REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CRIMINAL APPEAL NO. 31 OF 2019

JMC.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in the Senior Principal Magistrate's Court at Engineer Sexual Offence Case No.1133 of 2015 delivered by Hon. H.O. Barasa, SPM on 28th October 2019).

JUDGMENT

Background

1. The appeal is from a judgment of Engineer Senior Principal Magistrate H.O. Barasa delivered on 28th October, 2019 in Criminal Case No.1133 of 2015. The Appellant was the Accused whereas the Respondent was the Prosecution in the trial.

2. **JMC, the** Appellant herein was charged in the main count with the offence of defilement contrary to Section 8 (1) as read with Section 8 (3) of the Sexual Offences Act No. 3 of 2006. The particulars were that on diverse dates between September 2015 and the 3rd day of December, 2015 in Kinangop within Nyandarua County intentionally caused his penis to penetrate the vagina of CMK, a girl aged 14 years. In the alternative, the Appellant was charged with indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006 in that he intentionally caused his penis to come into contact with the vagina of CMK, a girl aged 14 years.

3. The Appellant pleaded not guilty to both charges. Upon trial, he was convicted of defilement. He was sentenced to 20 years imprisonment under **Section 8 (3)** of the **Sexual Offences Act**. Aggrieved by both his conviction and sentence, he preferred the instant appeal.

Grounds of Appeal

4. He filed a Petition of Appeal on 1st November, 2019 and later Supplementary Grounds of Appeal on 16th December, 2021 raising seven (7) grounds of appeal rephrased as follows:

i. THAT the trial magistrate erred in law and fact by convicting him on circumstantial evidence.

ii. THAT the learned trial magistrate erred in law and fact when he convicted him on evidence obtained through coercion thus the offence was not conclusively proved.

iii. THAT the learned trial magistrate erred in law and fact when he convicted him based on flawed and inadequate evidence as to the actual time of the commission of the offence.

iv. THAT the learned trial magistrate erred in law and fact by relying on medical evidence yet failed to order for DNA test which would prove the paternity of the new born baby claimed to have been fathered by him.

v. That the learned trial magistrate erred in law and fact by convicting the appellant on the evidence of witnesses who did not testify.

vi. That the learned trial magistrate erred in law and fact by not considering his defense which was plausible.

vii. That the learned trial magistrate erred in law and fact by meting the minimum mandatory sentence thus failing to exercise

discretion based on circumstances of the case.

Submissions

Appellant's submissions

5. The Appellant relied on written submissions which were filed contemporaneously with Supplementary Grounds of Appeal on 16th December, 2021. He submitted that the court convicted him purely based on circumstantial evidence. This, he alluded, was because it was confirmed on 16/12/2015 that PW1 was ten weeks pregnant and the doctor recommended that a DNA test be conducted but was not. That the failure to conduct a DNA test meant that the pregnancy could not be linked to him. In the same argument, therefore, it could not be established that he had had any sexual intercourse with PW1.

6. The Appellant cited a number case law to posit the argument that for a court to rely on circumstantial evidence, the evidence must irresistibly point to the guilt of the accused person and no other person and that there must be no other co-existing circumstances that could weaken such a conclusion.

7. The Appellant also submitted that the learned trial magistrate failed to have regard to the likelihood of a bad blood between him and the family of the complainant. He based his argument on the fact that he and the complainant's family lived together and it is a common occurrence that when families live together, bad blood develop. It was his argument that had the trial court critically analysed this scenario, it would have arrived at a reasonable hypothesis of his innocence.

8. The Appellant went on to submit that the elements of the offence were not proved at all. Adding to the fact that he could not have impregnated PW1, he submitted that the PW1 testified that in all the occasions he had sexual intercourse with him, he ejaculated outside her vagina. As such, he could not have been responsible for the pregnancy.

9. He further submitted that even if a report was made, the same was done under coercion. This was in view that PW2 claimed only to have seen them holding hands and not having sex. Again, PW2 who claimed he saw the two in a house through cracks on the wall of the house was a departure from the trial court's finding that PW2 saw them through a window. That the trail court then invited extraneous evidence to arrive at a conclusion that he(Appellant) was properly identified.

10. He thus questioned the evidence of PW2 which in his view was not supported by other surrounding circumstances. He concluded that PW2 (brother to PW1) could have reported the issue because he had quarreled with his mother who was disciplining him for kicking a cup. He maintained that nobody saw him committing the offence as a consequence which the court ought to find that the prosecution did not discharge the burden of proving the case beyond all reasonable doubt.

11. It was also the submission of the Appellant that the trial court should have considered that PW1 too committed the offence because her brother had told him (Appellant) to go and report to her (PW1) parents that she had been with him.

12. On the failure to call other crucial witnesses, the Appellant referred to two other boys who were with PW1's brother, PW2 and six other old men in front of whom her father beat PW1. He submitted that these were crucial witnesses who would shed light as to who would have leveled the allegations of defilement against him

13. It was the further submission of the Appellant that the trial court did not consider his defence. He submitted that he gave a plausible defence which unfortunately the trial court dismissed as a mere defence.

14. The Appellant urged the court to uphold the appeal.

Respondent's submissions

15. Learned State Counsel, Miss Maingi made oral submissions. On the issue that the trial court relied on circumstantial evidence, she submitted that this was a case of direct evidence. In this regard, she submitted that PW1 referred the Appellant as elder uncle hence, he was identified by recognition. She referred to the case of **Anjononi V R (1980) KLR** where it was held that recognition is more reliable and satisfactory than identification.

16. As to penetration, she submitted that PW1 narrated clearly how the Appellant defiled her severally. That her evidence was corroborated by that of her brother, PW2 who saw the Appellant holding PW1 inside a house. That after the Appellant realized that PW2 had seen them, he followed him and threatened him if he dared disclose what he had seen.

17. Learned counsel denied that PW1 and PW2 were coerced to testify. She submitted that they gave voluntary evidence and in any case PW1 was beaten by her father after she had disclosed to him and elders what had happened.

18. It was also her submission that defilement need not be established by DNA as was held in the case **of *Benjamin Mbugua v R [2011] eKLR.***

19. On the issue that the Appellant's defence was not considered, counsel rebutted this by submitted that the assertion that he was framed was ousted by the consistent and cogent evidence of the prosecution witnesses. That the trial court too did not believe the Appellant's defence that he was framed by PW1's father whom he claimed owed him money.

20. Finally, as regards sentence, counsel submitted that the Sexual Offences Act at Section 8(4) provides for a minimum sentence of 20 years which is what the trial court imposed. She thus urged this court to uphold both the conviction and sentence.

Analysis and determination

21. I have considered the entire record of proceedings before the trial court. What comes out clearly is that the Appellant was initially charged with a main count of defilement and an alternative charge of indecent act. He took plea on 21st December, 2015. PW1 testified on 9th November, 2016. On 9th November, 2016, the prosecution applied to amend the charge sheet to substitute the charge of defilement with that of incest after it was disclosed by the evidence of PW1 that the Appellant was his uncle. The request was granted and the Appellant pleaded to the charge of incest. He denied the charge. Subsequently, PW2 and PW3 testified.

22. At the conclusion of the trial, the learned trial magistrate convicted the Appellant for the offence of defilement without making a finding that the evidence on record had disclosed the offence of defilement as opposed to incest.

23. The prosecution called a total of five (5) witnesses. PW1 to PW5 all adduced evidence that was intended to establish the offence of incest. The turn of events is the trial magistrate failed to consider that the charge sheet had been amended and proceeded with the judgment as if the Appellant had been tried for the offence of defilement. This error on the part of the learned magistrate did not only vitiate the trial but violated the Appellant's right to a fair trial in that he was convicted for an offence he did not defend him for.

24. I say so because one of the key elements for the offence of incest is proof of consanguinity relationship between the victim and the perpetrator. After the substitution of the charge, the Appellant ought to have been informed of the right to choose to recall PW1 for either further cross examination or fresh evidence. The recalling of the witness would have enabled the Appellant to test the consanguinity relationship if need be. The choice is however optional. But this is not for the trial court which is obligated to inform the accused person to make the choice as provided for under **Section 214 (1)** of the **Criminal Procedure Code**, the section under which the charge was amended. The said provision reads:

> ***"Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case: Provided that—...***
>
> ***(ii) where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination."***

25. The failure by the trial court to inform the Appellant of his right to choose to recall PW1 as provided by **Section 214 (1)** above means that he was not given sufficient information and material to enable him to defence himself against the fresh charge of incest.

26. On these grounds, it is my view that a retrial should be ordered. The court however must consider whether the case meets the threshold for ordering a retrial. The Court of Appeal in **Pius Olima & Another –Vs- Republic [1993] eKLR** stated that:

> ***"Our attention was drawn to authorities that deal with the principles that should be applied when considering whether a retrial should be ordered or not. These are:- Ahmed Sumar –Vs- Republic [1964] EA 481; Manji –Vs-Republic [1966] EA 343; Mujimba –Vs- Uganda, [1969] and Merali & Others –Vs- Republic, [1971] 221. The principles that emerge are that a retrial may be ordered where the original trial as was found by the High Court……is defective, if the interests of justice so require and if no prejudice is caused to the accused. Whether an order for retrial should be made ultimately depends on the particular facts and circumstances of each case."***

27. In ***Muiruri Vs Republic [2003] KLR 552*** the court stated:

> ***"Generally, whether a retrial should be ordered or not must depend on the circumstances of the case. It will only be made where the interest of justice requires it and if it is unlikely to cause injustice to the appellant. Other factors include, illegalities or defects in the original trial, length of time having elapsed since the arrest and arraignment of the appellant; whether the mistake leading to the quashing of the conviction was entirely the prosecution making or not."***

28. Again, in ***Mombasa Criminal Appeal 6 of 1980 John Njeru Vs Republic [1980] eKLR*** the Court of Appeal held:

> ***"In general, a retrial should be ordered only when the original trial was illegal or defective, as otherwise an order for retrial would give the prosecution an opportunity of filling gaps in its case"***

29. It is generally accepted that a paramount consideration in ordering a retrial is whether the retrial will result in a conviction. Without delving into the evidence in detail, the same is disclosed by PW1 and PW2 who were siblings that the Appellant was their uncle. PW1 was the complainant in the case. The identification of the Appellant was thus by recognition as he was well known to PW1. Whereas a court may convict an accused person solely on the basis of uncorroborated evidence of a minor so long as it believes in the evidence of the minor, in this case PW1's evidence was corroborated by that PW2 who saw the PW1 with the Appellant locked up in the house allegedly committing the offence. PW1 was candid that the Appellant had sexual intercourse with him, a fact that was reasserted by the medical evidence. As for the age of PW1, the same was established by a birth notification card adduced by PW3, the victim's mother.

30. No doubt this is not a case where, a retrial if ordered, the prosecution would attempt to fill up gaps in its case. In summary, this is case that on the face it, *prima facie* evidence points to the guilt of the Appellant.

31. As to whether any prejudice would be occasioned to the Appellant if a retrial is ordered, it is noted that, if convicted he would be sentenced to a mandatory life imprisonment. Although he has so far been in custody for about five years, a life imprisonment far outweighs the five years spent in custody. In any case, one cannot tabulate life imprisonment a lasts for the lifetime of the convicted person. In so finding, I find solace from the case of Nairobi ***Criminal Appeal 135 of 2004 Richard Charo Mole –Vs- Republic [2010] Eklr (Court of Appeal in Nairobi)*** **and** Nakuru ***Criminal Appeal No. 178 OF 2006 Joseph Macharia Miano & Others –Vs- Republic [2009] eKLR***, where the courts allowed a retrial notwithstanding the fact that the Appellants therein had served 17 and 8 years in prison, respectively. The court considered the serious nature of the charges, in both cases robbery, the weight of potentially admissible evidence, the nature of the irregularities and who was responsible – the court or prosecution – for the same, as well as the interests of justice.

32. Further, the charge of incest is a very serious offence which demands that an impartial trial be conducted in the interests of the minor victim. Justice should also as well be done for the Appellant who did not enjoy a fair trial.

33. The Appellant shall be escorted to Kinangop Police Station not later than 2/3/2022 for purposes of preparing a fresh charge sheet and be charged at Engineer Law Courts not later than 2/3/ 2022. The trial shall be conducted by another magistrate with competent jurisdiction other than Hon. Barasa. The trial court file shall forthwith be sent to Engineer Law Courts to facilitate the retrial.

34. It is so ordered.

DATED AND DELIVERED AT NAIVASHA THIS 24TH DAY OF FEBRUARY, 2022.

G. W. NGENYE-MACHARIA

JUDGE

1. APPELLANT IN PERSON.

2. MS. KIRENGE FOR THE RESPONDENT.