REPUBLIC OF KENYA

IN THE REPUBLIC OF KENYA

AT GARISSA

CRIMINAL APPEAL NO. 61 OF 2013

Appeal from the original conviction and sentence by the Acting Senior Principal

Magistrate at Mwingi in Criminal Case No.996 of 2010 (H.M.Nyaberi)

CHRIS MUNYOKI MUSEE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

Background

Chris Munyoki Musee, referred to in this judgement as the appellant, is serving a life sentence for the offence of incest. The appellant was jailed by the lower court after taking into account evidence of eight prosecution witnesses and one defence witness and finding the case proved beyond reasonable doubt. The charge is brought under section 20(1) of the Sexual Offences Act (the Act). It is alleged that the offence was committed on diverse dates between 15th September and 15th October 2010 at (particulars withheld) in Mwingi Location, Mwingi Central District in Kitui County. The victim is the appellant's daughter aged 13 years named as **M.M**.

Brief facts

At the time of the alleged incest, **M.M** PW1 and the complainant, was visiting with her father the appellant and stepmother whose name is abbreviated also as **M.M,** PW2**,** in a one roomed house. In the same house were the appellant's and PW2's other three children. The complainant had left her mother, **M.K** PW7 who has separated from the appellant, at their rural home and had travelled to Mwingi Town to visit her father and stepmother where she arrived at her father's place of work on 15th September 2010 at 4.00pm. She met the appellant who took her home to his other family where PW1 met her stepmother, PW2. The appellant left and returned at night drunk. PW2 opened the door for him and he settled to bed next to PW2. PW1 slept on a sofa in the same room. She heard the appellant complain of heat and leave the bed to sleep on the floor on a mattress. In the night the appellant approached PW1, removed her clothes and he slept on her. She screamed waking PW2. A fight broke out between the appellant and PW2. PW2 managed to get out and lock the appellant and PW1 inside the house. The appellant went after PW1 and defiled her.

The matter was reported to the police and the appellant was arrested. He was later charged with this

offence. PW1 was referred to hospital for treatment.

Petition of appeal

The appellant, through his counsel Mr. C.P. Onono, filed a petition of appeal on 13th June 2013. It lists one ground of appeal, namely that the conviction was against the weight of the available evidence. The record shows that the appellant filed his own grounds of appeal on 17th June 2013 listing 7 grounds of appeal. Learned counsel for the appellant told the court that he would rely on the petition of appeal filed on 13th June 2013. He did not however ask the court to expunge from the record the second petition filed on 17th June 2013. This court will therefore consider the petition by learned counsel dated 13th June 2013.

Learned counsel for the appellant submitted orally during the hearing of this appeal and stated that the appellant and his wife, PW2, had some issues because PW2 did not want the complainant staying with them; that as a result of these issues the appellant and PW2 physically fought; that the case against the appellant was a frame-up by PW2 and the trial court failed to take this into consideration; that PW2 was present but did not confirm if there was defilement but she denied it took place; that PW2 took advantage of the appellant's state of drunkenness and this ought to have been considered by the trial magistrate; that the complainant's diminished mental capacity ought to have been taken into consideration by the trial court.

Learned counsel further submitted that the complainant claimed that her father had sexually molested her before and that she had informed her stepmother; that the complainant did not tell any other person about this and that it is a made-up story which is not true. Further that if it is true that the complainant had told PW2 about the alleged defilement, PW2 would not have kept silent about it considering that she did not like the complainant.

Learned counsel further submitted that the allegations that this was not the first time the appellant had committed this offence to the complainant prejudiced the mind of the trial court against the appellant and that the appellant did not have adequate representation by legal counsel after his advocate failed to attend hearings on several occasions. Learned counsel urged this court to subject the evidence to fresh scrutiny and find that it does not support the charge.

Respondent's submissions

The respondent through learned state counsel Mr. Orwa opposed the appeal. Learned state counsel submitted that there is evidence to prove that the complainant was below 18 years and that the medical evidence from the doctor proves penetration occurred due to traces of blood in the complainant's vagina and the broken hymen.

Learned state counsel further submitted that the complainant was aged below 18 years and was a minor; that the relationship between the complainant and the appellant has been established and proved beyond reasonable doubt; that the trial magistrate did not caution himself on relying on the evidence of a single witness but this court has a duty to re-examine all the evidence afresh and arrive at its own independent conclusion; that there was no evidence of existence of domestic strife between the appellant and PW2 and the defence is a mere denial; that there is no evidence to show that the complainant had diminished mental capacity or that PW2 framed the complainant. Learned state counsel urged this court to dismiss the appeal for lack of merit and for being frivolous, vexatious and an abuse of the process of this court.

Determination

This court is alive to the duty placed on it while sitting on first appeal. All evidence tendered in the lower court will be subjected to thorough scrutiny to guild this court in arriving at its own independent conclusion. But first, let me analyze the relevant legal provisions.

Incest is an offence under section 20 (1) of the Act. This section provides as follows:

"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"(emphasis added).

This provision demands that some definitions, which establish the ingredients of this offence, must be made for clarity. In my view, the prosecutor must prove "**indecent act"** or **"an act which causes penetration"**.

These terms are defined under section 2 of the Sexual Offences Act as follows:

'"Indecent act" means an unlawful intentional act which causes—

(a) any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration.

(b)……'

'"Act which causes penetration" means an act contemplated under this Act.'

In my view this definition is complete when the definition of "penetration" is considered.

'"**Penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person.'**

The prosecution bears the onus of proving that an "**indecent act**" or "**act which causes penetration**" has been committed in addition to proving the relationship between the accused/appellant and the complainant as well as the age of the complainant. I need to emphasize here that consent is not an issue in an offence of incest. Section 20(1) above, makes it clear that whether consent was given or not, once the ingredients of incest have been proved, the accused/appellant is found guilty consent notwithstanding.

In determining this appeal, this court will be considering whether the above ingredients have been proved beyond reasonable doubt.

In support of "**indecent act**" and "**act which causes penetration**" is the evidence of PW1 the complainant. She told the court that her father the appellant defiled her. The only other person who could have corroborated that evidence is her step mother PW2 who was also present. Record shows that this witness refused to cooperate and had to be treated as hostile witness after the application by the prosecutor. She denied defilement took place. Obviously, she was covering up for the appellant. PW7 the complainant's mother told the court that her daughter told her that her father had defiled her. PW7 also told the court that her co-wife PW2 confirmed to her that the complainant had been defiled by the appellant. Of course PW2 did not confirm this during her testimony in court.

The medical evidence was given by Dr. Philemon Ogeto Nyambati, PW6, on behalf of Dr. Allan Barongo who had examined the complainant. It shows that the complainant was examined on 15th October 2010. The examination findings were that the hymen was broken and there were traces of blood in the vaginal canal; blood was visible on the speculum (the medical tool used to examine the complainant's vagina). The same findings are indicated on the P3 Form.

My conclusion based on the above evidence is that there is proof that the complainant had been sexually molested. The evidence on record to me proves beyond reasonable doubt that there was an act which

caused penetration and the next issue is the identity of the person who did it and the relationship with the complainant.

That the complainant had left her mother in the rural home where they lived to visit her father is not in dispute. It has been admitted by the appellant and PW2. What is in dispute is what happened on the night of 14th October 2010. The complainant told the court that the appellant and PW2 fought when PW2 found the appellant defiling the complainant; PW2 denied this in her evidence and the appellant denied it as well. There is mention of neighbours being woken up by the commotion in the appellant's house. One such neighbour is Christine Kalikanda, PW5. She testified that her house is about 10 feet from that of the appellant and that while asleep on 14th October 2010 at 10.00pm she was woken up by noise from the appellant's house. She heard the word: "open the door" and "I won't open the door, there is no woman in this house this is my child" (*sic*). PW5 said this was an exchange between the appellant and PW2. She said that in the morning when she learned of a defilement case in the same house she reported the matter to Jacinta Mwinzi, PW4, who was the Children's Officer. In company of PW4 and PC Wasilwa they went to the plot where they found the complainant and two women. PW4 said that the complainant could not talk when questioned by the police and attempted to run away but was restrained.

The evidence of PW7, the girl's mother that PW1 and PW2 told her that the appellant defiled PW1 is hearsay. But this is not the only evidence. There is evidence of PW1 that she was defiled and that her father and step mother fought over the matter. PW5 the only neighbour who testified talked of commotion in the appellant's home and of hearing the words I have quoted above uttered. She said it was the appellant and PW2 uttering those words. Then there is medical evidence confirming that the complainant had been defiled. When all this evidence is considered together, it leads this court to make a conclusion that there are good reasons to believe that the complainant was telling the truth. I have also taken into account the proviso to section 124 of the Evidence Act on the issue of corroboration of evidence of a child victim of a sexual offence.

Learned counsel for the appellant brought another angle to this case that the complainant had diminished mental capacity and due to this condition she was confused and made up this story to implicate her father. There is no evidence, safe what the appellant stated on this issue, to establish that the complainant suffered from some mental problem.

The doctor who examined the complainant indicated that she was timid and shy. This obviously is not a mental incapacity. I doubt that the doctor could have failed to notice that the complainant had some mental disorder.

Other circumstances surrounding this case, especially the fight between the appellant and PW2 which has been medically confirmed after the appellant was examined by a doctor and the commotion witnessed by PW5 lead me to conclude that the appellant sexually molested his daughter. The contradictions as to whether the appellant had defiled the complainant before this date does not go to the root of this case. Of importance in the case before me is that medical evidence confirmed broken hymen and traces of blood in the vaginal canal of the complainant confirming sexual activity.

The appellant denied having a daughter by the name of Mawia. He did not deny that the complainant is his daughter. To me he seems to take issue with the name Mawia. This does not hold water. PW1 identified herself before the court as Mawia Makasi Munyoki. The medical evidence shows that the doctor examined a girl known as Mawia Munyoki and PW7 her mother gave the name of Mawia Makasi as one of her children. I have no doubt in my mind that these names refer to the complainant and that the relationship between the complainant and the appellant is that of daughter and father. This puts to rest the issue of the relationship of the two as an issue to be proved under section 20(1) of the Act by confirming that they are father and daughter.

In respect to the age of the complainant, I have considered her evidence that she was 14 years of age. PW7 said her daughter the complainant was aged 15 years while the age indicated in the P3 Form shows her age as 13 years. The date of the offence is 15th October 2010. I find no contradiction in the age of the complainant. If she was 13 years in October 2010 she would be about 15 years in 2012 when PW7

testified in court. The complainant was under 18 years and therefore a child under our law. This brings this offence under the ambit of the proviso to section 20 (1) of the Act.

I have considered the defence of the appellant. He testified on the events of 13th September 2011 when he and his wife PW2 discussed the issue of returning the complainant to her mother. He said that elders told him to look for money to take PW1 home. He also talked about 13th September 2010 as the date PW1 had left home to go to Kyulungwa and coming back on 14th September 2010. He said his daughter had mental problems.

I must admit I find the appellant's defence mixed up and unclear. The bottom line of his defence is however denial that he had defiled his daughter. I have considered this defence in line with the prosecution evidence as analyzed in this judgement and I find the defence incredible. I find that I cannot believe it and therefore reject the same.

Conclusion

Before concluding this matter I wish to point out that the evidence of the complainant shows that she was defiled on 15th September 2010. The charge is drawn showing offence was committed on diverse dates between 15th September and 15th October 2010. From the evidence of PW4, the Children's Officer, PW5 the appellant's neighbour and that of the doctor as well as the entries on the charge sheet, the offence was committed on the night of 14th October 2010. The complainant was examined on 15th October 2010 and found with blood traces on her genitalia. The contradictions on the date of the offence found in complainant's evidence are not fatal to the prosecution case given that other evidence exists to show the date of the offence. These contradictions in my view are not prejudicial to the appellant in view of other evidence confirming the date the offence was committed.

I have given all the evidence due consideration and subjected it to critical analysis. I have considered the sole ground of appeal by learned counsel for the appellant and I do not agree with him that the conviction of the trial court was against the weight of the evidence. On the contrary, I have found sufficient evidence to support the charges and prove the same beyond reasonable doubt. All the ingredients of the offence have been proved as shown in this judgement. The defence of the appellant is not credible and has not raised any doubts in my mind that he defiled the complainant. Consequently, I find the petition of appeal filed by the appellant lacking in merit and it must fail. I hereby dismiss the appeal and uphold the conviction and sentence of the trial court. Orders are made accordingly.

Dated, signed and delivered this 17th September 2014.

S.N.MUTUKU

JUDGE