



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CRIMINAL APPEAL NO. 169 OF 2017

(Appeal originating from Nyahururu CMC's Court Cr. No. SOA 20 of 2016 by Hon. A.P. Ndege – SRM)

JMG.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

On 10/01/2017, Hon. A.P. Ndege PM convicted JMG, the appellant, for the offence of Incest contrary to **Section 20 (1) of the Sexual Offences Act**.

The particulars of the charge are that on diverse dates in the month of September 2014 in Nyandarua County, being a male person, intentionally and unlawfully caused his penis to penetrate the vagina of MNM who was to his knowledge his daughter who was by then aged 8 years.

In the alternative, the appellant faced a charge of Indecent Act contrary to **Section 11 (1) of the Sexual Offences Act**.

Upon conviction, the appellant was sentenced to serve life imprisonment. The appellant is aggrieved by the judgment of the court and preferred this appeal through the firm of Waichungo & Co. Advocates who preferred ten grounds of appeal. The said grounds can be condensed into the following;

- 1) That the exact dates of the alleged defilement were contradictory and not proved;**
- 2) That the court erred in finding that the medical evidence proved that the complainant was defiled;**
- 3) That the court failed to consider that a grudge existed between the complainant's parents because they had separated;**
- 4) That the court erred in finding that the appellant escaped after commission of the offence;**
- 5) That the court erred in failing to order that a psychiatric examination be made on the appellant to determine whether he was able to stand trial;**
- 6) That the offence of incest was not proved to the required standard;**
- 7) That the trial court did not comply with Section 169 of the Criminal Procedure Code in the structuring of a judgment;**
- 8) That the court erred in failing to consider the appellant's defence;**
- 9) That the sentence was excessive.**

The appellant therefore prays that the conviction be quashed, sentence set aside and the appellant be set at liberty.

Though Ms. Rugut, learned Counsel for the State indicated that she had filed her submissions, they have so far not been received by the court and hence not available to be considered in this judgment.

This is a first appeal and it behoves this court to exhaustively examine all the evidence that was tendered in the trial court, evaluate and analyze it and arrive at its own conclusions. The court has however to make allowance for the fact that it neither saw nor heard the witnesses

testify.

In total, the prosecution called four witnesses. **PW1 MNM(complainant)** underwent a voire dire examination by the court and the court found that she was intelligent enough but did not however understand the meaning of the oath and she was affirmed. PW1 told the court that she was in Standard four and identified the appellant as her father; that her father and mother had separated. She would meet the appellant on her way from school, he would give her a loaf of bread, then he would take her to his house, would remove the school uniform, then he would remove his inner wear and would use his 'big organ' and insert in her genitalia while on the bed; that the appellant repeated that act several times and he would then release her to go home; that she reported the incidents to her mother who would dismiss them as lies; that one night, the mother came and found the appellant in the act and she went to report to the Chief; that the appellant disappeared from home that night; that thereafter she got pimples in her genital area and her mother applied medicine.

PW2 EW is the complainant's mother. PW2 recalled that on 11/09/2014, about 7.10pm, the appellant went where she worked and spent the night. They all slept in the same bed the appellant, PW1 and 2. PW2 heard the complainant crying in pain. She found the appellant lying on PW1; PW2 examined PW1 and found a whitish discharge in her private parts and reported to his relatives and later to the police. PW2 said that the complainant told her it was not the first time the appellant had done that to her. PW2 confirmed that he had seen PW1 with pimples in her private parts at one time.

Dr. Joseph Karimi (PW3) of Nyahururu County Hospital examined the complainant on 23/09/2014. On examination, he found that the hymen was broken, she had a whitish discharge from her private parts and had an infection. He also had access to the treatment notes from PRC forms.

PW4 PC Erick Oduk of Mairo – Inya Police Station recalled that the complainant was taken to the station on 23/09/2015 with an allegation of defilement by the father. The child narrated how the father had been defiling her on her way from school and on the last incident, the appellant had visited the mother when he defiled her. PW4 also produced a copy of complainant's birth certificate which indicates that she was born on 14/08/2006 (P-Exhibit 4).

When called upon to defend himself, the appellant in his unsworn statement totally denied committing the offence claiming to have been born and raised in a Christian family that would not have condoned such acts.

THE APPELLANT'S SUBMISSIONS:

Mr. Waichungo took issue with the contradictions in the dates on which the offence was allegedly committed; that whereas PW1 never stated the date, PW2 said it was on 11/09/2014, PW3 said the records indicated that the offence was committed on 18/09/2014 whereas PW4 said it was on 11/09/2014; that though the court appreciated that there were contradictions, the court found the same not to have been material by relying on **Section 214 (2) of the Criminal Procedure Code**. Counsel was of the view that the said section is not applicable because it addresses variance between the charge and evidence. Counsel argued that there should have been independent evidence to confirm that the appellant visited PW2's house. Counsel relied on the decision of **James Otengo Nyarombe & Others vrs Republic (2007) eKLR** where the evidence varied from the date and the appellants were acquitted.

On grounds two, six and seven, Counsel argued that penetration was not proved because PW1 referred to the appellant using his big organ to insert into her genital area; it was Counsel's submission that the big organ could refer to anything; that the complainant failed to explain what the big organ was; that it was speculation for the court to conclude that the big organ means a penis; that PW2 did not tell the court whether she saw the appellant insert his organ in PW1; that PW3 did not state whether there had been any hymen and if so, when it was broken; that there was no evidence of penetration i.e. bruises, lacerations e.t.c; that though PW3 found that PW1 had a urinary tract infection, the appellant was never examined to determine whether he suffered from the same infection and that in any case such infection can be caused by anything. He said that there was no medical evidence to support PW1's evidence.

Counsel relied on the following decisions;

- 1) **HCCRA No. 130 of 2004 Donato Njue M'Ndui Vrs Republic;**
- 2) **HCCRA No. 14 of 2011 Bernard Ochieng Okomo Vrs Republic;**
- 3) **HCCRA No. 247 of 2011 Humprey Mobutu Fund Vrs Republic;**
- 4) **HCCRA No. 280 of 2004 Michael Odhiambo Vrs Republic.**

On ground 3, 4, 8 and 9, Counsel argued that because PW2 and the appellant had separated, there was a grudge which was explained by the delay in reporting the incident and that the court dealt with extraneous matters in its judgment. Counsel argued that there was no evidence to prove that the appellant had vanished from the area and resurfaced two years later.

It is also Counsel's submission that the trial court was in breach of **Section 169 of the Criminal Procedure Code** by not considering the appellant's defence and never gave reasons for disbelieving the defence.

Lastly, Counsel faulted the trial court for failing to subject the appellant to a psychiatric examination to determine whether he was fit to stand trial. Counsel argued that when this matter came up on 12/02/2018, the appellant was found to be unfit to proceed with the appeal and that the appellant was admitted at Mathare Mental Teaching and Referral Hospital from 27/03/2018 to 09/05/2018; that the appellant's mental status was raised in the probation officer's pre-bail report which should have prompted the court to subject him to mental assessment to ascertain whether he was fit to stand trial; that when on 16/09/2016, the appellant claimed to be unwell, the court should have considered that

he be taken to hospital and maybe his illness would have come to the fore therein. Counsel urged the court to find that the trial court sentenced a person who was unfit to stand trial. Counsel relied on the decision of Julius Wariomba Githua vs Republic CRA No. 261 of 2006 and urged the court to acquit the accused instead of ordering a retrial.

I have duly considered the evidence on record, grounds of appeal and submissions of Counsel. In my view, I will need to deal with the last ground first, that is, whether the court erred by not sending the appellant for mental examination when it was indicated in the mental assessment report that the appellant suffered from mild retardation.

On 12/02/2018 when the appellant appeared before the Deputy Registrar for mention of his appeal, his Counsel applied that he be taken for mental assessment. Doctor Njau (Psychiatrist) examined the appellant and observed that he suffers from intellectual disability (mental retardation) and recommended treatment and a follow up in a psychiatric unit. The appellant was admitted at Mathare Mental Hospital on 13/03/2018 and on 09/05/2018, a period of about 1 ½ months. Doctor Ngugi Githare certified the appellant fit to stand trial. The doctor observed that he had not found any abnormal behavior upon admission. What is not clear to this court is whether a person with a low IQ or mental retardation needs to be sent to a psychiatric hospital for treatment as was in this case.

Whatever the case, although the appellant did not seem to show any signs of mental illness during the trial because mere failure to ask questions as pointed out by Counsel does not mean one does not understand the proceedings. The appellant's defence seems to have been sensible enough as he claimed to be from a Christian family and not capable of such a deed. However, the above notwithstanding, the Magistrate should have taken into account the fact that the appellant was said to suffer from mild retardation and should have been medically examined to determine whether he could follow the proceedings or not. Failure to do so was a serious omission on the part of the trial court and amounts to a mistrial and the proceedings must be set aside. The question this court has to answer then is whether the court should acquit the accused or order a retrial.

The Supreme Court of India in the case of Satya Jit Benerjee & Others vs State of W.B & Others CRA (CrI) 1331/2004 opined that direction for retrial should not be made in all or every case where acquittal of accused is for want of adequate or reliable evidence. It is only when an extraordinary situation with regard to a just trial is formed so as to treat it as a farce or a 'mock trial', direction for retrial would be justified.

The Kenyan position was captured by Justice Khamoni in the case of Laban Kimondo Karanja vs Republic (2016) eKLR (CRA 310 – 312/2001 (Nyeri) where the Judge stated, "**At the end.... the principles an appellate court should apply in determining whether to order a retrial are as follows;**

- i. A retrial may be ordered only when the original trial, was illegal or defective;**
- ii. Whether an order for retrial should be made depends on the particular facts and circumstances of each case but should only be made where the interests of Justice require it and where it is not likely to cause injustice to an accused person;**
- iii. A retrial should not be ordered unless the appellate court is of the opinion that on a proper consideration of the admissible evidence, or potentially admissible evidence a conviction might result."**

See also Ahmed Sumar vs Republic (1964) EALR 483.

In Laban Kimondo Karanja vs Republic (2006) eKLR (CRA 310 – 312/2001 (Nyeri) Justice Khamoni also considered the term 'mistrial' when he said "**the term 'mistrial' has sometimes been used. That is a trial vitiated by some error or an inconclusive trial. An error is a mistake or inaccuracy. It is something one makes without one knowing that he is making it. It is something done unintentionally.**" In this case, though the pre-bail report mentions that the defence said that the appellant suffers from mild retardation, the court may not have even noticed that fact because the appellant's mental condition was not brought to the fore anywhere else during the trial.

Applying the above stated principles, an order of retrial should not be made unless the interests of Justice require it. Fair trial will entail the interests of the appellant, the victim and the society at large. In the instant case, the victim herein was the appellant's own daughter, a child of tender age whose rights have to be protected. On a careful consideration of the evidence adduced by the prosecution, and specifically the complainant (PW1) and her mother (PW2), I am of the view that the potentially admissible evidence is likely to result in a conviction. I am therefore satisfied that there is ample evidence on record necessitating the court to order a retrial.

The appellant's rights to a fair trial are paramount and the court has to consider the time the trial has taken, time in prison. The appellant was arrested in February 2016 and was sentenced to serve life imprisonment on 10/01/2017. So far he has served about 3 ½ years. He was charged with a very serious offence of incest which carries a maximum sentence of life imprisonment. The child (complainant) too requires justice and protection. The court has to balance both rights and not only tilt in favour of the appellant alone. It is therefore in the interest of justice that a retrial be ordered. I find that the retrial will not prejudice the appellant. He will be subjected to mental examination and be able to challenge the prosecution case.

In the end, I quash the conviction, set aside the sentence. A retrial is hereby ordered. The appellant be produced before the Chief Magistrate Nyahururu for directions on which Magistrate will hear the case. The court also directs that the case be given priority and should be concluded expeditiously as the circumstances will allow. The appellant be produced before the Chief Magistrate Nyahururu on 05/10/2020 for plea and fresh hearing.

It is so ordered.

Dated, Signed and Delivered at NYAHURURU this 29th day of September, 2020.

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R.P.V. Wendoh

JUDGE

PRESENT:

Ms. Rugut for State

Ms. Wanjiru Mureithi for Appellant

Appellant present

Henry – Court Assistant