**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**CRIMINAL APPEAL NO. 119 OF 2016**

**G N N.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

(*from the original conviction and sentence by B. Ochieng, CM*

*in Kakamega CMC,S.O No. 85 of 2016 dated 29/11/16).*

**J U D G M E N T**

1. The appellant was convicted of the offence of defilement contrary to section 8(1) and (2) of the Sexual Offences Act No. 3 of 2006 and sentenced to serve a life in prison. He was aggrieved by the conviction and the sentence and hence filed this appeal.

2. The grounds of appeal are that:-

1. The learned trial magistrate grossly erred in law and fact in placing inordinate weight on the medical evidence tendered without observing that the duration of the one week as recorded on the P3 form invalidated the finding therein hence null and void.

2. The learned trial magistrate grossly misdirected himself in law and fact in taking the appellant through a trial without informing him and or assigning him with legal representation as guaranteed under article 50(2) (h) of the constitution thereby occasioning prejudice and an unfair hearing.

3. The learned trial magistrate gravely erred in law and fact in failing to observe that none of the people who arrested him were called as witnesses.

4. The learned trial magistrate erred in law and fact in basing the conviction on flimsy, doubtful and framed up evidence which was not watertight enough to uphold a conviction.

5. The learned trial magistrate grossly erred in law and fact in shifting the burden of proof to the appellant in light of the inconsistencies, contradictions and inadequate evidence of the prosecution.

6. The learned trial magistrate erred in law and fact when he rejected the

Appellant's defence.

7. The learned trial magistrate erred in law and fact in handing the appellant a harsh sentence when the evidence on record was not in support of the charge of defilement.

8. The learned trial magistrate erred in law and fact in convicting the appellant based on his legal weaknesses.

3. The appeal was opposed by the state.

4. The particulars of the offence against the appellant were that on the 31st July, 2016 within Kakamega Central District in Kakamega County he intentionally and unlawfully caused his penis to penetrate the vagina of L.L. (herein referred to as the complainant) a child aged 9 years.

**Prosecution Case**

5. The case for the prosecution was that the appellant is the father to the complainant. The complainant was living with the appellant and a younger sister. The appellant and the complainant's mother are separated.

6. That prior to the material day the appellant and his two children together with the grandmother to the children PW3( also mother to the accused) had attended the burial of a relative. The appellant and his children retuned home on the material day which was on a Sunday. The grandmother to the children was left at the funeral. That while the children were at home, the appellant sent the complainant's younger sibling and a boy called M for an errand at the home of a neighbour. The appellant then called the appellant into his house to light a fire. When she entered into the house the appellant took her to the bedroom and defiled her. The complainant's younger sister came back and the appellant did the same thing to her. The appellant warned the complainant not to tell anybody of what had happened.

7. On the following day the complainant went to school. Her teacher PW2 then routinely checked the pupils' cleanliness and she noticed that the girl was weak and sick. She also had a foul smell. She inspected her further and found that her panties appeared dirty. She asked her whether she had been defiled but she denied it. The teacher instructed the girl to ask her mother to go to school on the following day. On the said day the complainant's grandmother presented herself at the school. PW2 told her that she suspected that the girl had been defiled. When PW2 returned home she took the girl into a room with the intention of interrogating her. The appellant appeared and started to beat the girl for no reason. Pw3 abandoned the mission and returned to the funeral.

8. On 4/8/16 the area *nyumba kumi* chairman PW4 received information that the girl had been defiled .He summoned her grandmother who took the girl to him. He escorted them to Kakamega Police Station. PC Kemunto PW6 issued a P3 form to the girl. She was taken to Kakamega County Hospital. She was examined by a Dr. Nderitu. The doctor found her with a broken hymen and laceration on the labia minora and majora. The doctor concluded that the girl had been defiled. Pc Kemunto thereupon charged the appellant with the offence. He denied the charge. During the hearing Dr. Mambiri PW5 produced the P3 form and Post Rape Care form as exhibits, PEX 1 and 2 respectively on behalf of Dr. Nderitu who was outside the county on further studies. PC Kemunto produced the girl's church dedication card as exhibit, Exhibit 5 that indicated that she was born on 5/4/2007.

**Defence case**

9. When placed to his defence the appellant gave an unsworn statement in which he stated that on the 30/7/16 he and his daughters were attending the burial of his late sister. That his late sister had been keeping into custody the title deed to their ancestral land. He asked his brother- in-law to handover the document to him. His mother protested and said that the appellant might sell the land. On the 31 st he and his daughters returned home.

10. That at the home there were some people who were making bricks in the compound. They prepared lunch and ate. In the evening his daughters went to the home of his brother. They did not go back. On the following morning he saw them on their way to school. Later at 11 am his mother returned home from the funeral. In the evening the children retuned from school. He noticed that they were not playing as usual. On 2/8/16 his mother told him that the complainant's teacher had summoned her to school and she had told her that she suspected the complainant to have been defiled. That he questioned the girl and she implicated a neighbour called Majori. He asked his mother to take the girl to hospital but she became angry with him. His mother took his daughter to hospital on the 3rd. On the 4th he was arrested on allegations that he had defiled his daughter. He was charged. He said that he was framed by his mother over the dispute over land left behind by his father.

**Judgment of the trial court**

11. The complainant gave unsworn evidence. She was cross- examined by the appellant. The trial magistrate found the evidence of the girl to have been candid and credible. He said that he found corroboration of the evidence of the girl in the evidence of her teacher PW2 who on the following day after the incident saw her in a distressed state with foul smell emanating from her private parts. That the medical evidence on the condition of her private parts also offered corroboration to the unsworn evidence of the girl. That the appellant's conduct of beating the girl when the grandmother wanted to interrogate her also offered corroboration to the evidence of the girl.

12. The magistrate found that the dedication card proved that the girl was aged 9 years and 3 months. The magistrate dismissed the appellant's defence that the case was fabricated by his mother PW3 due to a dispute over land. The magistrate said that the person who raised a red flag on the defilement was not the appellant's mother but the victim's teacher who then alerted the appellant's mother. The magistrate found the charge against the appellant to have been proved beyond all reasonable doubt.

**Submissions**

13. The appellant made written submissions. He submitted that he was convicted of the offence of defilement yet the evidence adduced in court disclosed an offence of incest.

14. That PW3 denied reporting the matter to the police. The prosecution failed to come out clearly as to who reported the matter to the police.

15. He stated that the appellant gave her age as 10 years yet the charge stated that she was aged 9 years.

16. That there were contradictions in the evidence of the prosecution witnesses. For instance that the complainant stated that she was taken to hospital on the 22nd yet the doctor PW5 said that the girl was examined on 5/8/16.

Further that the prosecution failed to call some crucial witnesses who were mentioned in the case such as the complainant's sister LM and a boy called M. That the inference that the trial court ought to have made for failure to call the said witnesses was that their evidence was adverse to the prosecution case.

17. The appellant faulted the trial court for not believing his defence that the case was framed up by his mother due to a dispute over land.

It was further submitted that the doctor who examined the complainant did not testify and as such there was no credible and reliable medical evidence to sustain a conviction. It was also submitted that the medical findings were inconclusive and doubtful.

18. The state did not make any submissions. They relied on the record of the lower court.

**Duty of first appellate court**

19. This is a first appeal. It is the duty of a first appellate court to analyse and examine the evidence adduced in the lower court and draw its own conclusions while bearing in mind that the trial court had the advantage of hearing and seeing the witnesses testify – See **Kiilu Vs Republic (2005) 1KLR 174**.

**Analysis and Determination**

20. The offence the appellant was convicted of was committed on 31/7/16. The charge sheet stated that the complainant was aged 9 years. She testified in court on the 8/9/16 during which time she stated that she was aged 10 years.

21. The age of a person can be proved in various ways as was stated by the Court of Appeal in ***Mwolongo Chichoro Mwanyembe Vs Republic ,*** Mombasa Criminal Appeal 24 of 2015 (UR) (cited in ***Edwin Nyambaso Onsongo Vs Republic(2016 )eKLR***, where it said that:

> ***"…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 documents, 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." ".. we think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age , it has to be credible and reliable."***

Rule 4 of the Sexual Offences Rules of Court, 2014 states that when determining the age of a person, the court may take into account evidence of the age of that person that may be contained in a birth certificate, any school document or in a baptismal card or similar document.

22. In this case, a church dedication card was produced that indicated that the complainant was born on 5/4/2007. That therefore puts her age, as correctly pointed out by the trial magistrate, at 9 years and 3 months at the time of the commisision of the offence. That the complainant said in her evidence that she was aged 10 years was not a grave error It was just a mathematical error.

23. The complainant stated in cross – examination that she was taken to hospital on the 22nd. It is not indicated 22nd of which month. The Post Rape Care form Pex2 indicates that Dr. Nderitu completed it on 4/8/16. The said doctor also completed and signed the P3 form Pex-1 on 4 /8/16. It is then clear from these two documents that the complainant was taken to hospital on 4/8/16. That the complainant said that she was taken to hospital on the 22nd is not such a crucial contradiction that should lead to the evidence being dismissed.

24. The complainant stated that her sister called LM was also defiled by the appellant. The trial court stated in its judgment stated that the girl was aged 5 years and that it had dispensed with her evidence as she was too young and was not capable of giving rational answers. However there is no record that the girl appeared before the court for the court to make that observation. The said child's dedication card, Pex6, indicated that she was born on 20/12/2011. That means that in July 2016, she was aged 4 ½ years. The investigating officer PW4 stated that the child was aged 4 years and was too young to record a statement. The court will take judicial notice that a child of 4 ½ years is of too young an age as to give rational answers to the court even with the assistance of an intermediary. It is not the fault of the prosecution that the said girl was not called to court to testify.

25. The complainant stated that the appellant had sent her sister and a boy called Mato to the home of a neighbour to collect keys. It was not alleged that M saw the appellant defiling the complainant. The evidence of M would therefore not have added any value to the case. There was no basis for making the interference that the reason why the prosecution failed to call him is because his evidence was adverse to that of the prosecution.

26. The appellant contended that the charges were fabricated by his mother due to a dispute over the family land. The trial magistrate considered the appellant's defence and stated that the matter of defilement was raised by the complainant's teacher and not the appellant's mother. Indeed this was the case. The appellant did not cross-examined his mother of any dispute between them over the family land. Neither did he cross examine the other prosecution witnesses on the issue when they testified in court. The appellant only raised the issue in his unsworn statement in court. The defence can only have been an afterthought. The trial court rightly dismissed the defence.

27. The P3 form and the Post Rape Care form were competed by a doctor Nderitu. The documents were produced in court by Dr. Mambiri PW5. The said doctor stated that Dr. Nderitu was at the time outside the country pursuing further studies. Before he produced the documents he stated that he had been working with Dr.Nderitu and that he was familiar with his handwriting and signature. The doctor sought for permission from the court to produce the documents on behalf of Dr. Nderitu. The court record indicates that the appellant said that he had no objection to the application. The doctor then proceeded to produce the documents as exhibits.

28. The said documents were made by a government medical practitioner in discharge of his professional duties. The doctor who prepared them was unavailable to produce them in court. Dr. Mambiri was conversant with the handwriting and signature of the doctor who completed the documents as they were working together. The documents were properly produced in court in accordance with sections 33 and 77 of the Evidence Act. The appellant did not raise any objection to Dr. Mambiri producing the documents. He cross- examined on the documents. He therefore did not suffer any prejudice and there was no failure of justice in Dr. Mambiri producing the documents.

29. Dr. Nderitu who examined the complainant found her with lacerations on the labia majora and labia minora and a broken hymen. The combination of the two corroborated the complaint's evidence that she had been defiled. The act of defilement was conclusive.

30. The trial court found further corroboration of the complainant's evidence in the distressful state she was in on the following day as stated by her teacher PW2. A distressed state of a victim of defilement can offer corroboration in a case.

The magistrate also found corroboration of the evidence of the girl in the fact that when the appellant's mother wanted to interrogate the girl on the defilement, the appellant started to beat the girl for no apparent reason. It was clear that the appellant was beating the girl to prevent her from telling her grandmother as to what the appellant had done to her. The evidence offered corroboration to the evidence of the girl that the appellant had defiled her.

31. The complainant's grandmother PW3 stated that after the appellant intervened when she wanted to question the complainant on the incident she returned to the funeral and later learnt that the complainant had been taken to hospital and the appellant arrested. The investigating officer PW6 however stated in her evidence that it is the complainant's grandmother PW3 and a member of community policing who took the complainant to the police station and reported that she had ben defiled . The chairman of *nyumba kumi* PW4 stated in his evidence that he received the report of defilement from a member of *nyumba kumi*. He summoned the grandmother to the complainant who took the girl to him. He interrogated her. The chief instructed him to escort her to Kakamega police station. He did so. The complainant in her evidence stated that it is her grandmother who escorted her to hospital for treatment.

32. There was contradictory evidence from the prosecution witnesses as to who reported the matter to the police. The nyumba kumi chairman PW4 and the investigating officer Pw5 said that it is the complaint's grandmother and PW4 who reported the matter to the Police. PW4 indicated that she did not report the matter.

PC Kemunto PW6 stated that the appellant was arrested by members of community policing assisted by administration policemen. The said people did not testify in the case.

33. Where there are contradictions and inconsistencies in the evidence of witnesses, it is the duty of the court to weight the contradictions and consider whether they have any effect on the overall evidence in the case. The court in **Njuki & Other Vs Republic (2002) 1 KLR 771** held that :

> ***" Where such allegations are raised, the obligation of the court is to determine as to whether the said discrepancies, contradictions and indisrepanincies are of such a nature as would create doubt as to the guilt of the accused. Where they do not they are curable under section 382 of the Criminal Procedure Code".***

34. There is no doubt that the appellant was arrested and the matter reported to the police. That is why the police launched investigations into the matter. The contradictions on the evidence of the prosecution witnesses as to who reported the matter to the police was not contradiction of such a nature as to affect the guilt of the accused person. The court can ignore evidence that does not go to the substance of the prosecution case – see **Jackson Mwanzia Musembi Vs Republic (2017)eKLR.** The contradiction therefore ought to be ignored.

35. Article 50(2)(h) of the constitution provides 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.**

In **Republic Vs Karisa Chengo& 2 others (2017) eKLR** the Supreme Court held that the right to legal representation is not open ended but is only available" if substantial injustice would otherwise result. The appellant did not show that he had difficulties in conducting his defence. He did not show that there were complex issues of law in the case which would result to substantial injustice if no advocate was allocated to him. Though the trial magistrate did not comply with article 50(2)(h) of the constitution the non- compliance did not occasion a failure of justice.

36. The appellant was initially charged with incest contrary to section 20(1) of the Sexual offences Act No. 3 of 2016. The charge was however withdrawn and substituted with the charge of defilement contrary to section 8(1)(2) of the said Act. The appellant submitted that the offence proved against him was that of incest. That the sentence of life imprisonment imposed upon him is unsustainable in law.

37. The complainant stated in her evidence that the appellant was her father. The appellant's mother PW3 stated that the appellant was the father to the complainant. The appellant admitted in his evidence that the complainant was his daughter. There was sufficient evidence from the evidence of the complainant and the doctor that the appellant defiled the complainant. The appellant was staying with the said child. He knew that the child was his daughter. The offence proved against the appellant was therefore that of incest. It appears that the Sexual offences Acts 2006 treats incest as a less serious offence than defilement under section 8 of the Act. The minimum sentence under section 8(2) where the child is under the age of 11 years is life imprisonment. For incest under section 20(1) of the Act, the sentence where the victim is under the age of 18 years is between 10 years and life imprisonment. It means that if the appellant was found guilty of incest he could be sentenced to anything between 10 years and life imprisonment but for defilement under section 8(1) as read with section 8(2), the

minimum sentence is life imprisonment.

38. Was it then tenable for the prosecution to substitute the charge to defilement under sections 8(1) and 8(2) when the offence proved was incest? Where for offences created by statute the state has the option of selecting between charging an accused person with one offence that provides for more severe sentence to another charge that provides for a lesser sentence, the accused, is in my view , entitled to be charged with the offence that provides for the lesser sentence . It was therefore untenable for the prosecution in this case to amend the charge so that the accused, if found guilty, would get life imprisonment instead of charging him with incest where he, if found guilty, could get an option of a sentence ranging from 10 years to life imprisonment.

39. Section 186 of the Criminal procedure Code provides that:

> ***" When a person is charged with the defilement of a girl under the age of fourteen years and the court is of the opinion that he is not guilty of that offence but that he is guilty of an offence under the Sexual Offences Act, he may be convicted of that offence although he was not charged with it."***

40. Section 20(1) of the Sexual Offence Act provides that:

> ***"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. "***

41. In the case facing the appellant it was stated in the charge sheet that the girl was aged 9 years. It was proved that she was of that age. The appellant knew that the girl was his daughter. The offence proved against the appellant was incest contrary to section 20(1) of the Sexual offences Act No. 3 of 2016. The conviction and the sentence under section 8(1) as read with section 8(3) of the said Act are set aside. I substitute the offence committed to incest contrary to section 20(1) of the Sexual offences Act No. 3 of 2006.

42. The Maximum sentence under the provisio to section 20(1) of the Sexual Offences Act No. 3 of 20006 is life imprisonment. Considering that the appellant committed incest with his own daughter who was aged 9 years at the time of the Commission of the offence, I sentence him to serve twenty years imprisonment.

Delivered, dated and signed in open court at Kakamega this 27th day of September, 2018.

**J.NJAGI**

**JUDGE**

In the presence of:

Appellant – appearing in person

Ng'etich for state

George court assistant

14 days Right of Appeal explained.