Court of Kenya at Nairobi by Hon. Justice Khaminwa dated 14th February, 2011

in

H.C.CRA. 371 OF 2008)

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JUDGMENT OF THE COURT

The appellant was charged before the Chief Magistrate's Court at Thika in Criminal Case No. 5165 of 2007 with two counts of incest contrary to **Section 20 (1)** of the Sexual Offences Act and an alternative charge of indecent act contrary to **Section 6 (a)** as read with **Section 11 (1)** of the Sexual Offences Act, on each count.

According to the particulars of the offence in both counts, it was alleged that on diverse dates during the month of July 2007 at **[Particulars Withheld]** Village in Thika, the appellant committed an act which caused penetration with L N M. and M W W. girls aged 9 and 7 years, respectively, who, to his knowledge, were his daughters.

After hearing the evidence presented by both the prosecution and defence sides, the learned Magistrate, (L. Gicheha, SRM) returned a finding of guilty on the 2nd count and upon conviction, sentenced the appellant to 20 years imprisonment.

Against that finding and sentence, the appellant filed a petition in the High Court. Khaminwa, J. in a terse judgment of four pages dismissed the appeal, upholding the trial court. Undeterred the appellant now comes before this Court on a second appeal, on the following condensed grounds contained in his "*home-made"* memorandum of appeal and in the written submissions:-

1. **That the two courts below erred in failing to consider that the doctor's evidence exonerated him.**

2. **That the High Court failed to analyze the evidence thereby failing to find that it was not safe to convict on such evidence.**

3. **That the appellants defence was not considered, and**

4. **That the sentence imposed was excessive and harsh.**

Mrs. Ouya for the respondent opposed the appeal and urged us not to disturb the decisions of the two courts below as the evidence was overwhelming. According to her, the only error committed by the two courts below was on the sentence of 20 years, which in her submission ought to have been life imprisonment in terms of **Section 20** of the Sexual Offences Act.

Being a second appeal for which this Court is enjoined by **Section 361** of the Criminal Procedure Code to consider only matters of law. Accordingly, we only revisit the facts of the case here by way of background. The appellant who lived separately from his wife had the care of their two daughters L N W. (9 years) and M W W (7 years). L N M. recalled how on a particular night the appellant returned home drunk and undressed her while she was asleep. She woke up and ran out of the house to a Baba K, an uncle who in turn reported the incident to the children's maternal grandmother.

The learned trial magistrate considered this evidence and found, correctly in our view, that it did not meet the standard of proof required in a criminal trial, as there was no evidence that the appellant had done any act causing penetration with L N W. Consequently, the charges in count 1 were dismissed.

L N W on her part gave the following testimony at the trial.

> **"My father did me bad manners while I was asleep. He did me in my private parts where I urinate. I cried. He did me bad manners with his thing for urinating. He did me every day. The first time I cried. It was painful and I bled. ……. My stomach still pains."**

Although the doctor upon examination of the witness did not notice any injuries or tears in her genitalia, he found that her hymen was not intact, and as a consequence thereof concluded that that was evidence of penetration. The learned trial magistrate was persuaded from the foregoing evidence that the witness must have been defiled by the appellant. The learned judge of the High Court agreed with that conclusion.

The offence of incest is committed under **Section 20 (1)** aforesaid when a male adult does an act which causes penetration with a female person who to his knowledge is his daughter, granddaughter, sister, mother, niece, aunt or grandmother. It is not in doubt that L N W was the appellant's daughter. The doctor found that she had been penetrated and both courts below made factual finding that indeed the penetration was caused by the appellant. Because the first appellate court and this court lack the advantage of hearing and seeing the witnesses, the law requires the trial court to observe the demeanour of sexual offences victims and if it is satisfied, for reasons to be recorded, that the victim is a witness of truth, it can proceed to convict on such evidence - see **Section 124** of the Evidence Act. The learned trial magistrate after conducting a *voir dire* examination to the child witness noted that:-

"The witness is intelligent but young."

In her judgment, the learned magistrate said of the witness;-

> **"PW3 evidence was so thorough that I doubt that even with teaching from the grandmother she would have achieved such thoroughness. She must have undergone the said sexual encounter."**

That is the statutory role of the trial court and we have no basis to doubt the findings and conclusions reached by that court.

Although, as we have noted, the judgment of the High Court was rather brusque, consisting of only four pages, in our opinion, it was in conformity with the requirement of **Section 169 (1)** of the Criminal Procedure Code. The ground that it was too short and failed to re-evaluate the evidence on record, together with the ground that the appellant's defence raising a question of a grudge between him and his mother-in-law was not considered, are without merit and we accordingly reject them.

On sentence, the learned judge of the High Court merely noted that:-

> **"The sentence of 20 years imprisonment in the circumstances of this case cannot be equivalent to the trauma the children have suffered."**

It did not occur to the learned judge that the appellant was charged under **Section 20** of the Sexual Offences Act. The general offence of incest is punishable under **Section 20** with a term of imprisonment 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 <u>accused person shall be liable to imprisonment for life</u> and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person**." (Our emphasis)

See proviso to **Section 20** aforesaid.

In the course of arguments of this appeal before us, we brought this provision to the attention of the appellant so as to make an election whether to proceed with the appeal or to withdraw it. He elected the former after our fervent prodding. There was evidence that L N W was under the age of 18 years bringing the offence within the proviso to **Section 20,** and attracting life sentence. The sentence of 20 years imposed by the trial court and upheld by the High Court was illegal and must be as we now do set aside.

Accordingly, we dismiss this appeal and substitute the sentence of 20 years with that of life imprisonment.

Dated and delivered at Nairobi 22nd day of November 2013.

P. KIHARA KARIUKI

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PRESIDENT,

COURT OF APPEAL

W. OUKO

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRA