REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL NO.61 OF 2017

CKW.....APPELLANT

VERSUS

REPUBLIC.....PROSECUTOR

Appeal against the conviction and sentence by Hon D.M Ireri SRM

in OTHAYA SRMCr C no 6 of 2015 of 24th August 2018

JUDGMENT

The appellant herein CKW was charged with the offence of incest contrary to s. 20(1) of the Sexual Offences Act no 3 of the Laws of Kenya.

It was alleged that on the 30th Day of December 2014 in Nyeri South sub county within Nyeri County being a male person intentionally and unlawfully caused his penis to penetrate the vagina of MNH a female child aged 4 years who to his knowledge was his niece.

In the alternative he was charged with committing an indecent act with a child contrary to s. 11(1) of the Sexual Offences Act no 3 of 2016. It was alleged that at the same, time and place he intentionally and unlawfully touched the vagina of MNH a child aged 4 years with his penis.

The trial proceeded before Hon Langat SRM who heard the five prosecution witnesses. He was transferred. The matter was taken over by Hon DM Ireri at the close of the case for the prosecution. Upon compliance with s. 200(3) of the CPC the accused opted to proceed from where the matter had reached before Hon Langat.

Hon. Ireri heard the defence. In his judgment delivered on the 24th August 2017, he found the appellant guilty of the offence of incest and sentenced the appellant to 20 years' imprisonment.

The appellant filed this appeal based on 10 grounds dated 22nd September 2017 through the firm of Waweru Macharia and Co Advocates:

1. **The learned trial Magistrate erred in law and fact in placing reliance on the evidence of the prosecution witnesses which was materially contradictory.**

2. **The learned trial Magistrate erred in law and in fact in failing to warn himself about the inconsistency in the evidence of the prosecution about the time, date, and the reporting of and the nature of the reporting of the alleged offence.**

3. **The learned trial Magistrate failed to warn herself about credibility of the prosecution witnesses and thereby arrived at a wrong decision.**

4. **The learned trial Magistrate erred in failing to warn herself on the reliability of the medical evidence and police evidence and thereby arrived at an erroneous decision.**

5. **The charge as framed was not supported by the evidence on record.**

6. **The trial Magistrate erred in out rightly dismissing the defence of the accused while the same had merit.**

7. The trial Magistrate erred in law and fact by admitting the evidence of the complainant and thereby arrived into a wrong conclusion.

8. The learned Magistrate erred in failing to appreciate that the prosecution failed to call crucial prosecution witnesses.

9. The learned trial Magistrate erred in relying on worthless evidence of the complainant taken by a fellow magistrate.

10. The learned trial Magistrate erred in shifting the burden of proof to the accused.

An analysis of the grounds leads to the conclusion that the appellant's complaint is that the prosecution did not prove their case beyond a reasonable doubt as the evidence was contradictory, inconsistent and incredible, that the trial magistrate shifted the burden to the accused person, that he dismissed the accused's defence though it had merit.

As a first appellate court my duty is settled as was stated in **OKENO VERSUS REPUBLIC [1972] EA 323 where the court said**

"This is the evidence that was presented before the trial court. We are enjoined as the first appellate court to analyze it afresh and come to our own conclusion. It is the appellant's right as much as our obligation to undertake this task. As always we must bear in mind that the trial court had the benefit of hearing and seeing the witnesses and was therefore better placed to assess the witness's demeanor and disposition."

The obligation is to reevaluate the evidence and draw my own conclusions always alive to the fact that I never had the privilege of hearing or seeing the witnesses.

The appeal is supported by the appellant counsel's oral submissions. It is opposed by the state through prosecuting counsel Kennedy Magoma.

The case for the prosecution

At the start of the case for the prosecution the record states:

'Court: The complainant is four years old. Because of her tender age she is declared a vulnerable witness to testify through an intermediary'

The record shows that the child testified through one Veronica Kanyago, a children's Officer who was sworn and stated;

I *know uncle CKW. He is at the dock- (points at the accused person). I am called* MNH. *Uncle CKW placed his thing to me. He placed alcohol, soil and did tabia mbaya here (points at the private part). Points at the penis on the doll. The trouser was torn. He removed my clothes. I had a trouser. He removed. We were at the shamba. She(sic) did tabia mabaya at the shamba. We were at T home. He came to T home. I only felt alcohol. He poured alcohol and soil on me on my private parts. He had alcohol on the pocket. He told me to pee. I did not pee. He took me home. He had told me to go to the shamba to cut bananas. He only wounded me her (point at private parts). He used his hands. I told W1 my sister. I felt pain I cried. Uncle CKW is at the dock (points). I was taken to hospital by mum. My mum was told by my Aunty W2. W1 told her. Mum was not at home. She was at casual jobs.*

On cross examination she said she was with W1, B and her Aunty W2. She told both aunty and W1 what happened. That the accused took her home but did not enter the house. That from the shamba to the home was far but they walked.

PW2 LW a minor aged 10 years was taken through voire dire and the magistrate determined that she did not understand the nature of an oath. She testified unsworn. She told the court that they were 7 in the family, she being the older as between her and the victim, who was the youngest. That the accused was their uncle. On the material date MNH came home about 4:00pm. She was limping. She asked her what the problem was. MNH told her that the accused had done tabia mbaya to her. LW told her to tell their mother. MNH told their aunt. LW told their mother. She remained at home till 5:00pm when their mother came home.

On cross examination she said that her aunt RN was a doctor but they never told her about the incident. She said the child came home when dressed and did not remove her clothes to show where the accused had done the tabia mbaya. That she was crying and she told her to keep quiet. That her clothes were wet and she assisted her change the same. She said accused house was not far from their house. That there were 5 houses in the homestead and their grandmother and aunts are their neighbours.

PW3 RW the mother to PW2 and the victim said she came home on 30th December and found the child sleeping at 5:30pm. Her eyes were red. She told her that her uncle CKW had taken her to the banana plantation and done tabia mbaya to her by inserting his penis into her, after removing her trouser. She found that the child had changed her trouser. The child told her that the accused poured soil and alcohol on her private parts after the act. RW took the child to her daughter in law. The child narrated what had happened. She checked her and saw that she had bruises and soil on her vagina. She did not bathe her but took her to Othaya District hospital. The child was examined. They were referred to Othaya Police station. She was issued with P3 and post rape care form. The accused who is a brother to her husband disappeared but was arrested after one week.

On cross examination she told the court that she took the child to her son and daughter in laws house where they also examined her. She did not involve her mother in law or nay other member of the family. She claimed that the family now wanted to chase her away because she had

reported this case, she denied any grudges between her and her brother in law the accused.

DR. Ian Ngumo Waithera was PW4. He testified that upon examination the child had bruises on the vagina, her hymen was freshly broken, there was no spermatozoa. His opinion was that she had been defiled. The prosecutor confirmed that certain samples had been forwarded to the government analyst but the report had not been received. The matter was adjourned accordingly.

This witness was recalled and testified that he was a clinical officer but the stamp on the P3 was that of the Medical Superintendent Dr.Mwangi. That the child was examined by another person that he never examined the child physically but used what was documented. That the physical examination took place when the injuries were 6 hours old.

PW5 no. 96052 PC Velma Agungo testified that the child was taken to the police station on the 30th October 2014 at 8:00 hours. She told her that her uncle had approached her about noon to accompany him to cut grass for the cows. That they left together but when they got to the banana plantation, he took her inside, removed her clothes and defiled her. That he ejaculated on her thighs, then poured soil and alcohol which he had in a bottle on her. Then he used her clothes to wipe her then told her to go home. At home she told her sister LW and they waited for the mother RW who upon arrival and learning what had happened took her to hospital and then the police station.

The police officer issued the P3 and also prepared samples for the government analyst. These included blood samples of both the accused and the child, and genital swab from the child and her soiled trouser.

On cross examination she confirmed that she arrested the accused person and did not interrogate any other witnesses. She was not aware of any grudge between the child's family and that of the accused person.

In his sworn statement of defence the accused person told the court that the father of the child was his brother and yes she was his niece. He said he was 50 years old. He denied the offence telling the court that the whole of 30th December 2017 he spent the whole day at Othaya with his brother GGW. He said he was arrested 10 days after the alleged offence yet he was home all that time and his home is barely 50m from that of the complainant. He stated that the mother of the complainant RW had a grudge with him because he had refused to allow her to cultivate his land. He said they were 6 brothers in the home.

His brother GGW testified that the father of the child one GH was his elder brother and was at home even on the material date. He said they were with the accused the whole day in Othaya. They came back home at about 6:30 to 7:00pm. They visited their mother where they stayed till 11:00pm and then went to sleep. He stated under cross examination that the complainant's mother had a grudge with the mother of the accused. That at some point she had wanted him arrested for not educating her child. He said he had heard about the land dispute but was not party to the details.

Submissions

The appellant relied on **Eric Onyango Odeng v R [2014] eKLR** to the effect that serious contradictions should lead to the rejection of the evidence. It was submitted on his behalf that the case was full of serious contradictions. **Jeremiah Okuona Obioha v R [2016] eKLR citing Bukenya v Uganda [1972] EA 349** on the point that the prosecution had failed to call key witnesses hence the curt was at liberty to draw the conclusion that that evidence would not support the case for the prosecution. It was also argued that the evidence of complainant was worthless as no voire dire evidence was taken. That the court simply declared the child vulnerable and proceeded to appoint an intermediary. That this failure was fatal as was held in **Kivevelo Mboloi v R [2013] eKLR**.

Finally, the without the reports from the government analyst the medical evidence was inconclusive.

Mr. Magoma for the state countered these arguments arguing that the charges had been proved. That the child properly identified her defiler who was her uncle. She narrated how he defiled her. That it happened in the home of T aunt to the victim. That the evidence was well corroborated, there were fresh injuries on the child.

He argued that there is no laid down procedure in law on how to appoint an intermediaries and therefor the trial court could not be faulted. He argued that even the sentence was lenient and the state was seeking an enhancement of the same.

In his rejoinder counsel for the appellant argued that the error on the part of the court was failing to establish the vulnerability of the complainant and failure to comply with the Oaths and Statutory Declarations Act, and without establishing the complaints competency to testify then this rendered her evidence worthless.

Analysis

Section 20 of the Sexual Offences Act provides for Incest by male persons. It includes both defilement and indecent act by a male relative as defined by the Act.

> *(1) 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: (emphasis added)*
>
> *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.*

It is clear from the wording of this provision that it caters for both the act that causes penetration and the act that answers to the description of an indecent act under the law. Hence it was not necessary to cite the general s. 11(1) on indecent acts.

To prove the charge of incest of an act that causes penetration the prosecution needed to prove

1. The age of the victim

2. That there was penetration

3. The identity offender.

On the 1st issue the age of the victim was proved by the production of the certificate of birth, showing date of birth as 22nd January 2010.

On the issue of penetration the child told the court that her uncle put his thing (penis) (which was demonstrated by use of a doll) into her (pointed to her private areas). She was taken to hospital the same day. The Post Rape care form indicates that on that same evening when she was examined the **'outer genitalia had fresh reddish bruises, the hymen was freshly broken, there were signs of inflammation on the minor labia painful on touch'.** She had changed her clothes but carried her trouser which she had at the time of the defilement to the hospital. The P3 was completed out of this information. This evidence is sufficient to demonstrate penetration as defined by s. 2 of the Act that **"penetration"** *means the partial or complete insertion of the genital organs of a person into the genital organs of another person*; "For this child the description of what happened to her is evidenced by the physical findings upon the examination of her genitalia. That did not require the evidence from the government analyst to prove that there was penetration. It was there for the medical officer to see, that there was insertion of something into the child's genitalia which she described to be her uncle's penis.

There was the child's description that the appellant poured 'sand' into her private parts, and 'alcohol' that he had in a bottle. I am not a psychologist but I would not want to throw away that evidence as either contradictory or inconsistence or misplaced? What if that is how the child experienced the sexual assault like someone had poured sand into her private parts and what appeared like alcohol? It could be her description of the defilement. Needless to say, sexual assault is a traumatic event that has been found to have far reaching psychological damage on victims. Our criminal justice system refuses to acknowledge that it is not sufficient to simply have evidence of the physical 'harm 'caused to the victim. The P3 form simply requests for

> **"…report of the nature and extent of bodily injury"**

On Section C ' To be completed in alleged sexual offences after the completion of sections A and B' also requests for description in detail of

> **'…the physical state of any injuries to the genitalia with special reference to labia majora, labia minora , vagina, cervix… injuries to the genitalia'**

The Post Rape Care form (PRC) (MOH 363) developed purposely by the Ministry of Health for the examination of survivors of rape/ sexual assault to be **'used as clinical notes along with P3 form for legal purposes'** contain a section headed **'PSYCHOLOGICAL ASSESSMENT' (Complete Psychological Assessment section in Part B)'** . A perusal of the PRC form presented as PEX3 does not have that Part B. hence the absolute absence of any psychological assessment of the victim, except for a ticked box that there was referral to Trauma Counselling.

What that does it to leave courts with only part of the evidence with regard to the offence. With a provision such as the proviso s. 124 of the Sexual Offences Act in place, where the court may convict on the sole evidence of the victim, and case law that the fact of defilement is not necessarily proved by medical evidence, the need for this other evidence, the psychological assessment of the victim cannot, in my humble view be overstated. I think if properly it would clarify certain situations as the statements made by this child.

Be that as it may, the argument that the medical evidence was inconclusive as proof of defilement was very well dealt with by the trial court. He relied on the case of **Lawrence Chamwanda and Anor v R [2016] eKLR** where the court said inter alia:

> *Furthermore, the law is now settled that rape or defilement is not proved by a DNA test or medical examination but by evidence of the victim, and that evidence could include circumstantial evidence. This position was stated in the case of* ***Fappyton Mutuku Ngui v Republic*** *[2014] eKLR. In that case, it had been argued for the appellant that there was no medical examination to link the appellant with the offence of defilement. The court stated: -*
>
> ***"In our view, such evidence was not necessary and in any event, the trial court found that there was sufficient medical evidence in support of PW2's testimony which was trustworthy as to the person who had defiled her."***
>
> ***…*** *In the case of* ***Kassim Ali v Republic*** *[2006] eKLR the court stated: -*
>
> ***"The absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim or by circumstantial evidence."***
>
> *And in the case of* ***Benjamin Mbugua Gitau v Republic*** *[2011] eKLR, the Court of Appeal stated that there was no necessity of a DNA test as penetration which is the main element of the offence was proved.*

That brings us to the identity of the perpetrator.

This was a four-year-old. From the undisputed evidence she was school going. Her father is a brother to the appellant. Their homesteads are in one compound as confirmed by PW2 and the appellant and his brother DW2. So the child would be able to differentiate one uncle from the next. She named him by his name. She identified him in the dock. She said they were at a certain home. He took her from there. They were to go cut bananas. Instead he wounded her in her private parts. She was in pain. She cried. At home she told her sister LW who told their mother. Her mother took her to hospital. The string of evidence of identification is not broken by anything to create a doubt. That identification by the child is clear. It was not shaken on cross examination. And the same is corroborated by PW2 who was at home when the child got there. That upon arrival at home the child mentioned the accused by name.

So from the record it is clear that the child was not guessing who had defiled her. She was certain it was this uncle out of the many others that she has.

Was the appellant's defence considered?

It was argued that the appellant raised a good defence which the trial court did not consider. That he was away from home that whole day and he could not have committed the offence. It was also argued that the complainant's mother had a grudge against him. A perusal of the cross examination of RW the mother to the complainant shows that she was asked about a grudge which she denied. The particulars of the alleged land promise were not put to her and the grudge was generalized to the whole family which she denied. In any event how would a sister in law enter into land transactions with her brother in law while her husband was present? His own brother DW2 knew almost nothing about the alleged land dispute. If it was such a serious issue to create a grudge, then the whole family would have been aware especially now that it was alleged by the appellant that he gave the land to another brother's son. It is an ingenious argument and does not appear tenable. I agree with the trial magistrate that this was not established and by rejecting it the trial court did not shift nay burden,

Regarding the appellant's alibi. I have carefully considered the evidence given by the appellant and his brother. The appellant stated that he was in Othaya the whole day buying water materials with his brother. There was nothing to show that he was in Othaya that day, not even evidence that they had done some shopping or an eye witness who had seen him in Othaya. Weighed against the rest of the evidence this appeared to be an afterthought. The trial court relying on **Karanja v R (1983) KLR 501** rejected it after weighing it against all the other evidence. Hence the appellant's defence was rejected on solid reasons.

This brings us to the issue of the credibility of the witnesses and the failure to call the complainant's aunt and brother. The drawing of a negative inference when the prosecution fails to call a witness will only happen if that witness is crucial in the proving of certain facts. Where it is so glaringly clear that the evidence of that witness is what would have established a certain fact. In this case, what would the two witnesses who were not called say that has not been said. The aunty was told by PW2, the brother to the subject learnt about it when the subject was taken to him long after the fact. The only person who saw the child immediately she got home and the person she told what happened immediately she got home was PW2 her sister. The failure to call the two in my view would not change anything with regard to proving the ingredients which would raise any issue on the credibility of the witnesses. I found no contradictions serious enough to warrant the rejection of the evidence in toto.

Finally, on the issue of the *voire dire* and the appointment of intermediary for the PW1.

The authority on the appointment of intermediary under s. 31 of the Sexual Offence Act as read with Article 50 of the Constitution is the Court of Appeal case of **M.M v R [2014] eKLR** which the appellant cited to the subordinate court.

In that case the Court observed:

> *The use of an intermediary in evidence is a unique and novel phenomenon in our jurisprudence, introduced upon the enactment of the Sexual Offences Act, 2006 and few years later reproduced in* ***Article 50 (7)*** *of Constitution of Kenya, 2010.*
>
> *There is no unanimity in the few local decisions we have sampled regarding the procedure for appointment and the role of an intermediary…*

The Court discussed the provisions of s. 31 of the SOA and the difference with Article 50 of the Constitution.

It is clear from the record on 20th April 2015 that no voire dire examination was conducted with regard to PW1. The court simply recorded that the child was vulnerable by virtue of her age.

The Court observed:

> *It is clear from* ***sections 31 (2)*** *and* ***32*** *that, first and foremost it is the duty of the prosecution to ascertain the vulnerability of the witness and to apply to the court to make that declaration before appointing an intermediary.* ***In addition, the court, as we have earlier observed, can on its own motion, through voir dire examination, declare a witness vulnerable and proceed to appoint an intermediary.*** *Any witness (other than the one to be declared vulnerable) can likewise apply to the court for the declaration.* ***The application must not be granted merely because the victim is young*** *or too old or appears to be suffering from mental disorder.* ***The court itself must be satisfied that the victim or the witness would be exposed to undue mental stress and suffering before an intermediary can be appointed. (emphasis mine)***
>
> *It is clear from what we have said so far that* ***the procedure of appointing an intermediary preceeds the testimony of the intended vulnerable witness even where the court does so suo moto.***

What comes out from the foregoing is that the trial magistrate did not make any effort to establish the vulnerability of the PW1 but declared her one by virtue of her age only. He was required 1st to conduct a voire dire examination during which he would have established that the child could not with stand the rigors of the trial due to the trauma suffered. Secondly, before putting PW1as the intermediary, to the stand there was the procedure of appointing the intermediary. There is none whatsoever that was followed. In fact, it is only from the introductory heading when swearing a witness that one gathers that that intermediary was a children officer. An intermediary is defined by the act as

> *an expert in a specified field or a person, who through experience, possesses special knowledge in an area or a social worker, or a relative, a parent or a guardian of the witness.*

The court must have used the children officer because it believed that she was an expert in such matters. However, the court was required to establish her expertise, possession of special knowledge or relationship with the child

> ***…****through examination of the prospective intermediary before the court appoints him or her. It goes without saying, in view of that role, that an intermediary must subscribe to an appropriate oath ahead of the witness' testimony, undertaking to convey correctly and to the best of his/her ability the general purport of the evidence. The trial court must then give directions to delineate the extent of the intermediary's participation in the proceedings.*

None of the above was done.

So, does that render the evidence of the child worthless?

I have considered the authorities cited by the appellant to support that ground. They are High Court decisions hence of persuasive purport. However, in **M.M v R** the Court of Appeal was dealing with the case of a complainant who was also four years old, who did **not** testify and her mother's evidence was adopted as the evidence of an intermediary. While faulting the two courts below for adopting the mother's testimony as that of an intermediary without following the procedure, the court pointed out that the two courts could have simply relied on her evidence as an independent eye witness. Then the court said:

> *Any requirement that insists on a child victim of defilement, irrespective of his or her age to testify in order to found a conviction would occasion serious miscarriage of justice. What fair hearing would a child victim have aged six (6) months, like that in the case of* ***Robinson Tole Mwakuyanda V. R.*** *HC. Cr. Appeal No. 227 of 2007, get if the courts were to insist on the evidence of such a child, who on account of his/her tender age cannot speak?*

The court was of the view that the presence of other evidence linking the appellant to the offence was sufficient and proceeded to dismiss the appeal.

If this court was to discard the evidence of PW1 would there still be evidence sufficient to sustain the conviction against the appellant for the offence of incest c/s 20 (1) of the SOA? Is there other evidence linking the appellant to the offence? My considered answer is yes. The evidence of PW2 and PW3 as confirmed by the medical evidence is sufficient. The relationship between the appellant and the child is not denied. She is his niece. The identity of the defiler was mentioned by the child as soon as she got home. The fact of defilement was established.

Was the sentence too harsh?

The minimum sentence for defilement is 10 years' imprisonment.

The proviso to s. 20 (1) states:

> *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 (emphasis mine)***

By virtue of the age of the child at 4 years the appellant was liable to imprisonment for life. The prosecuting counsel may have had a point when he stated that the sentence was lenient. However, taking a cue from the Sentencing Policy Guidelines, considering the age of the appellant, his record as a first offender, and the minimum sentence provided, the age of the minor, the effect of the offence on her ,i.e. the aggravating circumstances, the 20-year sentence was sufficient in the circumstances of the offence.

Determination

In the upshot I find that the appeal lacks merit. The same is dismissed.

Dated, delivered and signed at Nyeri this 28th day of February 2019.

Mumbua T. Matheka

Judge

In the presence of:-

Court Assistant: Juliet

Ms.Jebet for state

Mr.Kimunya holding brief for Waweru for Appellant.

Mumbua T. Matheka

Judge

28/2/19