REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 8 OF 2016

(Appeal originating from the conviction and sentence by Hon. C. MBURU RM in Nyeri S.O CASE NO.17 of 2015)

E G M.....APPELLANT

VERSUS

REPUBLIC…….....RESPONDENT

J U D G M E N T

The Appellant was charged with incest contrary to section 20(1) of the Sexual Offence Act No. 3 of 2006. The particulars were that on 11th April 2015 at Maregima sub-location within Nyeri county, the appellant being a male person intentionally and unlawfully caused his penis to penetrate the vagina of C.W a female person aged 5 years 9 months who to his knowledge was his cousin. The alternative charge was the offence of committing indecent act with child contrary to section 11(1) of the Sexual offences Act No.3 of 2006. Particulars are that on 11th April 2015 at Maregima sub-location within Nyeri County the appellant unlawfully and *intentionally* touched the vagina of C.W a child age 5 years 9 months with his penis.The appellant who was a minor aged 13 years was convicted and committed to a rehabilitation institution for a period of 3 years.

The appellant filed this appeal through his lawyer Mr.Gori.The appeal was argued by Mr.ombongi who was holding brief for Mr.Gori.the submitted that the prosecution to prove that there was defilement. He argued that mesne rea-guilt intent was not proved and that the trial magistrate shifted the burden to the appellant. He submitted the trial magistrate failed to appreciate that the complainant who was a minor was not cogent. He submitted that the record show that the trial magistrate expressed doubt as to whether he could rely on evidence of the complainant and found the need for an intermediary as the minor could not be able to give evidence in view of her age. He said that the trial magistrate relied on uncorroborated evidence of the minor which occasioned miscarriage of justice.

The second ground was that the appellant was not accorded legal representation as required by section 77(1) of the children Act. He submitted that the charge of sexual offence has intricate issues and the appellant was denied justice by not being given an Advocate by the state to represent him.

The third ground is that the trial magistrate failed to consider the appellants defence. He submitted that the appellant denied the offence and said he was only in the vicinity with a boy called mwangi and that there were differences between his family and complainant's family. He submitted that the charges were a fabrication arising from the long standing difference between the two families. He said it did not come out clearly why the prosecution failed to call the said mwangi as a witness. He submitted that on record pw1 and pw2 the complainant (pw1) and the said m were asked to remove clothes. He added that the said

m was a crucial witness who should have been availed.

Counsel pointed out discrepancy in the p3 form on the date of treatment. He said the offence occurred on 14/4/2014.The trial magistrate said the minor was examined on 13/6/2014.He submitted that the trial magistrate pointed out discrepancies but went ahead to convict. He submitted that the defence testimony was cogent and truthful and the issue of defilement arose when the complainant was being disciplined by her mother.

Lastly he submitted that all the witnesses were trying to suggest an element of incest but the trial magistrate made a finding of defilement. He submitted that in as much as the circumstances are related, they are not similar. He argued that in the offence of incest the issue would have been relationship and the requirements of defilement and incest greatly differ. He said section 214 of criminal procedure code provide for amendment of the charge by prosecution before close of prosecution case but not before defence close and not in the course of judgment. He submitted that where there is amendment, plea is supposed to be taken afresh. He pointed out that the trial magistrate found that there was no miscarriage of justice as appellant and complainant were cousins and went ahead to convict of defilement, he said he is aware of jurisprudence providing for amendment if the new charge attract lesser sentence. He submitted that the trial magistrate should not have convicted of a charge which was not subjected to scrutiny.

Counsel for the appellant further submitted that the court never showed vulnerability of the complainant before appointing a mediator. He said that the concept of section 3 of the children Act is intended for the court to get as much as possible from the witness. He said voir dire examination as explained in ***criminal appeal no 273 of 2010 Duncan Mwai Gichui vs rep*** is aimed at finding if the minor understand the nature of oath. He submitted that the trial magistrate found that the child was too young and proceeded to appoint the children officer as intermediary. He said the record do not indicate if the information came from the child or children officer. He argued that the information cannot be authenticated without record showing whether it was from the minor. He submitted that the complainant was overly overprotected by misconception of the concept. He said that the duty of the children's officer was to expound to the court what the child had said.

Lastly counsel for the appellant submitted that no samples were taken from the appellant for scrutiny.

Ms. Mwaniki for the state submitted that the complainant was 5 years while the appellant was 9 years old and that voir dire examination was conducted and minor found to have difficulty in expressing herself. Following that finding the trial magistrate appointed the children's officer as intermediary for the complainant. She submitting that section 31 of the sexual offences Act provide that a witness can be declared vulnerable if the witness is a victim of sexual violence or when she is a child; and in this case the complainant was both victim and a child. She submitted that the complainant was rightfully declared vulnerable. She added that once an intermediary ifs appointed the witness gives evidence through untermediary.she submitted that the evidence on record was from the minor put through an intermediary.

Ms. Mwaniki submitted that the appellant placed himself at the scene of crime by admitting that he was at home but denied defiling the minor. She submitted that the complainant told the truth and that she was taken to hospital on 12/4/20915 one day after the incident. She submitted that the doctor confirmed penetration by report indicating that the heymen was broken. She urged that court to confirm the date from original court record.

On identification she submitted that pw2 said that the appellant was her nephew and the appellant also admitted that she knew the complainant.

She submitted that birth certificate confirmed age and the sentence imposed was legal.

On legal representation Ms Mwaniki submitted that the right is not automatic but the mandate is discretional.

On the appellant being convicted of offence he was not charged with, she said that is cured by section 186 of the criminal procedure code which apply to sexual offences Act. She referred to criminal Appeal no.4 of 2016 where the trial court relied on section 186 of criminal procedure code to convict of defilement in a case where the appellant was charged with incest. She submitted that elements in the two offences are similar and the sentence imposed is legal. She urged court to uphold both conviction and sentence.

In response counsel for appellant submitted that on failure to amend the charge, the court may have made proper decision but the appellant was not given opportunity to subject the charge of defilement to scrutiny. On legal representation he submitted that as much as it is discretional it is the duty of the court to inform the accused.

This being the first appellate court, I have a duty to reevaluate evidence adduced before the trail court and come up with an independent decision. I have in mind the fact that as the appellate court I have not had the opportunity of taking evidence first hand and making observation on the demeanor of the witnesses. Principles that guide first appellate court were set out in the case ***OKENO VS REPUBLIC [1972] EA 32*** where it was stated as follows:-

> ***"The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala v. Republic [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 findings and conclusions; 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 v. Sunday Post, [1958] EA 424.)"***

Record show that voir dire examination was done on the complainant. The trial magistrate found that she had difficulties in expressing herself. The children officer who was appointed an intermediary said "I have spoken to the subject and she has given me the following". It is therefore evident that what the children officer was stating came from the minor. Even the cross examination clearly show it was the minor responding. At the end of the evidence it is recoded under minor/subject "I have heard what the children officer has said". There is no doubt therefore that the evidence recorded came from the minor. The court examined her and found her with difficulty of expressing herself. I do not see any fault in declaring the child vulnerable and the format of taking evidence thereafter.

As concern convicting appellant of a different charge, the same is not disputed by the state. The prosecution should have amended the charge. The crucial element for prove both in offence of defilement and incest is penetration of genital organ of one person to genital organ of the other. For incest beside penetration there is need to prove rationship.It cannot therefore be said that the appellant was not given opportunity to scrutinize evidence on penetration which is the main ingredient in the offence of defilement. Section 186 of the criminal procedure code gives the court power to convict for an offence proved under sexual offences Act if evidence does not prove the offence charged.In ***malindi criminal appeal no.4 of 2016(2017) eKLR K.KK.K vs Republic*** the court held that the trial court was right in substituting to the charge of defilement as the relationship between appellant and complainant was not proved.

On the issue of legal representation, no explanation has been advanced as to why the appellant was not accorded legal representation. Article 50(h) of the constitution of kenya2010 provide that an accused person has a right to have an Advocate assigned to him/her by the state, if substantial injustice would otherwise result and to be informed of this right promptly. The appellant was a minor age 13 years. The offence trial count found to have been proved by the prosecution carries sentence of life imprisonment .The appellant being a child aged 13 years, it's unlikely that he had the capacity to properly conduct his defence nor understand the seriousness of the charges he was facing. Record show that the appellant did not ask any question pw2 and pw4 on cross examination. For the other two witness pow1 and pw3 answers given show only three questions were put to the witnesses. It was necessary for the court to direct that he be accorded legal representation at the cost of the state if his parents/guardian were unable to do so.

I now wish to consider whether the charge was proved beyond reasonable doubt.Pw2 testified that her daughter informed her that she was with one mwangi in her home and that they were both told to remove clothes by the appellant.pw1 confirmed that she was with m and they were both told to remove clothes; Even though the doctor pw3 confirmed that the complainant's heymen was broken, there was need to avail the said mwangi who was said to have been with the complainant at the time of alleged defilement. The prosecution concealed crucial evidence by failing to avail the said crucial witness. Appellant said her family were not in good terms with complainant's family and in the presence of bad blood between the two families, it was crucial to avail an independent who complainant confirmed was present when the incident is alleged to have occurred.

From the forgoing I find that it was unsafe to find conviction on the evidence on record. I proceed to quash the conviction and set aside the sentence herein. I hereby release the appellant unless lawfully held.

Dated and signed at Nairobi this……..day of……2017.

……

RACHEL NGETICH

HIGH COURT JUDGE

Delivered at Nyeri this 26TH day of JULY 2017.

……..

JUDGE