REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CRIMINAL APPEAL NO. E028 OF 2021

(Being an Appeal against conviction and sentence of the Hon. M.N.Gicheru

in Embu Criminal Case (Sexual Offence) No. 51 of 2020 whereby the

appellant was sentenced to life imprisonment)

MMK.....APPELLANT

VERSUS

PROSECUTOR.....RESPONDENT

JUDGMENT

1. The appellant herein filed the instant appeal which was instituted by way of a petition. However, in the course of hearing of the appeal, the appellant abandoned his challenge on sentence and proceeded to challenge both the conviction and sentence by the trial court in Embu CM's Criminal Case No. 51 of 2020.

2. The appellant was tried and convicted of the offence of incest contrary to Section 20(1) of the Sexual Offences Act and sentenced to life imprisonment.

3. It was the conviction and that sentence that necessitated the instant appeal, which was instituted vide the petition of appeal wherein he raised Seven (7) grounds of appeal that can be summarized thus: -***That the prosecution failed to discharge the burden of proof.***

4. At the hearing of the appeal, the parties elected to rely on their written submissions to argue the appeal.

5. The appellant complained that the charge sheet was defective in that it did not disclose the offense and further that, it was based on a wrong law. The appellant maintains that the offence is not known by law and that it can therefore not sustain a conviction and sentence in such circumstances. Further, it was his argument that the prosecution witnesses' evidence was contradictory and equally unreliable thus the same could not form a sound basis for conviction. In the same breadth, it was his contention that the sentence meted out to him was very harsh and excessive.

6. The respondent opposed the appeal vehemently and argued that from a reading of the entire record, the appellant committed the offence and all the relevant facts and particulars were stated on the charge sheet. It was further argued that the sentence was lawful

and justified given the circumstances of the case.

7. The respondent submitted that the evidence on record was sufficient as the prosecution witnesses were concise and credible and corroborative of each other and not contradictory. As such, the appeal was frivolous and baseless and the sentence is legal and commensurate to the charge.

8. The duty of this court while exercising its appellate jurisdiction was set out by the Court of Appeal in **Okeno v. Republic [1972] E.A. 32** and re-stated in **Kiilu and another v R (2005) 1 KLR 174** and is to submit the evidence as a whole to a fresh and exhaustive examination and weigh conflicting evidence and draw its own conclusions. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses. Further, the court should be alive to the principle that a finding of fact made by the trial court shall not be interfered with unless it was based on no evidence or on a misapprehension of the evidence or that the trial court acted on the wrong principles (See **Gunga Baya & another v Republic [2015] eKLR**).

9. In the re-evaluation of the trial court's evidence, there is no set format to which this court ought to conform to, but the evaluation should be done depending on the circumstances of each case. What matters in the analysis is the substance. (See the Supreme Court of Uganda's decision in **Uganda Breweries Ltd v. Uganda Railways Corporation [2002] 2 EA 634 and Odongo and Another v Bonge Supreme Court Uganda Civil Appeal 10 of 1987 (UR)** as was quoted with approval by Odunga J in **Alex Nzalu Ndaka v Republic [2019] eKLR).**

10. I have considered and analyzed the evidence which was tendered in the trial court by both the appellant and the prosecution following the principles **in Okeno v Republic (supra)** and re-stated in **Kiilu and another v R (supra)**, the amended grounds of appeal and the written submissions by the parties herein. The two issues for determination are whether the case was proved beyond reasonable doubt and whether the sentence meted out to the appellant is harsh and excessive.

11. It must be appreciated that under Section 107(1) of the Evidence Act, the burden of proof is on the prosecution to establish every element in a criminal charge beyond reasonable doubt. This was well buttressed in the well stated principles in the cases of **Woolington v DPP 1935 AC 462** and **Miller v. Minister of Pensions 2 ALL 372-273.**

12. Section 120(1) of the Sexual Offences Act provides that: -

"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."

13. The section above creates the offence and ingredients of incest and also prescribes the punishment in the event that it is proven that the complainant is a minor.

14. As such, from the above definition, the prosecution had a burden of proving;

i. Knowledge that the person is a relative.

ii. Penetration or indecent Act.

iii. Age of the complainant.

15. The appellant's complaint here is that the charge sheet was defective in that it did not disclose the offense and further that, it was based on a wrong law. The appellant maintains that the offense is not known by law and that it can therefore not sustain a conviction and sentence in such circumstances. The prosecutor opposed this ground vehemently by arguing that from the reading of the entire record, the appellant committed the offence and all the relevant facts and particulars were stated on the charge sheet.

16. Section 137 of the Criminal Procedure Code stipulates on the rules for the framing of charges and information. It thus provides hat this provision shall apply to all charges and information, and not withstanding any rule of law or practice, a charge or information shall, subject to this code, not be open to objection in respect of its form or contents if it is framed in accordance with this code.

17. Further, Section 382 of the Criminal Procedure Code talks about finding or sentence when reversible by reason of error or omission in charges or other proceedings as follows:

Subject to the provisions hereinbefore 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.

18. The Court of Appeal in the case of **Peter Ngure (supra)** was further guided by the case of **Peter Sabem Leitu v R, Cr. App No. 482 of 2007 (UR)** where the Court held thus:

"**The question therefore is, did this defect prejudice the appellant as to occasion any miscarriage of justice or a violation of his fundamental right to a fair trial" We think not. The charge sheet was clearly read out to the appellant and he responded. As such he was fully aware that he faced a charge of robbery with violence. The particulars in the charge sheet made clear reference to the offence of robbery with violence as well as the date the offence is alleged to have occurred. These particulars were also read out to the appellant on the date of taking plea. The fact that PW1 was not personally robbed and did not also witness the robbery did not in any way prejudice the appellant."**

19. Further, in **Jackson Mwanzia Musembi v Republic [2017] e KLR** the court relied on the Ugandan Court of Appeal in **Twehangane Alfred v Uganda- Criminal Appeal No 139 of 2001, [2003] UGCA, 6**, where the court noted that it is not every contradiction that warrants rejection of evidence. There the court stated:

"With regard to contradictions in the prosecution's case, the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."

20. In the present case, a *voire dire* examination was conducted on the complainant as required by the law. The complainant said ***''my father did something small to me…It is my father who did it. He did it on the grass. He did it on this part (touches the vagina). I did not have the clothes on….I slept with my father….''*** This does not diminish the fact that the appellant (being the father of the minor) penetrated the minor since the main argument fronted by the appellant is that the minor as noted in the record 'touched her vagina' instead of the anus.

21. In regards to whether there was penetration, the appellant argues that there was no proof of penetration and that PW 6, a forensic physician testified that the genitalia was normal and further that the specimen was never submitted for analysis and for that reason, the link between him and the alleged offence he was charged with were never proven.

22. Section 2 of the Sexual Offences Act defines penetration to mean the **'partial'** or complete insertion of the genital organs of a person into the genital organs of another.

23. Conviction on the evidence of a single witness has been subject of appeals for a long time. It is now well settled that the oral evidence of a single witness is indeed sufficient to warrant a conviction. In **Kassim Ali v Republic [2006] eKLR** it was held:

"… [The] absence of medical examination 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."

24. This was reaffirmed in the case of **George Kioji v R Nyeri Criminal Appeal No. 270 of 2012** (unreported) that-

“Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to section 124 of the Evidence Act, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief.”

25. In the case herein, PW2, the complainant, gave detailed evidence of how the incident occurred, and subsequent medical evidence corroborated the event. PW2 testified that:

“…’my father did something small to me…It is my father who did it. He did it on the grass. He did it on this part (touches the vagina).I did not have the clothes on….I slept with my father….’’

26. PW6, Dr.Phyllis Muhonja produced a P3 medical report and Post Rape Care Report as Exhibits 1. The reports show that the complainant was sexually abused and describes in detail injuries to anus as follows:

“At 6 and 7 O’clock, she had 2 lacerations which were superficial. On internal examination, there was a 360 degrees 1 cm abrasion (all round) in the inner anal wall….She could not control faecal material”

27. It is my considered view that in the instant case, corroboration was not necessary. As per the provisions of the Sexual Offences Act and the proviso to Section 124 of the Evidence Act, the trial court can convict on the basis of the complainant’s evidence, if satisfied that the complainant is a truthful witness as was held in the case of **Sahali Omar v Republic [2017] eKLR**. The medical evidence in this case was sufficient to corroborate the evidence of PW2 even if the court was to disregard that of the other witnesses.

28. Contrary to the assertions of the appellant, therefore, there was proof of penetration beyond reasonable doubt and this ground of the appeal cannot stand.

29. On the age of the complainant, PW2 testified that she was in class one; this was on the day she gave evidence in court which was on 17.02.2021 while the alleged offence took place on 30.08.2020. PW1 further testified that the minor was 6 years of age when she testified in court on 17.02.2021. Further, a Notification of Birth Document was produced in evidence which showed that the minor herein was born on 15.10.2014. This means that at the time of the offence, PW2 was aged 6 years. As such, I am satisfied that the age of the complainant was established as Six (6) years which satisfies the legal requirement.

30. As for the sentence, the appellant was sentenced to life imprisonment; the provision of law under which he was charged, provides for life imprisonment.

31. The position was stated succinctly by the Court of Appeal for East Africa in the case of **Ogola S/O Owoura Vs Reginum (1954) 21 270** as follows:-

"The principles upon which an Appellate Court will act in exercising its jurisdiction to review sentences are firmly established. The Court does not alter a sentence on the mere ground that if the members of the Court had been trying the appellant they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless, as was said in James V R., (1950) 18 E.A.C.A 147:

"It is evident that the Judge has acted upon some wrong principle or overlooked some material factor."

To this we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case: R. v Shershewky, (1912) C.C.A. 28 T.L.R. 364."

32. In my view, there is nothing which can prevent the trial court from imposing the maximum sentence and therefore, the sentence

imposed was within the law, and within the discretionary powers of the court. This court cannot interfere with the exercise of the said discretion as the appellant did not justify the interference. He did not prove that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle.

33. It is my finding that the conviction and sentence were proper and lawful in the given circumstances.

34. In view of the above, I find that the appeal is bereft of merits and I dismiss the same.

35. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 1ST DAY OF DECEMBER, 2021

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the Respondent