REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO 23 OF 2018

AM.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case(S O) Number 12 of 2017 in the Chief Magistrate's Court at Machakos delivered by Hon I.M. Kahuya (SRM) on 18th January 2018)

JUDGEMENT

1. The Appellant herein, AM, was tried and convicted by Hon I.M. Kahuya, Senior Resident Magistrate at Machakos for the offence of incest by male contrary to Section 20(1) of the Sexual Offences Act No 3 of 2006. He was also charged with an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the said Act.

2. He was sentenced to serve life imprisonment for the offence in the main count. The Learned Trial Magistrate made no finding on the alternative Charge.

3. The particulars of the charges were as follows:-

Count I

> **"AM on the 3rd May, 2017 in Machakos sub - county within Machakos County intentionally and unlawfully caused his penis to penetrate the vagina of GM a child aged 5 years who was to his knowledge his daughter."**

Alternative Charge

> **"AM on the 3rd May, 2017 in Machakos sub - county within Machakos County intentionally and unlawfully touched the vagina of GM a child aged 5 years with his penis."**

4. Being dissatisfied with the said conviction and sentence, the Appellant filed his Petition of Appeal and raised the following grounds of appeal:-

> **a) THAT the trial magistrate erred in both law and fact by convicting him despite inconsistent, insufficient as well as contradictory evidence.**
>
> **b) THAT the credibility of Pw1's evidence was questionable and doubtful.**
>
> **c) That the medical evidence adduced by the medical officer, which the magistrate acknowledged was conducted after the stipulated 72 hours as enshrined in the Sexual Offences Act, hence was obscure, indeterminate and professional dysfunction .**
>
> **d) THAT the trial magistrate erred in both law and facts by convicting him without considering the facts that there was a family grudge between him and the mother of the complainant who is his wife due to her immoral behaviour.**
>
> **e) THAT the trial magistrate erred in both law and facts by not considering his defence which was consistent.**

5. Subsequently, the appellant filed amended grounds of appeal together with his submissions, and the grounds were as follows:

a) That the Honorable trial magistrate erred in matters of law and fact by failing to note that the charge sheet was defective for non-conformity with the evidence adduced.

b) That the Honourable trial magistrate erred in matters of law and fact by failing to find that penetration by the accused person was not proved by the evidence on record.

c) That the Honourable trial magistrate erred in matters of law and fact by misapplying Section 31 of the Sexual Offences Act thereby denying the accused an opportunity to cross-examine the witness on the adverse evidence adduced.

d) That the Hon trial magistrate erred in matters of law and fact by failing to find that the prosecution's evidence was so inconsistent and contradictory and thus could not sustain a conviction.

e) That the Hon. trial magistrate erred in matters of law and fact by failing to find that the accused person was denied essential documents in the name of witness statements and OB report thereby violating Articles 50(2) (c) and (j) of the Constitution.

f) That the Honourable trial magistrate erred in matters of law and fact by rejecting the cogent defence case which exhibited an underlying grudge between the accused person and Pw1 which forms the basis of the charges herein.

g) That the Hon. trial magistrate erred in matters of law and fact by failing to adhere to the statutory frame work of sentencing under Section 169 of the Criminal Procedure Code.

6. In the absence of an application for leave to file amended grounds of appeal, the same would have been deemed improperly on the record. However the court duly accepted the same as being properly filed.

7. The prosecution had called five witnesses in support of its case before the trial court. Pw1 was MM who is the ex-wife of the appellant. She testified that on 3rd May, 2017 at about 1 pm, the complainant told her that the appellant had stripped her naked and placed her on the bed and stripped off his clothes before raping her. She testified that she observed that the complainant was bleeding from her private parts. She testified that when she confronted the appellant, he locked her in the house and after a while he unlocked it and she managed to rush the complainant to Ikulu dispensary from where she was referred to Machakos Level 5 hospital where the complainant was treated. The matter was later reported to Machakos Police Station. On cross-examination, she testified that the complainant was taken to hospital one week after she had been defiled because the appellant had locked her in the house and that she left the house on 12.5.17. The birth notification of the victim was produced in court and the same indicated her date of birth as 13.10.2012.

8. Pw2 was AK, who testified that the appellant was his brother in law and that on 10.5.2017, his wife informed him that the complainant had been defiled by the appellant and that he rushed to Machakos police station and realized that the matter had already been reported by Pw1 and was under investigations. He stated that he helped in looking for the appellant who was eventually apprehended and handed over to the police.

9. Pw3 was Dr John Mutunga who testified on the medical examination that was conducted on GM by Dr Mativo. The witness testified that the victim was aged 5 years and with a history of incest. According to the P3 form dated 18.5.2017, her private parts were swollen, sore and had bruises, her hymen was absent , her private parts excreting foul smelling liquids and that her urine was blood-stained. He produced the P3 form, PRC and treatment notes as exhibits. On cross-examination, he testified that the treatment notes from Ikulu District hospital where the victim was first taken for treatment were what was used to fill out the P3 and PRC forms.

10. Pw4 was Emily Kimanzi who testified as an intermediary pursuant to Section 31(4)(b) of the Sexual Offences Act. She testified that the victim was too scared to testify, however she interviewed her on 28.9.2017 having been brought by her mother and the investigating officer. She testified that the victim informed her that the appellant inserted his tail into her vagina and this is the information that she had replicated to court.

11. Pw5 was No 93896, Pc Wangui who testified that on 11.5.2017 she received a call of a report that was made by MM that her daughter had been defiled by her father and that the following day the victim and her mother came to the station at 8.00 am whereupon they were referred to Machakos level 5 Hospital and they returned with the PRC form and treatment notes; she gave them a P3 form that was filled out at Machakos Level 5 Hospital and once it was returned, she recorded the statements . Pw5 testified that according to Pw1, she had found the victim bleeding from her private parts and when she interrogated her, she informed her that the appellant had inserted his penis into her vagina. She testified that Pw1 informed her that the appellant locked had locked her in the house and on 11.5.2017 she managed to escape and sought treatment at Ikulu Health Centre from where the victim was referred to Machakos level Five Hospital. The matter was reported to the police and the appellant was arrested by members of the public and promptly charged.

12. The court found that the appellant had a case to answer and he was put on his defence. He opted to give sworn evidence. He testified that on 7.5.2017 his wife informed him that she was going to hospital but she did not return and he decided to go and search for her whereupon on arrival at Machakos Township he was arrested and taken to Machakos police station. He testified that the case is as a result of a grudge from his wife's family. On cross-examination, he testified that on 3.5.2017, he was not at home for he was away in [particulars withheld]. He testified that on 3.5.2017 he spent the whole day in the farm with his wife and that the intermediary lied while the victim did not testify in court. The appellant was subsequently convicted on the main count and sentenced to life imprisonment.

13. The appeal was canvassed by way of written submissions.

14. The appellant submitted that the charge sheet was defective as it did not conform with the evidence on record. The appellant submitted that the element of penetration was not proved as the P3 form was signed thirteen days after the date of the alleged incident. The appellant

also submitted that there was misapplication of Section 31 of the Sexual Offences Act as the appellant was denied an opportunity to cross-examine the victim. The appellant challenged the procedure in the use of an intermediary and the manner of communication which he referred to as "one-way". He relied on the case of **MM v Republic (2014) eKLR** where the court observed that the role of the intermediary is to communicate to the witness the questions put to him and to communicate to the court the answers from the victim to the person asking the questions and to explain the answers to the victim.

15. The appellant pointed out to court that there were inconsistencies in the evidence of the prosecution that casts doubt on the evidence. Firstly, whereas Pw2 and Pw4 testified that the appellant inserted his tail, Pw5 testified that it was a finger that was inserted. Secondly, whereas Pw1 testified that the victim was born on 3.10.2012, on re-examination she testified that the victim was born on 13.10.2012. Finally there are contradictions on the date when Pw1 left her matrimonial home. According to her evidence, she left on 12.5.2017 after the appellant unlocked the door, however according to the evidence of Pw2, he met Pw1 on 10.5.2017 when she reported the ordeal to him. Further, Pw5 who was the investigating officer testified that Pw1 informed him that she escaped from home on 11.5.2017.The appellant relied on the case of **Josiah Afuna Angulu v R (2010) eKLR ,** however did not indicate its relevance to his case.

16. On the issue of violation of article 50(2) (c) of the Constitution, the appellant submitted that he requested for witness statements and the same were not availed and thus the case was heard in the absence of the said witness statements. He relied on the case of **Daniel Chege Magotho v R (2014) eKLR** where the appeal was allowed on the grounds of failure to supply witness statements for the court found that the same was a breach of the constitutional rights of the appellant to a fair trial.

17. The appellant submitted that the trial court failed to interrogate the fact that there was a grudge between him and his wife and in his view this created reasonable doubt as per the case of **Elizabeth Waithiegeni Gatimu v R (2015) eKLR.**

18. The appellant submitted that the trial court failed to conform with Section 169(1) and (2) of the Criminal Procedure Code with regard to the contents of a judgement and specifically failing to state which count the appellant had been charged with and thus the same occasioned him injustice; He relied on the case of **James Nyanamba v R (1983) eKLR** where the court held that;

> ***"Again, the magistrate transgressed subsection (2) of section 169 of the Criminal Procedure Code which requires that in the case of a conviction, the judgment must specify the offence of which, and the section of the Penal Code or other law under which the accused person is convicted. Since in his opening statement of the judgment, the magistrate did not state which accused was charged alone in which count of the counts 3 and 4 it cannot be said that the omission to comply with section 169 (2) (ibid) did not occasion the appellant injustice. In the circumstances of this case that omission is not cured by section 382 of the Criminal Procedure Code."***

19. Mr Machogu learned counsel for the Respondent in submissions filed on 25th February, 2019 opposed the appeal and framed five issues for determination. Firstly, whether the trial court complied with section 31 of the Sexual Offences Act; Secondly, whether penetration was proved; thirdly, whether there were material contradictions on the prosecution's case; fourthly whether the Appellant's defence was considered during trial; finally, whether the appellant was supplied with witness statements.

20. On the first issue, counsel cited the provisions of Section 31(5) of the Sexual Offences Act that provides that "***Once a court declares any person a vulnerable witness, the court shall direct that an intermediary referred to in subsection (3), be appointed in respect of such witness unless the interests of justice justify the non-appointment of an intermediary, in which case the court shall record the reasons for not appointing an intermediary"*** Counsel submitted that according to the record, the trial magistrate observed that the minor refused to talk and she was stood down and because the appellant never objected, the children officer was brought in to testify as an intermediary; the said children officer was cross-examined and therefore in his view the trial court complied with the provisions of Section 31 of the Sexual Offences Act. He further submitted that in the absence of the complainant's testimony there was independent evidence of the complainant's mother, the clinical officer that linked the appellant to the defilement of the complainant.

21. On the 2nd issue, counsel submitted that the medical evidence of vaginal bruises and absence of hymen of the complainant was corroborated by the evidence of Pw1 and Pw3 and it befits the definition of penetration under Section 2 of the Sexual Offences Act.

22. On the 3rd issue, counsel submitted that discrepancies ought to be considered in the light of Section 382 of the Criminal Procedure Code and interpreted in the case of **Joseph Maina Mwangi v R Crim Appeal 73 of 1993** where court observed that the test to meet is prejudice caused to the appellant. Counsel submitted that the evidence of Pw1, Pw3 and Pw4 corroborate penetration and thus the appellants grievance on contradictions touching on penetration are of no consequence as the same are minor and curable under Section 382 of the Criminal Procedure Code.

23. On the 4th issue, counsel submitted that the appellant gave a defence of alibi but this did not exonerate him from the charges he was facing. The trial court dismissed the defence and was thus convicted and sentenced as the evidence was credible.

24. On the 5th issue, counsel submitted that the appellant was supplied with the evidence that the prosecution intended to rely upon and he confirmed to court that he was ready to proceed hence because he did not raise this issue at any point during trial this is now too late to raise the same. Counsel concluded by submitting that the prosecution proved its case beyond all reasonable doubt and therefore the appeal be dismissed.

25. This being a first appeal, this court is mandated to analyse and re-evaluate the evidence afresh in line with the holding in the case of **Odhiambo vs Republic Cr App No 280 of 2004 (2005) 1 KLR** where the Court of Appeal held that:-

> **"On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the**

witnesses when they testified as the trial court did and therefore cannot tell their demeanour".

26. Having looked at the Appellant's and the Respondent's Written Submissions, the appeal and amended grounds of appeal, I find the issues for determination are as follows:-

a. Whether or not the Charge Sheet was defective;

b. Whether or not the Prosecution had proved its case beyond reasonable doubt.

c. Whether there were constitutional and procedural infractions and whether the same occasioned injustice to the appellant

d. Whether there were contradictions in the evidence of the prosecution and whether the same could be cured by section 382 of the Criminal Procedure Code.

e. Whether there is sufficient evidence to make a finding on the alternative charge.

27. The Appellant contended that the charge sheet was defective and did not accord with the evidence adduced. He argued that the evidence talks of insertion of a tail and yet the charge sheet talks of a sexual organ hence the charge was defective. The state made no submission on this aspect. In this regard, this court would have to direct itself as to whether or not the appellant was prejudiced or the same occasioned any miscarriage of justice as the charges in my view were clearly elaborated. In addition the Appellant was fully present during his trial, was aware of the charges facing him and that at no point did he raise any objection regarding the charges that he faced. He also fully cross-examined the witnesses at length and conducted his defence fully. He also participated in the trial from start to finish.

28. Section 134 of the Criminal Procedure Code provides as follows:-

"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."

29. From the above section, I am satisfied that it was not correct that the charge sheet was defective, in that he appellant's complaint hinges more on the proof of the case and not on the validity of the charge sheet. In other words, the evidence that was adduced by the Prosecution witnesses were the test as to whether the prosecution proved any or all of the Counts the appellant had been charged with. I note that the Learned Trial Magistrate disregarded the alternative charge that had been preferred but however the appellant seems to have no issue with this.

30. In the premises this court does not find the Appellant's Supplementary Grounds of Appeal No 1 to be meritorious and the same is hereby dismissed.

31. On the issue of proof of the prosecution case, I shall combine the same with the aspect of contradictions. The Appellant submitted that there was contradiction on the evidence of what was inserted. Secondly, there were contradictions on the day but not on the month and year of the birth of the complainant. Finally there are contradictions on the date when Pw1 left her matrimonial home. According to her evidence, she left on 12.5.2017 after the appellant unlocked the door. However according to the evidence of Pw2, he met Pw1 on 10.5.2017 when she reported the ordeal to him. Further, Pw5 who was the investigating officer testified that Pw1 informed her that she escaped from the home on 11.5.2017.

32. A perusal of the List of Exhibits in the Trial Court showed a birth notification as evidence of birth and therefore the ground raised by the appellant to the effect that age of the complainant had not been proved must fail.

33. With regard to the offence of incest, Section 22 of the Sexual Offences Act provides as follows:-

"In cases of the offence of incest, brother or sister includes half - brother and adoptive brother and adoptive sister and a father includes a half father and an uncle of the first degree and a mother includes a mother and an aunt of the first degree whether <u>through lawful wedlock or not</u>"

34. Section 20(1) of the Sexual Offences Act provides as follows:-

"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. The appellant has not disputed that he is the father of the complainant and therefore the element of consanguinity was easily proved and was not controverted at all by the Appellant.

36. With regard to evidence of penetration, the trial court relied on the evidence of Pw1, Pw2, Pw4 and Pw5 who were not eye witnesses as well as the medical evidence from Pw3. The said medical evidence was based on a P3 form, PRC form, treatment notes and a health card that were filled out on 11.5.2017 that was about eight days from the date of the alleged incident. Whereas Pw3 testified that the complainant had vaginal injuries, he also testified that he relied on the treatment notes from Ikulu District Hospital to fill out the P3 and PRC forms which were availed to the court. The court ought not to be fixated on the absence of hymen as evidence of penetration and would need to look at the evidence in totality so as to conclude that indeed there was penetration by a male organ into the genital organ of the Complainant.

37. The Appellant has raised an issue to do with contradictory evidence such as the length of time between the incident and the reporting of the same to the hospital. The appellant has questioned the evidence on record. Whereas Pw2 and Pw4 testified that the appellant inserted his tail, Pw5 testified that it was a finger that was inserted. Hence it did not come out quite clearly as to what had been used to insert the genital organ of the complainant.

38. The appellant has also raised the defence of alibi that the trial court has not addressed itself as to whether or not the prosecution had discharged the same.

39. In **KIARIE v REPUBLIC [1984] KLR** the Court of Appeal held:

> "***An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable...***

40. The appellant's defence appeared to suggest that he was elsewhere on the date of the alleged incident and as such he ought to have been given the benefit of doubt by the trial court. In **Paul v Republic [1976-80] 1KLR 1622 at 1624**, the Court stated as follows:

> ***"In a case depending exclusively upon circumstantial evidence the court must before deciding upon conviction, find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than of guilt"***

However the Appellant's alibi defence appears not to have shaken the prosecution's evidence since he had been left with the minor as the wife rushed to the shops nearby to purchase some items. The Appellants' wife was informed by the minor that the Appellant had defiled her. Indeed the mother to the minor found the appellant at home with the victim. Further, the appellant confirmed on being cross examined that on the material date that he had been with his wife at the farm. This then weakens his claim that he had been away working at Mitamboni. All these weakened his alibi defence and left no doubt that he was squarely placed at the scene of crime.

41. In addressing the question as to whether or not the Prosecution proved its case to the required standard, being proof beyond reasonable doubt, I find that the evidence on record does not establish the main charge but it proves the alternative charge of indecent act with a child contrary to Section 11(1) of the Sexual Offences Act. Hence the trial court ought to have convicted the Appellant only on the alternative charge as the principal charge had not been proved beyond any reasonable doubt. The evidence adduced did not clearly indicate whether the organ used to insert the complainant's vagina was either a penis or tail or finger. It was therefore unsafe to convict the Appellant on the main count. The evidence clearly established the alternative charge of indecent act on a child contrary to section 11(1) of the Sexual Offences Act.

42. On the issue of procedural and constitutional infractions and their effect, I find the appellant's main concern is the fact that the complainant did not testify. However, the trial court upon proper inquiry established that the victim was too young and vulnerable and thus resorted to Section 31(4) (b) of the Sexual offences Act and allowed an intermediary (PW.4) to testify on her behalf. The Appellant cross – examined the witness (Pw4) at length and I find there was no prejudice occasioned to him. Further the Appellant did not object to the said intermediary testifying on behalf of the victim. The interests of justice as per the circumstances availed to the court warranted the appointment of an intermediary. Indeed the trial court interviewed the victim and observed that an intermediary was necessary. The intermediary was not related to the complainant in any way and hence her neutrality did not pose any prejudice to the Appellant who duly cross examined her at length. Besides the evidence of the mother to the complainant as well as the doctor was sufficient enough to establish that indeed the minor had been sexually assaulted.

43. On the issue of whether the appellant had been supplied with witness statements, it is noted from the record that before the first witness took the witness box the appellant expressly indicated that he was ready to proceed with the hearing. At no time in the proceedings did he ever raise any issue to do with lack of witness statements. He proceeded with the trial throughout and duly cross examined witnesses. In the premises, I find that the claims of constitutional infractions alleged by the appellant lacks merit. Indeed his rights to a fair trial under Article 50 of the constitution were not at all infringed.

44. On the issue of contradictions in the evidence of the prosecution witnesses, I find that even though such did occur, the same did not prejudice the appellant in any way since the same were curable under section 382 of the Criminal Procedure Code. It cannot always be ruled out that in every trial there are bound to be discrepancies for the simple reason that it is not possible for all witnesses to testify on a similar script in their testimonies. What is important is to see whether such discrepancies are so fundamental as to cause prejudice to the appellant. Upon perusal of the record, I find that the contradictions are inconsequential and did not prejudice the appellant.

45. Finally, the ingredients to be satisfied are that the victim was a child and that there was an indecent Act. Section 2 of the Children Act defines a child as any human being under the age of 18 years, and from my afore going analysis, the victim was a child aged five years. Section 2 of the Sexual Offences Act also defines indecent act to mean an unlawful act and which causes any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration. From the evidence on record, there was contact with the genital organs of the Complainant by the appellant. The evidence presented by the witnesses indicated that there was contact with the complainant's genital organ. Hence it can be safely concluded that the elements of the offence on the alternative count have been satisfied. On the issue of the appellant as the perpetrator, from the evidence on record, on the material date

when the act was committed, the appellant was alone with the complainant at home on 3.5.2017 and in his very own words stated "on the alleged date of 3.5.2017 we spent the whole day in the farm with my wife." According to the evidence of Pw4, Pw1 had left the home to go buy rice meaning that at one point in time the appellant was alone with the complainant. This is corroborated by the evidence of Pw1 that she left for the shop briefly. The Appellant was therefore placed at the scene of the crime. PW1 found the Appellant at home with the complainant and the appellant on being confronted confirmed that he was aware of the incident. It was highly unlikely that the appellant could be framed for the offence as he confirmed that he had no problem with the victim or his brother in - law. Again his wife could not have used her young and vulnerable daughter as a victim so as to settle scores with the appellant. I find the appellant's defence not believable. Therefore the trial court was right in rejecting the appellant's defence.

46. From the above analysis, I find that there was sufficient evidence to support the offence in the alternative charge that had been preferred against the Appellant and therefore I find the appellant guilty of the offence of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act.

47. The sentence as per Section 11(1) of the Sexual Offences Act upon conviction is imprisonment for a term of not less than ten years.

48. In the result, the appeal succeeds to the extent that the trial court's conviction and sentence is set aside and substituted with a conviction for the alternative charge of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act and the Appellant is sentenced to a period of ten (10) years imprisonment from the 18/01/2018.

It is so ordered.

Dated and Delivered at Machakos this 25th day of June, 2019.

D.K.KEMEI

JUDGE