REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 75 OF 2019

CST.....APPELANT

-V/S-

REPUBLIC.....RESPONDENT

(Being an appeal against the decision by Hon. R. Odenyo,

Senior Principal Magistrate on 14th December 2015

in Mombasa S. O. Case No. 552 of 2013,

***Republic v Cosmus Safari Tuva*).**

JUDGMENT

Background

1. CST was charged with the offence of incest by a male person contrary to Section 20(1) of the Sexual Offences Act No. 3 of 2006. The particulars are that CST on the 12th day of January 2013 at [Particulars Withheld] Village in Changamwe District within Coast Province, intentionally and unlawfully caused his penis to penetrate the vagina of MS aged 5 years old who is to his knowledge his daughter.

2. In the alternative charge, CST was charged with the offence of indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006. The particulars are that CST on the 12th day of January 2013 at [Particulars Withheld] Village in Changamwe District within Coast Province, willfully and unlawfully caused his penis to rub the vagina of MS aged 5 years old.

3. The trial magistrate considered the evidence of four prosecution witnesses and the accused person's defence and concluded that the accused was guilty. He was convicted and sentenced to serve life imprisonment.

4. The appellant was aggrieved and dissatisfied by the entire decision by the trial court preferred the appeal herein on the following amended grounds:-

1. That the learned trial court magistrate erred in law and fact by convicting and sentencing the Appellant to life imprisonment without proper finding that the prosecution failed to prove its case beyond reasonable doubt.

2. That the learned trial court magistrate erred in law and fact by failing to consider the contradictions and inconsistencies in the prosecution case.

3. That the learned trial court magistrate erred in law and fact by failing to find out that there was no penetration to the victim which is a critical component on defilement cases.

4. That the learned trial court magistrate erred in law and fact by failing to find that the Appellant raised a plausible defence which ought not to have been dismissed.

7. That the learned trial court magistrate erred in law and fact by failing to find that the doctor made no application to have the P3 form produced as an exhibit and be part of the trial records.

6. That the learned trial court magistrate erred in law and fact by failing to find out that since there was no penetration to the victim the mandatory minimum life imprisonment sentence was manifestly harsh and excessive in the circumstances of the case.

7. That the learned trial court magistrate erred in law and fact by failing to consider the time spent in remand custody prior to conviction and sentence.

5. This appeal was canvassed by way of written submissions.

Prosecution's Case

6. PWI, MMM said that on 12.1.2013, she was asleep with CST when at around 4 am, he woke her up and told her that he was leaving for work. PW1 said that when she woke up she realised that her child was pointing at the young child MS who was lying on the floor next to the door. PW1 said that she examined the child and saw some semen on her vagina and on the ground. She took the child to the police in the company of one Veronica. PW1 said that the police advised them to take the child to Coast Provincial General Hospital where the child was examined and a PRC form filled at Coast Provincial General Hospital. PW1 said that it is Mbithe who went with the child to Coast Provincial General Hospital. PW1 did not go with them to as she returned home with the other children from the police station. Later, the police officers went and arrested the man, pointing at the accused. PW1 said that the accused is her husband and the father to the complainant and they had stayed together for one year and five months. The complainant was born on 6.6.2007 and aged 5 years.

7. PW2, VNM said that on 12.1.2013 at about 5 am, she was sleeping in her house when her sister went and woke her up. PW1 told her what had happened to her child. She accompanied her back to her house and saw the child where there were sperms in her private parts. PW2 advised PW1 to take the child to the police and report the matter. PW2 followed PW1 to Changamwe Police Station where they were advised by the police to take the child to Coast Provincial General Hospital where she was examined and treated. The PRC form MFI-1 was filled at Coast Provincial General Hospital. However, PW2 did not ask the complainant about who had done the act to her.

8. PW3, Dr. Doctor Lawrence Ngone is based at Coast Provincial Hospital and his duties include filling the P3 form. PW3 said that he had a P3 form for the complainant aged 5 years old who had a history of being defiled by a person known to her on 12.1.2013 where she was taken to Coast General Hospital on the same day and seen vide PRC form No. xxxxx/13. On examination, the hymen had been raptured. She had pains in her private parts, a tenderness and a reddish at the vulva and vagina, and a tenderness on her mons pubis. She also had tenderness on her thighs. Investigations for VD were negative. A vaginal swab revealed no spermatozoa. PW3 said that it was established that the complainant had been defiled on 12.1.2013. PW3 said that he assessed the degree of injury as maim. He then signed the P3 form on 30.1.2013 MFI-2. PW3 also had a PRC form in court which was used to examine the patient and produced it as Exhibit 1.

9. PW4, No. 51872 CPL Regina Chule the Investigating officer in the case based at Changamwe Police Station said that on 12.1.2013, she was at the police station where she perused the OB and found that a case had been minuted to her. The case had been reported by MM (PW1) who reported that the complainant had been defiled by PW1's husband and that the offence had happened that morning on 12.1.2013 at about 4.00 am. PW4 said that she called PW1 who said that she was in hospital with the child. PW4 told her to pass by the police station on their way from the hospital. Later that evening, PW1 went with child but they looked tired. PW4 told them to return the next day. The next morning on 13.1.2013, the complainant went to the station where PW4 filled a P3 form and escorted them to Coast Provincial Hospital and the form was filled. A PRC form was also filled. PW4 said that the complainant had told her that she was sleeping in the same room with her parents with her parents on the bed and her on the floor. There were other children in the family as well. That night as she was sleeping, someone went and removed her clothes. That she tried to raise an alarm but heard the voice of her father informing her not to make noise. That the father then defiled her. PW4 said that she started looking for the suspect. After some days, she went to that home where she found the suspect sleeping. He was identified by PW1 before being arrested. PW4 identified the accused in the dock.

Defence Case

10. DW1, CST, a resident of Changamwe and a conductor said that on 9.9.2012, his wife came from home and he welcome her. After 2 weeks, his sister who lives in Kiambu telephoned him and told him that her daughter wanted to visit him which DW1 agreed and she went to visit. DW1 said that his wife was not happy as she thought his first wife had gone there where PW1 was mistaking his niece for his wife. DW1 called his brother and informed him about it. He also gave his niece fare to go to his brother's house in Kongowea. DW1 said that when he clarified to his wife that his first wife was upcountry with his 3 children and that the child was his niece, she did not believe him. That is when she decided to report to the police. She even reported him falsely to the landlord. DW1 said that on 1st January, they celebrated the New Year as a family. On 12.1.2013, DW1 woke up to find their child sleeping outside the net and he asked his wife why but she told him to let it be. DW1 took the child back inside the mosquito net. Later that evening, DW1 met PW1 and asked her what had happened to the child but she told him that they would meet at the police station. DW1 informed his landlord about this who called and asked her about it but she was rude. The landlord advised her to be patient. DWI said that PW1 then went to her sister's place and from there they went to Changamwe Police Station where she wrongly reported. On 12.2.2013, DW1 was arrested by police officers from Changamwe Police Station and later charged in court.

11. DW2, Eunice Mwaura said that the accused is her tenant and knows what he is charged with. On 16.2.2013, M was with her sister N in the house adjacent to DW2's. M was living with DW1 and his wife. DW2 said that he heard M and N conspired to fix the accused. On 17.2.2013 at night, DW2 was in the house when she heard police officers come to the house of the accused and arrested him. The next day, DW2 went to the police station where she heard that the accused was being held to be charged with the offence. DW2 learnt that M was thinking that the accused's niece who was staying there was actually the child of the first wife.

Appellant's Submissions

12. The Appellant submits by citing the case of *Maina v Republic* [1970] EA 370 that in every case of an alleged sexual offence, the magistrate should warn himself that he has to look at the particular facts of the particular case and if having given full weight to the warning, he comes to the conclusion that in the particular case the woman or girl without any real doubt is speaking the truth then the fact that there is no corroboration need not to stop his conviction.

13. The Appellant submits that contradictions and inconsistencies in the prosecution case should be determined in favour of the Appellant for reasons that the Complainant's mother told the court at page 3 line 4-9 that *"on 12.1.2013, I was asleep with CST. At around 4.00am, he woke me up and told me he was leaving for work. When I woke up I realised that this child, pointing at a young child, called MS was lying on the floor, next to the door. I examined the child. I saw some semen on her vagina and on the ground. I took the child to the police in a company of one Veronica."* In her testimony in chief, the Complainant's mother PW1 stated that the incident occurred as he was asleep. After the alleged incident, the Complainant did not immediately complain to PW1 her mother who was alleged to be asleep. PW1 never told the court in her evidence in chief that the Complainant had told her that it was him the Appellant who defiled her. PW1 the complainant's mother gave no reason why she failed to do so while testifying in chief. It is only when the Appellant challenged PW1 in cross examination that she stated at page 4 line 1-2 that *"I did not see you commit the offence. The Complainant also said that you are the one who did that to her.'*

14. The Appellant further submits that PW2 was in the company of PW1 when they took the Complainant to report the matter to the police and told the court in her testimony in chief at page 5 line 2-3 that *"the complainant is called M. S. I did not ask her who had done that act to her."* The decision to report to the police after the incident was made by PW1's sister VNM (PW2). The Appellant submits that at page 4 lines 15-18 that *"I saw the child. There were sperms in her private parts. I advised PW1 to take the child to the police and report the matter. I followed her there (that is Changamwe Police Station) after I had breastfed my baby."* The Appellant submits that if PW2 could advise the Complainant's mother PW1 to report the alleged matter to the police, the reasons for failure to ask the Complainant and her mother who defiled her sounds rather unconvincing. The Complainant's mother never testified of the Complainant having complained of any injury in her private parts.

15. The Appellant submits that the doctor PW3 in his testimony in chief at page 12 lines 6-10 said that *"on examination, the hymen had been raptured. She had pains in her private parts. She had tenderness and reddishness at the vulva and vagina. She had tenderness on her mons pubis. She had tenderness on her thighs. Investigations for VD were negative. A vaginal swab revealed no spermatozoa."* The Appellant submits that there is nowhere in his testimony in chief that the complainant was put under any treatment after the alleged act of defilement. The doctor was looking for deposit for sperms but conclusively said that he found nothing.

16. The Appellant further submits that the honourale court considers the time spent in remand prior to conviction and sentence as provided under Section 333(2) of the Criminal Procedure Code.

17. The Appellant submits by humbly begging the honourable court to independently evaluate the matter and come up with an independent evaluation and allow the appeal, quash the conviction and set aside the sentence.

Respondent's Submissions

18. The Respondent submits that they concede that the evidence did not establish all the ingredients of the offence. Failure to call the victim or state reasons why she was not called as witness renders the identification evidence as pure hearsay. The Respondent further submits that the evidence established that the complainant is a female person and that the Appellant is her step-father and that the Appellant knew her to be his stepdaughter. Further, that the evidence adduced established the act of penetration. However, the identity of the perpetrator was not established since the victim was not called to testify. PW1 stated that the victim told her the Appellant was not the perpetrator. On the other hand, PW2 says that she did not ask who committed the act to her.

19. The Respondent submits citing the case of *John Kinyua Nathan v Republic*, Nyeri Court of Appeal Criminal Appeal No. 52 of 2015 where the court stated inter alia that:-

> **"…**He wondered why the child could not have given the same story to the court and face cross examination. He also observed that, on the recorded evidence, there appears to have been another unnamed child who gave a similar story to their mother but was not called to testify. To make matters worse, he contented, a neighbor named Lydia who was supposed to corroborate the mother's story was not called to the stand In his view, therefore, all those omissions rendered the charge unprove as here was no eye witness account to prove that he was involved.
>
> **…**The Court of Appeal went further to explain that the court ought to have conducted a voire dire and make its findings as to whether the alleged victim could testify.
>
> Moreover, the learned appellate judges went on to analyse situations when an intermediary would be needed, appointed by the court and subscribe to an appropriate oath, in which case the role of the intermediary would be to assist a complainant or an accused person to communicate with the court.

It is to be noted that the evidence presented by the intermediary to the court ought to be that of the witness and not an intermediary's.

No reason was given for failure to call the complainant in this case and the trial court made no finding on that crucial aspect of the case."

20. The Respondent submits that there was no contradiction in the prosecution's case. The evidence was cogent, consistent and unshaken during cross examination.

21. The Respondent submits that penetration was proved by the medical evidence. Findings were that the hymen was raptured. Similarly, the victim had pains in her private parts with tenderness and reddishness on her pubis with tenderness on her thighs. Comments on the PRC form states that 'Defilement very likely'. The mother also testifies to have examined the minor and seen semen on her thighs.

22. The Respondent submits that the trial court evaluated the evidence by both the prosecution and the defence.

23. The Respondent submits that the P3 form was produced by the Prosecution through the Doctor who was the maker of the document complying with Section 77 of the Evidence Act. There is no requirement for a special application to produce the medical documents as exhibits.

24. The Respondent submits that the sentence would have been lawful and proportionate to the offence had the conviction been safe.

25. The Respondent submits that time spent in custody was not considered, and that the conviction was unsafe.

Analysis and Determination

26. This being the first appellate court, I am guided by the principles in **David Njuguna Wairimu v Republic [2010] eKLR** where the court of appeal held:-

> **"The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellant court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions."**

27. After considering the grounds of appeal, Records of the trial court, submissions and circumstances of the case, the issues for determination are as follows:-

i. Whether the P3 form was produced as an exhibit and formed part of the trial court records

ii. Whether the prosecution proved its case beyond reasonable doubt

iii. Whether the time spent in remand custody prior to conviction and sentence was considered

iv. Whether the sentence was manifestly harsh and excessive in the circumstances of the case

Whether the P3 form was produced as an exhibit and formed part of the trial court records

28. PW3, Dr. Lawrence Ngone on page 12 of the typed proceedings said that *"…I signed the P3 form on 30.1.2013(Cr. MFI-2 exhibit 2). I also have a PRC Form here which is the one which was used to examine the patient. I wish to produce it as an exhibit."* However, the Respondent submitted that the Doctor complied with Section 77 of the Evidence Act in producing the medical documents.

29. This court finds that the allegation by the Appellant that the documents were not properly produced is as the proceedings clearly indicate marking and production of the exhibits as required by the law.

Whether the prosecution proved its case beyond reasonable doubt

30. The Respondent submitted by conceding on this issue that the evidence did not establish all the ingredients of the offence. Failure to call the victim or state reasons why she was not called as witness renders the identification evidence as pure hearsay. The evidence established that the Complainant is a female person, that the Appellant is her stepfather and that the Appellant knew her to be his step-daughter. Further that the evidence adduced established the act of penetration. However, the identity of the perpetrator was not established since the victim was not called to testify. PW1 stated that the victim told her the Appellant was the perpetrator. On the other hand, PW2 says that she did not ask her who committed the act to her.

31. This court finds that indeed the prosecution failed to prove its case beyond reasonable doubt. Failure to call the Complainant as a witness cast doubt on the identity of the perpetrator. Further, it is on this basis that the evidence of PW1 and PW2 in relation to what they were told by the complainant is considered to be hearsay. There were options of conducting *viore dire* examination on the Complainant to establish whether she could testify or testify through an intermediary which options were not explored by the court.

Whether the time spent in remand custody prior to conviction and sentence was considered

32. The Appellant on the one hand submitted by begging the honourable court to consider the time spent in remand prior to conviction and sentence. The Respondent on the other hand submitted by conceding that indeed the time spent in custody was not considered.

33. This court finds that the trial court in sentencing the Appellant to serve life imprisonment failed to consider the time that the Appellant had spent in custody in accordance with Section 333(2) of the Criminal Procedure Code which states as follows:-

> **'Subject to the provisions of section 38 of the Penal Code (Cap. 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.**
>
> **Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.'**

Whether the sentence was manifestly harsh and excessive in the circumstances of the case

34. The Appellant submitted that the prosecution evidence in the case was of a lesser charge as provided under Section 11(1) of the Sexual Offences Act which provides a minimum sentence of 10 years. The Appellant further cited the case of *Hamisi Bakari & Another v Rep* (1987) eKLR where it was held that *"we would note that where a heavy minimum sentence is involved, the lower court should be particular to see that each ingredient in the charge is reflected in the particulars of the offence, and is properly proved. Seven years is a long time to serve in a case where the issues are not clear."* The Respondent in support submitted that the sentence would have been lawful and proportionate to the offence had the conviction been safe.

35. In **Benard Oloo Ombewa v Republic [2017] eKLR** the court held as follows:-

> **"This court has discretion under Section 354 (3) (b) of the Criminal Procedure Code to increase or reduce sentence or alter the nature of the sentence. Had the appellant been properly convicted, this is one case where the court's discretion would not been exercised…"**

36. From the foregoing, the Respondent conceded that the sentence was harsh and excessive as the conviction was not safe. Therefore, this court will not exercise the discretion to alter the nature of the sentence.

37. In conclusion, this court finds that the age of the minor and the issue of penetration were proved. However, the identity of the perpetrator was not proved to the required standard rendering the conviction unsafe. The appeal is therefore allowed, conviction quashed and the sentence set aside. The Appellant is set at liberty unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS, THIS 9TH DAY OF DECEMBER 2021

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of:-

Turuki- Court Assistant

Ms. Karanja for the Respondent

Appellant present in person

HON. LADY JUSTICE A. ONG'INJO

JUDGE