



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITUI**

**CRIMINAL APPEAL NO. 14 OF 2018**

**LK.....APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

**JUDGEMENT**

1. The appellant one LK was charged with offence of incest contrary to section 20(1) of the Sexual Offences Act No. 3 of 2006. The particulars being that on diverse days in the month of August to October 2015 had defiled his daughter by causing his penis to penetrate her vagina having knowledge that she was his daughter.
2. The appellant denied the charge and matter went into full trial.
3. After prosecution case, the appellant was put on his defence and he tendered sworn evidence and called three witnesses. He denied committing the offence. He claimed his wife framed him because they disagreed over his sale of maize without her consent.
4. After matter was heard the appellant was convicted and sentenced to serve life imprisonment.
5. Being aggrieved by the said decision the appellant lodge the instant appeal and set out 5 grounds which in summary complain of –

***i. Whether the charge was defective?***

***ii. Whether admission of witness statements violated Article 50 (4) of the Constitution?***

***iii. Whether the prosecution proved its case beyond reasonable doubt?***

6. The parties were directed to canvass appeal through submissions. The prosecution relied on evidence on record.

**APPELLANT'S SUBMISSIONS**

7. The appellant submitted that the trial magistrate's finding in the instance case was not supported by the evidence on record. The charge sheet stated that on the diverse days between 1st August and 11th October 2015 he defiled one MM who to his knowledge was his daughter.
8. The prosecution called a total of 6 witnesses in order to prove their case but at the end of the day the burden of proof was not discharged in spite of the trial magistrate's findings that the case for the

prosecution was proved beyond any reasonable doubt.

9. PW1 and PW2 repudiated their testimony on oath. They claimed they recorded the statements at the police station which were produced as exhibits. However, on oath they stated contradicting information. Since they were not very reliable witnesses the court must warn itself when considering their testimony.

10. The testimonies by PW1, PW3 and PW4 there is no doubt that their evidence is no more than mere hearsay evidence. Nobody witnessed the incident. In law such evidence is inadmissible and of no any evidential value in a case.

11. Furthermore, their evidence was mere hearsay evidence which in law is not admissible. In the case of ***Kinyatti vs Republic Cr. Appeal No. 60 of 1983 (CA)*** it was held:-

***“Hearsay or indirect evidence is the assertion of a person other than the witness who is testifying. It is not original evidence and is inadmissible.”***

12. See also **Article 50(4) of the Constitution** which states: -

***“Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of the evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice.”***

13. He cites the case of In the case of ***Burunyi & Anor vs Uganda Cr. Appeal No. 1968 EA 123*** whereby **Sir, UDO UDOMA** the then CJ held:

***“It is not the duty of the court to stage-manage cases for the prosecution nor is it the duty of the court to endeavor to make a case against an accused where there is none. In a criminal case, the court cannot enter into the arena. The only duty of the court is to hold the scale to see that justice is done according to law on the evidence before it.”***

#### EVIDENCE TENDERED

14. The prosecution was that PW1 the complainant's mother tendered evidence on oath. Initially she denied that her husband defiled the minor. She claimed they disagreed over maize. However, she admitted voluntarily recording a statement at the police station and signing it. She claimed she recorded what the child had reported to her.

15. PW6 the investigating officer who took over the matter from PC Sosten Leting who was deceased confirmed he recorded PW1's statement which she voluntarily recorded and signed. He confirmed he read it to her. He also confirmed PW2's statement was recorded by the late PC Leting and it was voluntary.

16. These two statements together with PC Leting's statements were produced. PW1 recorded that she found the minor in bed with the father in October 2015 after she came from milking the cow. The appellant threatened her after the child reported her father had defiled her.

17. PW2 the child also did not narrate the incident to court. She only testified that her father was the appellant and she was in Class Two. She also stated that she spoke with the police and wrote her name in the statement.

18. In the said statement produced as exhibit 1, the child narrated to the police that in August 2015 her father defiled her several times. The child told the police her mother found her in bed with her father but he threatened her. The child also reported to her teacher Mr. K who accompanied her to the police station together with the teacher.

19. PW3 Angeline Kalunda testified that she was the Assistant Chief of Kaliva Sub-Location. On 15/10/15 the headteacher of N called her and notified her that the complainant had narrated to the teacher

that her father repeatedly defiled her. The next day she went to the school and spoke with AM a teacher.

20. The child confirmed to her and the teacher that her father defiled her repeatedly until she no longer felt any pain. The said witness confirmed taking the child to the police station where she recorded a statement and also accompanied her to the hospital at Migwani.

21. PW4 AM corroborated the Assistant Chief's statement. She stated that on 2/10/15 the minor narrated to her of her defilement ordeal by her father which had been done several times. She told the witness that once her mother found her in bed with her father.

22. She stated that her father had threatened her that is why she never made a report. She confirmed she accompanied the complainant to the police station and to the hospital.

23. PW5 Dr. Christopher Wahinga testified on behalf of Kalula a clinical officer who did the treatment notes. He stated that the doctor was transferred on medical grounds but he had worked with him for a year and was familiar with his handwriting.

24. The witness confirmed he completed the P3 form and examined the child at that point. The complainant was observed to have a smelly discharge. She gave history of defilement by her father. She was noted to have rushes in her labia majora which was swollen.

25. Her hymen was completely torn and healed in accordance with the testimony of the witness. He concluded there was evidence of repeated sexual defilement. He produced the post rape care form on behalf of the clinical officer Kalula. He also produced the P3 form which he had completed, the lab request and report form.

26. PW6 Gregory Maingi testified that he took over the case from the late PC Sostein Leting. He recorded PW1's statement and produced it as exhibit 1. He confirmed PW2's testimony was by PC Leting. He produced it as exhibit 2. The witness also produced the statement by PC Leting.

27. The witness confirmed the complainant was accompanied by the teacher and Assistant Chief to make a report of defilement on 16/10/15. The deceased PC Leting and Cpl. Katui spoke with the minor. After investigations the appellant was said to have been arrested and charged in court.

28. The appellant in his defence tendered evidence on oath. He claimed he fell out with his wife over the sale of maize. In addition he said he was framed because after he chased his wife she wanted to come back. The appellant claimed all that time he was working at Thitha but came home every two weeks to buy food for his family.

29. DW2 and DW3 were brother and sister of the appellant. They stated that in July 2015 the appellant disagreed with his wife over maize. She went to live with her grandmother but DW2 claimed that she was brought back by her father.

30. DW3 claimed her sister in-law was brought back by their uncle after she fled the home. DW4 the brother to the complainant's mother testified that she requested him to assist her get the maize from the purchaser. The complainant was living at their grandmother's home.

31. He stated he only testified about the disagreement over the maize but did not know whether or not he defiled the child. He could not recall the year or month the maize incidence arose.

#### ISSUES, ANALYSIS AND DETERMINATION

32. After going through the evidence on record and filed submissions, I find the issues are ;

##### **i. Whether the charge was defective?**

ii. Whether admission of witness statements violated Article 50 (4) of the Constitution?

iii. Whether the prosecution proved its case beyond reasonable doubt?

33. On whether the charge was defective, The charge sheet in court stated as follows;

***“On diverse dates, between 1<sup>st</sup> August to 4<sup>th</sup> October 2015 ....., being a male person caused his penis to penetrate the vagina of MW a female person aged 9 years who to his knowledge is his daughter”***

34. On whether the charge sheet was defective, **section 137 of the Criminal Procedure Code** provides as follows:

***“The following provisions shall apply to all charges and information, and, notwithstanding any rule of law or practice, a charge or information shall, subject to this Code, not be open to objection in respect of its form or contents if it is framed in this accordance with this Code-***

***(i) a count of a charge or information shall commence with a statement of the offence charged, called the statement of the offence;***

***(ii) the statement of the offence shall describe the offence shortly in ordinary language, avoiding as far as possible the use of technical terms, and without necessarily stating all the essential elements of the offence, and if the offence charged is one created by enactment shall contain a reference to the section of the enactment creating the offence;***

***(iii) after the statement of the offence, particulars of the offence shall set out in ordinary language, in which the use of technical terms shall not be necessary; provided that where any rule of law or any act limits the particulars of an offence which are required to be given in a charge of information, nothing shall require more particulars to be given than those so required.”***

35. The court finds that all the essential elements were well captured in the charge sheet read to the appellant on the 12th May 2015. It contains appellants name, victims name and age, and allegations of penetration and knowledge of the appellant that she was his daughter.

36. **Section 134 of the Criminal Procedure Code** provides that:

***“Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with particulars as may be necessary for giving reasonable information to be offence charged.”***

37. In ***BND vs Republic [2017] eKLR*** the trial court laid out the test to be followed in determining whether a charge sheet is defective as follows:

***“...the principle of the law governing charge sheet is that an accused should be charged with an offence known in law .The offence charged should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to a specific charge that he can understand. It will also enable an accused person to prepare his defence.”***

38. The appellant complains that the provisions of **Art 50(4)** were breached as hearsay evidence in statements of pw 1,3 and 4 were admitted thus trial was unfair.

39. Hearsay or indirect evidence is the assertion of a person other than the witness who is testifying, offered as evidence of the truth of that asserted rather than as evidence of the fact that the assertion was made. It is not original evidence.

40. The rule against hearsay is that a statement other than one made by a person while giving oral evidence in the proceedings is inadmissible as evidence of a stated fact.

41. In court of appeal case of *Kinyatti vs Republic*[1984] eKLR the court stated;

***“Hearsay evidence may be admitted if the statement containing it is made in conditions of involvement or pressure and within proximity but not exact contemporaneity as to exclude the possibility of concoction or distortion to the advantage of the maker or the disadvantage of the accused. The evidence of a statement made to a witness by a person who is not called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is not admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made. Some seemingly hearsay evidence may be proved to be original evidence when the fact that it was made, as distinct from its truth by taking the following into account:***

***(a) was the statement made or not***

***(b) it is relevant to an issue, regardless of whether it is true or false***

***(c) if it affects the credit of a witness by either being consisted or inconsistent.***

42. On 30/8/016 the appellant confirmed that he was supplied with statements and was very ready to proceed with hearing of the matter. On the 4/10/016 the matter proceeded and appellant cross-examined all the witnesses .The statements he is now calling hearsay were produced without objections raised.

43. The makers of statements by PW1, and PW2 were in court thus same were not hearsay as the makers agreed for them to be produced and they confirmed they made the same. The appellant never opposed production and did cross-examine the witnesses.

44. PW3 testified on her statement but same was not produced. What she was informed by PW2 is not hearsay under exceptions to hearsay rule. She was not saying she witnessed the incidence but said PW2 told her what had happened whether true or false. The appellant could have questioned PW2 whether she had told pw3 about the incident subject of charge.

45. The same finding applies to the evidence of pw4 who was informed by the child of the incident. Thus there was no law which was violated in admission of statements and evidence of PW1, PW2, PW3 and PW4 thus that ground fails.

46. On prove of the charges, the prosecution must prove penetration, that time the accused was aware she was his daughter. The prosecution must the also prove the age of the victim for sentencing purposes.

47. PW1 and PW2 repudiated their testimony on oath. They claimed they recorded the statements at the police station which were produced as exhibits. However, on oath they stated contradicting information. Since they were not very reliable witnesses the trial court did warn itself when considering their testimony.

48. However, their written statements though not on oath were corroborated substantially by PW3, the Assistant Chief and PW4 the teacher to the complainant. They confirmed receiving the complaint of defilement from the complainant.

49. PW5 testified that indeed the complainant had been repeatedly defiled since she had a totally torn and healed hymen, and a smelly discharge at the time of examination. In addition, she had rashes on her labia majora and labia minora which were swollen. PW6 also testified that he recorded the statement of PW1 who had indicated she found the complainant in bed with the appellant.

50. The appellant claimed he was framed. The evidence of the prosecution was weighty against the appellant's claim. The witnesses of the appellant gave contradicting version of who escorted the appellant's wife after she fled from her home. None of them could recall when the incident occurred.

51. The trial court found that, the evidence of the prosecution even without relying on the evidence of PW1 and PW2 on oath was sufficient to prove indeed the appellant caused his penis to penetrate the vagina of the complainant. The complainant identified her father as the appellant. The appellant did not deny she was his daughter. This fact was proved beyond reasonable doubt.

52. This court agrees on the said finding on the basis of the evidence on record. The same finding is justified.

53. At the time the appellant defiled the complainant, he was aware she was his daughter. The appellant also admitted in his defence that he had two children, the complainant and another.

54. On the issue of the age of the complainant, her mother stated she was born the year 2005. An age assessment was done by **Dr. Ubus**, a report was produced as an exhibit by PW5. She was estimated to be between 9 and 12. He observed her teeth and other early signs of puberty. The mother of the child indicated she was 11 years at the time of the offence.

55. The court finds that the appeal on conviction has no merit and the same fails. However, on sentence, though the trial court entertained the mitigations and noted the same, it went ahead to state that the sentence was prescribed meaning mandatory life on the basis of the age of the victim.

56. Under supreme court of Kenya petition no 15 of 015, MURUATETU case, the court rendered mandatory aspect of the sentence unconstitutional. This authority has been followed by all superior courts in that respects. Thus this court will tamper with the sentence to correct trial court order on sentencing.

57. Thus court makes the following orders;

***i) The appeal on conviction is dismissed and upheld.***

***ii) The appeal on sentence succeeds and the life sentence is set aside and matter is referred to the trial court for sentencing after considering mitigations.***

**DATED, SIGNED AND DELIVERED AT KITUI THIS 17<sup>TH</sup> DAY OF JANUARY, 2020.**

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**C. KARIUKI**

**JUDGE**