REPUBLIC OF KENYA

IN THE HIGH COURTOF KENYA

AT KAJIADO

CRIMINAL APPEAL NO. 52 OF 2019

F O J.....APPELLANT

.VERSUS

REPUBLIC.....RESPONDENT

(An appeal against conviction and sentence delivered on 8th May 2019

(Hon. Okuche, SRM) in criminal case No. SO 18 of 2018 at Loitokitok)

JUDGMENT

1. The appellant was charged with several counts. In count one, he was charged with incest contrary to section 20(1) of the Sexual Offences Act, No. 3 of 2006. Particulars were that on diverse dates between 2016 and November 2018 within Kajiado South Sub-County, he intentionally caused his private organ to penetrate the private organ of D.A a female person who was to his knowledge his daughter.

2. He faced an alternative count of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act. Particulars being that on diverse dates between 2016 and 11th November, 2018 at Rombo location within Kajiado South Sub County, he intentionally touched the private organ of D.A. a child aged 8 years with his private organ.

3. In count 2, the appellant was charged with incest contrary to section 20(1) of the Sexual Offence Act No 3 of 2006. Particulars were that on diverse dates between 2016 and 11th November, 2018 within Kajiado South Sub County, he intentionally caused his private organ to penetrate the private organ of V.O a female person who was, to his knowledge, his daughter aged 12 years.

4. The appellant faced an alternative count of committing indecent act with a child contrary to section 11(1) of the Act. Particulars being that between 2016 and 11th November, 2018 at Rombo location within Kajiado South County, he intentionally touched the private organ of V.O a child aged 12 years with his private organ.

5. He also faced a third count of assault causing actual bodily harm contrary to section 251 of the Penal Code. Particulars being that on 11th November, 2018 at Rombo location within Kajiado South Sub County, he assaulted D.A occasioning her bodily harm.

6. The appellant pleaded not guilty to all counts and after a trial in which the prosecution called 5 witnesses and the appellant's defence, he was convicted in all the 3 counts and sentenced to life imprisonment in count 1 and 2 and fined Kshs. 5000/- in count 3 and in default, one month imprisonment.

7. He was aggrieved with both the convictions and sentences and lodged an appeal raising the following grounds of appeal, namely:

1. That the trial Magistrate erred in law and fact by failing to analyze and evaluate the evidence.

2. That the trial Magistrate erred in law and fact in convicting him on contradictory evidence.

3. That the trial Magistrate erred in law and fact in failing to find that the charge was defective.

4. That the trial court erred in law and fact in failing to find that essential elements of the charge were not proved.

5. That the trial Magistrate erred in law and fact in failing to give reasons for dismissing his defence of alibi in terms of

section 169(1) of the Criminal Procedure Code.

6. That the trial Magistrate erred in law and fact in convicting him on evidence that fell below the required standard.

8. The appellant filed amended grounds of appeal together with his submissions filed on 4th March, 2020 stating:

1. That the trial Court erred in law and fact by conducting a flawed trial that violated his constitutional right to information guaranteed under Article 50(2) ,(g) ,(h), (j) and (k).

2. That the trial court erred in law and fact by not conducting a fair trial as required by Articles 25(c), 50(2) and (5) of the constitution.

3. That the trial court erred in law and fact by failing to appreciate that essential witnesses never testified.

4. That the trial court erred in law and fact by ignoring his defence of alibi.

5. That the trial court failed to appreciate that there existed a grudge between him the D.O and his wife.

6. That the sentence imposed was harsh and unconstitutional.

9. During the hearing of this appeal, the appellant who was unrepresented, relied on his written submissions and urged the court to allow the appeal, quash the convictions and set aside the sentences.

10. In the written submissions, the appellant argued that he was not informed of his right to defend and challenge the prosecution evidence as required by Article 50(2) (g) (h) (j) and (k). This, he argued, violated his right to a fair trial. He stated that after plea, the trial court ordered that he be supplied with witness statements but they were not supplied. He relied on ***Daniel Chege Magotho*** [2014] eKLR for the submission that his right to fair trial was violated to the extent of allowing the appeal on that ground alone. He urged this court to so find with regard to his trial.

11. The appellant further argued that being denied crucial documents such as witness statements, treatment notes, discharge summary form, PRC and P3 form rendered his conviction unsafe. He relied on ***Francis Muniu Kariuki*** [2017] eKLR for the submission that it is statutory practice for the trial court to satisfy itself that an accused person has all reasonable facilities for his defence and all the prosecution disclosure documents before trial. He argued that the spirit of Articles 25(c) and 50(2) (c) and (j) was violated.

12. On non-production of essential witnesses, the appellant argued that the prosecution should have called the witnesses that were vital to the case. He relied on ***Donald Majiwa & 2 Others*** [2009] eKLR for the submission that the prosecution is obliged to call witnesses who are necessary to establish its case even though some of those witnesses' evidence may be adverse to its case. And that in an appropriate case, the court is entitled to infer that had that witness been called, his evidence would have tendered to be adverse to the prosecution case.

13. The appellant raised questions why Beatrice Atieno failed to testify in his case. He also questioned why she recorded her statement and went underground.

14. Regarding his defence of *alibi*, the appellant argued that he raised the defence of alibi and that he had been framed for the offence due to a long standing grudge between him and wife as well as the D.O. (PW3). He relied on ***Peter Kioko Kiilu*** HCCR No. 54 of 2005**,** which cited ***Sekitoleko v Uganda*** [1967] EA 531 on the general principle that it is the duty of the prosecution to prove the guilt of the accused beyond reasonable doubt and that the burden of proving an ***alibi*** does not lie on the prisoner whether set up as an ***alibi*** or something else.

15. The appellant also relied on ***Kiarie v Republic*** [1984] KLR 739 para. 745 for the submission that an alibi raises a specific defence and an accused who puts forward an alibi as an answer to a charge does not assume any burden of proving that answer.

16. On sentence, he argued relying on ***Francis Karioko Muruatetu & Others,*** Supreme Court Petition No. 15 of 2015,[2017] eKLR, that the maximum sentence deprives the court discretion. He also relied on ***Nyawanyale v Republic*** [2018] eKLR (Criminal Appeal No. 82 of 2015**)** for the submission that penal provisions in the Sexual Offences Act do not take into account the objective intended to be achieved.

17. Mr. Njeru learned Assistant Prosecution Counsel, opposed the appeal, supported convictions and sentences. According to counsel, the prosecution adduced sufficient evidence that proved its case beyond reasonable doubt. He submitted that there was evidence that the complainants were the appellant's children and therefore there was evidence of commission of incest and assault, thus all the counts were proved. Regarding sentences, counsel submitted that the sentences meted out were appropriate. He urged the court to dismiss the appeal.

18. I have considered this appeal; submissions and the authorities relied on. I have also considered the evidence and the impugned judgment. This being a first appeal, it is the duty of this court as the first appellate court to reevaluate, reanalyze and reconsider the evidence afresh and draw its own conclusion on it. The court should however bear in mind that it did not see the witnesses testify and give due allowance for that.

19. In ***Okeno v Republic*** [1972] EA 32**,** the Court of Appeal held;

"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination…and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting

evidence and draw its own conclusion....It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."

20. And in ***Kiilu& Another v Republic*** [2005]1 KLR 174, the Court of Appeal again held that:

"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses."

21. PW1 D.A a minor aged 8 years old, testified that the appellant, her father, started defiling her while she was in class one. She told the court that the appellant would remove her cloths; remove his own cloths and then defile her. According to this witness, the appellant defiled her several times at night. She also told the court that the appellant assaulted her using a club until she could not walk properly. He then warned her not to reveal to anyone what had happened; that her sister reported the matter to the D.O. and thereafter the police took her to hospital.

22. PW2 V.A. also child aged 12 years and sister to PW1, testified that the appellant, her father, started defiling her in 2016; that he used to removed her cloths and defile her after warning her not to cry; that she reported the matter to her mother but she ignored and told her never to play with the appellant. According to the witness, the appellant defiled her several times; that on the night of 11th November, 2018, the he again took her to his bedroom and defiled her. It was then that she reported the matter PW3.

23. PW3 Boniface Matembi, the Assistant County Commissioner of Rombo Division, testified that on 13th November, 2018 at about 5 pm a minor, went to his office crying and told him that the appellant, her father, had chased her away after defiling her. They went to the appellant's home; rescued the other child; arrested the appellant and took him to Rombo police post. On the following day, they took the children to the children's office. PW1 and PW2 told him that their mother was aware of their tribulations. The two children were taken to hospital.

24. PW4 Ismael Wazoki, a clinical officer working at Loitokitok Sub County Hospital, testified that the minors were transferred from Rombo to Loitokitok hospital on allegations of defilement by their father. He examined PW1 who had bruises on the left leg and swelling on left thigh. The injuries were two days and he classified the injury as harm. She had numerous pus cells and epithelial cells. Her hymen was missing. He filled a PRC and P3 forms for her. On the same day, he examined PW2; the hymen was missing and she had pus cells and epithelial cells in her urine. The age of the injury was of seven weeks. He signed a P3 form on 14th November, 2018. He also filled PRC form for her. He produced the P3 forms, treatment notes and PRC forms as exhibits.

25. PW5 No. 2011312537 Administration Police officer based at Rombo testified that on 13th November, 2018 at 4 pm he was called by PW3 to his office. PW3 told him that a minor had reported to him that she had been assaulted by the appellant. He went to the office where they talked with the minor who told him that the appellant was defiling her and her sister. They went to the appellant's home where she identified the appellant and they arrested him and took him to Rombo Police Patrol Base.

26. PW6 No. 105076 PC Faith Mutua attached to Rombo Police Patrol Base, testified that on 13th November, 2018 at 8 pm she received the appellant together with PW1 and PW2. PW1 and PW2 told her that the appellant had defiled them. She booked the appellant and placed him in the cells. The following day they took the minors to a rescue Centre in Kimana. She then took the appellant and the minors to hospital where they were examined and the minors' age assessed. The appellant was then taken to Loitokitok police station. She produced the age assessment forms for PW1 and PW2 as exhibits. They showed that PW1 and PW2 were 8 and 12 years old respectively.

27. On being put on his defence, the appellant gave a sworn testimony and told the court that on 13th November, 2018 he was in church when his neighbor, Joan Bakari, called and informed him that his children had stolen from his house. When PW2 saw him, she ran away. PW1 told him that it was PW2 who had sent her to steal maize flour. He canned her on the leg and followed PW2 and went back to the farm. He later called and asked PW1 whether PW2 had come back but she told him that she had not. He then went to the shop. At 7.30 pm, he met police officers in the company of PW1. The officer arrested him and took him to the police station. He was taken to hospital together with his children who were examined but he was not examined himself. He was later charged. He told the court that he had a longstanding grudge with his wife who was drunkard and that he was not in good terms with the PW3 because they were fighting over land.

28. After considering the above evidence, the trial court was satisfied that the prosecution had proved its case, convicted him on the three main counts and sentenced him prompting this appeal.

29. I have considered the evidence on record and reevaluated it myself. The evidence is primarily that of PW1 and PW2 that they were defiled by the appellant, their father. These are minor children of 8 and 12 years respectively. They were sworn, gave testimonies on oath and were cross-examined. This was after the trial court conducted a ***voire dire*** examination and was satisfied that they possessed sufficient intelligence and understood the importance of telling the truth.

30. The appellant was charged with two counts of incest under section 20(1) of the Sexual Offences Act and one count of assault under section 250 of the Penal Code. He denied committing incest with PW1 and PW2 as well as that of assaulting PW2

31. PW1 and PW2 testified that the appellant defiled them on several occasions; that he would sleep with them at night after undressing them

and thereafter threaten them not to tell anyone. PW2 informed their mother but she only told her not to play with the appellant. According to PW1 and PW2, the last time the appellant slept with them was on 11th November 2018, the same day he assaulted PW2.

32. They reported the matter to PW3 who intervened and together with PW4, they had appellant arrested and placed in cells. He was later taken to Loitokitok hospital and then Loitokitok Police station. The minors were also taken to hospital and later to a children's home. This was confirmed by PW6, the police officer who received the appellant and took him and the minors to hospital.

33. PW5 the clinical officer who examined the minors confirmed that they had been assaulted. Both had pus cells and epithelial cells and their hymen were missing. He filled P3 and PRC forms for them which he produced as exhibits. He confirmed that he two had been sexually assaulted and that the probable weapon was a male organ.

34. As I have already stated, the appellant was charged with incest under section 20(1) of the Sexual offences Act which 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."**

35. There is no denial that the appellant is father to PW1 and PW2. The two testified on oath how the appellant had sexual intercourse with them on diverse dates. They informed their mother who did nothing about it. It took the courage of PW1 to report the matter PW3 who together with PW5 intervened and rescued them,

36. The offence of incest stems sexual assault of a close relative. In that regard, the prosecution was required to prove the ingredients of the offence for the trial court to return a guilty verdict. The incontrovertible evidence was that PW1 and PW2 were aged 8 and 12 years respectively. There was also no denial that the appellant was their father. What the prosecution was required to prove was that the appellant committed the offence of incest. That is, he defiled both PW1 and PW2

37. The evidence on the commission of the offence was that of PW1 and PW2 as well as PW4, the clinical officer who examined them. The evidence of PW1 and PW2 was that the appellant had sexual intercourse with them on different occasions the last occasion being 11th November 2018. The medical evidence by PW4 and the P3 and PRC forms was that the hymen was missing and that both had pus cells and epithetical cells in their private organs. The P3 form however showed that their external genitalia were normal. It was this evidence that led the trial court to conclude that there had been penetration and therefore defilement.

38. Looking at the evidence of PW1 and PW2 and compared to that of PW4 and the P3 and PRC forms, I am unable to agree with the trial court that evidence conclusively proved defilement. It has been held couple of times that absence of hymen is not proof of sexual activity as some children may be born without it or it may be lost because of reasons other than sexual intercourse.

39. In ***PKW v Republic*** *(*supra*),**Maraga and Rawal, JJ***(as they then were) stated regarding absence of hymen*:*

> **"[15]. In their analysis of the evidence on record, the two courts below…appear to have placed a high premium on the finding that the child's hymen had been broken. Was this justified? Is hymen only ruptured by sexual intercourse?**
>
> **[16].Hymen, also known as vaginal membrane, is a thin mucous membrane found at the orifice of the female vagina with which most female infants are born. In most cases of sexual offences we have dealt with, courts tend to assume that absence of hymen in the vagina of a girl child alleged to have been defiled is proof of the charge. That is, however, an erroneous assumption. Scientific and medical evidence has proved that some girls are not even born with hymen. Those who are, there are times when hymen is broken by factors other than sexual intercourse. These include insertion into the vagina of any object capable of tearing it like the use of tampons, masturbation injury, and medical examinations can also rupture the hymen when a girl engages in vigorous physical activity like horseback riding, bicycle riding, and gymnastics, there can also be a natural tearing of the hymen. See the Canadian case of The Queen vs Manuel Vincent Quintanila [1999] AB QB 769."**

40. This view was upheld by the Court of Appeal in ***David Mwingirwa v Republic*** [2017] eKLR, where the appellant had been convicted because the victim's hymen had been broken. The Court of Appeal held:

> **"From that reasoning of the learned judge, it would seem that the certainty or confidence with which the asserted that there was overwhelming evidence of L K having engaged in sexual activity came in no small measure from what she considers the corroboration afforded by the evidence of PW4 on the broken hymen. According to the learned judge, PW4 was of the view that "there was continuous process of defilement." With respect, we do not think that this was entirely correct. The Clinical Officer PW4 noticed that the hymen was broken but there were no other injuries to L K's genitalia. Nor was there spermatozoa or any male emission in her vaginal carnal. He merely stated that the broken hymen was suggestive of an ongoing process of defilement. He did not suggest that his said conclusion was based on any other observation beyond the broken hymen. Then this brings to the fore the issue raised by the appellant whether, in the absence of any other medical or physical evidence, a broken hymen is conclusive proof of penetrative sexual intercourse as PW4 seemed to suggest (his remarks in the P3 and his testimony in Court do not go beyond a suggestion) and as the learned judge seemed to have concluded, we think it was an error for the learned judge to form a firm conclusion of defilement from the fact alone of the broken hymen."**

41. In the present appeal, PW4 stated that the injury (defilement) was seven weeks old. That was on 14th November 2018 despite the fact that both PW1 and PW2 states that the appellant had defiled them on 11th November 2018, three days before they were examined. This was not consistent with the victims' evidence. There was also no evidence that the appellant had infected the victims with a sexually transmitted decease to explain the presence of pus and epithelial cells despite the fact that he was taken to hospital. This evidence did not prove defilement as required by law.

42. The appellant also alleged that he had a grudge with his wife who was a drunkard. He complained that she was not called to testify despite having recorded her statement with the police. The prosecution did not deny that the appellant's wife had recorded a statement and was a witness to the case. She was a material witness given that PW1 and PW2 told the court that they reported the incidents to her and therefore she knew about it. If that be true and the prosecution did not deny it, there would be good reason for the appellant to suspect because of the grudge between him and his wife it played a part in mounting the charges against him. The court is therefore entitled to infer that had she been called, her evidence would have been unfavourable to the prosecution.

43. The appellant further argued that the trial court did not consider defence of alibi. I have gone through the record and in particular the appellant's defence. He only stated that he was in church when his neighbour called and informed him that his children had stolen from his house. I am unable to trace the defence of alibi on record. The fact that he testified that he was in church when he was called could not be a defence of alibi taking into account the charges he faced.

44. Regarding the charge of assault, the appellant admitted that he caned PW2 on the legs but explained that it was because they had stolen from a neighour's house. Other than what the appellant stated that the minors had stolen, there no other evidence to support this evidence. I am therefore satisfied that the prosecution proved this charge given the evidence of PW2 as supported by the medical evidence by PW4. I find no reason to fault the trial court on its finding with regard to this charge.

45. Regarding sentence, the appellant was sentenced to life imprisonment for the first and second counts. This sentence was excessive given that section 20(1) states that where the victim of the offence is under age of eighteen years, "**the accused person shall be liable to imprisonment for life."** The section uses the words **"liable"** which is not the same as mandatory. As was stated in ***David Mwingirwa v Republic*** (supra), 'liable to' connotes a maximum as opposed to a mandatory sentence. (See also **Daniel Kyalo Mwema v Republic** [2009] eKLR)

46. Having considered the appeal submissions and the authorities and reanalysed the evidence on record, I am satisfied that the appeal on count 1 and 2 has merit. Consequently, the appeal on count 1 and 2 is allowed, conviction quashed and sentence set aside. The appeal on count 3 is dismissed. Since the appellant has already served sentence on count 3, he is hereby released forthwith unless otherwise lawfully held.

Dated, signed and delivered at Kajiado this 30th day of April, 2020.

E.C MWITA

JUDGE