REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO. 314 OF 2015

M E M.....APPELLANT

VERSUS

REPUBLIC.....STATE

(Being an Appeal from the Judgment of the Chief Magistrate's Court at Nakuru Hon. H. O. Barasa – Resident Magistrate delivered on the 1st March, 2010 in A/CR Case No.* 201 of 2009*)

JUDGMENT

1. MEM is the Appellant herein. He has preferred an appeal against his conviction and sentence in ***Nakuru Chief Magistrate's Criminal Case No. 201 of 2009*** in which he faced two counts: one of attempted incest contrary to section 20(2) of the Sexual Offences Act; the other the offence of neglecting a child contrary to section 127(1) of the Children's Act. The Appellant also faced an alternative charge to Count 1: committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act.

2. The Appellant denied the charges and a trial ensued. The Prosecution called six witnesses and the Appellant gave a short, unsworn statement. The Learned Trial Magistrate then returned a verdict of guilty. He then sentenced the Appellant to life in prison.

3. The evidence from the trial was short and straightforward. The Complainant testified as PW1. Her testimony was that she was living with the Appellant who is her father during that time. Another girl by the name J also lived in the same house. By that time, the Complainant was eleven years old.

4. The Complainant testified that the Appellant asked her to go sleep in his bed with him. He allegedly removed his clothes; then removed hers. He then touched her breasts, buttocks and thighs before lying on top of her and putting his "thing" (the one "he uses to urinate [with] into [hers]"). The Complainant says she felt some wetness between her legs.

5. This pattern apparently continued for five days. At last tired of the molestation but terrified, the Complainant ran off to Loise Mineyo's house (who was a neighbor to the Appellant and who testified as PW3). The Complainant told Mineyo what had happened – and Mineyo set off a chain reaction which ended up with the Appellant being arrested by the Police. Mineyo confirmed that the Complainant ran off to her house one evening and refused to go back to her father's house.

6. John Buseili, a brother to the Appellant, testified that he used to live with the Complainant but that the Appellant asked if the Complainant could go visit him for one month during the Christmas holidays. Buseili allowed the Complainant to go visit her father – and that is when the incident happened.

7. Corporal Relia Galgalo and PC Mureithi testified about how the report was made about the case and the steps they took to arrest the Appellant and secure the Complainant to ensure her safety.

8. Nancy Njenga, a Clinical Officer, testified that she examined the Complainant and filled the P3 form. She found no evidence of penetration: both the labia majora and vagina were unharmed; and the hymen was intact.

9. After receiving this evidence, the Learned Trial Magistrate thought that there was sufficient evidence for the Appellant to answer to the charges and put him on his defence. The Appellant chose to give an unsworn statement. It was remarkable in its brevity. It went thus:

> *I am Mark Eseli Mateuwa. I stay (sic) at Njoro. I am a farmer. I also do casual jobs here and there. I did not commit the offence herein. I was framed up by the neighbours, That is all. I shall not call any witness.*

10. In his judgment, the Learned Trial Magistrate was persuaded that the evidence proved Count I beyond reasonable doubt. The Learned Trial Magistrate concluded thus:

There is, however, strong evidence that [the Appellant] committed an indecent act with the Complainant. The Complainant gave clear testimony as to what the Accused herein used to do to her.

I would point out there that the Complainant though young was intelligent and was very clear about what the Accused did to her. She narrated to the Court how the Accused used to touch her breast, buttocks and vagina. She even explained that she would feel a wet substance between her legs. The Accused was given the opportunity to cross-examine her but her evidence was not shaken at all during that cross-examination. She did not give me any impression that she was couched (sic) by anyone. PW3 narrated to [the] Court how the Complainant went to her place and refused totally to go back to her father. This means she was running away from something and this Court believes that she did not want to go through the ordeal the Accused was putting her through. I am aware that a minor's evidence should be taken with a lot of caution.

11. With that conclusion, the Learned Trial Magistrate proceeded to convict the Appellant of the main charge in Count I and sentenced him to life imprisonment.

12. On appeal, the Appellant raised three major arguments:

i. ***THAT,*** *the learned trial Magistrate erred in law and fact by convicting me in the present case yet failed to find that I was not provided with witness statements as provided for by Article 50 of the Constitution of Kenya, 2010.*

ii. ***THAT,*** *the learned trial Magistrate erred in law and fact when she convicted me in the present case yet failed to find that the evidence adduced lacked corroboration.*

iii. ***THAT****, the learned trial Magistrate erred in law and fact when she convicted me in the present case yet failed to find that the complainant's age was not proved.*

13. The State opposed the Appeal. Learned Counsel, Mr. Motende appeared for the State and submitted that there was enough evidence to affirm the conviction. He further argued that the sentence was lawful and should be affirmed as well.

14. Mr. Motende submitted that the Appellant was below 11 years old and that she gave account of how the Appellant committed an indecent act with her. Mr. Motende submitted that the Complainant's evidence was corroborated by PW3 who gave evidence how the complainant refused to go back to her father's house after going to her house.

15. Mr. Motende pointed out that although the Appellant claimed he was framed by neighbours he had failed to explain how. He admitted that there were no grudges between him and the witnesses. Therefore, after the conclusion of the case, the Trial Magistrate found all the ingredients of incest were proved and was entitled to convict.

16. Mr. Motende also submitted that the sentence imposed was life imprisonment as per the law. The sentence was, therefore, lawful.

17. On witness statements, Mr. Motende argued that the record shows that the Appellant participated in the trial and nowhere did he complain he had not been given statements and that his complaint on appeal was an afterthought. Mr. Motende was categorical that the applicant was given a fair hearing.

18. This being the first appeal, this Court has the duty to re-evaluate the all the evidence given at trial and come to its own independent conclusions. The duty of this Court is not to merely confirm or disconfirm particular hypothesis made by the Trial Court. Even as it re-evaluates the evidence afresh, this Court is reminded to be acutely aware that it never saw nor heard the witnesses as they testified and, therefore, it must make an allowance for that. This is especially crucial when it comes to evaluating the credibility of witnesses. See ***Okeno v R [1972] EA 32*** and ***Kariuki Karanja v R [1986] KLR.***

19. I will begin by addressing the constitutional issue raised by the Appellant: that he was not supplied with witness statements.

20. There is no question that it would be a violation of the Appellant's constitutional rights – and in particular Article 50(2)(c) and (j) to fail to provide witness statements to an Accused Person. At a minimum, this right includes the right to receive a copy of the charge sheet, witness' statements and copies of any documents which will be relied on at the trial. See ***Simon Githaka Malombe v R [2015] eKLR (Court of Appeal Crim. App No. 314 of 2010 at Nyeri***).

21. In this case, the Appellant says on appeal that the witness statements were never supplied to him. However, he does not allege that he asked for them and that the Court failed to give them. Indeed, his argument is that the Court record does not reflect that he was given witness statement. This argument verges on the technical: that failure of the Court to record that an Accused Person has been given witness statements is a per se proof violation of his constitutional right to fair trial. I do not think our decisional law has enunciated such a rigid and formalistic rule.

22. Instead, our case law provides a more functional approach. While it is a salutary practice for a Trial Court to record to indicate that it has given orders for an Accused Person to be provided with the statements or has facilitated their supply, failure to record this is not necessarily fatal. As I held in an earlier case:

It is salutary practice for the Court to do so when it has given orders. Indeed, it is salutary practice for the Trial Court to satisfy itself that an Accused Person has all the reasonable facilities for his defence and all the prosecution disclosure documents before commencement of trial.

However, an Accused Person has an obligation to bring it to the attention of the Court that he has not been supplied with the witness statements (or any other prosecution documents) as ordered by the Court. This minimum obligation on the Accused Person triggers the Court's duty to ensure the documents are supplied before commencement of the trial.

Francis Muniu v Republic [2017] eKLR.

23. In his case, as in the ***Francis Muniu Case***, there is evidence that the Appellant participated in the trial vigorously through cross-examination which is in an indication that he knew the case facing him well. There is also no indication that he asked for the witness statement and was not supplied with them. These two factors lead to the conclusion that the fair trial rights of the Appellant were not violated in this case: he either received the witness statements or failed to fulfill his minimal obligation to inform the Court that he did not have the statements.

24. The Appellant's second complaint can be easily disposed. It is that it was wrong for the Learned Trial Magistrate to convict him on the uncorroborated evidence of a minor. The Appellant has cited ***Maina v R Nairobi Criminal Appeal No. 955 of 1967*** for that proposition.

25. Unfortunately for the Appellant, the position in our law has since changed. In 2003, the Kenyan Parliament passed Criminal Law (Amendment) Act 2003 in Legal Notice No. 5 of 2003 which amended Section 124 of the Evidence Act. The proviso to that section now states:

Provided that where in a criminal case involving a sexual offence the only evidence is that of a child of tender years who is the alleged victim of the offence, the court shall receive the evidence of the child and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the child is telling the truth.

26. One need not belabour this point. The only issue is whether the Trial Court was persuaded, for reasons recorded, that the child was telling the truth. In the section of the judgment reproduced above, the Learned Trial Magistrate was quite explicit in giving his reasons why he believed the Complainant was telling the truth.

27. What about the age of the Complainant? The Appellant complains that no documentary evidence was produced to show that the Complainant was less than eleven years old. That is true. However, age is a matter of fact which can be proved by oral testimony just like any other fact in issue. The Court of Appeal has provided a conclusive answer to this question in ***Mwalongo Chichoro Mwanjembe v Republic, [2015] eKLR***:

…*the question of proof of age has finally been settled by recent decisions of this Court to the effect that it can be proved by documentary evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. It has even been held in a long line of decisions from the High Court that age can also be proved by observation and common sense. See* ***Denis Kinywa v R, Cr. Appeal No.19 of 2014*** *and* ***Omar Uche v R, Cr. App.No.11 of 2015****. We doubt if the courts are possessed of the requisite expertise to assess age by merely observing the victim since in a criminal trial the threshold is beyond any reasonable doubt. This form of proof is a direct influence by the decision of the Court of Appeal of Uganda in* ***Francis Omuroni v Uganda, Crim. Appeal No.2 of 2000****. We think that what ought to be stressed is that whatever the nature of evidence presented in proof of the victim's age, it has to be credible and reliable…*

28. In the present case, the Complainant provided clear and un-impeached oral testimony that she was eleven years old. The Appellant, who is the father of the Complainant, did not challenge that fact during cross examination. Neither did he dispute the same information as provided in the P3 form.

29. In the end, therefore, there is little doubt that all the ingredients of the offence of attempted incest were proved:

a. The Complainant was related to the Appellant by blood as daughter and father;

b. There was evidence of attempted but unsuccessful penetration as defined in section 2 of the Sexual Offences Act;

c. There was no question that the person who attempted the penetration was the Appellant; and

d. The Complainant is a child of less than eleven years old.

30. The Appellant was charged with the offence of attempted incest contrary to section 20(2) of the Sexual Offences Act. That charge was never amended. It was what the Prosecution sought out to prove and it was what the Appellant defended at trial. However, in his judgment, the Learned Trial Magistrate amended the charge and convicted the Appellant of the offence of committing an indecent act under section 20(1) of the Sexual Offences Act.

31. In my view, it was an error that caused grave prejudice to the Appellant for the Learned Trial Magistrate to convict the Appellant of a more serious offence at the conclusion of trial. The Learned Trial Magistrate ended up convicting the Appellant of the offence of under section 20(1) of the Sexual Offences Act.

32. 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.

33. It is readily obvious that the offence created in section 20(1) is much more serious than that created in section 20(2): the former attracts a minimum of life imprisonment if the victim is less than eighteen years while the latter attracts a minimum sentence of life imprisonment. It is, therefore, not possible to say that a Court can rely on section 179 of the Criminal Procedure Code to convict under section 20(1) of the Sexual Offences Act an Accused Person who has been charged with an offence under section 20(2) of the Sexual Offences Act: the former is not a lesser and minor cognate offence of the former.

34. To this extent, I would set aside the conviction under section 20(1) of the Sexual Offences Act and, instead, substitute it with a conviction under section 20(2) of the Act. That is the offence the Appellant faced and went to trial for. It was the offence with respect to which the Prosecution adduced evidence which was found to be sufficient to warrant a conviction.

35. In the same vein, given that the minimum sentence provided under section 20(2) of the Sexual Offences Act is ten years imprisonment – and given the fact that the Accused Person was a first offender and no other aggravating circumstances were disclosed – I would also set aside the sentence of life imprisonment and substitute it with a sentence of ten years imprisonment which is the minimum sentence imposed for a conviction under section 20(2) of the Sexual Offences Act.

36. **The upshot, then, is the following:**

a. The conviction of the Appellant for the offence of committing an indecent act under section 20(1) of the Sexual Offences Act is hereby quashed;

b. In its place, there shall be entered a conviction for the offence of attempted incest contrary to section 20(2) of the Sexual Offences Act;

c. The sentence imposed of life imprisonment is hereby set aside;

d. **Instead, the Appellant shall be sentenced to ten years. The sentence shall run from 01/03/2010**.

37. Orders accordingly.

Dated and delivered at Nakuru this 14th day of June, 2018

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(PROF.) JOEL NGUGI

JUDGE