REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

CRIMINAL APPEAL NO. 51 OF 2018

JSM.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence of Hon. A.G Ndung'u (SRM) in Makindu Senior Principal Magistrate's Court Criminal Case No. 354 of 2016).

JUDGMENT

1. **JSM** the Appellant was charged with the offence of **Incest contrary to Section 20(1) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence were that on diverse dates between **1st January 2016 and 20th March 2016** in Makindu sub-county within Makueni county, the Appellant being a male person caused his penis to penetrate the vagina of **JMM** a child aged 10 years who was to his knowledge his niece.

2. There was an alternative charge of **committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006**. The particulars being that on diverse dates between **1st January, 2016** and **20th March, 2016** in Makindu sub county within Makueni county the Appellant intentionally and unlawfully committed an indecent act by touching the vagina of **JMM** a child aged 10 years with his penis.

3. After a full trial, the learned trial magistrate convicted him on the main charge and sentenced him to life imprisonment.

4. Aggrieved by that decision, the Appellant filed this appeal and listed 4 grounds stating that the learned trial magistrate erred in law and fact by;

> ***a) Convicting and sentencing him without disclosure of the prosecution evidence that was to be brought against him as laid down in Article 50(2) (j) of the Constitution.***
>
> ***b) Convicting him without observing that he was prejudiced for not being represented by a lawyer as stipulated by Article 50(2) (h) of the Constitution.***
>
> ***c) Failing to observe that the charges were defective hence prejudicial to his defence and fatal to the prosecution's duty of proving the case beyond reasonable doubt.***
>
> ***d) Failing to observe that penetration was not proved beyond reasonable doubt.***
>
> ***e) Dismissing his defence and meting out an excessive sentence under the circumstances.***

5. The Appellant canvassed the appeal through written submissions and the learned prosecution counsel Mrs. Owenga responded orally.

6. **Pw1 (JMM)** and **Pw2 (MMM**) who are sisters were aged 10years and 16 years respectively at the time of testifying but 10 years and 15 years at the time of incident were each taken through a *voire dire* examination by the trial court. Both were found to be intelligent and they understood the seriousness of an oath. They therefore gave sworn evidence and were each cross examined.

7. The mother of Pw1 and Pw2 died before this incident and the Appellant who is a brother to their father took them in as their guardian. Their father stays in Kitui. It was their evidence that the Appellant had defiled each of them on several occasions. The Appellant, Pw1 and Pw2 shared the same room but different beds. Pw1 and Pw2 shared the same bed.

8. On this material night **20/3/2016,** Pw1 was sleeping with Pw2 when the Appellant picked her and took her to his bed and removed her clothes. It was then that she woke up. He laid her on the floor and inserted his genital organ into hers. He threatened to kill her if she screamed. When he was through he took her back to their bed.

9. They had lived with the Appellant in Mombasa and Mui Nzau and he had defiled them at both places. Pw1 explained how one day Pw2 woke up to find the Appellant defiling her and switched on the electricity light. She was ordered to switch it off and returned to bed crying.

10. Both said they would not report the matter due to the threats issued to them by the Appellant. Pw2 informed one woman on what was happening to them and that is how the children's officer came into the picture. They denied having been coached by the police and children's officer on how to fix the Appellant.

11. Pw1 and Pw2 were accompanied by a police woman to Makindu district hospital for examination and P3 and PRC forms filled.

12. **Pw3** was **DR. Makali** from Makindu sub-county hospital. He testified that he filled the P3 form for Pw1 using the treatment card, post rape care form and his own examination. That there was no injury in her genitals because the child had been defiled severally and had gotten used, but the broken hymen was evidence that the child had been defiled. The tests for HIV, syphilis and pregnancy were negative and there were few pus cells in the urine. He produced the P3 form as exhibit 2, PRC form and treatment notes as exhibit 1.

13. On cross-examination, he said that he could not tell the specific time that Pw1 was defiled and could not tell who did it. He said Pw1 told him that she had been defiled by her uncle severally, though he did not conduct a DNA to know the perpetrator. He explained that it was not possible to do DNA testing because there were no spermatozoa on the child's genitalia. He denied being paid to fill the P3 form.

14. **PW4** was **Cpl Caroline Kibiwott**, the investigating officer. She testified that on 21/03/2016 at about 6.30 p.m., she was called by the OC crime and asked to go back to the office because a case of defilement of two children had been reported by members of the public. She found Pw1 and Pw2 at the station and was told by the former that her uncle had been defiling her since January 2016. That the last defilement incident was on **20/03/2016** at Mbui Nzau but they had also been defiled at Mombasa.

15. She took them to the hospital where they were examined and P3 forms and PRC forms filled. The doctor confirmed that they had been defiled for long. She recorded statements from the children. Pw1's age was assessed and found to be 10 years. She produced the age assessment report as exhibit 3.

16. Upon cross examination, she explained that the children feared reporting as the Appellant is their uncle. They had told her he defiled them between January and March 2016. She denied being forced by the children rights activists to charge the Appellant and said she relied on their evidence and medical evidence to charge him.

17. **DW1**, the Appellant testified while unsworn and stated that he was arrested at Mbui Nzau on 21/03/2016. That on 28/02/2016, he had travelled from Mombasa to Mbui Nzau with the intention of carrying out business. That he started operating a boda boda business and after 3 days he received a phone call from an unknown person who requested him to proceed to Kanguni centre.

18. He was interrogated as to why he was operating a boda boda without being a member of the sacco. The caller was known as Dr. Snake who told him to stop operating any business at Mbui Nzau. After 2 days, he noted that other boda boda operators did not want to see his motor cycle and alleged that he was a thief and a spy for the Government. He decided to operate at night to avoid hostility.

19. On 21/03/2016, he returned home from work and found 3 men and a lady at his homestead. They said they were from FIDA and wanted to know why the children were not going to school. They talked to the children and gave him one week to return the children to school or they would take them to a children's home. They exchanged contacts and left.

20. After 2 hours, the children alerted him that there was a crowd of people approaching the plot from the market. They assaulted and escorted him to Makindu police station. The OCS told him that the children said he had defiled them. He said he was arraigned in court for charges he does not understand to date. He was surprised as he had lived with the children since 2009 when their mother died. That he was taking care of them on top of his 3 children and yet there were no such complaints.

21. On grounds **(a)** the Appellant submitted that he was not provided with the witness statements and the trial magistrate did not follow up on the issue despite making the order. That it is a Constitutional right to be informed in advance of the evidence the prosecution intends to rely on and to have reasonable access to it. He cited *inter alia* the case on **Thomas Patrick Gilbert Cholmondeley –vs- R (2008) eKLR** where the Court of Appeal stated thus;

> *"We think it is now established and accepted that to satisfy the requirement of a fair trial guaranteed under our Constitution 2010, the prosecution is now under a duty to provide the accused person with and to do so in advance of the trial, all the relevant material such as copies of statements of witnesses who will testify at the trial, copies of the documentary exhibits to be produced at the trial and such like items."*

22. He submitted that it was discriminatory for the trial magistrate to order that he be supplied with the charge sheet and witness statements at his own cost. That if he did not have money, injustice would occur as he would be bound to proceed with the matter without the disclosure.

23. On ground **(b)**, he submitted that he was unrepresented yet the State had all the powerful state machinery on its side. That in criminal trials, representation makes a lot of difference due to the complexities in the adversarial system that an accused person, devoid of the requisite legal skills, may find difficult to comprehend. He relies *inter alia* on the case of **Pett –vs- Greyhound Racing Association** where **Lord Denning** stated that;

> *"It is not every man who has ability to defend himself on his own. He cannot bring out the point in his own favour or the weakness in the other side. He may be tongue tied, nervous, confused or wanting in intelligence. He cannot examine or cross examine witnesses. We see it every day. A magistrate says to man; 'you can ask any question you like' whereup the man immediately starts to make a speech. If justice is to be done, he ought to have the help of someone to speak for him and who is better than a lawyer who has trained for the task"*

24. He also cited **Macharia –vs R (2014) eKLR** where the Court of Appeal expressed itself as follows;

> *"Article 50 of the Constitution sets out a right to a fair hearing; which includes the right of an accused person to have an Advocate, if it is in the interests of ensuring justice. This varies with the repealed law by ensuring that any accused person regardless of the guilt of their crime may receive a State appointed lawyer, if the situation required it. Such cases may be those involving complex issues of facts or law, where the accused is unable to effectively conduct his or her own defence owing to disabilities or language difficulties, or simply where the public interest requires that some form of legal aid be given to the accused because of the nature of the offence. We are of the considered view that in addition to a situation where 'substantial injustice would otherwise result', persons accused of capital offences where the penalty is loss of life have the right to legal representation at State expense."*

25. The Appellant submitted that the penalty in the charge he faced was life imprisonment hence stiff and if conviction occurred due to bad representation, substantial injustice would be caused. He contends that bad representation entails representation by a layman.

26. On ground **(c)**, he submitted that according to the charge sheet, the offence occurred in Makindu and not Mombasa. That the information in the charge sheet varies totally from the evidence on record. That he should have been charged with defiling the complainant in Mombasa.

27. On ground **(d)**, he submitted that the lack of even minor injuries on a 10-year-old girl alleged to have been defiled by a grown up uncle speaks volumes and is proof that there was neither partial nor complete insertion of his penis in Pw1's vagina. That the period of two months is not so long that a doctor cannot even see the scars of the previous bruises and injuries of such a tender child.

28. On grounds **(e)**, he submitted that a 10-year-old could not be able to recount every act that a man does under the circumstances of having sex including narration of pushing his penis into her vagina several times and using terminologies like *'alinibaka'*. Further, he contends that Pw1 was stood down the first time due to crying and this was inconsistent with the bold testimony she gave on the second occasion.

29. He contends that the evidence of Pw1 and Pw2 was copy and paste yet when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. That some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. He also contends that the evidence was fabricated as such details would not be given by a child of such age with such clarity. He submitted that his defence should not have been dismissed without good reasons.

30. Mrs. Owenga submitted that the trial court arrived at the correct decision as the evidence was overwhelming. That the complainant was found to be 10 years of age and her evidence was corroborated by the doctor. The doctor's evidence was clear on the issue of penetration and identification was proved by Pw1 and Pw2. The children identified the Appellant as their uncle and had lived with him for 4 years since their mother's death.

31. With regard to the violation of rights, she submitted that the Appellant was not forced to proceed and he never requested for any legal representation or any other issue. She urged the court to dismiss the appeal.

32. This is a first appeal and this court is under a duty to scrutinize and re-examine the evidence on record, make its own findings and conclusion. An allowance must be given owing to the fact that it is only the trial court that saw and heard the witnesses. **See Okeno –v- R 1972 E.A 32.**

33. I have considered the evidence on record, grounds of appeal and the submissions by both parties. I will deal with the grounds of appeal separately.

a) <u>Disclosure of the prosecution evidence</u>

34. The record shows that the matter came up for hearing for the first time on 03/08/2016 and the Appellant indicated that he was not ready to proceed because he had not been supplied with witness statements. The trial court allowed the adjournment and ordered that he be supplied with witness statements and charge sheet at his own cost. The Appellant did not indicate any financial hardship at that stage.

35. On 12/10/2016, the matter came up for hearing again and the prosecution applied for adjournment because the complainant was sitting for exams. The Appellant opposed the application for adjournment but the trial court allowed it nonetheless. The opposition by the Applicant was an indication that he was ready to proceed. He did not raise the issue of witness statements.

36. On 17/11/2016, the matter came up for hearing and the Appellant indicated that he was ready to proceed. Pw1 testified but was stood down due to her being emotional. She proceeded with her testimony on 15/02/2017 and the Appellant cross-examined her without raising the issue of the witness statements. The trial proceeded to conclusion without the Appellant ever raising the issue.

37. The record also shows that he did not raise the issue on the numerous occasions that the matter was mentioned before commencement of the trial. He was present when the order to supply him with statements was made and the record shows that the proceedings were conducted in the language that he understands.

38. Indicating readiness to proceed entitled the trial court to conclude that he was comfortable and that the order for supply of statements had been complied with. I find that the Appellant was fully prepared for the hearing. He could not have lacked witness statements and he chooses to proceed. This ground lacks merit.

b) Legal representation

39. Just like the issue of witness statements, the Appellant did not raise this issue with the trial court and the record shows that he participated in the trial without any difficulty. As much as the penalty prescribed for the offence is life imprisonment owing to the age of the minor, my considered view is that this case does not meet the test laid out in **Macharia –vs R (supra).** There were no complex issues of law or facts, the Appellant participated in the trial fully and even cross examined the witnesses. There was no language barrier and it was certainly not a case that attracted public interest *perse*. I find no merit in this ground.

c. Whether the charge sheet was defective

40. Section **134 CPC** 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."***

41. The charge as drawn contains a statement of a specific offence, namely incest, and the particulars given were sufficient to inform the Appellant that the offence was committed on diverse dates in Mbui Nzau. The fact that the minors testified about prior incidents of incest in Mombasa does not make the charge sheet defective.

d. Whether penetration was proved

42. Pw1 testified that the Appellant inserted his organ for urinating into her organ for urinating. That her sister, Pw2 witnessed the act and was also a complainant in another case. Pw2 corroborated her sister's version and the doctor(Pw3) explained that the absence of injuries and lacerations was because the child had been defiled severally hence gotten used to the act. He also confirmed that the hymen was broken thus an indication of penetration.

43. The Appellant agreed that he had lived with the girls since their mother died in 2009 and did not deny that he was sleeping in the same room with them and he was their paternal uncle.

44. In my view, the doctor's explanation as to the absence of injuries in the genitalia was cogent and penetration was proved to the required standard. This evidence supported the evidence of Pw1 and Pw2 that they had been defiled severally.

e. Dismissing the defence and meting out an excessive sentence

45. Having looked at the Appellant's defence, I agree with the trial magistrate that it was simply a denial which did not displace the overwhelming evidence given by the prosecution. It was not strange for Pw1 and Pw2 to give consistent testimonies owing to the fact that they all slept in the same room and were privy to the Appellant's actions.

46. As for the sentence, the age assessment report produced as exhibit 3 shows that Pw1 was 10 years at the time of the offence. The law prescribes a sentence of life imprisonment upon conviction for carnal knowledge with a child below 10 years. The Appellant is like a father to these children. Their mother died about ten (10) years ago and the Appellant took them in as a guardian leaving his own children with his mother.

47. Nothing prevented him from letting Pw1 and Pw2 stay in Kitui with their own father or grandmother. There is nothing placed before this court for consideration to make it interfere with the lawful sentence meted out against him.

48. I find no merit in this appeal which I hereby dismiss. The conviction and sentence are upheld.

Orders accordingly.

DELIVERED, SIGNED & DATED THIS 8TH DAY OF AUGUST 2019, IN OPEN COURT AT MAKUENI.

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H. I. ONG'UDI

JUDGE