REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CRIMINAL APPEAL NUMBER 43 OF 2017

JMM.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Kithimani Principal Magistrate's Court Criminal Case No. 16 of 2014, M. A. Opanga, SRM on 8th December, 2015)

BETWEEN

REPUBLIC.....PROSECUTOR

AND

JMM .....ACCUSED

JUDGEMENT

Introduction

1. The appellant, **JMM**, was charged in the Chief Magistrate's Court at Machakos in Criminal (SOA) Case No 16 of 2014 with the offence of incest contrary to section 20(1) of the ***Sexual Offences Act. No. 3 of 2006***. The particulars were that the appellant, on the 9th day of May, 2014 in Yatta District within the Machakos County, intentionally touched the vagina of **ENM** with his penis who was to his knowledge his daughter.

2. In support of its case the prosecution called 7 witnesses. After *voir dire* examination, the complainant, a minor aged 9 years old testified that on the night of 9th May, 2014, their mother was away from home, having been chased away by the appellant. When she was sleeping with her two sisters, the appellant who was her father went where they were sleeping and took her to another bed where he slept on her and defiled her. She spent the said night on that bed and the following day the appellant threatened her. When her mother returned, the complainant disclosed to her what had happened and her mother took her to the hospital and later to the police station where she was issued with a P3 Form. According to her birth certificate, she was born on 28th December, 2005. It was her evidence that her sisters did not know what had happened to her.

3. PW2, **AFM**, the complainant's mother testified that the complainant was her third born daughter, born on 28th December, 2005 based on the birth certificate which she produced as an exhibit. On 8th May, 2014, the appellant returned from Nairobi and they had a disagreement and as a result she left her children at home and returned on 10th May, 2014. She did not find her husband and when the complainant saw her, she started crying and when she inquired why the complainant was crying, the layer informed her that the appellant took her on the night of 9th May, 2014 to his bed, lay on top of her and defiled her. Upon examining the complainant's vagina, PW2 saw the complainant bleeding. She then reported the matter to the village elders and to Ndalani AP Police Post and took the complainant to her to the hospital. The appellant was then called from Nairobi and was arrested. According to her, the appellant had never defiled any of their children before and though they had disagreements, it was never a big deal. She however denied the insinuation by the appellant that she had a Somali boyfriend.

4. PW3, **DMK**, the village elder received a phone call from **JK**, the head of *Nyumba Kumi* on 10th May, 2014 that a child had been sexually abused by her father, the appellant. They reported the matter to the police who referred them to the Chief and later went to the police station

where they were referred to the Hospital for examination of the complainant and treatment.

5. PW5, **JK**, the head of *Nyumba Kumi*, testified that on 10th May, 2014 at 8.00 pm. The appellant's wife called him on phone and requested him to go with the village elder. They found her at home as well as the complainant who was bleeding from her vagina and blood was flowing down her legs. They then went to the Chief and proceeded to the Hospital. It was her evidence that the complainant revealed that it was her father, the appellant who had defiled her. By that time the appellant had already returned to Nairobi. He denied any knowledge of an affair between PW2 and a police corporal.

6. PW5, **Sgt Charles Barasa**, was called by the OCS and sent to Embakasi Police Station where he rearrested he appellant after he had earlier on been arrested and taken to Embakasi Police Station. The witness produced the child health card for the complainant showing that she was born on 28th December, 2005.

7. PW6, **Benjamin Maingi**, a clinical officer based at Matuu District Hospital, produced the P3 Form filed in for the complainant. According to him, a report had been made that the complainant had been defiled by the father on 9th May, 2014 after the father chased the mother away. It was his evidence that the complainant had perianal tear and was bleeding. Upon examination, there was penetration although there were no spermatozoa. He produced the P3 Form and the age assessment report done by his colleague which placed the complainant's age at 8 years six months as at that time. It was his evidence that from the history given, the object of penetration was a penis.

8. PW7, APC **PM**, was as on 10th May, 2014 based at Ndalani AP Post. On that day, PW2 accompanied by village elders and carrying the complainant who was crying and was unable to talk due to pain, reported that the complainant who was in tears had been defiled by her father. It was his evidence that they referred the complainant's mother to take the complainant to the Hospital. The following day, the appellant who was at large was found at Embakasi in Nairobi. The witness denied any knowledge of any affair between one Corporal Galgalo, who was posted at the AP Post and PW2 though he was aware that both were Boranas.

9. At the close of the prosecution's case, the appellant was placed on his defence and testified that on the material day, he came home on 10th but returned to Nairobi. On 13th some three people approached him and told him to accompany them to the police station informing him that a case had been reported against him. He then accompanied them to Embakasi Police Station. He was then charged with the present offence. According to him, he did not know the reason why he was arrested. He however admitted that the complainant was his daughter and that on 9th he was at home as well as the complainant's mother. It was his evidence that he did not chase PW2 away that night and denied that he was left with the children at home. It was his testimony that he had no problem with his children.

10. In her judgement, the learned trial magistrate found that the appellant committed the offence with which he was charged. It was her view, that PW1 and PW2, being the appellant's daughter and wife respectively would not have had any reason to fabricate the charges against him. Based on the injuries the complainant had, it was her finding that the appellant not only touched PW1's vagina but intentionally penetrated her with his penis knowing too well that she was his daughter. She therefore found the appellant guilty, convicted him accordingly and sentenced him life imprisonment.

Determination

11. I have considered the grounds of appeal, the evidence, the submissions and authorities relied upon.

12. This is a first appellate court. As expected, I have analysed and evaluated afresh all the evidence adduced before the lower court and have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. See **Okeno vs. Republic [1972] EA 32** where the Court of Appeal set out the duties of a first appellate court as follows:

> **"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post [1958] E.A 424."**

13. Similarly in the duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in **Pandya -vs- Republic [1957] EA 336** is as follows:-

> **"On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."**

14. It was therefore appreciated by the Court of Appeal in **Kiilu & Another vs. Republic [2005]1 KLR 174,** that:

1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.

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

15. The appellant contended that the *voir dire* examination was not properly conducted since there was no finding that the complainant understood the importance of giving evidence on oath. It is true that the finding of the learned trial magistrate was rather brief and did not sufficiently meet the object of *voir dire* examination. In **Macharia vs. Republic [1976] KLR 209**, it was held by **Kneller & Platt, JJ** (as they were) that:

"It [*voir dire*] must be a preliminary examination of a witness by the magistrate in which the witness is required "to speak the truth" with respect to questions put to him, or her, so that the magistrate can discover if he, or she, is competent (e.g. she is not too young, or she is not insane) to give evidence and should be sworn or affirmed (according to whether or not she is a Christian, or of any other, or no, faith, and understands the nature and obligation of an oath to tell only the truth). A finding on these points after the person of tender years has testified will not do. The irregularity is not fatal. These girls were aged thirteen and twelve years, attending a primary school and in standard VII. Their answers to questions were coherent and revealed that they were intelligent. They were competent."

16. It was however appreciated in Court of Appeal decision in **Maripett Loonkomok vs. Republic [2016] eKLR** that:

"It is firmly settled that not in all cases that voir dire is not administered or is not administered properly the entire trial would be vitiated. This Court sitting at Nyeri has recently reiterate what has been said many times before that that question will depend on the peculiar circumstances and particular facts of each case. See James Mwangi Muriithi v R, Criminal Appeal No.10 of 2014. Section 19 of the Oaths and Statutory Declarations Act is concerned with the reception and admissibility of evidence of a child of tender years. The section starts by declaring that where the child does not, in the opinion of the court understand the nature of an oath, his evidence may nonetheless be received though not given upon oath. But that evidence shall only be received if, again in the opinion of the court the child is possessed of sufficient intelligence to justify the reception of the evidence and also if, the child understands the duty of speaking the truth. So long as that evidence, though not on oath, is taken down in writing, it amounts to a deposition under section 233 of the Criminal Procedure Code. The Code does not prescribe the precise manner of ascertaining and determining whether the child witness understands the nature of the oath or is possessed of sufficient intelligence or even his or her ability to understand the duty of speaking the truth. Voir dire, a latin phrase (verum dicere) for saying "what is true", "what is objectively accurate or honest" has been used in most Commonwealth jurisdictions and in some instances in the United States of America, as "a trial within a trial", a hearing to determine the admissibility of evidence or the competency or qualification of a witness or juror See Duhaime, Lloyd. "Voir Dire definition" Duhaime's Legal Dictionary. But the origin of the rule on voir dire examination of a child witness as we know it today was first applied in the ancient yet landmark English case of R v Braisier (1779) 1 Leach Vol. I, case XC VIII, PP 199 – 200, which incidentally was a case involving sexual assault on a girl under 7 years of age. The twelve Judges in that case stated, in part, that; ".. an infant, though under the age of seven years, may be sworn in a criminal prosecution, provided such infant appears, on strict examination by the court, to possess a sufficient knowledge of the nature and consequences of an oath… for there is no precise or fixed rule as to the time within which infants are excluded from giving evidence" (our emphasis)

Although this decision, through section 19 of Oaths and Statutory Declarations Act underpinned the legal practice in relation to children's testimony in Kenya, we reiterate that the format and procedure of testing the intelligence, and sufficient knowledge and nature of the oath has been varied. For instance, in the past the courts insisted that voir dire examination must be in the form of a dialogue, with the trial court recording questions posed to the child and the child's answers nearly verbatim in the first person before drawing its conclusion on the question of suitability of the child. See Johnson Muiruri v R (1983) KLR 447. The courts today accept both the question and answer format and the recording of the child's answers only. See James Mwangi Muriithi (supra). What is constant is that, whatever format the court adopts it must be on record. It is equally settled that by dint of sections 208 and 302 of the Criminal Procedure Code, the law allows cross-examination of a witness who does not give evidence on oath. See Nicholas Mutua Wambua and another v **Msa Criminal Appeal No.373 of 2006."**

17. In this having considered the answers given by the complainant I am not satisfied that the proceedings were vitiated by the brief finding made by the learned trial magistrate.

18. Section 20 of the ***Sexual Offences Act*** provides as follows:

(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:

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.

(2) If any male person attempts to commit the offence specified in subsection (1), he is guilty of an offence of attempted incest and is liable upon conviction to a term of imprisonment of not less than ten years.

3) Upon conviction in any court of any male person for an offence under this section, or of an attempt to commit such an offence, it shall be within the power of the court to issue orders referred to as "section 114 orders" under the Children's Act and in addition divest the offender of all authority over such female, remove the offender from such guardianship and in such case to appoint any person or persons to be the guardian or guardians of any such female during her minority or less period.

19. In explaining the distinction between the offence of defilement and incest, **Majanja, J** in **F O D vs. Republic [2014] eKLR** held that:

"While in the case of incest, the prosecution was only required to prove either penetration or an indecent act, in defilement the prosecution was required to prove penetration. The additional element of the relationship between the accused and the child is what makes the offence incest."

20. It is therefore clear that in order to prove incest the evidence must prove that the accused committed an indecent act or an act which causes penetration. In other words, once there is evidence of indecent act, penetration is not necessary. Section 2 of the ***Sexual Offences Act*** defines "penetration" as:

the partial or complete insertion of the genital organs of a person into the genital organs of another person.

21. "Indecent act" on the other hand means an unlawful intentional act which causes-

(a) 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.

(b) exposure or display of any phornographic material to any person against his or her will.

22. What it means is that even in the absence of penetration as legally defined under the ***Sexual Offences Act***, where there is evidence of contact between any part of the body of the accused with the genital organs, breasts or buttocks of the complainant, the other ingredients of the offence being satisfied, commission of sexual offence may still be proved. In this case the complainant's evidence was that the appellant took her to another bed, slept on her and defiled her. It is unfortunate that the term recorded by the learned trial magistrate was a term of art rather than what actually took place. In these circumstances, it is clearly difficult to find that there was penetration. On the other hand, while from the totality of the evidence, there was clearly contact with the complainant's genital organs, the object of that contact cannot be determined from the evidence presented. In other words, even indecent act cannot be said to have been proved.

23. In the submissions before me, the appellant raised the issue of fabrication of the case against him. While in cross-examination he alluded to the fact of the existence of a relationship between his wife and one **Galgalo**, in his evidence he did not testify that the case actuated by malice and the totality of the evidence does not support this allegation. In **D W M vs. Republic [2016] eKLR**, the Court of Appeal expressed itself as hereunder:

"The learned Judge concurred with the learned trial magistrate's rejection of the appellant's assertions on fabrication of charges because there was no suggestion in his cross-examination of his wife that the two had any prior differences. In his defence, the appellant only mentioned that he quarrelled with his wife on 23rd September, 2010 when she left but there was nothing to suggest that *R s'* evidence was motivated by malice as *R* only repeated in her testimony what the complainant had narrated to her. On that account the learned judge affirmed the trial magistrate's finding that there was nothing on the record that would suggest that the complainant and her mother *R* acted in concert to make up a case against the appellant."

24. In this case the appellant did not allude to any differences that existed between him and his wife. Dealing with similar circumstances the Court in **Tito Kariuki Ngugi vs. Republic [2008] eKLR** expressed itself as follows:

"I am satisfied and I agree with Mr. Mugambi that the allegation of a frame up is an afterthought. The Appellant's own daughter especially did not have any reason to frame up her father."

25. In this case, the appellant admitted that there were no problems between him and the complainant.

26. As regards the sentence, the learned trial magistrate seems to have been of the view that the offence provides for a penalty which has no option. With due respect that is not the correct legal position. That section states "***shall be liable to imprisonment for life"***. **Sir Henry Webb C.J.** in **Kichanjele S/O Ndamungu versus Republic (1941) 8 EACA 64** had this to say on the proper construction of the words "**liable to**":

"The wording used throughout the code is "*shall be liable to*" but a consideration of the various sections shows in our judgment, that the use of the words "*shall be liable to*" does not import that the sentence mentioned in any particular section in which these words occur is merely a maximum and that the court may impose any lesser sentence below the limit indicated."

27. The predecessor of the court went further in **Opoya versus Uganda [1967] EA 752** at page 754 where **Sir Clement DeLestang V.P**. picked up the conversation *inter alia* thus:

"It seems to us beyond argument that the words "*shall be liable to*" do not in the ordinary meaning require the imposition of the stated penalty but merely express the stated penalty which may be imposed at the discretion of the court. In other words they are not mandatory but provide a maximum sentence only and while the liability existed, the court might not see fit to impose it."

28. A similar position was adopted in **D W M vs. Republic** (supra) where the Court held that:

"As for the sentence the 1st appellate court properly addressed its mind to the operative words in Section 20(1) of the Sexual Offences Act that the offender "*Shall be liable to imprisonment for life*" means that imprisonment for life was the maximum sentence for an offence under the section. A lesser sentence could be imposed considering that the appellant was a first offender though the offence was said to be prevalent, serious and most importantly that the appellant who was supposed to be the complainant's protector turned out to be her tormentor and perpetrator of the defilement. The judge however deemed it proper to substitute the sentence for life imprisonment with that of twenty (20) years imprisonment and it was within his powers to do so. The resulting sentence was within the limits permitted by law and we find no reason to interfere with the exercise of that discretion."

29. That the life sentence is not mandatory appears from the sentence meted in **Tito Kariuki Ngugi vs. Republic** (supra) where the Court held that:

"The appeal against sentence has also no merit. The Appellant defiled his own daughter and caused her trauma which she will have to live with for the rest of her life. The 20 years he was given against life imprisonment provided for by the section under which he was charged cannot in the circumstances of this case be said to be harsh."

30. Therefore, bearing the totality of the above principles in mind, it is my view that the use of the words "***shall be liable to imprisonment for life***" in section 20(1) of the ***Sexual Offences Act*** gave room for the exercise of judicial discretion. The court below fell into error when it took the words "***liable to***" to mean that only the maximum sentence could be meted out against the appellant. In **Shadrack Kipchoge Kogo vs. Republic Eldoret Criminal Appeal No. 253 of 2003** the Court had this to say:-

"Sentence is essentially an exercise of the trial court and for this court to interfere, it must be shown that in passing the sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of those the sentence was so harsh and excessive that an error in principle must be inferred.

31. I therefore agree that the learned trial magistrate ought to have recorded the exact words used by the complainant rather than using a legal term of art.

32. What is the course available to the Court in such circumstances? In other words, should the Court order a retrial or not? The Court of Appeal in the case of **Ahmed Sumar vs. R (1964) EALR 483** offered the following guidance:

"...in general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purposes of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered;....."

33. The Court of Appeal likewise had the following to say in the case of **Samuel Wahini Ngugi vs. R [2012] eKLR**: -

"The law as regards what the Court should consider on whether or not to order retrial is now well settled. In the case of Ahmed Sumar vs. R (1964) EALR 483, the predecessor to this Court stated as concerns the issue of retrial in criminal cases as follows:

'It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the Court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not in our view follow that a retrial should be ordered…In this judgment the court accepted that a retrial should not be ordered unless the Court was of the opinion that on consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on the particular facts and circumstances of that case but an order for the retrial should only be made where the interests of justice required it and should not be ordered when it is likely to cause an injustice to an accused person'

That decision was echoed in the case of Lolimo Ekimat vs. R, Criminal Appeal No. 151 of 2004(unreported) when this Court stated as follows:

'…the principle that has been accepted to courts is that each case must depend on the particular facts and circumstances of that each case but an order for the retrial should only be made where interests of justice require it.'"

34. In **Muiruri –vs- Republic (2003), KLR, 552** and **Mwangi –Vs- Republic (1983) KLR 522** and **Fatehali Maji vs. Republic (1966) EA, 343** the view expressed was that: -

"Although some factors may be considered, such as illegalities or defects in the original trial, the length of time elapsed since the arrest and arraignment of the appellant; whether mistakes leading to the quashing of the conviction were entirely the prosecution's making or not; whether on a proper consideration of the admissible or potentially admissible evidence a conviction might result from a retrial; at the end of the day, each case must depend on its own particular facts and circumstances and an order for a retrial should only be made where the interests of justice requires it."

35. **Makhandia J.** (as he then was) in the case of **Issa Abdi Mohammed vs. Republic [2006] eKLR** opined that: -

"An order for retrial would have been most appropriate in the circumstances of this case. To do so however, in the circumstances of this case would cause irreparable prejudice to the appellant since the prosecution may have become wiser and would wish to plug the loopholes already alluded to in this judgment. In the result there is only one channel left to this court and that is to allow the appeal, quash the conviction and set aside the sentence. The appellant may be set at liberty forthwith unless otherwise held on a lawful warrant."

36. In this case the appellant was convicted on 8th December, 2015. He has served 3½ years. However, the offence facing him was a serious offence and this Court cannot lose sight of the fact that the alleged culprit here was the complainant's father who ought to have been in the forefront in protecting the complainant. Instead of doing so, it is alleged that he took it upon himself to be the instrument through which the complainant would be traumatized. Just like the Court of Appeal in **Elijah Njihia Wakianda vs. Republic [2016] eKLR** I quash the conviction and set aside the sentence. I set the clock back so the process is restarted on proper footing. In consequence, I direct that the appellant shall be presented before any other Magistrate with jurisdiction to hear and determine the matter other than, **Hon. Opanga**, SRM.

37. However, any resulting sentence, if at all, will where appropriate, take into account the period the appellant spent in custody.

38. Orders accordingly.

Judgement read, signed and delivered in open Court at Machakos this 30th day of September, 2019.

G. V. ODUNGA

JUDGE

In the presence of:

Appellant in person

Ms Mogoi for the Respondent

CA Geoffrey