REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL CASE NO.195 OF 2014

F M O.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the judgement and conviction of **Hon. L. N. Mugambi (Senior Principal Magistrate) in Kangundo Principal Magistrate's Court *Criminal Case number 398 of 2014*** *delivered on 3rd October, 2014)*

JUDGEMENT

1. The Appellant herein **F M O** had been charged with the offence of incest by male contrary to Section 20(1) of the Sexual Offences Act in the main charge with an alternative charge of committing an Indecent Act with a child contrary to Section 11(1) of the Sexual Offences Act No.3 of 2006. The trial court conducted a full trial and subsequently convicted and sentenced the Appellant with the offence of unnatural offence contrary to Section 162 (a) of the Penal Code and ordered him to serve 21 years imprisonment.

2. Aggrieved by the above conviction and sentence, the Appellant lodged the following grounds of appeal:-

i. That the learned Trial Magistrate erred in law and in fact in convicting the Appellant even upon finding the charge sheet was defective.

ii. That the learned Trial Magistrate erred in law by proceeding to convict and sentence the Appellant when his rights to a fair trial had been violated.

iii. That the learned trial Magistrate erred in law and in fact by convicting and sentencing the Appellant for the charge of committing an unnatural offence contrary to Section 162 (a) of the Penal Code without any evidence of sexual assault as put by PW.3.

iv. That the learned Trial Magistrate erred in law and in fact by failing to find that the age of PW.1 was not proved beyond reasonable doubt.

v. That the learned Trial Magistrate erred in law in sentencing the Appellant and the sentence imposed was excessive in the circumstances and a miscarriage of justice was occasioned.

3. Parties agreed to canvass the appeal by way of written submissions.

Appellant's submissions

Mr. Makundi Learned Counsel for the Appellant first submitted that the trial court erred when it resorted to the use of Section 179 of the Criminal Procedure Code after establishing that the initial charge was defective but then again the new charge relied upon namely unnatural offence contrary to Section 162(a) of the Penal Code was not a minor offence to that of incest contrary to Section 20(1) of the Sexual offences Act. Reliance was placed in the case of **Kalu =Vs= Republic [2010] 1KLR** where the Court of Appeal held that Section 179 of Criminal Procedure Code is only resorted to where a minor and cognate offence is proved after the major offence has not been established by the same evidence.

It was also submitted that the rights of the Appellant to a fair trial under Article 50(2) (b) of the Constitution had been violated in that he was not informed of the charge with sufficient detail to answer it. Reliance was placed in the case of **Sigilani =Vs= Republic [2004]2KLR** where it was held that an accused should be charged with an offence known in law and which should disclose the issues clearly so as to enable the accused plead and prepare his defence. It was also submitted that the Appellant was prejudiced when he was convicted of an offence which he had not been earlier charged with. It was also submitted that the offence of unnatural offence contrary to Section 162 (a) of

the Penal Code was not proved since there was no evidence of sexual assault as per evidence of PW.3.

It was also submitted that the age of the complainant was not proved beyond reasonable doubt.

Finally it was submitted for the Appellant that the sentence imposed was excessive in the circumstances and a miscarriage of justice was occasioned.

Respondent's Submissions

Mr. Machogu learned Counsel for the Respondent submitted that the trial court upon establishing that the offence under Section 20(1) of the Sexual offences Act was defective by virtue of the fact that the offender and victim were both males and therefore resorted to the offence of Unnatural Act contrary to Section 162(a) of the Penal Code as the evidence proved the same. Learned Counsel submitted that the Trial Court was entitled to reach such a finding under Section 179 of the Criminal Procedure Code. It was also submitted that the Appellant's rights to fair trial were not violated by the Trial Court when it resorted to Section 179 of the Criminal Procedure Code since the evidence adduced supported the offence under Section 162(a) of the Penal Code.

It was also submitted that medical evidence was adduced which supported the charge as per the evidence of PW.3.

Finally on the issue of age, it was submitted that the offence with which the Appellant was charged did not require proof of age.

4. This being a first appeal, this court is obligated to re-evaluate the evidence afresh and reach its own independent conclusion bearing in mind that it neither saw nor heard the witnesses testifying and to make an allowance for that (see **OKENO =VS= REPUBLIC [1972] EA 32).**

The Appellant had been charged with an offence of incest contrary to Section 20(1) of the Sexual offences Act. The particulars being that on the 13th December, 2013 in Mwala District within Machakos County touched the anus of ***NMM*** with his penis who was to his knowledge his son. The Appellant also faced an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act with the particulars being that on the same day and place he intentionally touched the anus of ***NMM*** a child aged 8 years with his penis against his will in contravention of the Sexual offences Act No.3 of 2006.

The Complainant (***NMM***) testified and stated that he is a pupil in class one at [Particulars Withheld] Primary school. He stated that the Appellant who is his father called him to his house and ordered him to remove his shorts and lie on his belly and he started penetrating or pricking on his buttocks. He later informed a neighbour who alerted his mother.

LNM (PW.2) was the mother of the complainant. She testified that on the material date she was away attending a church function when her neighbour alerted her that her son had been sexually assaulted by her husband. She rushed home and interrogated the minor who informed her that the Appellant had penetrated him from behind. She reported the matter to the police who issued her with a P.3 form and then took the minor to hospital where it was established that the minor's anus had been ruptured.

Dominic Mbindyo (PW.3) a Clinical Officer at Kangundo District Hospital and who testified that upon examining the victim noted lacerations in the anal area with bleeding and faeces oozing out.

Phidelola Mukiba Nduva (PW.4) stated that the minor confided in her on what had happened to him and she immediately alerted his mother. She further added that on checking the minor, she noted lose faeces splattered on the thighs.

Grace Musila (PW.5) was a private nurse at Jamii Health Clinic who examined the minor and confirmed that there was evidence of penetration as there were lacerations and free flow of faeces as well as some bloodstains.

PC. Elijah Onyancha (PW.6) booked the report and issued a P.3 form to the complainant's mother. He later arrested the Appellant after he resurfaced from hiding.

The Appellant was put on his defence. He tendered a sworn testimony. He denied committing the offence and averred that he had been framed by his wife in collaboration with a neighbour after he declined their request to assist them purchase "*djinis*" or demons. He further stated that his wife organized for his arrest so that she could bring in the "*djinis"*.

The Determination

5. I have considered the arguments made by the Appellant and the Prosecution, as well as the evidence before the trial court. I find that there are two issues for determination in this appeal. These are whether the Appellant was convicted for the offences of unnatural offence on the basis of a defective charge, and if so whether the defect was fatal. The second issue is whether the conviction was on the basis of sufficient and satisfactory evidence.

6. On the first issue, the Prosecution counsel did concede that the charge sheet was defective and the trial Court also noted the defect in the charges brought against the Appellant. The issue of when a charge is defective is to be examined in light of the requirements of the law as regards the framing of charges as stated in section 134 of the Criminal Procedure Code which provides as follows:

> **"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable**

information as to the nature of the offence charged."

7. In addition it was held in **Sigilani vs Republic, (2004) 2 KLR, 480** that:

> **"The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence."**

8. However, I note that the defect in the charge sheet relates to the gender of the victim, thus rendering the inapplicability of section 20(1) of the Sexual Offences Act and or inapplicability of the description of the victim for purposes of section 20(1) of the Sexual Offences Act. The Appellant was charged pursuant to application of 179 of the Criminal Procedure Code with the offence of an unnatural offence contrary section 162(a) of the penal code on the same set of facts. The appellant argued that this raises the risk of violating the right to a fair trial that is enshrined in Article 50 (2) (b) of the Constitution.

9. This application of Section 179 is what the appellant has challenged, because the same according to him states that a person ought to have been charged with a minor and cognate offence. In this regard I would have to satisfy myself that the evidence on record could satisfy the offence for which he was convicted and the authority to take such action to convict him is grounded in the law. In doing so, the said finding shall be cured under section 179 of the Criminal Procedure Code, if it is shown that no prejudice has been occasioned by the said finding, sentence or order.

10. In order to determine the effect of the recourse to section 179, I will need to first address the second issue as to whether the prosecution proved that the Appellant committed the offence of an indecent act on a minor beyond reasonable doubt.

11. The appellant was charged in the alternative with the offence of indecent act with a child. Indecent act is defined in the Sexual Offences Act as follows:

> "Indecent act" **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 pornographic material to any person against his or her will."**

However the Appellant was convicted of an unnatural offence contrary to section 162(a) of the penal Code.

12. Section **162 (a)** and **(b)** provide as follows:

> **"162. Any person who-**
>
> **a. has carnal knowledge of any person against the order of nature; or**
>
> **b. has carnal knowledge of an animal; or**
>
> **c. permits a male person to have carnal knowledge of him or her against the order of nature,**
>
> **d. is guilty of a felony and is liable to imprisonment for fourteen years.**
>
> **…provided that, in the case of an offence under paragraph (a), the offender shall be liable to imprisonment for twenty-one years if-**
>
> **i. the offence was committed without the consent of the person who was carnally known; or**
>
> **j. the offence was committed with that person's consent but the consent was obtained by force or by means of threats or intimidation of some kind, or by fear of bodily harm, or by means of false representations as to the nature of the act."**

13. First, it is to be noted that under the Sexual Offences Act, there is no offence known as **"Sodomy".**

In my understanding, Section 5 of the Act, which defines the offence known as **"Sexual Assault"**, is broad enough to incorporate such offences as Sodomy, rape and defilement. That section reads as follows:-

> **"5(1) Any person who unlawfully -**
>
> **(a) Penetrates the genital organs of another person with**

(i) Any part of the body of another or that person; or

(ii) an object manipulated by another or that person except where such penetration is carried out for proper and professional hygienic or medical purposes;

(b) Manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ into or by any part of the other person's body, is guilty of an offence termed as sexual assault."

14. Section 2 of the Sexual Offences Act defines the word "Penetration" as follows:-

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

15. The offence of incest on the other hand as provided under section 20(1) of the Sexual Offences Act is as follows:

"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."

16. In order to prove incest under section 20(1) of the Sexual Offences Act, it is not necessary to prove penetration. The prosecution may prove either penetration or an indecent act to obtain a conviction.

17. The relevant evidence adduced in the trial Court as to an indecent act with a child and incest was that of the complainant, (NMM). He testified that the Appellant, who was his father, pricked his buttocks with a stick. Further, that he ordered him to remove his shorts and lie on his belly. The medical evidence by PW3 corroborated the fact of penetration as there were lacerations and anal bleeding and faeces oozing from the complainant. The testimony by PW5 was consistent and corroborated this fact, and there is no reason for this Court to doubt the complainant.

18. PW2 was also clear in her testimony that the Appellant was her husband, and known to her as she was living with him. To the extent that the offence is deemed to have been committed when a person had **"carnal knowledge"** of another person against the order of nature, I find that it required penetration. I find that there was, at least, partial penetration of the complainant's anal orifice. From the record, the said penetration was by way of the appellant's action using a stick. Therefore, from the evidence of the trial court, there was proof of carnal knowledge and it was against the consent of the minor, therefore sexual assault as defined in Section 5 of the Sexual Offences Act was committed against the minor. It follows that the appellant's argument in his memorandum of appeal that there is no evidence of sexual assault will not stand.

19. I will now address the issue of the age of the complainant. The trial Magistrate stated the complainant is of "tender age". I am of the opinion that although no documentary evidence was availed on the age of the child from the evidence on record, the child could not have been more than eight years of age. The basis of this opinion is that:

(a) PW1 in his testimony stated that:

"I am in class 1…I am aged 6 years old."

(b) PW5 who examined the boy and prepared the report indicates his age as 7 years. The report has not been objected to by the Appellant.

(c) PW3 who also examined the boy and filled in the P3 form that he tendered indicated his age as 7 years; the said form has not been objected to.

From the above, it is quite clear that the complainant was a minor and a child as the age was below 18 years.

20. I do not find any error in the way the Magistrate proceeded with regard to the age of the complainant. In the case of **Basil Okaroni v Republic [2016] eKLR** the Court of Appeal quoted the decision in the Ugandan case of **Francis Omuroni v Uganda, Court of Appeal Criminal Appeal No. 2 of 2000** where it was held that:

"… Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense…."

21. The cumulative effect of the reports and the testimony of the complainant is that the age of the complainant has been established as 7 years. The trial Magistrate using his experience as a Senior Principal Magistrate, has recorded all evidence that was available during trial. I therefore find that there was evidence that the complainant was a child within the meaning of the Children's Act which states that "child"

means any human being under the age of eighteen years.

22. Lastly, I am satisfied that committing an indecent act with a child is the alternative with which the appellant was charged. The elements of the offence of committing an indecent act with a child are ingrained in the elements of the offence of incest which this court finds proved, save that the charge sheet was defective thus the court was unable to convict under provisions for the offence of incest. The trial magistrate ought not to have resorted to Section 179 of the Criminal Procedure Code since the evidence clearly established an offence of indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act which had been preferred against the Appellant as an alternative charge.

23. The penalty for indecent act with a child under section 11(1) of the Sexual Offence Act is an imprisonment term for not less than 10 years as follows:

> "11. (1) Any person who commits an **indecent act with a child** is guilty of the offence of committing an indecent act with a child and is liable upon conviction to **imprisonment for a term of not less than ten years."**

24. Accordingly, the appellant who had been charged with an offence of indecent act with a child and had pleaded to the same was not prejudiced because as observed above, the elements of the offence are ingrained in the offence of incest. In that regard, the argument that the appellant's right to fair trial under Article 50(2) (b) was violated is not correct and I am guided by the holding in **Republic V. Cheya & Another [1973] EA 500 …. that the accused person was not prejudiced, and that by being charged with the major offence, he had sufficient notice of all the elements that constitute the minor offence.**

The Appellant indeed participated in the proceedings upto the end and he was aware of the charges he faced.

25. The evidence adduced in the trial Court pointed to the offence of committing an unnatural act, however because it is a main charge and not a minor/ cognate one then the conviction would not be allowed to stand. Even though the charge sheet is found to be defective on account of not being applicable to the male gender, the alternative offence of indecent act with a child is however complete as an alternative to the offence of incest. The prosecution's case would have been affected by want of proof of age, however as I have observed above, the element of age was established, and the appellant will therefore be convicted and sentenced accordingly for the offence of indecent act with a child contrary to section 11 (1) of the Sexual Offences Act.

26. For the reasons set out above the appellant's appeal party succeeds and I hereby proceed to make the following orders:

> **1. The appellant's conviction for the main charge of Unnatural Offence contrary to Section 162 (a) of the Penal Code is quashed and the sentence of imprisonment for twenty one years is set aside.**
>
> **2. The Court enters a conviction against the appellant for the alternative charge of indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act, and sentence him to serve the minimum sentence therefor, that is imprisonment for ten (10) years from the 3rd October, 2014 i.e. the date of the sentence in the trial court.**

It is so ordered.

Signed, Dated and delivered at Machakos this 26th day of November, 2018.

D.K. KEMEI

JUDGE