REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

HCCRA NO. 94 OF 2018

MOA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Being an appeal against the conviction and sentence of the Senior Principal Magistrate's Court

at Maseno (Hon. C. Oruo RM) dated the 11th October 2018 in Maseno PMCCRC No. 119 of 2016]

JUDGMENT

The Appellant, **MOA**, was convicted for the offence of **Incest** Contrary to **Section 20 (1)** of the **Sexual Offences Act**. He was then sentenced to Life Imprisonment.

1. In his appeal, he raised 9 Grounds of appeal, which can be summarized as follows;

(i) There was no medical evidence linking the appellant to the offence.

(ii) Section 50 (2) (j) of the Constitution was not complied with.

(iii) The evidence was at variance with the Charge Sheet.

(iv) The Defence was not accorded due consideration.

(v) The evidence on record could possibly only prove the offence of "Attempt to Commit Incest."

2. When canvassing the appeal, the Appellant drew the Court's attention to the fact that the Complainant was first taken to hospital after more than 1 month from the date when she was allegedly sexually molested.

3. The medical doctor who examined the Complainant found that her hymen was missing. Because of that fact, the doctor concluded that there had been penetration.

4. It was the contention of the Appellant that some medical tests ought to have been conducted, with a view to verifying whether or not he was linked to the offence.

5. In this case, the Complainant did not testify at the trial.

6. She had passed away before the trial commenced.

7. The medical doctor testified that the cause of death was Sepsis occasioned by Intestinal Perforation.

8. It was the evidence of the medical doctor that, the cause of death had no connection with the alleged sexual molestation of the Complainant.

9. In the light of Complainant's demise, the prosecution sought to have her written statement adduced in evidence.

10. Although the defence objected to the production of the said statement, the learned trial magistrate delivered a ruling in which the Investigating Officer was authorized to produce the Complainant's statement as evidence.

11. During the trial, the Complainant's mother also failed to testify. The Investigating Officer informed the trial court that the mother of the Complainant had disappeared from home, and she could not be found.

12. The court was told that the Complainant's mother feared to testify. Therefore, the prosecution made an application to have the written statement of the mother produced in evidence by the Investigating Officer.

13. The learned trial magistrate overruled the objection raised by the Defence, and allowed the Investigating Officer to produce the written statement that had been recorded by the Complainant's mother.

14. The Appellant submitted that the trial court erred by allowing the Investigating Officer to produce the statements of the Complainant and her mother.

15. In the opinion of the Appellant, **Section 35** of the **Evidence Act**, which the trial court relied upon when allowing the Investigating Officer to produce the written statements, was not applicable to criminal cases.

16. The second Ground of Appeal was that the prosecution violated **Article 50** of the **Constitution**, as the Appellant was first provided with Witness Statements and Documentary Evidence, about 7 months after he had been arraigned in court.

17. As regards Ground Three of appeal, it was submitted that the prosecution failed to prove that it was the Appellant who committed the offence.

18. The Appellant observed that there was no witness who mentioned him, save for the Complainant whose statement was read out in court.

19. In any event, the written statements of the Complainant and her mother were delivered through the Investigating Officer, thus depriving the Appellant an opportunity to test the veracity thereof, through cross-examination.

20. The Appellant submitted that the said Witness Statements had no probative value, and ought not to have been the foundation for a conviction.

21. As regards his Defence, the Appellant submitted that the trial court failed to give it due consideration.

22. He reiterated that the Complainant had been unwell, and had undergone surgery in 2010.

23. He expressed the view that the admission of the Complainant into hospital, and her eventual demise, were connected to the growth in her stomach: but not to the alleged sexual molestation.

24. Furthermore, the Appellant believes that the evidence on record was wholly inadequate, because essential witnesses never gave evidence.

25. He also added that those who gave evidence, tendered evidence which was marred with contradictions and discrepancies. As an example of the said discrepancies, the Appellant drew attention to the statements of the Complainant and her mother.

26. He pointed out that whilst the mother said that they cooked in the house of her mother-in-law, the Complainant said that they cooked in their own house.

27. Another example given by the Appellant was that whereas the medical doctor **(PW2)** said that the Complainant was taken to hospital on 25th February 2016, the Discharge Summary indicates that the Complainant was admitted into the hospital on 20th January 2016.

28. On the issue of the Sentence, the Appellant submitted that if the Complainant was 13 years old, the trial court ought to have invoked **Section 8 (1)** as read with **Section 8 (7)** of the **Sexual Offences Act**. Had the court done so, the Appellant submitted that the trial court would not have sentenced him to Life Imprisonment.

29. Finally, the Appellant submitted that the evidence on record was only sufficient to prove the offence of *"Attempt to commit Incest"* Contrary to **Section 8 (3)** of the **Sexual Offences Act**.

30. He reasoned that the particulars of the charge;

> ***"clearly indicates that he 'intentionally touched'. No indication that he 'penetrated', hence the particulars of the charge did not charge him (appellant) with penetrative act."***

31. In answer to the appeal, the Respondent submitted that the medical evidence clearly proved that there had been penetration.

32. It was the Respondent's further submission that the medical evidence was corroborated by the Witness Statements of both the Complainant and her mother.

33. On the issue of the Sentence, the Respondent submitted that pursuant to **Section 20** of the **Sexual Offences Act**, the offender is liable to Life Imprisonment if the victim was under the age of 18 years.

34. Being the first appellate court, I am obliged to re-evaluate all the evidence on record, and to draw my own conclusions.

35. When drawing conclusions from the process of re-evaluation, I am enjoined to bear in mind the fact that I did not have the opportunity to observe the witnesses when they were giving evidence.

36. As alluded to earlier, the Appellant was convicted for the offence of **INCEST** contrary to **Section 20 (1)** of the **Sexual Offences Act**.

37. In the charge sheet, the particulars of the offence were given as follows;

> ***"MOA: On the 20th day of January 2016 in Kisumu West District of the Kisumu County, intentionally touched the VAGINA of VAO with his Penis, who was to his knowledge his daughter."***

38. In my considered view, if the prosecution led evidence to prove that there had been penetration, such evidence would not have advanced the case for the prosecution as the charge sheet never suggested that there had been any penetration.

39. In the event that the evidence proved that the action of the perpetrator had caused penetration of the Complainant's vagina, and if penetration was one of the ingredients of the offence with which the Appellant had been charged, the prosecution ought to have sought the amendment of the charge sheet.

40. PW1, TAO, testified that on 20th January 2016, the Appellant visited her home at about 9.00pm.

41. PW1 said that the Appellant was her grandfather. He lived at [Particulars Withheld], whilst **PW1** lived at Karabuon.

42. After receiving the Appellant at her house, **PW1** notified their relatives at Rota, about the visit by the Appellant. The relatives told her that the Appellant had defiled his daughter.

43. PW1 then phoned the Chief who also told her that the Appellant had defiled his daughter. The Chief who told **PW1** about the incident was the Chief of Rota. He advised **PW1** against allowing the Appellant to spend the night at her house.

44. During cross-examination **PW1** said that he was not present when the incident occurred.

45. PW2, DR. EVE KALE is a Medical Officer of Health. She produced the **P3** Form which had been prepared by her colleague, Dr. Fiona Adagi.

46. When the Complainant was examined, the doctor found that her hymen was absent. In the circumstances, the doctor concluded that there was evidence of penetration.

47. Accordingly, the diagnosis was described as;

> ***"Defilement by person known to her."***

48. The doctor also testified thus;

> ***"Final diagnosis – Defilement with posterior lumbar fistula."***

49. Apart from the **P3** Form, **PW2** produced the Post Mortem Report that had been prepared by Dr. Sara, who was the hospital pathologist.

50. The Complainant passed away whilst undergoing treatment at the Jaramogi Oginga Odinga Teaching & Referral Hospital, Kisumu.

51. It was the finding of the pathologist that the cause of death was

> ***"Sepsis occasioned by intestinal perforation."***

52. During cross-examination, the doctor made it clear that there was no relationship between the contents of the **P3** Form and of the Post Mortem Report.

53. PW3, PC JOSEPH EMURON, testified that he had questioned the Complainant whilst she was admitted in hospital.

54. He told the court that the Complainant informed him about what the Appellant had done to her. After **PW3** had carried out investigations, he preferred charges against the Appellant.

55. It was the evidence of **PW3** that the Complainant's mother could not be traced. She had vanished because she feared to testify in court.

56. In those circumstances, the prosecution made an application to have **PW3** produce in evidence, the written statements written by the Complainant (who was deceased) and her mother (who had vanished).

57. The learned trial magistrate overruled the objection raised by the Appellant, and permitted the Investigating Officer **(PW3)** to produce the statements.

58. In the statement recorded by the Complainant, it was indicated that on the material night, the Appellant had sex with the Complainant, after grabbing her, when she had taken a meal to him in his bedroom.

59. In the statement recorded by the Complainant's mother, she corroborated the statement of the Complainant, saying that at the material time she was away from home. The mother had gone to attend a funeral in Asembo.

60. After **PW3** testified, the prosecution closed its case.

61. Thereafter, in his sworn defence, the Appellant denied committing the defence.

62. He explained that the Complainant who is his daughter, had been sick, and had undergone surgery in 2010, in relation to a growth in her stomach.

63. His evidence was that the Complainant was scheduled to undergo a second surgery and for that reason she had already been admitted in hospital from 18th January 2016.

64. However, when his attention was drawn to the medical records, the Appellant conceded that the records showed that the Complainant was admitted into hospital on 26th January 2016.

65. In determining the appeal, the first point that I wish to address is about medical evidence linking the Appellant to the offence.

66. In law there is no requirement that there should be medical evidence linking an accused person to the offence.

67. Pursuant to **Section 20 (1)** of the **Sexual Offences Act**;

> ***"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 immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person."***

68. Therefore, the ingredients of the offence of incest by a male are;

> ***(a) An indecent act or an act which causes penetration;***
>
> ***(b) the act should be with a female person;***
>
> ***(c) the said female must be either a daughter, niece, aunt, granddaughter, sister, mother or grandmother of the accused.***

69. In this case the Appellant confirmed that the Complainant was his daughter.

70. He also confirmed that the Complainant was 14 years old at the time of the alleged offence.

71. Therefore, if there was sufficient evidence to prove that the Appellant had committed an indecent act with the Complainant, the prosecution would have proved the offence of incest. And because of the age of the Complainant, the Appellant would have been liable to Life Imprisonment.

72. From the written statement of the Complainant, the Appellant is said to have had sex with his daughter.

73. Indeed, the Complainant said that as a result of the sex, she started bleeding from her private parts.

74. In the **P3** Form, it is indicated that the Complainant had told the police that she had been defiled by her father.

75. The General History recorded by the Medical Officer, on the **P3** Form, also shows that the Complainant told the Medical Officer that she had been defiled by her father.

76. One of the ingredients of the offence of defilement is penetration.

77. It was therefore surprising to note that notwithstanding the evidence of penetration, the Appellant was, in the Charge Sheet, said to have used his penis to *"TOUCH"* the Complainant's vagina.

78. However, it is arguable that prior to actual penetration, the penis would touch the vagina.

79. In the circumstances, the evidence tendered is not actually at variance with the Charge Sheet.

80. The evidence was sufficient to prove a more serious act than touching; but which incorporated touching.

81. If the particulars of the Charge Sheet were that there had been penetration, but the evidence only proved that the Complainant was touched, I would have held that the evidence fell short of the proof required.

82. As regards the alleged delay in the provision of Witness Statement, the Appellant said that the same were given to him on 4th September 2017.

83. I note that by that date, the trial had not yet started. The hearing commenced on 16th April 2018.

84. Thereafter, the Appellant put forth his defence on 1st October 2018.

85. Although there was a delay between the time when the Appellant was first charged on 1st February 2016, and the time when the trial commenced, I find that the Appellant was given the Witness Statements well before the trial commenced, and he therefore had ample time and opportunity to prepare for the trial.

86. In fact, the defence counsel severally complained about delays in the start of the trial. The delays had been attributed to issues such as the disappearance of the Complainant's mother; the ailment of the Complainant, which ultimately led to her demise; and the need to organize for police vehicles to ferry the Complainant to court.

87. As regards the contention that the Witness Statements of the Complainant and her mother constituted hearsay evidence, because the said statements were produced in evidence through the Investigating Officer, I note that the learned trial magistrate conducted a trial-within-a-trial, to determine whether or not the Investigating Officer could produce the said statements.

88. In his reasoned Ruling, the learned trial magistrate said;

> ***"I have had a look at Section 35 (1) of the Evidence Act. It does give statements/attendance of witnesses can be produced.***
>
> ***(i) Where a witness has been satisfied as dead;***
>
> ***(ii) Where the witness cannot be found/incapable of giving evidence, or if his attendance cannot be procured without any delay.***
>
> ***So, from the reading of Section 35 (1) of the Evidence Act, it would be possible to have the investigating officer produce the statements in evidence."***

89. The Appellant has faulted the trial court for allowing the Investigating Officer to produce written statements of persons who did not testify in court.

90. He pointed out that the statutory provision which the trial court relied upon when permitting the investigating officer to produce the Written Statements, was only applicable to Civil Cases.

91. A perusal of the Evidence Act shows that **Section 35** was under Part **V** of the said statute. The said Part **V** was headed;

> **"*STATEMENTS IN DOCUMENTS***
>
> ***PRODUCED IN CIVIL PROCEEDINGS."***

92. Both **subsection (1)** and **(2)** of that provision commence with the words;

> **"*In any civil proceedings***
>
> **……..."**

93. In the circumstances, when it is borne in mind that the case herein was of a criminal nature, the question that this court must grapple with, is whether or not **Section 35** of the **Evidence Act** was also applicable in criminal cases.

94. In my considered opinion when the legislators made a conscious decision to have that statutory provision made applicable to civil cases, that was a clear implication that **Section 35** would not be applicable to criminal cases.

95. I hold the view that the relevant provision in criminal cases is **Section 33** of the **Evidence Act**, which specifies the circumstances in which Statements, Written or oral or electronically recorded, which were made by a person who is dead or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured, or whose attendance cannot be procured without undue delay or undue expense; are admissible in evidence.

96. The statements recorded by the Complainant and her mother do not fall into any of the specified circumstances.

97. Although the Complainant was dead, her written statement did not relate to the cause of her death.

98. If anything, the Medical Officer of Health made it clear that the **P3** Form, (which contained evidence relating to the offence of incest, with which the Appellant was charged) had no relation at all to the Post-mortem report.

99. As for the statement of the Complainant's mother, I find that it was not made in the course of business; or in the discharge of professional duty; nor did constitute an acknowledgment written or signed by her that she was indebted to any person.

100. Ordinarily, an accused person can only be deemed to have gone through a fair trial if he is accorded an opportunity to test the evidence of the prosecution witnesses, through cross-examination.

101. When a witness is not available to be cross-examined, such evidence as he would have given, cannot be tested.

102. That is the reason why hearsay evidence is ordinarily inadmissible.

103. However, the law-makers appreciated that there might arise circumstances in which an exception can be made in relation to the hearsay rule.

104. In order to safeguard the rights of the accused person, the law-makers enacted **Section 33** of the **Evidence Act**. Accordingly, when evidence was not within the scope of that statutory provision, it would be inadmissible.

105. In a nutshell the evidence which was the basis of the conviction of the Appellant, may have appeared adequate in content, but was inadmissible in law.

106. Therefore, the conviction cannot be sustained. I thus allow the appeal; quash the conviction, and set aside the sentence.

107. I order that, unless he is otherwise lawfully held, the Appellant should be set at liberty.

FRED A. OCHIENG

JUDGE

DATED, SIGNED and DELIVERED at KISUMU

This 29th day of January 2020

T. W. CHERERE

JUDGE