REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 4 OF 2017

AND

CRIMINAL APPLICATION NO. 42 OF 2019

(From Original Conviction and Sentence in Kakamega Chief Magistrate's

Court Sexual Case No. 50 of 2015 (Hon. E. Malesi, SRM) of 21st December 2016)

BL.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The appellant was convicted by Hon. E. Malesi, Senior Resident Magistrate, of incest contrary to section 20(1) of the Sexual Offences Act, No. 3 of 2006, Laws of Kenya, and was accordingly sentenced to thirty (30) years imprisonment. The particulars of the charge against the appellant were that on diverse date between 30th June 2015 and 1st July 2015, both dates inclusive, at [particulars withheld], Ivihiga Location, Kakamega East District, Kakamega County, being a male person caused his penis to penetrate into the vagina, of VL, a person who was to his knowledge his daughter. He had pleaded not guilty to the charges before the trial court, and the primary court conducted a full trial. The prosecution called five (5) witnesses.

2. VL, the complainant, testified as PW1. She gave unsworn testimony. She stated that she was eight years old and a Standard One pupil at [particulars withheld] Primary School. She identified the appellant as her father, with whom she lived. She stated that he defiled her on 30 th June 2015, at their sitting room, and she informed her teacher of the incident, who then reported to the police. The appellant was arrested and she was taken to hospital. She also mentioned that the appellant defiled her twice, and that he had chased her mother away. She was not cross-examined. PW2, Donboss Mboi Emoja, was the clinician who attended to PW1, prepared the relevant medical records that were put in evidence. He stated that upon examining her, he found that her vagina had injuries, her hymen missing, and despite her age her vaginal orifice was large enough to accommodate a finger. He stated that given the age of PW1 her hymen should have been intact. On cross-examination, he stated that he had not said that any of the two complainants before the trial court had an infection. JK (PW3) was the teacher of PW1. It was to her that PW1 made the report of what had transpired between the appellant and her. She found that she was walking with difficulty, staggering as if in pain. She said that she and her younger sister had been defiled by their father, the appellant. She reported to the school authorities who then escalated the matter to the provincial administration and to the police. She testified that she had examined the vagina of the PW1 and found it to be swollen. Police Constable Mwangangi Ponda testified as PW4, and he was the police officer who received the report and investigated the matter.

3. The appellant was put on his defence. He gave a sworn statement He denied the offence, and sought to poke holes in the case of the prosecution. He conceded that PW1 was his daughter and that he age was eight years. He further conceded that he was separated from her mother. He called one witness, DW2, his brother, who said nothing about the alleged defilement.

4. After reviewing the evidence, the trial court convicted him of the main charge, and sentenced him as stated in paragraph 1 of their judgment.

5. Being dissatisfied with the conviction and sentence the appellant appealed to this court and raised several grounds of appeal. He averred that the trial court convicted him on the basis of evidence that was not corroborated, fabricated, inconsistent, discredited and contradictory. He also averred that the charge sheet was defective to the extent that the two witnesses who were supposed to testify were not listed in the charge document that he was furnished with. He also complained that the medical report done on him by the doctor was not availed to him. He further averred that there was no medical evidence that he had assaulted PW1 on the neck and also raised questions on the evidence of PW3 to the effect that PW1 had difficulty walking.

6. The appeal was canvassed on 21st May 2015. The appellant relied on written submissions that he had placed before the court, but he added five issues. He submitted that the trial court had failed to take into account his written submissions, specifically pages 29 and 30 thereof. He submitted further that PW3 had not properly investigated the case, for he never visited PW1's school. He further submitted that there was no medical evidence of defilement, saying that the doctor who treated PW1 at Shinyalu health centre should have been called as a witness. Finally, he submitted that the father of his estranged wife had come to prison and said that PW1 had been coached to testify against him, with the help of PW3 and his estranged wife. He urged the court to call in that evidence. Mr. Juma, for the respondent, opposed the appeal. He urged the court to grant the appellant opportunity to apply to adduce additional evidence, as that appeared to be what he wanted.

7. The court thereafter took the appeal out of the cause list, and granted leave to the appellant to file a formal application seeking to adduce additional evidence.

8. The appellant took advantage of the leave granted by the court, by filing HC Miscellaneous Application No. 42 of 2019. The application is by way of Motion seeking a retrial. The grounds are set out in his affidavit sworn in support of the Motion. He averred that he had information that PW1 had been misled by her mother to implicate him. He claimed to have had gotten the information from PW1's grandfather, who was PW'1 guardian.

9. The matter was thereafter placed before me on 17th December 2019. The appellant stated that he had already filed his written submissions and invited me to look at them. On his part. Mr. Mutua, for the respondent, submitted orally on all the issues raised in the petition of appeal. On the evidence, he stated that the same had been corroborated by the medical evidence. On the matter of the sexually transmitted deceased (STD), he submitted that the investigation officer who testified about it was not a medical officer, and was not the right person to give evidence on the matter. On the two witnesses who were allegedly not listed in the charge sheet but did testify, he submitted that there was no law which required that only the persons listed in the charge sheet could testify. He submitted that the appellant had been given witness statements of the two witnesses and he had sufficient to prepare to confront them at the trial. On the medical report on him, he submitted that the same was not necessary. He stated that the report was made after sometime, and, therefore, his medical examination would have been of little value. On the alleged injuries on PW1's neck, he submitted that they had probably healed by the time she sought medical attention. On the issue of PW1 having difficulty walking, he submitted that she was nine years old and any sexual activity with her was bound to place her in a difficult position physically. He submitted that the appellant's fair trial rights had not been infringed. On retrial, he submitted that the same would be injurious to PW1, as it would reopen her wounds.

10. In response to the respondent's submissions, the appellant pointed at some inconsistencies between the dates of the incident pleaded in the charge sheet and the evidence given by PW3 as to what had happened. On medical evidence he submitted that PW4 had testified that there was no P3 Form. He stated that PW4 had said that he took the victims to a health centre and no explanation was given as to what happened at the health centre. He submitted that he and PW1 were not subjected to medical examination. He stated that when PW1 testified he did not know what was happening. He simply sat there without knowing what was going on. He submitted that PW1 testified without a police file. He further stated that he was held in prison even after the court had ordered that he be held in police custody. He said that his relatives had told him that the child had confessed that she had been misled by her mother.

11. Being the first appellate court, I have re-evaluated all the evidence on record. I have drawn my own conclusions, whilst bearing in mind the fact that I did not have the benefit of observing the witnesses as they testified. The Court of Appeal's decision in the case of ***Okeno vs. Republic*** **(1972) EA 32** has consistently been cited on this issue. In its pertinent part, the decision is to the effect that: -

> *"An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. 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 magistrates' findings can 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."*

12. I shall dispose of the appeal and the application simultaneously, starting with the issues raised in the appeal.

13. The first issue raised ralates to the evidence tendered. The same was said to be uncorroborated, fabricated and contradictory. On the matter of corroboration, PW1, the victim, testified that she was defiled on 30th June 2015, and that she informed her teacher. The teacher, PW3, testified that on 1st July 2015, she noted that her pupil was having difficulty walking, and she talked to her, whereupon PW1 told her that the appellant had defiled her. She and others then took her to the police and the hospital on 3rd June 2015. At the hospital the medical personnel noted evidence of defilement, as narrated by PW2. Clearly, it cannot be said that there was no corroboration of the testimony of PW1.

14. The second issue related to the charge sheet being defective. This ground was not articulated in a coherent manner. I understood the appellant to be saying that the prosecution presented two witnesses who were not listed in the charge sheet as prosecution witnesses. The column on the witnesses the prosecution intends to call at the trial is only a guideline, an indication of the persons that the prosecution proposes to present to the court to establish the charge. The state is not bound by that list. It may call or drop the persons listed as witnesses, and call other persons who are not in that list, provided that the witness statements for the new witnesses are given to the accused person in advance of the hearing to allow him prepare himself to confront them. The appellant has not demonstrated that the statements for the said witnesses were not availed to him, nor that he was not ready to confront them at the trial. There is nothing on record to indicate that he ever objected to the two witnesses testifying, either because they were not listed in the charge sheet or because he had not been supplied with their statements.

15. The other ground relates to his medical examination. This ground is not clearly articulated. On one hand, he appeared to suggest that medical examination was done on him, but a report thereof was not presented to the court. On the other hand, he appeared to argue that he and the two complainants were not submitted to medical examination to determine his culpability. Either way, it was not mandatory that he be subjected to any such test for the state to prove a sexual offence. He was perhaps alluding to section 36 of the Sexual Offences Act.

However, that provision is not in mandatory terms. Proof of sexual offences is not founded on medical evidence, the court can convict purely on the basis of the testimony of the victim, whether corroborated or not, so long as it finds the testimony clear and credible.

16. On lack of medical evidence of neck injuries to the victim, it is not clear whether he was referring to an injury to PW1 or whether it was in respect of the other complainant in connection with the charge of which he was acquitted. Either way, I do not see the relevance of this ground. The case against the appellant related to a sexual offence, it had nothing to do with an assault that might have occasioned injuries to the neck of PW1. Such injuries were completely irrelevant to the charge that the appellant faced.

17. He further argued that the testimony by PW3 that PW1 had difficulty walking, yet, according to the state case she had been having regular sexual intercourse, suggesting that she had gotten used to it and was not expected to suffer any difficulty walking thereafter. I take note of the fact that PW1 was child of eight years at the material time. The appellant himself testified that that was her age at the time. Such a child is immature and cannot possibly have a sexual encounter with an adult of the appellant's age and go unscathed, whether or not she was sexually active. I do not, therefore, find anything odd with the testimony of PW3 on that score.

18. I will now turn to the appellant's written submissions. The first issue on which the appellant submitted on is on the defectiveness of the charge. I have already addressed that in the foregoing paragraphs of this judgement. The second issue raised in the submissions is on the unfairness of the trial. He argued that, given the gravity of the sentence, he should have been assigned an advocate paid for by the state. I am alive to Article 50(2) (h) (j) of the Constitution. The courts have, however, stated that that provision is progressive, as the state is yet to get the set up the infrastructure to facilitate compliance with the said provision.

19. The third issue is on doubtful evidence of penetration. This revolves around the issues raised about the evidence being uncorroborated. I have already dealt with this elsewhere. PW2 gave clear evidence which pointed to the vagina of P1 being penetrated. PW2 testified that the vagina had injuries and the hymen was absent, which was unusual for an eight year old. PW3 stated that she saw PW1 walk with difficulty, and when she examined her vagina, she noted that the same was swollen. All that was consistent with penetration, and was sufficient corroboration of the testimony of PW1 that she had been defiled.

20. The fourth issue is about inconsistencies in the evidence. I have addressed some of the aspects of this submission above. I shall, however, address what is raised in the written submissions which does not come out clearly from the petition of appeal. On the age of PW1, the appellant himself testified on oath that she was eight at the material time. She was a minor of tender years. That is not in dispute. On the matter of the dates of the incident, I have also addressed this elsewhere. It is clear that the incident happened on 30th June 2015. A report was given to the teachers on 1st July 2015 and to the authorities on 3rd July 2015. There is some mix-up in the way the evidence was recorded from PW1, but I take judicial notice of the fact that she was a minor of nine at the time of trial, and her testimony cannot possibly be expected to flow as smoothly as that of the adult witnesses. It was, however, clear enough on the sequence of events, when taken together with that of the other witnesses.

21. The appellant raised several issues on the mother of PW1 and the village elders not being called as a witnesses. The answer to this submission is that there is no specific number of witnesses that the prosecution is required to call to prove its case. It suffices that the state calls such number of witnesses as it believes would be sufficient to establish the charge that they have brought against the accused person. In this case, the calling of the village elder or the mother of PW1 would have added no value to the case. The principal actors in the matter were PW1, PW2 and the medical personnel and police officers who handled the matter. These were the most critical witnesses. The state had no obligation to call every individual who might have, in any remote manner, come into contact with PW1.

22. In his oral submissions made on 21st May 2019, the appellant submitted that his defence was not considered, particularly the submissions that he made on 14th November 2016. I note from the record that the submissions that he refers to were made on 14th November 2016 and related to a no case to answer. They are not relevant for the purpose of the judgment. In any event, at that stage, the trial court is under no obligation to analyze the evidence and submissions in its ruling should it conclude that there was a case to answer. There is, therefore, no merit in this submission.

23. Secondly, he argued that the case was not properly investigated by PW3. He pointed out that PW3 did not visit PW1's school to gather evidence. The report of the incident was made by PW3, the teacher to whom the report was made. She was not an investigator. The investigation officer was PW4. He was under no obligation to visit the school. A report was made to him by PW3, and was sufficient. In any event, it should not be the duty of the trial court to concern itself with the manner of conduct of investigations. It should only be interested with the evidence that is placed before it by the witnesses, not how the evidence was gathered, unless it is claimed that the same was obtained illegally, which is not the case here,.

24. Thirdly, he argued that the state witnesses did not testify as to whether PW1 was taken to hospital. I have gone through the record, and I do not find any merit in this submission. PW1 testified that she was taken to hospital.PW3 testified that they took PW1 to the police station and later to hospital. PW2 testified that he did not treat PW1, but prepared a P3 Form based on treatment notes made by the medical officer who had attended to her. He produced the treatment notes, a post-rape care form and the P3 Form. PW4 testified that after he received PW1 he had her sent to a hospital. The appellant raised the issue of clothes, it is not mandatory that in sexual offence cases the clothes that a victim was wearing at the material time be subjected to forensics and presented in court. There was, in my view, sufficient medical evidence upon which the trial court could act.

25. Fourthly, the appellant raises issues relating to an incident at Ileho health centre. The state did not lead evidence as to what might have transpired at that health centre. If the appellant felt that the incident, if at all there was one, was relevant to the case, it was his obligation to place that evidence before the court. I note that from the record, he did not cross-examine PW2, PW3 and PW4 about any incident at Ileho health centre on whether the doctor who attended to him and PW1 had absolved him of any wrongdoing.

26. Finally, he raised the issue of additional evidence, relating to what he had established after conviction. He claimed that the relatives of his estranged wife had established that PW1 was influenced by her mother to frame him and give false evidence. He was given time to file a formal application seeking leave to be allowed to adduce additional evidence. Curiously, when he did file the application, he did not seek that

leave, instead he sought that the matter be tried afresh. He claimed that he got that information from the grandfather and guardian of PW1, yet he did not attach any affidavit from the said grandfather.

27. Having gone through the record of the trial court, I am persuaded that the trial court largely handled the trial well, save for the testimony of PW1. She was the appellant's accuser, yet when she testified, the appellant did not cross-examine her. The record is silent on whether he was afforded opportunity to cross-examine her. I am persuaded that he was not given the chance to cross-examine her, for, if he had, the record would indicated nil under cross-examination. One of the rights under Article 50(2) of the Constitution, is the right to challenge evidence, that should include the right to confront accusers at a trial during cross-examination. That right is stated in Article 50(2)(k) of the Constitution in the following terms:

> *"50. (1) …*
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> *(2) Every accused person has the right to a fair trial, which includes the right— (a) …*
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> *(b) …*
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> *(c) …*
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> *(d) …*
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> *(e) …*
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> *(f) …*
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> *(g) …*
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> *(h) …*
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> *(i) …*
>
> *(j) …*
>
> *(k) to adduce and challenge evidence; (l) to refuse to give self-incriminating evidence;*
>
> *(m) …*
>
> *(n) …*
>
> *(o) …*
>
> *(p) … and*
>
> *(q) …"*

28. The right to confront accusers or challenging evidence through cross-examination is fundamental. The omission to allow an accused a chance to challenge evidence, especially through cross-examining the principal witness is fatal to the prosecution case, and a trial would be imperiled by it.

29. That being the case, it is my conclusion that the appellant herein was not afforded a fair trial. That ought to vitiate the trial that was conducted against him. However, that does not entitle him to an acquittal. The same amounts to a mistrial. The proceedings ought to be quashed. Ideally, where a mistrial is declared the court should consider order of a retrial. The question then that I should confront is whether I should order a retrial in this case. The offence is a very serious. It is the case of a father turning against his own child of tender years and subjecting her to defilement. That is the accusation. A father is expected to be the child's protector, especially where such child is of tender years like in the instant case, it is only right that very young children be protected from parents who may prey on the. I am persuaded that this is a proper case for doing just that. The events happened in 2015, all the witnesses must, no doubt, still be available.

30. I shall accordingly quash the proceedings that were conducted in Kakamega CMCCRC No. 50 of 2015. The conviction of the appellant herein shall be accordingly quashed and the sentence imposed against him set aside. The matter shall be remitted to the Chief Magistrate's Court at Kakamega for retrial. It shall be mentioned before the Chief Magistrate for directions at the soonest possible time. The Chief Magistrate's Court shall be at liberty to address the matter of admitting the appellant to bond pending trial.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 17th DAY OF JANUARY, 2020

W MUSYOKA

JUDGE