



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CRIMINAL DIVISION
CRIMINAL APPEAL NO. 94 OF 2017

BETWEEN

FEO:.....:APPELLANT

AND

REPUBLIC :.....:RESPONDENT

**(Being an appeal against conviction and sentence of ten years imprisonment for the
offence of Incest contrary to Section 20(1) of the Sexual Offences Act, 2006 in a judgment**

delivered by Hon. F. Makoyo, Senior Resident Magistrate on 25th July,2017

in Butere SPMC Criminal Case No. 7 of 2017)

CORAM: LADY JUSTICE RUTH N. SITATI

JUDGMENT

Introduction

1. The appellant was charged with the offence of defilement contrary to **section 20(1) of the Sexual Offences Act, No. 3 of 2006**, the particulars being that on the 7th day of February 2017 at [particulars withheld] Village, Mujiti sub-location in Khwisero Sub-County within Kakamega County, he intentionally touched the vagina of a girl named GA with his penis who was to his knowledge his daughter. The appellant denied the charge so the prosecution called seven (7) witnesses to prove the case against the appellant.

2. At the conclusion of trial, the learned trial magistrate found the appellant guilty as charged, convicted him and sentenced him to ten (10) years imprisonment.

The Appeal

3. This appeal stems from the judgment of the learned trial magistrate aforementioned which was filed by the appellant on 16th August 2017 on the following home made grounds:-

1. THAT the learned trial magistrate grossly erred in law and facts in taking the appellant through a trial that did not meet the demands of Article 50(2)(g)(h) and (j) of the Constitution of Kenya, 2010.

2. THAT the learned trial magistrate grossly erred and or misdirected himself in law and facts in basing my conviction and sentence on flimsy, doubtful, inconsistent and fabricated evidence of the prosecution.

3. THAT the learned trial magistrate gravely erred in law and facts in shifting the burden of proof to the appellant and disregarding the weak medical evidence.

4. THAT the learned trial magistrate erred in law and facts in rejecting the appellant's defence.

4. At the hearing of the appeal, the appellant submitted a new set of grounds of appeal, which reiterated the grounds of appeal, as initially filed only adding that the learned trial magistrate erred in law and fact by failing to appreciate the fact that the prosecution failed to call some crucial witnesses, among them APC Felix Njagi. He also complained that there were inconsistencies in the prosecution case touching on the age of the complainant.

5. This is the first appellate court and as such it is under a duty to observe the principles set out in the case of *David Njuguna Wairimu V – Republic [2010] eKLR* where the Court of Appeal stated:-

“The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.”

6. In *Okeno vs. Republic [1972] EA 32* the Court of Appeal held that:-

“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.”

Issues for Determination

7. The issues for determination in this appeal are:-

a) Whether the appellant's rights under Article 50(2) (g)(h) and (j) of the Constitution of Kenya were violated.

b) Whether the prosecution discharged the burden of proof to the required standard of beyond reasonable doubt by proving the essential ingredients of the offence of incest contrary to Section 20(1) of the Sexual Offences Act, 2006.

c) Whether the complainant's age was proved to the required standard.

a. Whether the appellant’s rights under Article 50(2) (g)(h) and (j) of the Constitution of Kenya were violated

8. The appellant stated in his Petition of Appeal that the trial did not meet the demands of the provisions of **Article 50(2)(g)(h) and (j) of the Constitution of Kenya, 2010**. The constitutional said provisions state that:-

50.Fair hearing

(1)

(2) *Every accused person has the right to a fair trial, which includes the right—*

(a).....

.....

(g) to choose, and be represented by, an advocate, and to be informed of this right promptly;

(h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

.....

(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;

.....”

9. The Supreme Court of Kenya, in the case of **Republic v Karisa Chengo & 2 others [2017] eKLR**, held as follows:-

“The issue of fair trial and fundamental rights also touches on the interpretation of the Constitution, and related legislation. It also has a bearing on the rights of accused persons to have their appeals determined according to law. Article 20(3) (b) of the Constitution thus requires Courts“to adopt the interpretation that most favours the enforcement of a right or fundamental freedom”

.....

In that regard, the right to legal representation at State expense, where the interests of justice demand, did not commence with the promulgation of the Constitution of 2010. This is a global right that has been in place for sometime now. The International Covenant on Civil and Political Rights (ICCPR) adopted on 16th December 1966, for instance, provides in Article 14(3)(d) that legal assistance should be assigned to a party in any case where the interests of justice so require, and without payment in the case of a party who lacks the means to pay for it. Needless to add that Kenya is a party to this Convention having acceded to it on 1 May 1972.

Before the promulgation of the Constitution, 2010, Kenya recognized that in the interest of justice, persons charged with the offence of murder required legal representation and provided counsel to such people through the pauper briefs scheme and by Gazette Notice of 2016, the retired Chief Justice sent out directions on pauper briefs under the current Constitution. In August 2010, Kenya enshrined in Article 50(2)(h) of its Constitution the right to legal representation at State expense, in both civil and criminal cases, to deserving Kenyans. In respect of criminal cases, Article 50(2)(h) thus declares that “Every accused person has the right to a fair trial, which includes the right ... to have an advocate assigned to the accused person by

the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly....”

.....

Article 50(2)(h) of the Constitution provides that “[e]very accused person has the right to a fair trial, which includes the right...to have an advocate assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly.” It does not define what “substantial injustice” means. However, in David Macharia Njoroge v. Republic, (supra), the Court of Appeal held that “substantial injustice” results to “persons accused of capital offences” with “loss of life” as the penalty if they have no counsel during their trials. We do not entirely concur with that holding, as it has the effect of limiting the right to legal representation in criminal trials only to cases where the accused person is charged with a capital offence. The operative words in Article 50 (2) (h) are “if substantial injustice would otherwise result....” While it is therefore undeniable that a person facing a death penalty and who cannot afford legal representation is likely to suffer substantial injustice during his trial; the protection embedded in Article 50 (2) (h) goes beyond capital offence trials. The Court of Appeal indeed appears to have embraced this reasoning in a recent decision in Thomas Alugha Ndegwa v. Republic; C.A No. 2 of 2004, when it allowed an application for legal representation by the appellant who had been convicted of defilement and sentenced to life imprisonment.

In addition to the above, we do not agree with the Court of Appeal’s holding in the instant case to the effect that the right guaranteed in Article 50 (2) (h) of the Constitution is progressive and that it can only be realized when certain legislative steps have been taken, such as the enactment of the Legal Aid Act. While this is true regarding the general scheme of legal aid which the Act is set to fully implement, the same cannot be the case regarding the right in Article 50 (2) (h). We are thus in agreement with Mr. Ole Kina, that the right to legal representation at state expense, under the said article, is a fundamental ingredient of the right to a fair trial and is to be enjoyed pursuant to the constitutional edict without more. We must however emphasize the fact that in accordance with the language of the Constitution, this particular right is not open ended. It only becomes available “if substantial injustice would otherwise result.”

It is noteworthy in the above context that the Legal Aid Act, 2016 which came into force on 10th May, 2016 in its preamble states that its focus is to “give effect to Articles 19(2), 48, 50(2) (g) and (h) of the Constitution to facilitate access to justice and social justice.”

10. The Supreme Court went further to state that the interests of justice in criminal matters should be determined by considering the seriousness of the offence as well as the severity of the sentence. It is upon the Judge or magistrate in considering what would meet the interests of justice to establish whether public justice would suffer if legal aid is not provided to an accused. I agree with the Supreme Court that it is not in all criminal cases that an accused person will be accorded legal representation. The Court must satisfy itself that lack of legal representation will result in substantial injustice to the accused person.

11. In the instant case, the record shows that at the start of the trial, the court only read out the charges to the accused during plea taking. There is nothing else on the record indicating that the trial court informed the appellant of his rights under **section 43 (1) of the Legal Aid Act, 2016 and Article 50(2)(h) and (g) of the Constitution** regarding the right to legal representation. There was even more reason for the trial court to have taken extra caution before proceeding with the trial of the appellant who was unrepresented for the reason that the offence he was charged with carried a sentence of up to life imprisonment going by the spirit and letter of the provisions of **section 20(1) of the Sexual Offences Act, 2016**.

12. The trial court in the first instance, ought to have informed the appellant of his right to choose and be represented by an advocate as per **Article 50 (2)(g) of the Constitution of Kenya and Section 43(1) of the Legal Aid Act, 2016**. Thereafter, the trial court ought to have ascertained whether the appellant was entitled to be assigned an advocate by the state and at the state’s expense as per **Article 50(2)(h) of the**

Constitution of Kenya. To ascertain this, the trial court ought to have been satisfied that the factors set out under **section 36 (4) of the Legal Aid Act, 2016** were met.

13. The auxiliary question for determination is whether this omission by the trial court was so fatal that it prejudiced and occasioned substantial injustice to the appellant. From the record, the appellant neither raised any issue that there was a complex legal matter he could not comprehend nor did he state that he had difficulty understanding the charges he faced. This can be inferred from the cross-examination of the respondent's witnesses and more specifically after cross-examination of PW3 where the appellant stated that he understood the severity of the offence. In light of the circumstances of this case, I find that no prejudice or substantial injustice was occasioned to the appellant by the omission of the trial court to inform the appellant of his right to choose and be represented by an advocate as provided under **Article 50 (2)(g) of the Constitution of Kenya** and **Section 43(1) of the Legal Aid Act, 2016**. Similarly, I do not see any prejudice that was suffered by the appellant or any substantial injustice that was occasioned to him by reason of the trial court failing to ascertain whether he was entitled to be assigned an advocate by the state and at the state's expense as per **Article 50(2)(h) of the Constitution of Kenya**.

14. On the complaint that the appellant was not informed in advance of the evidence the respondent intended to rely on and have reasonable access to it in contravention of the appellant's right under **Article 50(2)(j)**, the answer thereto lies in the record of proceedings. The record indicates that the respondent told the trial court on 13th February 2017 that he had supplied the appellant with the charge sheet, investigation diary, P3 form for both the appellant and the complainant, treatment notes, PRC form and seven witness statements. The appellant then confirmed to the trial court that he had received these documents. It is therefore preposterous for the appellant to turn around and claim that his right under **Article 50(2) (j) of the Constitution of Kenya** was violated or that the trial did not meet the threshold of that constitutional provision. I find this ground of appeal by the appellant to be baseless and lacking in merit and without limbs on which it can stand. It is hereby dismissed.

b. Whether the prosecution discharged the burden of proof to the required standard of beyond reasonable doubt by proving the essential ingredients of the offence of incest contrary to Section 20(1) of the Sexual Offences Act, 2006

15. The Appellant was charged with the offence of incest contrary to **section 20(1) of the Sexual Offences Act, 2006**. The said section reads:

"20.Incest by male persons

(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"

16. The charge sheet indicated that the Appellant ***".....intentionally touched the vagina of a girl named GA with his penis, who was to his knowledge his daughter."***

17. This in essence means that the respondent was under a duty to prove both penetration and the element of the relationship between the appellant and the child, G.A as proof of the offence of incest.

18. **GA** testified as PW1 and stated that the appellant who was her father did **"bad manners"** to her as she pointed to her crotch. **DM**, testified as PW2 and stated that she is a classmate of GA and that on a previous date, GA informed her that she was feeling pain in her vagina as her father had done "bad manners" to her and that her father used to do so every day. **Esther Emali Imbuiywa** testified as PW3 and stated that GA informed her that her father usually inserted his penis inside her vagina on a regular basis. **Corporal Richard Ondara** testified as PW4 and stated that two ladies and a child went into Emasasi AP post and complained that the child's father wanted to defile her and that upon arrest, the appellant confirmed that he was GA's father. **Joan Nanjala**, testified as PW5 and stated she is a village elder and that PW3 and G.A went to her with the complaint of defilement and that G.A described her

ordeal to her. On cross-examination, PW5 stated that G.A told her that it was the appellant, her father, who was responsible for defiling her. **Belinda Mulanya** testified as PW6 and stated that she is a clinical officer at Khwisero Health Center and that she attended to G.A. PW6 stated that during the medical examination, she confirmed that G.A had been defiled frequently which was evidenced by her blackened vagina and wide open vaginal orifice. PW6 added that the exact date of the incident could not be established. PW6 testified that she conducted medical tests on the appellant but saw no injuries on the penis and further that she could not establish a link between the appellant and G.A's defilement. **PC Omar Moyo** testified as PW7 and stated that he was the investigating officer and that on 11th February 2017, PW3 and PW5 went with GA to Khwisero Police Station where GA informed him that the appellant had defiled her on 7th February 2017. PW7 stated that he visited the home of the appellant who lived alone with G.A. PW7 stated that he relied on the statement of PW2. On cross-examination, PW7 stated that GA informed him that the appellant used to defile her on his bed and that it was GA who implicated the appellant.

19. The appellant gave sworn testimony in his defence and stated that on 10th February 2017, he was attacked by a mob allegedly for defiling his child. The appellant added after he was rescued, he went to his sister in-law's house after having supper with GA. The appellant stated that his sister in-law told him that she had witnessed children inserting sticks inside G.A's vagina and that he was arrested the following day on the way to the hospital. The appellant denied defiling GA. On cross-examination, the appellant confirmed that G.A was indeed his daughter and that he lived with her most of the time and sometimes together with GA's mother.

20. The appellant's sister in-law, **CA**, testified as DW2 and denied any knowledge of the incident apart from being informed that the appellant had defiled G.A. DW2 corroborated the appellant's testimony that he went to DW2's house after being beaten up but DW2 stated that the appellant went to her house while she was absent. DW2 denied seeing other neighbours' children inserting sticks into GA's vagina. On cross-examination, DW2 stated that the appellant was lying to the court when he alleged that she had told him she had seen other children inserting sticks into GA's vagina.

21. In the case of *W O O v Republic [2016] eKLR*, Makau J stated that:-

'The ingredients of an offence of incest are as follows: - "relationship, within the meaning of the law and penetration"

22. In the case of *H K K v Republic [2017] eKLR*, Korir J stated that:-

'The charge has four components namely the sex of the perpetrator and the victim, the relationship between the two, penetration and the age of the victim for purposes of sentencing.

23. The evidence of GA and the admission by the appellant himself clearly shows that the relationship of the appellant and GA was that of a father and daughter respectively. The evidence of GA and that of PW6 proves that there was partial penetration in the vagina of GA which was improper and unlawful. The only issue is whether the appellant was properly and positively identified as the offending party in this case, considering the fact that apart from GA, there was no eye witness of the incident as alleged by GA.

24. *Section 124 of the Evidence Act* provides that: -

124. Corroboration required in criminal cases

Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:

Provided that where in a criminal case involving a sexual offence the only evidence is that of the

alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.

25. From the proviso to **section 124 of the Evidence Act** (above), it follows that the evidence of G.A does not require corroboration for it to form the basis of a conviction. The trial court which heard and saw G.A testify said she was a candid and credible witness and believed her. I am also satisfied that GA spoke the truth and consequently proved the ingredient of penetration. Further, G.A was able to consistently tell her story to PW2, PW3, PW4, PW5, PW6 and PW7. The appellant's assertion that the penetration on G.A was as a result of other children inserting sticks into GA's vagina was not truthful and his attempt of trying to convince the trial court that that was the case was denied by DW2 who disputed the appellant's theory.

26. It should be noted that **The Sexual Offences Act No. 3 of 2006** defines "penetration" as

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

27. The evidence on record, more particularly the medical P3 form, *Pexhibit 2* produced by PW6 proves penetration of the vagina of GA and in my very considered view, it was the appellant who penetrated his own daughter's vagina.

c. Whether the complainant's age was proved to the required standard

28. The **Sexual Offences Act No. 3 of 2006** defines 'vulnerable persons' to include a child. A "Child" within the meaning of the **Childrens Act No. 8 of 2001** is defined as '**...any human being under the age of eighteen years.**'

29. GA, was clearly a human being who was below the age of eighteen years. The medical documents showed that she was 7 years of age, while the appellant was 35 years old. In effect, the complainant's age was proved to the required standard.

Sentencing

30. I am in agreement with the learned trial magistrate that the respondent proved a case of incest contrary to **section 20(1) of the Sexual Offences Act, No. 3 of 2006** against the appellant beyond reasonable doubt. The appellant did not simply touch GA's vagina with his penis, as that would amount only to attempted incest. The appellant actually pierced and penetrated the vagina of his own daughter with his penis. Her vagina was darkened from many incidents of penetration. That was incest. This court is aware of recent developments in sentencing jurisprudence starting with the Supreme Court decision in ***Muruatetu & Another versus Republic [2017]eKLR*** where the Supreme Court stated that mandatory minimum sentences deprived trial courts of their discretionary power to mete out sentences that are commensurate with the circumstances of the case. The court also held that where appropriate, the trial court was at liberty to impose the mandatory minimum sentence, even if that sentence is death.

31. The Court of Appeal has applied the same principle enunciated by the Supreme Court in the ***Muruatetu Case*** (above) in dealing with mandatory minimum sentences under the **Sexual Offences Act, No. 3 of 2006**. In appropriate cases, the mandatory minimum sentences have been quashed and substituted with shorter sentences. A Court of Appeal decision in point is the case of ***Evans Wanjala Wanyonyi versus Republic [2019]eKLR***.

32. In the instant case, **section 20(1) of the Sexual Offences Act** provides in part that: "**.....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.....**" The appellant herein was sentenced to 10 years imprisonment after considering the appellant's mitigation. I find this to be judicious and reasonable in the circumstances, taking into account the age of GA, the injuries caused by

the appellant on GA and the fact of the appellant being a first offender. I find no reason for this court to disturb the decision of the trial court on the sentence.

Conclusion

33. In light of all the foregoing, I find and hold that the appellant's appeal on both conviction and sentence is baseless and lacks merit and is accordingly dismissed.

34. It is so ordered.

Judgment written and signed at Kapenguria.

RUTH N. SITATI

JUDGE

Judgment delivered, dated and countersigned in open court at Kakamega on this 29th November, 2019

WILLIAM M. MUSYOKA

JUDGE

In the presence of:-

Appellant present in person

Ms. Omondi for respondent

Erick – Court assistant