IN THE COURT OF APPEAL

AT NYERI

(CORAM: KOOME, MUSINGA & MURGOR, JJ.A.)

CRIMINAL APPEAL NO. 20 OF 2012

BETWEEN

SNT ……...APPELLANT

AND

REPUBLIC ……... RESPONDENT

(An appeal from the judgment of the High Court at Nyeri (Wakiaga, J.)

dated 17th February, 2012

in

***H.C.CR.A NO. 301 OF 2008*)**

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JUDGEMENT OF THE COURT

1. This is an appeal from the judgment of the High Court (Wakiaga, J.) dated 17th February, 2012 in which the appellant's conviction for the offence of incest by the Senior Resident Magistrate at Kangema was confirmed and the sentence of 14 years' imprisonment handed down by the trial court was enhanced to life imprisonment. ***SNT,*** the appellant, was charged with the offence of incest contrary to ***Section 20 (1)*** of the ***Sexual Offences Act No. 3 of 2006*** and an alternative count of indecent assault of a female contrary to ***Section 11(1)*** of the ***Sexual Offences Act*** as aforesaid.
2. The Information placed before the court on the charge of incest was that on 22nd September, 2006 in Muranga District within the then Central Province, the appellant being a male person caused a penetration of his male organ into CWN., a female person who to his knowledge was his daughter. The particulars of the alternative charge were that on the aforementioned date and place the appellant unlawfully and indecently sexually assaulted CWN by touching her private parts.
3. The prosecution called four witnesses in support of its case against the appellant. It was the prosecution's case that on 22nd September, 2006 at around 8:00 a.m. PW1, the complainant a young girl aged 11 years, was at home in the company of her other siblings. Her father who is the appellant sent the other siblings to the shop and told the complaint to stay behind. The appellant took the complainant to his bedroom, lifted her dress and placed her on the bed. He removed his own clothes and applied jelly on his penis and proceeded to have carnal knowledge with the

complainant. At that time, the complainant's mother, PW2, JMN (J) was away looking for food for the family. According to the complainant, the appellant covered her mouth with his hand so as to prevent her from screaming. The appellant also told her that he would henceforth be having sexual intercourse with her and not her mother. The complainant testified that the appellant had on a previous occasion had carnal knowledge with her and he had threatened her with dire consequences if she disclosed the secret ordeal to anyone.

4. At around 5:00 p.m. on the same day, while J was cooking, she observed the complainant was having difficulties while in a sitting position. Upon inquiring, the complainant informed her that the appellant had sexual intercourse with her. Jane examined the complainant and noticed she had some spermatozoa on the vagina. J told the court that when she confronted the appellant, he refused to take the child to the hospital. Jane informed the appellant's mother and other elders about the sexual assault. The appellant's mother forbade Jane from disclosing the sexual assault to anybody else.
5. In defiance, J took the complainant to the police station on 27th September, 2006. She recorded her statement with PW3, PC Pansil Kamau (PC Kamau) who also referred them to Kangema Health Centre, where the complainant was examined and treated. PW3, Paul M. Gathogo (Paul), a clinical officer at the said Centre testified that upon examining the complainant on 28th September, 2006 he noticed a whitish discharge and bruises around the vaginal opening. He confirmed there was penetration and the complainant had had sexual intercourse.
6. After considering the above evidence the learned trial magistrate placed the appellant on his defence. He gave an unsworn statement and narrated how on 2nd October, 2006 while at his home police officers arrested him. He denied committing the offence he was charged with.
7. The trial court convicted the appellant for the offence of incest and sentenced him to 14 years imprisonment. Being aggrieved with the trial court's decision, the appellant appealed to the High Court. In a judgment dated 17th February, 2012 the High Court (**Wakiaga, J**.) confirmed the appellant's conviction and enhanced the sentence of 14 years to life imprisonment. It is against that decision of the High Court that the appellant has filed the current appeal based on the following grounds:-

- ***The learned Judge erred in law by failing to hold that the lower court did not rely on any evidence to ascertain that the appellant penetrated the complainant (Caroline) as required under Section 36(1) of the Sexual Offences Act.***

- ***The learned Judge erred in law by failing to hold according to the charge sheet that the sexual assault was reported and booked in the occurrence book on 12th October, 2006 while he was arrested on 2nd October, 2006 before the alleged offence was reported.***

- ***The learned Judge erred in law by failing to hold that the appellant's constitutional rights were violated by being arrested on 2nd October, 2006 and arraigned in court on 5th October, 2006; and that no reasonable explanation was given for the said delay.***

- ***The learned Judge erred in law by invoking Section 354 of the Criminal Procedure Code and enhancing sentence without taking into account that the prosecution had not proved the age of the complainant as required under Section 20(1) of the Sexual Offences Act.***

8. During the hearing of this appeal the appellant appeared in person and indicated that he would rely entirely on his written submissions filed on 26th September, 2013. It is argued in the said submissions that there was no medical evidence linking the appellant to the alleged offence of defilement of his child. He argued that he was never medically examined contrary to ***Section 36 (1)*** of the ***Sexual Offences Act***. He maintained that the charges against him were fabricated; this was quite evident from the fact that the charge sheet indicated that the alleged sexual assault was reported on 12th October, 2006 which was after his arrest on 2nd October, 2006; that his constitutional rights to a fair trial within a reasonable time as provided for under ***Section 72 (3)*** of the repealed ***Constitution*** were violated because he was arrested on 2nd October, 2006 but was

arraigned in court on 5th October, 2006; that the prosecution did not give any reasonable explanation for the delay; the learned Judge was wrong in invoking ***Section 354*** of the ***Criminal Procedure Code*** to enhance his sentence yet the prosecution had not proved the age of the complainant.

9. Mr. J. Kaigai, Assistant Deputy Public Prosecutor, supported the conviction and sentence. He submitted that complainant's evidence was clear that the appellant sent away the other children to the shop so as to get an opportunity to defile the complainant who was then aged 11 years old; that the trial magistrate found the complainant possessed sufficient intelligence and she gave sworn evidence which was believed by the trial court; further, her mother corroborated the complainant's evidence on age; also the treatment notes and the clinical officer also confirmed that the complainant was 11 years old at the time of the sexual assault. Concerning the alleged violation of the appellant's rights under the retired constitution by a delay of three days before he was arraigned in court, the High Court correctly addressed the issue and concluded that the same did not affect the process of a fair trial. Finally, he argued that the learned Judge was correct in enhancing the appellant's sentence to life imprisonment because it was the legal sentence prescribed under the law for the offence of defilement of a child below the age 18 years.

(10.) This being a second appeal, this Court is restricted to address itself on matters of law only. As this Court has stated many times before, it 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 ***Chemangong -vs- R [1984] KLR 611***. In ***Kaingo -vs- R*** **(1982) KLR 213 at p. 219** this Court said:-

> ***"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 Karari C/O Karanja -vs- R (1956) 17 EACA 146)"***

(11.) Bearing the above principles in mind, the appellant contended that the charge sheet indicated that the alleged sexual assault was reported and booked in the occurrence book on 12th October, 2006 while he was arrested on 2nd October, 2006. The Charge Sheet however shows that the offence was committed on the 22nd September 2006. The complainant in the company of her mother reported the matter to the police on the 27th September 2006; the police referred the complainant to hospital. They made it to the hospital on the 28th September 2006, and the P3 form was filled on 29th September 2006. The appellant was apprehended on the 2nd October 2006, and arraigned in court on the 5th October 2006.

(12.) If there was a discrepancy in the occurrence book, regarding the date of the arrest and or even the date of the offence (which was not the case here) that in our most respectful view did not cause any prejudice to the appellant. In any event that is a discrepancy which is curable under ***Section 382*** of the ***Criminal Procedure Code*** which provides*:*

> ***"Subject to the provisions herein-before contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:***
>
> ***Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."***

See also the case of; ***Joseph Maina Mwangi -vs- Republic*** ***Criminal Appeal No. 73 of 1993*** where this Court **Tunoi, Lakha** and **Bosire JJA**, held:-

> "***In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the wording of section 382 of Criminal Procedure Code viz whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentences."***

(13.) The ground of appeal regarding the establishment of the age of the complainant was only raised by the appellant in this second appeal. This is a matter of fact that should have been raised before the trial court. Nonetheless, we find that the prosecution's evidence that the complainant was 11 years old at the time of the sexual assault was supported by the treatment notes and the P3 form; the clinical officer also examined the complainant formed the opinion that she was 11 years old. All the aforesaid evidence was not at all challenged before the two courts below. The two courts arrived at concurrent findings on fact that the complainat was 11 years old at the time of the sexual assault. Under the provisions of Section ***361*** of the ***Criminal Procedure Code,*** the appellant is precluded from revisiting matters of facts.

(14.) The ground of appeal that the High Court failed to subject the entire evidence to fresh analysis is oft' relied on as it touches on a points of law and facts. In this appeal the appellant was charged with the offence of incest against the provisions of ***Section 20(1)*** **of the** ***Sexual Offences Act*** **which provides:-**

> ***"Any male person who commits an indecent act or an act persons 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.***

(15.) The trial magistrate who had the advantage of hearing and seeing the witnesses testify was satisfied that the complainant's evidence was truthful. The complainant's evidence was supported by that of her mother and the clinical officer who treated her. Under the proviso to ***Section 124*** of the ***Evidence Act***, **Chapter 80**, **Laws of Kenya** provides:-

> ***"Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."***

(16.) This is what the trial magistrate observed in part of the judgement that shows the evidence of the complainant was credible. The said evidence was also collaborated by medical evidence.

> ***"The complainant was clear in her testimony of what transpired and the accused never managed to reset the same. His defence is shallow and does not deal with the occurrence of the day in question.......... The P3 form filled and produced before court together with the treatment notes are a clear indication that penetration did take place and that the complainant was defiled. In the upshot I find that the testimony by the complainant is believable and the same has aptly been corroborated by the testimony of PW2 who saw her having difficulties in sitting.."***

The complainant was the step daughter of the appellant, thus the ingredients of the offence of incest under ***Section 20(1)*** of the ***Sexual Offences Act*** were established by the prosecution to the required standard.

(17)The ground of appeal regarding the delay of two or three days before the appellant was arraigned in court was correctly determined by the High Court. It is not in dispute that the appellant herein was arrested on 2nd October, 2006 and arraigned in court on 5th October, 2006. There was a delay of two or three days thus the appellant contends that the prosecution did not provide any reasonable explanation for the said delay and therefore, his constitutional rights under Section ***72(3)*** of the former

Constitution were violated.

Section 72(3) of the former ***Constitution*** required that an accused person who is arrested for an offence other than a capital offence ought to be arraigned in court within 24 hours of his arrest, failure to do so, the prosecution assumes the burden of showing the delay was reasonable. See ***Paul Mwangi -vs- Republic- Criminal Appeal No. 35 of 2006.***

This issue was raised by the appellant in the High Court and this is how the learned Judge expressed himself:-

> ***"This court has noted that a delay of three days cannot be said to be inordinate taking into account the fact that the appellant is the father of the complainant herein and that there was also a need to secure medical report on the complainant. Further, this court notes that the appellant's rights to a fair trial were never prejudiced by the said delay."***

We may also point out what this Court settled this matter by setting out some guiding principles in the case of; ***Julius Kamau Mbugua -vs- Republic- Criminal Appeal No. 50 of 2008*** while dealing with a similar issue;-

> *"**In our view, it is not the duty of a trial court or an appellate court dealing with an appeal from a trial court to go beyond the scope of the criminal trial and adjudicate on the violations of the right to personal liberty which happened before the criminal court assumed jurisdiction over the accused. However, the trial court can take cognizance of such pre-charge violation of person liberty, if the violation is linked, to or affects the criminal process. As an illustration, where the prolonged detention of a suspect in police custody before being charged affects the fairness of the ensuing trial e.g. where an accused has suffered trial related prejudice as a result of death of an important defence witness in the meantime, or the witness has lost memory, in such cases, the trial court could give the appropriate protection like an acquittal. Otherwise the breach of a right to personal liberty of a suspect by police per se is merely a breach of a civil right, though constitutional in nature, which is beyond the statutory duty of a criminal court and which is by Section 72 (6) expressly compensatable by damages."***

The three or so days of delay did not occasion the appellant an un fair trial. Thus we agree with the learned Judge of the High Court the said delay did not warrant an acquittal of the appellant.

(18.)The last ground of appeal is regarding the enhancement of sentence. The learned Judge set aside the sentence of 14 years imprisonment that was imposed by the trial court and substituted it with a life sentence. The appellant was not served with a notice of enhancement of sentence by the respondent.

Section 20(1) provides:-

> ***"Any male person who commits an indecent act or an act persons 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 added".***

The evidence is clear that the complainant was aged 11 years old at the time of the sexual assault. The High Court was entitled to correct the sentence because under Section ***20(1)*** of the ***Sexual offences Act*** provides for a mandatory sentence of life imprisonment for the offence of incest

where a female child below 18 years is concerned. Consequently, was the appellant required to be served with a notice of enhancement of the sentence in respect of the illegal sentence? In ***Stanely Nkunja -vs- Republic- Criminal Appeal No. 280 of 2012***, this Court held:-

> ***"While it is prudent, and fair, to warn the appellant and give him a notice of enhancement, we are of the view that such a notice is not required in respect of an illegal sentence. This is because by virtue of the provisions of Section 347(2) of the Criminal Procedure Code, appeals to the High Court may be on matters of facts and law. Illegality of a sentence is a matter of law and therefore, the learned Judge was correct in enhancing the sentence to life imprisonment."***

In ***Kingsley Chukwu -vs- Republic – Criminal Appeal No. 257 of 2007 this*** Court, on a second appeal enhanced a sentence that was passed against the appellant therein despite the fact that a notice of enhancement of sentence was not given to the appellant.

(19.) This ground of appeal like others also fail; in the upshot we come to the conclusion that the appellant was properly convicted and sentenced. This appeal lacks merit; it is dismissed with the result that the appellant will serve the life sentence ordered by the High Court**.**

Dated and delivered at Nyeri this 6th day of November, 2013.

M. K. KOOME

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JUDGE OF APPEAL

D. K. MUSINGA

JUDGE OF APPEAL

A. K. MURGOR

JUDGE OF APPEAL

I certify that this a true copy of the original.

DEPUTY REGISTRAR