REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NUMBER 5 OF 2019

JCN...APPELLANT

VERSUS

REPUBLIC..RESPONDENT

(Being an Appeal against both the conviction and the sentence of Senior Resident Magistrate Hon. R. Amwayi

delivered on 14th January, 2019 in MOLO CM Criminal Case Number 62 of 2018

Republic v Joseph Chege Ng'ang'a)

J U D G M E N T

1. The appellant herein JCN is charged with the offence of;

> **"COUNT 1**
>
> **INCEST CONTRARY TO SECTION 20(1) OF THE SEXUAL OFFENCES ACT NO. 3 OF 2006.**
>
> **JCN: On the 11th day of June, 2018 within Nakuru County intentionally touched the vagina of MWC with his penis who was to his knowledge his daughter aged 4 9/12 years.**
>
> **ALTERNATIVE CHARGE**
>
> **COMMITTING AN INDECENT ACT WITH A CHILD CONTRARY TO SECTION 11(1) OF THE SEXUAL OFFENCES ACT NO. 3 OF 2006(.)**
>
> **JCN: On the 11th day of June, 2018 within Nakuru County intentionally touched the vagina of MWC a child aged 4 9/12 years with his penis.**

He pleaded not guilty after a full trial where the prosecution called seven (7) witnesses, and he testified and called one witness. The trial magistrate found him guilty of the offence of **Incest c/s 20(1) of the Sexual Offences Act, a**nd sentenced him to life imprisonment.

2. Aggrieved by the conviction and sentence he filed this appeal on the following amended grounds;

> *1. That, the learned trial magistrate erred in law and when he convicted me in the present case yet failed to observe that the charges labeled against me are defective.*
>
> *2. That, the learned trial magistrate erred in law and fact when he convicted me in the present case yet failed to find that the witnesses for the prosecution were hostile.*
>
> *3. That, the pundit magistrate erred both in law and fact when he convicted me in the present case yet failed to observe that investigation done were shoddy in the present matter.*
>
> *4. That, the learned trial magistrate erred in both law and fact when he convicted on irregular trial which amounts to a mistrial.*

5. That the learned trial magistrate erred in law and facts when he shifted onus of prove against the appellant despite the outstanding grudge proved in the prosecution case against the appellant.

He also filed written submissions on which he relied during the hearing. He also made oral submissions to which the prosecution through Ms. Nyakira responded.

3. **CASE FOR PROSECUTION**

The case for prosecution is that the accused person and the mother to the complainant had been married for thirty (30) years in 2018. They had ten (10) children between them and the complainant. The last born was 4 ½ years. However, the two (2) parents were each living in their own houses on the same compound following a marital disagreement.

4. On Tuesday, 11th June 2018, the mother, PW1 TW left home and went to the farm leaving the children at home. When she returned at 3.00 p.m she found MW the complainant who told her she was feeling pain while urinating. Upon being asked why, she told the mother that her father, the accused called her to his house gave, her sugar and mandazi. He made her lie on the chair, removed her panty and then removed his. On hearing this, TW went into the house with the child and examined her private parts. She saw bruises but there was no blood. She asked the child what her father had done, the child told her that he had wiped her with a shirt.

5. She immediately reported to Michael, the "*nyumba kumi"* who told her to take the child to hospital. She also rang the chief who told her the same thing. She took the child to Elburgon Hospital where the Doctor confirmed that the child had been defiled. She reported to Elburgon Police Station, was issued with a P3 and the accused was arrested on 12th June, 2018. She said that the accused had sent the other children to buy sweets.

6. On cross examination she said that the child is the one who had said he had defiled her, that she was afraid of him and would cry when she saw the accused person. She denied that there was a grudge between them. On re-examination she said the accused was always at home.

7. JC a class two(2) minor aged seven (7) years testified that the accused was his grandfather and that he and his brother Kamau lived with their grandparents the accused and TW. That on the material date they had not gone to school. The grandfather gave them money to buy sweets at the shop. He was left with MW. TW was at the farm. When they returned MW was crying. She did not tell them why. That when TW returned they told her that MW had been crying and grandfather had given them money to buy sweets. On cross examination he said Kamau and John were not at home.

8. SW aged six (6) years and in class one (1) told the court that his mother's name was "mummy" but his father's name was Chege. He said that his father sent him with JC to buy sweets with Kshs. 5/=. That when they returned MW was crying. They later told Mummy when she returned from the farm that MW was crying.

9. When MW was put to testify, during *voire dire*, she said she did not know her mother's name. She knew they lived in Elburgon. She testified that,

> *"I am called MW. I do not go to school. My father removed my panty and told me not to tell anyone. He then blocked my mouth. I then felt pain in my private parts (points to her crouch). I felt pain while going for a short call. I felt pain in my private part for urinating. I do not feel pain of late. (The child breaks down and starts crying).*
>
> *My father removed his trouser. I feel pain in my private parts. I have stomach ache."*

That is all she said. The record shows that *"when the accused started to ask questions the child breaks down and starts crying uncontrollably."*The matter was apparently adjourned to 2.00 p.m. when the accused said he had no questions.

10. PW5 was Dr. Gladys Oseko from Elburgon Sub County Hospital. She filled the P3 for MW aged five (5) years on 12th June, 2018. The child had history of defilement by the father. There were swellings around the *labia minora* and the hymen was broken, reddening of the vulva and whitish discharge around external genitalia. She produced the P3, Post Rape Care Forms and the lab request which showed no pus cells because according to her the child had taken a shower. On cross examination she said the whitish discharge could have been sperms, as it was found around the vagina, that there was penetration. That the white discharge was coming out of the genitalia. She did not examine the accused. She said the child was not admitted. That there was penetration. That the discharge may had been due to ejaculation.

11. PW6 John Kamau Nderitu Area chief Chabena Location received a call from "*nyumba kumi"* on 12th June, 2018 at 6.30 a.m. that a man who had defiled his daughter "was intending to run away". He directed that the man be brought to his office. He was brought. He called the man's wife, she said she was at the hospital. He let the man leave with the *nyumba kumi*. Later the wife brought the Doctor's report. The OCS Elburgon was called and the police officers came from the accused person.

On cross examination he said that he heard that on the material date there was a dispute between the accused and his wife. He was not aware that the accused was away working on a contract.

12. Number xxx PC Rebecca Namoyi was the investigating officer.

On 13th June, 2018 the Officer In Charge crime told her that there was a defilement case for her to investigate. She was told that the P3 had been filled, complainant and witnesses were at the police station and the accused was in custody. She recorded their statements, interrogated the accused who was in the cells who denied committing the offence, interrogated the child who told her she was afraid of the accused, had

the child interviewed privately by a female Kikuyu Police Officer whom she told that it was the accused who had defiled her. She asked for birth documents for the child and was given the same. She established accused was father of the complainant. She charged him. She established that accused and his wife lived in separate houses, and that this case had nothing to do with their differences.

13. The accused was placed on his defence. He denied committing the offence. He said he was at work on that day between 8.00 a.m. at 5.00 p.m. He denied attempting to escape. That he took himself to the chief's office. That there was a grudge between him and his wife. His son DTC testified that there was a dispute between his parents which led to his father to construct his own house. He did not know whether the accused committed the offence.

14. The appellant in his submissions pointed out:-

i) That the charge was defective as the word 'penetration' was missing.

ii) That the case was poorly investigated.

iii) There was no proof of penetration.

iv) That the witnesses who were minors were influenced/persuaded to give incriminating evidence.

v) That the evidence was inconclusive, who was allegedly defiled, a daughter/son?

vi) That the learned magistrate's conclusions were far fetched and not supported by the evidence.

vii) That the medical reports were suspect.

viii) The case was a set up due to marital differences.

15. The prosecution opposed the appeal through Ms Nyakira, that age of child was proved, P3 proved penetration, child explained how it happened, child identified accused as penetrator.

16. This being a first appeal the accused is entitled to a review re-exam inanition, re-assessment of the evidence on record and to draw my own and arrive at my own conclusions bearing in mind that I t did not hear/see the witnesses testify. See **Okeno vs Republic**, **(1972) EA 32 Kimeu vs Republic (2003) KLR 756**

17. The issue for determination is essentially just one, whether there was sufficient evidence to warrant the conviction and sentence.

1. **The charge sheet**

It is evident on the face of the charge sheet that on the main charge and on the alternative charge the appellant is accused that he;

i) committed the offence of incest *"he intentionally touched the vagina of MW with his penis"*

ii) On the offence of indecent act *"intentionally touched with his penis"*

Clearly therefore there is no accusation of penetration of the child. So, on what basis was the case led on the ground that accused person defiled the child? None, the prosecution did not prefer a charge that required them to prove penetration, how then would they proceed to prove penetration.

According to the Sexual Offences Act, Section 2 penetration is key to any charge of defilement. Without placing it in the charge sheet, the prosecution were clearly saying from the onset that they did not have evidence of penetration and would not be dealing with that issue. The fact that throughout the trial the charge sheet was never amended raised issue as to the basis of the conviction based on evidence of penetration. Sexual offences are very serious offences, nothing ought to be taken for granted, not even the drawing of the charge sheet. It is my view the fact that the omission of such a key ingredient of defilement from the charge sheet was prejudicial to the appellant as it clearly stated that he was accused of ***"touching his daughter's vagina with his penis***" only for the prosecution to go off in a tangent and to produce evidence of alleged penetration.

18. Did the child tell of any penetration? The evidence of the child was a few lines. No -where in her evidence did she say that her father's body came into any contact with her body. **Nowhere**. She states that he removed her panty and she felt pain in her private parts and had a stomach ache. In the narrative it is after she has felt pain in her private parts and had a stomach ache that her father removes her trouser, what does he do to her? There is no evidence of what he did to her. This is also reflected in the testimony of TW her mother, in her testimony, nowhere does she say that the child told her what accused actually did to her. There is no evidence even from the mother that there was any bodily contact between the accused and the child. She simply says the child told her that her father removed her clothes, then removed his, nowhere does PW1 state that the child told her what the accused person actually did to her after he allegedly removed her clothes. This is very significant. Without any evidence body contact how can the prosecution say that it is the accused person who allegedly defiled the child?

19. The doctor's evidence is that there was discharge, hymen was not intact, and reddish vulva. The mother said she saw swellings and bruises, but never saw any blood or the discharge yet she was the one who allegedly examined the child so soon after the alleged defilement.

The doctor was bound to take samples and confirm whether what she saw was spermatozoa/semen. She took the court on a *"may be"* tour, may be they were sperms because the discharge was around the vagina, may be it was discharge from an ejaculation. What stopped her from subjecting the said discharge to lab tests to confirm whether or not it was spermatozoa? Nothing, possibly because there was no discharge otherwise TW would have seen it. In any event even the lab report produced said "no spermatozoa" after carrying out lab examination.

20. The P3 states that the date and time of the alleged offence is **"not well known",** but the Post Rape Care states it was on 11th June, 2018 at 3.00 p.m. How is that possible? That when reporting to the police TW would say she did not know the 'may be ' date or time of the alleged offence but at the hospital would give exact time and date? It is noteworthy that the 3pm mentioned in the PRC is the time she says she got home from the farm. So what time did it happen? That begins to create doubt as to whether an offence was actually committed.

21. The Dr. who completed the P3 indicated that there was a small penetration. What is a "small" penetration? The person who signed the P3, signed it "for" another doctor. Did this doctor actually examine the child? If she did why would she sign the P3 for her colleague? It is indicated that there was whitish discharge around the external genitalia, swelling of the labia minora and majora, "the hymen is not intact, conclusion there was small penetration". There is reddening of the vulva.

22. This is part "c" of the P3, which ought to be completed AFTER the completion of part A and B. For part 'B' which gives details of other injuries, treatment and age of injuries, the doctor crossed out all the areas and wrote "N/A". The part for the male accused was also crossed out yet he was arrested on 12th June, 2018 in the morning. He was not taken to hospital for examination, and though samples of what appeared to be 'sperms' were available none were taken for purposes of DNA from the complainant. Even part A of the P3, which relates to state of clothing, general medical history and general physical examination, including the hospital reference number was not completed. The offence is alleged to have been reported at 1510 hours on 12th June 2018 yet 6.30 a.m. on the same date the chief was rang that the offender was intending to run away". This same chief testified that the *nyumba kumi* told him that the accused had defiled his 'son'.

23. Coming to the investigations, what investigations were carried out? It is saddening that an investigating officer would consider the mere recording of statements as complete investigations in an SOA case. At what point in our criminal justice system an I.O take the statements, and then go find out the veracity of the same? Due to the nature of the offences and the fact that the victims are more or less very vulnerable members of our society, it is dangerous, and a violation of the victim's rights. The victim has a right to proper investigations, professional investigations. This I.O did not herself interview the complainant who was interviewed by "privately by a kikuyu female police officer'. It is to this officer that the child is said to have told she was defiled by her father. The investigating officer herself said she was told by this Kikuyu police officer who never testified that the child told her she was defiled by her father. She never visited the scene. According to TW the child told her her father wiped her with a shirt. That shirt was never looked for. The child was not asked anything about it and she never even mentioned it in her own testimony. She never confirmed the story of the two (2) minors that they had actually been sent to the shop by their father (grandfather). This was very crucial considering that the two gave unsworn statement, and the court formed the view that they did not understand the nature of an oath/importance of telling the truth. The investigating officer needed to prove every fact. The allegation that the accused had sent the other children away so that he could be alone with the minor was crucial. To leave it to chance was to leave a hole in the case for the prosecution, because that left that fact to sit on the unsworn evidence of two (2) minors. This was even more crucial because of the inconsistency between the testimony of TW and the two (2) minors as to who found the child crying. Both minors said they found the child crying and reported to TW when she arrived, but when TW testified she said she found her crying and proceeded to question her.

24. The prosecution was required to establish a prima facie case to warrant the accused to be put on his defence, see **Bhatt v Republic**. The trial magistrate was persuaded by the fact of the child crying "uncontrollably" when the accused began to cross examine. The issue is, there is nothing on record to show why the child was crying or that the child was crying because she was afraid of the father. It is only TW who said that the child was threatened and feared the father. The child never said that, and was never questioned about why she was crying.The trial magistrate and the prosecution had the opportunity to invoke the **Victim Protection Act** to provide the requisite psycho-social support for the child so that she could tell her story in court, but the court made the presumption that he tears were caused by fear of the accused. The fact it is, there was no evidence to support that.

25. The prosecution proved that the child was about five (5) years at the time of the alleged offence. However they presented a defective charge, and proceeded to present evidence that was so discredited it could not support the conviction. Had the trial magistrate applied her mind to it, the medical evidence is questionable, the fact of the alleged defilement doubtful and there having been no investigations conducted, I find the conviction unsafe, the same is quashed, the sentence of life imprisonment is set aside, and the accused is to be set at liberty forthwith unless otherwise lawfully held.

Dated, delivered and signed at Nakuru this 16th day of January, 2020.

Mumbua Matheka

Judge

In the presence of

.............................Court Assistant

Appelllant…..............................

Respondent ....