REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 147 OF 2015

F M W.....APPELLANT.

VERSUS

REPUBLIC.....RESPONDENT.

(An appeal from the original conviction and sentence in the Chief

Magistrate's Court at Makadara Cr. Case No. 2129 of 2013

delivered by Hon. W. Macharia, RM on 14th July 2015).

JUDGMENT

Background.

FMW, herein the Appellant, was charged with the offence of incest contrary to **Section 20(1) of the Sexual Offences Act, No. 3 of 2006**. The particulars of the offence were that on diverse dates between January 2013 and May 10th 2013 within Nairobi County being a male person, caused his penis to penetrate the vagina of L. W, a female person aged $4^1/_2$ years who was to his knowledge his daughter. The Appellant was charged in the alternative with an indecent act with a child contrary to **Section 11(1) of the Sexual Offences Act, No. 3 of 2006** in that he intentionally touched the vagina of a child aged 4 ½ years with his penis.

The Appellant was convicted of the main charge and sentenced to life imprisonment. He was dissatisfied with both the conviction and sentence as a result of which he preferred the instant appeal. In his amended grounds of appeal dated 7th November, 2017, he appealed on grounds that the learned trial magistrate shifted the burden of proof upon him and failed to take the complainant's testimony even though nothing in the *voire dire* examination showed that the same could not be admitted under Section 19 of the Oaths and Statutory Declarations Act. He was also dissatisfied with the fact that the trial court admitted hearsay evidence. Finally, he faulted the order issued under Section 114 of the Children's Act as illegal.

Submissions

The Appellant relied on file written submissions dated 7th November, 2017 and further oral submissions canvassed before the court on the same date. He took issue with the fact that the *voire dire* examination of the complainant was not properly taken in accordance with **Section 19 of the Oaths and Statutory Declarations Act**. He cited the failure by the leaned trial magistrate to record the questions and answers in the examination that informed him to make a finding that the child could not testify. In furtherance to this, the court proceeded to rely on hearsay evidence of witnesses who did not testify. In this respect, he submitted that the information that was allegedly taken from the complainant was clearly through coercion. He submitted that this information was obtained by some women who allegedly rescued the complainant from her abusive father, the Appellant. The same women were cited by PW1 who declined to disclose their identity. The investigations on the other hand were not extended to the women and no statements were recorded from them. They therefore did not testify. Accordingly to the Appellant therefore, admission of evidence based on information given by either the women or the complainant was hearsay evidence which the court could not rely on to found a conviction against him.

The Appellant further took issue with propriety of the medical evidence used to link him to the offence. He submitted that on examination, the child was confirmed to be HIV Positive. The same hospital found him to be HIV Negative. He submitted that he requested the court to have the mother of the complainant called for purposes of examination so as to confirm that she too was HIV Negative and that the child had been born HIV Negative. As a result, his view was that if the child was at that time HIV Positive, she had not contracted the disease from

him. His submission was that the failure by the court to admit the additional evidence not only weakened the prosecution case, but exonerated him from blame.

The Appellant also took issue with the manner in which he was arrested which he submitted was for ulterior motives. As was in his defence, he submitted that his children landed at the police station after they disappeared from his house in unclear circumstances. He subsequently reported the disappearance to the police. He submitted that as he was pursuing that issue after visiting the police station, he found his children and was subsequently arrested. He submitted that he suspected that the persons who took the children to the police station framed him because there had been requests to him to give away his children after he separated with his wife. He submitted that this was a clear case in which he was fabricated and urged the court to allow the appeal and give him back the custody of his children.

Learned State Counsel, Ms. Sigei for the Respondent opposed the appeal. She submitted that the Appellant's defence was a mere denial as he confirmed that he used to live with his children and did not explain how the children got infected. She submitted that the appeal had no merit and urged the court to dismiss it. She concluded by stating that the sentence was legal and submitted that the order of exclusion made by the court was granted so as to ensure the best care of the children.

Evidence

The background to the prosecution case is set by the evidence of **PW1, Millan Wanjiku Karanja. S**he was a community health worker stationed at Githurai. She recalled that on 4th May, 2013 she received a call from a neighbour to the complainant who informed her that she was being abused by her father. She visited the area and met five women who confirmed the same. The child was called and after being pestered she informed her that her father was sexually assaulting her. When she heard this she called the sub chief and since it was a weekend the sub-chief could not visit the area but he promised to do so the following week. On Tuesday she received a phone call from the Children officer to take them to the child. However, they delayed which meant she could not take them. On the following Friday, the women she had met earlier brought to her two children, including the complainant and informed her they had decided to rescue the children. They had also decided to rescue the complainant's brother.

They then took the children to Ruiru Police Station where the Children officer met them. The children were later taken to Ruiru District Hospital and later to a children home and their father arrested.

The child was taken to Ruiru Sub District Hospital where she was examined by **PW5, Edwin Kimani** a Clinical Officer on 10th May, 2014 on allegations of being defiled. He found that her external genitalia was fine but on further examination he found that her labia was inflamed and swollen while her hymen was absent. Lacerations were also noted on the walls of the vagina. He made the impression that defilement took place. He carried out a HIV test and the child tested positive. A high vaginal swab showed the presence of red blood cells but no spermatozoa was seen. She referred the child for comprehensive medication recommended for HIV+ patients. He produced his report. A Post Rape Care form was also filled.

PW6, Judith Makori also a Clinical Officer examined the Appellant on 13th May, 2013. When she carried out a HIV test she found that the Appellant was negative but a urine test showed pus cells which indicated he had an infection.

PW3, Dr. Joseph Maundu of police surgery further examined the child on 15th May, 2013 and filled her P3 form which he produced as an exhibit. He noted no injuries on her and that the general outlook of her genitalia was fine. However, it was swollen and her hymen was missing. There was no discharge. He recalled that the child was brought by a lady having been treated elsewhere. He also examined the Appellant and found that he had no injuries but his urine had pus which meant he had an Sexually Transmitted Disease. He filled his P3 form and produced it as an exhibit.

The case was investigated by **PW2, PC Moses Gitonga of** Kahawa Sukari Police Post. He recalled that on 13th May, 2013 he was assigned the case in question after the complainant was brought in the company of social workers. He found that the complainant had been treated at Ruiru District Hospital. He took the Appellant to the same hospital where he was also treated and investigated. He also took him to Dr. Kamau for samples to be taken. After receiving the results he charged him. In cross examination he stated that the Appellant was brought to the station together with the children.

The Appellant gave a sworn statement of defence. He stated he worked in construction sites at Mwihoko since April 2013. He lived with his children whom his wife left behind. He enrolled the children to High Puck Academy. He recalled seeking help from the DO and OC with regard to raising the children. He did not receive help and due to the unavailability of work they were forced to sleep outside hungry. Two police officers promised to help him but no help was forthcoming. He recalled that on 13th May, 2013 at midnight two AP officers knocked at his door and when he opened they asked him where his children were. He informed them that the children were lost. They asked him for evidence and he gave them OB No. 27/10/5/2013. They took him to the police station at Kahawa sukari to see if the children there were his. When they got there he was shocked to be arrested before being charged.

Determination

The law contemplates that a *voire dire* examination should be conducted by the trial court on a child of tender years. The purpose is for the court to satisfy itself that the child understood the nature of the oath and that he/she is possessed of sufficient intelligence to justify the reception of evidence that the child shall give. That is to say that the court tests whether the child understands the essence of giving evidence under oath and of speaking the truth. This requirement is mandatory in children of tender years. It is derived from **Section 19 (1) of the Oaths and Statutory Declarations Act, Cap 15, Laws of Kenya** which provides that:

> ***"where, in ay proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, if, in***

the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with Section 233 of the Criminal Procedure Code, shall be deemed to be a deposition within the meaning of that Section."

This then drives me to determine who a child of tender years is. Suffice it to say it is undoubted that the complaint was at the time of the incident aged 4 ½ years. An attempt to define this age bracket was made in the case of **Kabangeny Arap Kilil vs Republic [1959] E.A. at page 93** as follows:-

"There is no definition in the Oaths and Statutory Declaration of the expression 'child of tender years' for the purpose of Section 19. But we take it to mean, in absence of special circumstances, any child of any age, or apparent ages or under fourteen (14) years."

Again, in the dictum of Lord Goddard, CJ in **Republic vs Campbell [1956] 2 ALL E.R 272** the court said;

"whether a child is of tender years is a matter of good sense of the court… Whether there is no statutory definition, of the phrase approved."

In the instant case, the age of the complainant was ascertained at four and a half years. In a purported *viore dire* examination, the court recorded the proceedings as follows:

"**hearing**

PW1: a young girl aged about 4-5 years now assessed by the court."

Voire Dire

"Court: Upon assessing the child, this court establishes that the child is too young to give evidence in court, although she is able to positively identify the accused as her father. The child upon being asked whether she wished to go to the father said she wanted to go to him, and even smiled at this prospect but she is too young to understand the court process. She is not threatened by presence of the accused"

The above record clearly shows that the learned trial magistrate did not in fact examine the child. And if she did, she did not record what information she gathered from the child after the examination. The law requires that the information on the examination from the child must be recorded. In the absence of this crucial record, it is difficult for the court to deduce what information informed the court that the child would not testify. There was therefore a gross violation of Section 19 of the Oaths and Statutory Declarations Act. This voided the entire proceedings rendering the trial a mistrial. The only recourse to this defect is to order a retrial. But this can only be done on consideration of several factors as was held in the case of **Opicho vs Republc KLR, 369** in which the court of Appeal held as follows:

""In general a retrial would be ordered only when the original trial was illegal or defective. It would not be ordered where the conviction was set aside because of insufficiency of evidence or for purpose of enabling the prosecution to fill gaps in its evidence at the first trial. Even where a conviction was vitiated by a mistake of the trial court for which the prosecution was not to blame, it does not necessarily follow that a retrial should be ordered. Each case must depend on its own facts and circumstances and an order for a retrial should only be made where the interests of justice require it.

It is clear that the Appellant did not deny that the complainant was his daughter. But there are a number of puzzling issues that raise serious doubts about the propriety of the prosecution case. First, is the Appellant's defence that his children were missing since 10th May, 2013 an issue that is buttressed by the Occurrence Book entry number 27/10/05/13. PW1 testified that the children were brought to her on 10th May, 2013. However, the matter was only reported on 13th May, 2013. PW2 the investigating officer on the other hand did not give an account of how the Appellant was arrested save to state that he went to the police station together with the children and also took them to the hospital together. His further testimony was that the complainant and her sibling brother were taken to the police station by a social worker. PW1 testified that she took the children to a Children's Home after they were rescued from their father. This assertion was never confirmed as no witness from the children's home or a Children Officer testified. In my view, the failure to call a Children Officer or the persons who rescued the children or the arresting officer left many answered questions. For instance; what informed the women who rescued the children that the complainant was being sexually abused? On what basis were the children taken to a Children's Home if at all they were? Why was the Appellant arrested? None of the prosecution witnesses gave an answer to any of these questions seriously weakening the prosecution case and casting a doubt on the culpability of the Appellant.

Secondly, the Appellant sought to have the complainant's mother called as she would provide crucial evidence relating to the HIV status of the child. This was never done. The HIV status of the parties in this case was a crucial issue as the Appellant was found to be negative and the child positive. The Appellant sought the complainant's mother to be called as a witness to give evidence that the child was born while HIV negative. The matter was made murkier by the probation officer's report to which a pathological investigation from Giovanna -e- Sylvia Community Hospital was attached which gave the complainant's HIV status as negative. This had been commissioned by the Children's Home where the complainant had been living.

The report in question raised serious doubts about the medical evidence. I say so because the court found it strange that the same Clinical officer who found the child HIV positive also found the Appellant HIV negative. I concur with the Appellant that his request to the court to have the mother of the complainant examined so as to ascertain her HIV status was not in vain. It would have erased any doubt on the actual

status of the child at birth and by extension to what extent the medical findings linked the Appellant to the offence.

Other medical examinations on the Appellant were also done in a very casual manner. For instance, it was found that his urine had pus cells, a sign that he had a sexually transmitted infection. Similar examination on the complainant was negative. A VDRL test for syphilis was negative on the complainant. Interestingly, no such test was done on the Appellant. All these lapses, in my candid view, were most visible for an obvious reason; that the Appellant was not culpable. They are faults which attested that even if the complainant was defiled, the culprit was not the Appellant.

I cannot then belabor to say that even if a retrial were conducted, based on the investigations done, would not result in a conviction. At best, it would prejudice the Appellant, aid the prosecution to fill up gap in their case and generally, operate against the interests of justice.

In the result, I quash the conviction, set aside the sentence and order that the Appellant be forthwith set free unless otherwise lawfully held.

An exclusion order pursuant to **Section 20(3) of the Sexual Offences Act under Section 114 of the Children Act** was issued. Since the same was based on the conviction which has been set aside, I hereby set aside the said exclusion order. For clarity purposes, I restore the Appellant's authority over the minor who is currently under the custody of Locati Children's Home. The Appellant is at liberty over the custody of the minors. It is so ordered.

DATED AND DELIVERED THIS 20TH DAY OF DECEMBER, 2017

G.W. NGENYE-MACHARIA

JUDGE

In the presence of;

1. Appellant in person.

2. *Miss Sigei for the Respondent.*