REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 235 OF 2013

S K C.....APELLANT

VERSUS

REPUBLIC..... RESPONDENT

(An Appeal from the Judgment of the Principal Magistrate Honourable S. O TEMU in Kabarnet Criminal Case No. 758 of 2013, dated 19th November, 2013)

JUDGMENT

1. The appellant *SKC* was tried and convicted of the offence Incest contrary to *Section 20(1)* of the *Sexual Offences Act No. 3 of 2006.*

2. The particulars supporting the offence allege that on 15th day of September, 2013 in Baringo North District, Baringo County, being a male person, he intentionally and unlawfully caused his penis to penetrate the vagina of J.C (Name withheld) a child aged 7 years who to his knowledge was his daughter.

2. Upon his conviction, he was sentenced to life imprisonment. He was aggrieved by his conviction and sentence hence this appeal.

3. In his petition of appeal filed on 2nd December, 2013, the appellant relied on seven grounds of appeal which can be condensed into two main grounds; namely that;

> **(i)** The learned trial magistrate erred in law and facts by convicting and sentencing him on the basis of uncorroborated evidence which was not sufficient to prove the charges facing him beyond any reasonable doubt.
>
> **(ii)** The learned trial magistrate erred in law and facts by disregarding his defence without giving cogent reasons.

5. At the hearing of the appeal, the appellant appeared in person and chose to entirely rely on his home made written submissions which were filed in court on 23rd July, 2015.

6. In his submissions, the appellant re-iterated his grounds of appeal by submitting that the learned trial magistrate failed to appreciate that the evidence adduced by the minor (PW1) was not corroborated by any other evidence; that he was not given an opportunity to cross examine PW1; that the trial court erred in failing to comply with the provisions of *Section 211* of the *Criminal Procedure Code (CPC);* that the evidence of PW4 did not prove penetration; that the evidence of PW1, PW2 and PW3 was contradictory and that for all the above reasons, the charges were not proved beyond any reasonable doubt. He urged

the court to allow the appeal.

7. The state opposed the appeal. Learned prosecuting counsel *Mr. Mulati* submitted that the prosecution proved all the elements of the offence beyond any reasonable doubt. He invited the court to dismiss the appeal for lack of merit.

8. This is a first appeal to the High Court. I am alive to the duty of the first appellate court which is to revisit; re-evaluate and consider afresh all the evidence presented before the lower court and reach its own independent determination. In doing so, I should be careful to remember that unlike the trial court, I did not have the advantage of seeing or hearing the witnesses and give allowance to that disadvantage.

> See: ***Okeno V Republic 1972 EA 32***; ***Kiilu & Another V Republic (2005)1 KLR 174; Patrick & Another V Republic (2005) KLR 162***

9. The case for the prosecution was that the complainant (PW1) was living with a neighbour who testified as PW2 but on 15th September, 2013, his father the appellant, collected her from PW2's home. He was living alone as he had separated with PW1's mother.

10. PW1 after a brief voire dire examination testified in camera in the absence of the appellant and claimed that when the appellant took her home on 15th September, 2013, he defiled her. She described the act of defilement as "Tabia Mbaya". She testified that her father had defiled her twice before. On the following day, she went to PW2's home and reported the matter to her in the presence of PW3. PW2 in turn reported the matter to the police and the appellant was subsequently arrested by PW5.

11. PW2 also took PW1 to Kabarnet District Hospital where she was examined by PW4. According to the evidence of PW4, upon his examination of PW1, he noted that her vagina and clitoris were red and the hymen was missing.

12. The appellant in his defence gave a very brief unsworn statement in which he just denied the offence as alleged.

13. I have carefully considered the evidence on record as summarized above, the grounds of appeal and the submissions made by the appellant and the state.

14. I find that the proceedings before the trial court were fraught with several serious procedural flaws which taken cumulatively may have occasioned prejudice to the appellant and denied him an opportunity of having a fair trial.

I say so because to start with, the appellant was not given an opportunity to hear the testimony of PW1 and to cross examine her. Granted, the complainant was a minor aged seven years and though she gave an unsworn statement, she was nevertheless a prosecution witness and even if she testified in camera, the appellant should not have been excluded from the proceedings as the record does not indicate that the circumstances contemplated by *Article 50(f)* of the *Constitution of Kenya 2010* existed in this case. She was the key prosecution witnesses and the appellant was as a matter of law entitled to hear her testimony and test it on cross examination.

15. The learned trial magistrate having observed her demeanor as reflected on the court record did not declare her a vulnerable witness as he was required to do under *Section 31* of the *Sexual Offences Act.*

And even if she had been declared a vulnerable witness, she was still not exempted from being cross examined by the appellant. This is clear from a reading of *Section 31 1(13)* which states as follows;

> ***" An accused person in criminal proceedings involving the alleged commission of a sexual offence who has no legal representation shall put any questions to a vulnerable witness by stating the questions to the court and the court shall repeat the questions accurately to the witness".***

Similarly, Section 31 (7) (a) provides that;

"If a court directs that a vulnerable witness be allowed to give evidence through an intermediary, such intermediary may-

(a) Convey the general purport of any question to the relevant witness."

16. The appellant was not represented in this case and if the learned trial magistrate thought that PW1 was a vulnerable witness but omitted to record the same, he should have allowed the appellant to participate in the proceedings and cross examine the witness through the court or through an intermediary.

17. Under *Article 50* of the *Constitution of Kenya 2010*, every accused person has the right to a fair trial which includes the right to adduce and challenge evidence – See *Article 50(k)*. And the only way in which evidence adduced by any prosecution witness can be challenged is through cross examination. In this case, the appellant was not only denied the right to cross examine PW1 but he was also denied the opportunity to hear her testimony against him. This in my view violated the appellant's right to a fair trial.

18. Besides the constitutional provisions, the Criminal Procedure Code (*C P C*) at *Section 208 (2)* and *(3)* gives accused persons the right to cross examine witnesses called by the prosecution.

Section 208 (2) states thus;

"The accused person and his advocate may put questions to each witness produced against him".

And Section 208 (3) continues to provide that ***"If the accused person does not employ an advocate, the court shall, at the close of the examination of each witnesses for the prosecution, ask the accused person whether he wishes to put any questions to that witness and shall record his answer".***

19. As stated earlier, the record shows that the appellant was unrepresented in the lower court and the learned trial magistrate erred in law when he failed to comply with the requirement of *Section 308 (2).* He was under a duty to inform the appellant of his right to cross examine every prosecution witness, including PW1 which he failed to do in this case.

20. The other irregularity I have noted in the proceedings is that as submitted by the appellant, the learned trial magistrate does not appear to have compiled with the provisions of *211* of the *C P C* when he put the appellant on his defence. The record shows that the appellant chose to give an unsworn statement but it does not show that the trial court explained the all the options provided by the law vide *Section 211* in which an accused person may present his defence. It is possible that the learned trial magistrate did explain the provisions of *Section 211* of the *CPC* and this could be why the appellant chose to give an unsworn statement but there is no way of verifying that this was done when it is not reflected in the court record.

21. For all the foregoing reasons, I am satisfied that the errors that are evident on the record of proceedings in the lower court amount to errors which are not curable under *Section 382* of the *CPC* as they go to the very root of the requirements of a fair trial in criminal proceedings. In my view, they are sufficient to vitiate the conviction challenged in this appeal.

22. In the result, I find merit in the appeal and it is hereby allowed. Having allowed the appeal, I have agonized over whether to acquit the appellant or to order a retrial. The principles that guide the court in deciding whether or not to order a retrial have been enumerated in a string of authorities. See for instance, ***Muiruri V Republic (2003) KLR 522; Mwangi V Republic (1983) KLR 522; Fatekali Manji V Republic (1966) EA 343.***

23. The common thread that runs across all the authorities is that a retrial will be ordered when the

interests of justice requires it taking into account all the circumstances of the case including the nature of the offence and the evidence on record.

In this case, I have considered that the conviction has been vitiated by errors made by the trial court. I have also considered the nature and seriousness of the offence which faced the appellant and the evidence on record.

It is not lost on me that the appellant was convicted and sentenced on 19th November, 2013 about three years ago or thereabouts and in my view, a retrial will not occasion him much prejudice.

24. In view of the foregoing, I find that a retrial will best serve the wider interests of justice in this case. I therefore remit this case to the lower court for retrial before any competent court other than one presided over by *Hon. S.O Temu* (Principal Magistrate).

The appellant shall be released into police custody and shall be produced before the Principal Magistrate's court at Kabarnet on 8th March, 2017 for plea and further orders.

It is so ordered.

C.W GITHUA

JUDGE

DATED, SIGNED and **DELIVERED** at **ELDORET** this 28th day of February 2017

In the presence of:

The appellant

Ms. Kigegi for the state

Mr. Lobolia Court Clerk