IN THE COURT OF APPEAL
AT KISUMU

CORAM: O'KUBASU, WAKI & ONYANGO OTIENO, JJ.A.

CRIMINAL APPEAL NO. 285 OF 2010

BETWEEN

J.O.D ……..……..…...……..…… APPELLANT

AND

REPUBLIC ……..……. RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Kisumu (Karanja, J) dated 12th May, 2010

in

HCCRA NO. 173 OF 2008)
****

JUDGMENT OF THE COURT

The appellant, ***J.O.D***, was convicted and sentenced to ten (10) years imprisonment by the Resident Magistrate at Ukwala for the offence of indecent act with a child contrary to ***Section 11 (1) of the Sexual Offences Act***. He had been initially charged with incest contrary to ***Section 20 (1) of the Sexual Offences Act*** and alternatively, indecent act with a child contrary to ***Section 11 (1) of the Sexual Offences Act.*** After the trial the learned Resident Magistrate (E. K. Mwaita, Esq), convicted him on the alternative count and sentenced him accordingly.

The charge sheet presented to the trial court read as follows:

COUNT 1
Incest contrary to section 20 (1) of the sexual offences Act 3/06.

J.O.D *– on the night of 14th/15th day of July 2008 in Siaya district within Nyanza province, being a male person had carnal knowledge of S.A.D a girl aged 11 years who was to his knowledge his daughter.*

ALTERNATIVE COUNT II
Indecent act with a child contrary to section 11 (1) of the sexual offences Act no. 3/2006.

J.O.D *– on the night of 14th/15th day of July 2008 in Siaya district within Nyanza province, unlawfully and indecently acted with S. A.D a girl aged 11 years who to his knowledge is his daughter by touching her private parts (vagina)."*

It is to be noted that the appellant's conviction was based mainly on the evidence of a child of tender years, ***S.A (PW 1)*** who was aged 13 years at the time she gave evidence. The child was examined as to whether she understood the nature of an oath. The learned trial magistrate was satisfied that the child understood the nature of an oath and hence the learned trial magistrate adopted the correct procedure as set out in ***JOHNSON NYOIKE MUIRURI VS R (1982-88) 1 KAR 150 AT P. 152***.

In her evidence the child testified as follows:

"I live with my mother. She is my mother's sister. My mother died. I know J.O.D. He is my father. He is here in court. Identifies the accused in the dock.

On the night of 14/15/7/08, I was at home. At night I was asleep. The accused came to the room using the space between the wall and the door. He removed his clothes and mine. He then removed his penis and defiled me. He removed my pant. He strangled me so that I don't scream. He touched me and I was able to know that it was him. He lit the match box (wooden) and I was able to see him clearly. After that he left me and used to (sic) door to go away. He opened the door. He just fastened the door. He was sleeping in the main house and me in the kitchen. I came out and went to inform my grandmother M.A. She told me that if he comes again I scream.

He then came back again next night at night and then strangled me and then pulled me towards his main house. After informing my grandmother I then went back to sleep. Next day I went to school. I then informed my teacher – Madam M who then told the head teacher. The head teacher went to ugunja and took me to Ambira hospital for treatment after that I went to the police post at ugunja where I was assisted. The accused was then arrested by the police."

The child was examined by Joshua Ree (PW 3) of Ambira Sub District Hospital who testified *inter alia*:
"I examined her. On genital examination the genitalia was normal externally. The vaginal tract was intact. No discharge noted.

There was no evidence of penetration. My opinion, there was nothing to show that an act occurred. I signed it on 18/7/08. I produce is as exhibit."

When put to his defence, the appellant elected to make an unsworn statement in which he stated *inter alia*:

"My daughter went to school on 17th Thursday and never came back as at 6.30 pm. next day Friday 18th July, I went to school very early at about 6.30 a.m. the deputy head teacher was surprised that she didn't come home. He advised me to go to Ugunja to check. I went to the police post. I met the head teacher coming from the police post. I went to him. He was with policemen. The head teacher told the policemen to arrest me. I was arrested and up to now I am in remand suffering. I am suffering because I defended her educational right."

The learned trial magistrate considered the foregoing and the evidence of other prosecution witnesses and came to the conclusion that there was not sufficient evidence to support the main charge but the alternative charge of indecent act. In concluding his judgment on 15th December, 2008, the learned trial magistrate delivered himself thus:

"However due to the delay to take her to hospital immediately done (sic) to the complexities I raised herein above the clinical officer was unable to detect anything in her genitals of (sic) when he examined her on 18/7/2008 4 days latter.

Due to the above technicality, the main charge here cannot stand in the absence of medical corroboration i.e. to prove that there was penetration.

However while doing the act the accused must have touched the complainants genitals i.e. the vagina and that qualifies the Alternative count i.e. indecent act, i.e. therefore certify that the alternative charge he is

proved by the prosecute against (sic). The accused beyond any (sic) reasonable doubt and that the accused is guilty and he will be convicted."

Having convicted the appellant the learned trial magistrate considered what the appellant said in mitigation and proceeded to sentence him to ten (10) years imprisonment.

Being aggrieved with the foregoing, the appellant filed an appeal to the High Court which appeal was placed before Karanja, J for determination. The learned Judge considered the matter and in a judgment delivered on 12th May, 2010, the learned Judge went over the evidence as he was required to do and made the following observation:

"This court finds that a charge under Section 20 (1) of the Sexual Offences Act rather than under Section 11 (1) of the Sexual Offences Act was proved. Therefore, the appellant ought to have been convicted and sentenced under the said Section 20 (1) of the Sexual Offences Act."

Having satisfied himself that there was sufficient evidence on which the trial magistrate convicted the appellant the learned Judge concluded his judgment thus:

"This court would therefore confirm the conviction of the appellant by the trial court only that the same be under Section 20 (1) of the Sexual Offences Act and not Section 11 (1) of the said Act. The sentence of ten (10) years imprisonment is set aside and in accordance with Section 354 of the Criminal Procedure Code it is substituted for and increased to imprisonment for life."

It is the foregoing that has given rise to this appeal which came up for hearing on 13th June, 2011, when the appellant prosecuted his appeal in person. In his address the appellant stated that the evidence of indecent act was never brought before the trial court. He complained that his right to human dignity was violated. Finally, he said that he wanted justice to prevail in this matter.
On his part, Mr P M Gumo, the learned Assistance Deputy Public Prosecutor, supported the appellant's conviction and the sentence. He was of the view that the conviction was based on sound evidence and asked us to dismiss the appeal.

As already stated at the commencement of this judgment, the appellant's conviction was based mainly on the evidence of a child of tender years, S.A (PW 1) who was aged 13 years at the time she gave evidence. The learned trial magistrate adopted the correct procedure in receiving the child's evidence. The offence was committed in July 2008 which was long after the amendment to ***Section 124 of the Evidence Act by the Criminal Law (Amendment) Act No 5 of 2003. Section 103 of that Act*** provides:

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

The finding by the trial magistrate was that the child was a truthful witness. That finding was accepted by the first appellate court and on our part, we are satisfied by the concurrent findings of the two courts below that the appellant was indeed involved in the commission of the sexual offence on his own daughter! On the whole we agree with Mr Gumo that the prosecution evidence was overwhelming and clearly displaced the defence put forward by the appellant. The conviction was well invited.

Section 20 (1) of the Sexual Offences Act provides:

"Any male person who commits an indecent act or an act 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."

The appellant in this case was *"liable to imprisonment for life"*. There is a whole debate about what "life imprisonment" is about. This issue was considered in the judgment of this Court in ***FRED MICHAEL BWAYO VS REPUBLIC, CRIMINAL APPEAL NO 130 OF 2007 (Unreported)*** in which a few examples were considered. In Uganda, life imprisonment is taken to mean 20 years in prison while in Australia it is between 10 to 20 years. In Argentina it is between 13 to 25 years while in Congo (DRC) the maximum penalty is 30 years.

In view of the foregoing and what this Court said in ***BWAYO Case (Supra)***, we think that although the learned Judge of the superior court was entitled to correct the sentence, the appellant did not deserve the maximum sentence provided under the relevant section of the law. It has always been stated that the maximum sentence should be reserved for the worst offender. Ordinarily, there ought to be sufficient material placed on record to justify the severity of sentence but there was none.

In the event, we dismiss the appeal against conviction but set aside the sentence of life imprisonment imposed on the appellant and substitute therefor a term of imprisonment for fifteen (15) years from the date of conviction by the trial court, that is, 15th December, 2008. To that extent only shall this appeal succeed. It is otherwise dismissed.

Dated and delivered at Kisumu this 28th day of July, 2011.

E. O. O'KUBASU

JUDGE OF APPEAL

P. N. WAKI

JUDGE OF APPEAL

J. W. ONYANGO OTIENO

JUDGE OF APPEAL

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

DEPUTY REGISTRAR