REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

Criminal Appeal No.8 Of 2017

(Appeal Originating from Nyahururu CM's Court Cr.No.2702 of 2010 by: Hon. A.B. MONG'ARE – S.R.M.)

C K K.....APPELLANT

- V E R S U S –

REPUBLIC.....RESPONDENT

J U D G M E N T

C K K, the appellant herein was convicted by Hon. Mong'are for the offence of ***Incest Contrary to Section 20(1) of the Sexual Offences Act No.3 of 2006***.

The particulars of the charge were that on diverse dates between 1st September, and 31st October, 2010 at [particulars withheld], in Subukia District within Rift Valley Province, unlawfully and intentionally caused his genital organ, penis, to penetrate the vagina of A.W.M. a child aged 14 years old who to his knowledge is his granddaughter.

In the alternative, he was charged with the offence of Indecent Act with a child contrary to Section 11(1) of the SOA in that on diverse dates between 1st September and 31st October, 2010 at [particulars withheld], caused his genital organ, penis to come into contact with the vagina of **A W M**. a girl aged 14 years.

The appellant was sentenced to serve life imprisonment on the main charge. There was no finding made on the alternative charge.

Being aggrieved by both conviction and sentence, the appellant filed this appeal relying on the following grounds:

> ***(1) That the trial was conducted in violation of the appellant's rights to fair trial under Article 50(2)(b)(c) and (j);***
>
> ***(2) That the conviction went against the weight of the evidence;***
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> ***(3) That the trial court failed to consider the contradictions in the prosecution evidence;***
>
> ***(4) The trial court failed to consider the appellant's defence;***

(5) That the court erred by failing to call essential witnesses;

(6) That the court erred by declining to call the appellant's defence witnesses.

The appellant filed written submissions in support of the grounds and prays that the court do allow the appeal, quash the conviction and set aside the sentence.

As a first appellate court it is my duty to consider, re-evaluate all the evidence on record and arrive at my own independent decision as to whether or not the conviction and sentence are well founded or not while bearing in mind that this court did not have an opportunity to see or hear the witnesses testifying. *See* ***Okeno v Republic (1972) EA 32***.

Bearing the above in mind, I will briefly review the evidence that was tendered before the trial court.

PW1 A W M. a girl aged about 14 years testified that in April, 2010, she moved to live with her grandfather in [particulars withheld]. That her grandmother left the home in July, 2010 and she was left to live with the grandfather and her two young aunts; they lived in a single room; whereas the children slept on the floor, the grandfather slept on the bed; that sometime in September, 2010, the appellant came home late in the night, slept next to her, removed her pant and shorts, removed his trouser and inserted his genital organ into hers; that he defiled her for long and warned her not to tell anybody; that he continued defiling her for long till 31/10/2010 when he defiled her calling her his '*gachungwa*' meaning his sweethearts; he decided to tell her teacher.

PW2 A W M, a teacher at [particulars withheld], the school which PW1 attended, was at her home on 1/11/2010 about 4.00 p.m. when a child by name M W and PW1 went to her home. M W informed her that the complainant had a problem and PW2 was informed that the complainant had been defiled by the grandfather severally. PW2 she in turn informed the head teacher **Mr. M PW4**. PW4 advised PW2 to stay with the girl till next day. Next day, PW1 reported the same complaint to PW4 and PW4 informed the Children's Officer, **PW3 G W W**, on 2/11/2010. PW3 found the complainant at the Chief's Office, interviewed her and reported to Subukia Police Station and the complainant was then taken to hospital for investigation. **PW5 PC Jane Jelimo** of Subukia Police Station received a complaint from the Children's Officer in a case of alleged defilement. She interviewed the complainant and also booked the report in the O.B. recorded statements, took the appellant and complainant to the hospital for further investigations. **PW6 Dr. Ondera** of Nakuru Provincial General Hospital examined the complainant who was 14 years of age, on allegations of defilement. On examination PW6 found the complainant to be depressed, her hymen was missing, she had inflammation of the labia minora and a yellow discharge. She was HIV negative though accused was found to be HIV positive.

The appellant made an unsworn statement in his defence. He stated that the complainant, one A N and E came to his home on 23/7/2010 and on enquiring from the PW1's mother PW1 had to change schools, he was told that she had disappeared for two months; that he got PW1's transfer forms and she was admitted to [particulars withheld] School in September, 2010; that the complainant left for Nyahururu till 4/9/2010 whereas the grandmother had returned on 3/9/2010; that his wife had gone to look after her family cattle in Kiambu when a person by name W visited them and he reported to PW1's mother about the visit; that the complainant's mother allowed him to discipline her and he did; that PW1 had once stolen his phone and it was returned from school; that she went missing on 31/10/2010, he reported to the police and he learned that she had been held up in a house which he was shown by some ladies but he learnt of it and escaped. He was later arrested and it was alleged he had assaulted the complainant.

The appellant was charged with the offence of incest contrary to section 20(1) of the Sexual Offences Act. PW1 identified herself as the granddaughter of the appellant. The appellant does not deny that fact. It is also not in dispute that as of September, October, 2010, PW1 was living with the appellant; attending Victory Academy from his house.

At the time of the alleged offence, PW1 was in class 6 and she told the court that she was born in 1996 hence 14 years old. The complainant's mother did not testify nor was the Birth Certificate or any other

document produced in support of PW1's age. However, PW6, the Doctor who examined her assessed her age to be 14 years old.

PW1 was the only witness to the alleged offence. She vividly narrated how the appellant first defiled her in the night sometime in September after her grandmother went away and that after that he continued to sexually assault her till 31/10/2010 when he even called her, his '*gachungwa*' sweetheart.

The appellant complained that the prosecution failed to call key witnesses, i.e. the two aunts to PW1 who had been sleeping with her. PW1 did not tell the court how old the two girls were but merely stated that they were young. PW3, who visited the home said they were children of tender age. The prosecution did not disclose how old these children were. Even children of tender age can testify after the court conducts a *voire dire* examination. Generally, it is the duty of the prosecution to call all witnesses who are relevant to the case even if the evidence would tend to be adverse to their case. What is required is that the truth of the case is laid before the court so that the court can arrive at a fair decision. Under Section 143 of the Evidence Act, no particular number of witnesses is required to prove any fact unless a particular provision of law provides so. The prosecution has the discretion to call whoever they wish to call as a witness and it is not for the defence to determine that issue for the prosecution. However, the prosecution should not fail to call relevant witnesses for ulterior motives, for example: if they know that the evidence would be adverse to their case.

In ***Keter v Republic (2007) IEA 135***, the court held *inter alia* that "***the prosecution is not obliged to call a superfluity of witnesses but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt***".

In ***Bukenya and others v Republic (1972) EA 549 (pg.551)*** the Court of Appeal of East Africa said:

> ***"While the Director is nor required to call a superfluity of witnesses, if he calls evidence which is barely adequate and it appears that there were other witnesses available who were not called, the court is entitled under general law of evidence to draw an inference that the evidence of these witnesses, if called, would have tended to be adverse to the prosecution."***

In the instant case, although the prosecution did not establish the ages of the two young girls who were sleeping with PW1, PW3 said the girls were of tender age and besides this sexual assault was committed over a long period and there was no mention that they were witnesses. In my view, there is no basis for making an adverse inference on the uncalled minors. At least the defence has not demonstrated any ulterior motive. PW1's testimony, did not create the impression in the mind of the court that she was not a truthful or straight forward witness as to make her evidence unsafe to rely upon to found a conviction (*see* ***Ndungu Kimanyi v Republic (1979) KLR 282***).

The appellant also complained that the court erred by declining to allow him to call his witnesses namely PW1's mother and father. In the last sentence of his defence, the appellant said that he wanted to call PW1's mother and father to prove that PW1 was not living with him in August, 2010. Although PW1 denied having been away from Subukia in August, 2010, the sexual assaults on PW1 according to her started in September, 2010 but not August, 2010. So it was unnecessary to call PW1's parents to say where PW1 was in August of 2010. In my view, the court rightfully declined to have the two witnesses called.

The appellant complained that his right to a fair hearing was infringed in that he was not given witnesses' statements when he requested for them.

Articles 50 provides for fair hearing, Article 50(2) provides as follows:

> ***(2) Every accused person has a right to a fair trial which includes the right –***
>
> ***(j) To be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;***

In this case, the record shows that when plea was taken on 4/11/2010 no witness statements were given to the appellant. On 12/11/2010, when the case came up for mention, the appellant requested to be supplied with witness statements. When the case came up on 26/10/2010, the court again made an order that witness statements be given to the appellant at his own cost. When the case came up for hearing on 16/12/2010, the case commenced but the appellant never complained that he had not received witness statements until after PW1 had testified when he asked for adjournment on account of lack of witness statements. In reply, the prosecutor stated that there was an order for statements but the appellant had refused to pick the statements. The hearing was adjourned to 31/12/2010 for mention. On that day there was no mention of witness statements. On 3/1/2011 when the case came up for hearing, the appellant said he was ready to proceed. He never requested to recall PW1 but said he was ready to proceed. On 3/1/2011, when the appellant said he was ready to proceed and never complained that he had not received statements, the court presumed that he had received the statements.

It is only PW1 who testified before the appellant was given witness statements. It is clear that the appellant was aware of the right to the witness statements. Since the case had proceeded without them and he truly needed them to prepare his case, he should have drawn it to the attention of the court before the trial commenced or he should have asked for recalling of PW1. He can't wholly blame the prosecution when he kept quiet knowing very well that he had no witness statements as yet. The appellant cross examined PW1. In fact, during cross examination of PW3 the appellant referred the witness to her statement, meaning he had the statements. I am satisfied that his right to fair trial was not breached in any way as nor render trial a nullity.

According to PW1 she had been defiled from September till 31/10/2010 after which she ran away to inform her teacher. She was taken to hospital for examination and PW6 examined her on 2/11/2010. He found that her hymen was missing, her genitalia were inflamed, with a yellowish discharge. He concluded that she had been defiled.

The question then is whether it is the appellant who committed this heinous act. The appellant is PW1's grandfather. She lived with him. In his unsworn defence he alleged that he had earlier disciplined PW1 from being truant and that that is the reason she left Nyahururu but he never put any such questions to any of the witnesses. He then alleged that he was framed. He did not however state who framed him.

According to the appellant, his wife had not ran away from. As for PW1's mother, he said that she had even told him to discipline her. What the appellant did not tell the court is who framed him? It is PW1 who took the initiative to seek help from her school teachers and indeed they took action by reporting the matter to the Children's Officer then police. PW2 & 4 had no reason to frame him.

The appellant also alleges that PW1 had ran away from home on 31/10/2010 and had been at a man's house. However, PW1 told the court it is the last day the appellant defiled her and she went to seek help from the teacher. Indeed PW2 confirmed that PW1 was taken to her house that day. I believe that by the appellant reporting to police about PW1 going missing, he was pre-empting her making a report at the police. He knew she had taken off as soon as he defiled her. I find the appellant's story that PW1 was truant out and used to ran away from home and had loose morals to be diversionary. He never made such allegation during the prosecution case nor did he put any such questions to PW1, 2 & 4. I am satisfied that it is the appellant who defiled his own grandchild on several occasions and when she could not withstand it anymore, she sought help from her teacher.

The appellant alleged that there were material contradictions in the evidence of PW3 and 5 but having read the same, I did not find any. What I can deduce from what they told the court is that the appellant tried to convince PW1 to ran away so as not to incriminate him.

The Doctor found that the appellant was HIV positive whereas PW1 is not. However, PW6 explained that it was not a must that she would be infected even after engaging in sexual activity with the appellant.

Having considered all the above, I am satisfied that the trial magistrate arrived at the correct finding that the appellant defiled PW1 – his own grandchild. He took advantage of her when his wife was away. The

appeal lacks merit. I uphold the conviction. PW1 was a child of 14 years and the law provides a sentence of life imprisonment if one is found guilty. The sentence is legal and lawful and I cannot interfere with it. I dismiss the appeal.

Dated, Signed and **Delivered** at ***NYAHURURU*** this ***13th*** day of ***October,*** 2017.

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R.P.V. Wendoh

JUDGE

PRESENT:

Ms. Bosibori - Prosecution Counsel

Soi - Court Assistant

Appellant – present in person