REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 22 OF 2019

SAMMY CHARO KIRAO.....APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

(Appeal from original conviction and sentence in Kilifi Criminal Case No. 13 of 2017 in the Judgment delivered by Hon. R. K. Ondieki on 12th October 2017)

CORAM: Hon. Justice R. Nyakundi

Appellant in person

Mr. Nyoro for the State

JUDGMENT

This is an appeal by the appellant from the Judgment of the trial court dated 12.10.2017 in which the Learned trial Magistrate convicted the appellant for the offence of incest contrary to Section 20 (1) of the Sexual Offences Act and subsequently sentenced him to life imprisonment.

Being aggrieved with both orders forming the central basis of the Judgment he preferred an appeal to this court seeking for the reversal of both the conviction and sentence.

In the amended Memorandum of Appeal, the appellant is aggrieved of the following grounds:

> ***(1). That the Learned trial Magistrate grossly erred in Law and facts by failing to consider that he was denied the right to information disclosure prior to the taking of plea, in breach of Article 50, 2(a)(b)(c) of the Constitution.***
>
> ***(2). That the Learned trial Magistrate erred in Law and facts by failing to consider that the legal provision providing for mandatory minimum and maximum sentence under Section 20 in this case 20(1) of the Sexual Offences Act No. 3 of 2006.***
>
> ***(3). That the Learned trial Magistrate erred in both Law and fact by considering that the appellant was not accorded adequate time to prepare his defence.***

Analysis and determination

In the offence under Section 20 (1) of the Sexual Offences Act it was incumbent for the prosecution to proof beyond reasonable doubt as stated in the case of **Miller v Minister of Pensions {1942} 2 ALL ER and Woolmington v DPP 1935 AC 1** the following ingredients:

> ***(a). Sexual penetration of the child aged below 18 years.***
>
> ***(b). The said child must be at the time a family member or has a blood relationship with the appellant.***
>
> ***(c). That the person who committed the sex act was none other than the appellant.***

The trial history

The prosecution mainly relied on the testimony of **(PW1) K.K.S.** she stated in court that at one time she used to stay in the same house with her grandmother, but on instigation of the appellant they moved together to his house at Mbogolo. In one of the nights, the complainant alluded to in her testimony, the appellant demanded sex from her accompanied with threats, blows, kicks and assault. In her evidence not even the screams would stop the appellant from accomplishing his unlawful act to have sexual intercourse that night. That the sexual acts continued at various stations in Nairobi and Mbogolo in Kilifi whenever they happened to sleep together in the same house.

PW2 – Mary Komoro a village elder testified that the appellant had sold his land and migrated to Nairobi where they stayed with the complainant. However, in 2017, they moved back to Mbogolo Kilifi where they continued to stay in the same house without the complainant even going to school. PW2 further testified that in the course of her duties she received information of the appellant defiling the complainant during their stay. With this suspicion, PW2 reported the incident to Kilifi Police Station who issued the complainant with a P3 Form.

PW3 -Lucky Karisa, testified that the appellant and the complainant lived together at Mbogolo upon relocation from Nairobi. Notwithstanding, advise from PW3, he went on to stay in the same room with the complainant. According to PW3 evidence she even went to the house where she confirmed the surrounding circumstances under which the defilement took place.

PW4 – CPL Philip Dzombo, attached to Kilifi Police Station explained that on investigations, it emerged that the appellant has been having carnal knowledge with the complainant on diverse dates as reported to the police station. According to PW4, the P3 issued to the complainant was filled by **Dr. Bachu** but produced in court by **Dr. Aziza** of Kilifi County Hospital.

In conclusion PW5 told the court that **Dr. Bachu** opined that the complainant hymen was ruptured, there were signs of lacerations to the labia. The PRC and P3 forms were admitted in evidence as exhibit 1 & 2 respectively.

Thereafter, after the close of the prosecution case, appellant was placed on his defence. He denied the charge and any allegations pointing at him as having had carnal knowledge with the complainant.

Analysis and Resolution

As outlined above at the trial court the crux of the matter was for the prosecution to proof the elements of defilement beyond reasonable doubt inorder to secure a conviction as expressly provided for under Section107(1) of the Evidence Act.

In so far as penetration of the complainant's genitalia was concerned, the trial court had at its disposal her own testimony on the sequence of events leading to the commission of the crime. What amounts to penetration is clearly defined under Section 2 of the Sexual Offences Act to include both partial, slight or complete insertion of the male genitalia into the complainant genitalia.

In respect of proof of the charge the Supreme Court of Uganda in **Hussein Bassita v Uganda CR Appeal No. 35 of 1995** held as follows:

> ***"The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually, the sexual intercourse is proved by the victims own evidence and corroborated by the medical evidence or other evidence. Though desirable it is not a hard and fast rule that the victims evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration. Whatever evidence the prosecution may wish to adduce to prove it's case such evidence must be such that is sufficient to prove the case beyond reasonable doubt."***

According to the provisions under Section 124 of the Evidence Act, it is a general principles of Law that sexual offences can be corroborated by any other evidence implicating the accused. However, the same provision, the absence of corroboration does not render the testimony of a single identifying witness fatal to the charge. A trial court correctly can convict an accused person without corroboration subject to the proviso in Section 124 of the Act after sounding a warning on the danger of moving to convict an accused on the basis of a single identifying witness. I am satisfied that the parameter set of a single identifying witness as observed in **R v Turnbull** could not be faulted.

Incidentally, in this case as I understand it and from perusal of the record, the other valuable evidence in support of the element of penetration can be found in the testimony of medical evidence by PW5. According to PW5, the complainant hymen was ruptured compounded with lacerations to the labia.

There was therefore compliance by the Learned trial Magistrate with the provisions of Section 124 of the Evidence Act. It follows also from the decisions of the courts in **Simon Musoke {1958} EA 715 and Teper v R {1952} A.C. 480**. The circumstantial evidence of **PW2 Mary Komoro, PW3 Lucky Karisa, PW4 Philip Dzombo and PW5 – Dr. Aziza,** the exculpatory facts and evidence admitted by the trial court are incompatible with the innocence of the appellant and incapable of any explanation upon any other hypothesis than that of the commission of the sexual act and his guilt.

The appellant's defence that the complaint arose because of an attempt he made to discipline the complainant to stop her from going to discos remains an averment that did not satisfy cogent evidence in rebuttal of the watertight case put forth by the prosecution.

On the age of the complainant the evidence considered by the trial court was that of **Dr. Mwachai L. G.** in his medical assessment report dated 21.4.2017 her age was assessed at 16 years old. With regard to the importance of proof of age in sexual offences, in **Hudson Ali v Mwachungo v R {2016} eKLR** it was held by the Court of Appeal as follows:

> ***"The importance of proving the age of the victim of defilement under the Sexual Offences Act, by cogent evidence cannot be***

gain said. It is not in doubt that the age of the victim is an essential ingredient of the offence of defilement and forms an important part of the charge, because the prescribed sentence is dependent on the age of the victim.

In **Hilary Nyongesa v R HCCRA NO. 123 OF 2009** the court held that:

> ***"In defilement cases medical evidence is paramount in determining the age of the victim and the doctor is the only person who would professionally determine the age of the victim. In the case of any other evidence apart from medical evidence, age may also be proved by a birth certificate, the victims parents or guardian and by observance and common sense."***

In the instant case, based on the evidence on medical assessment report produced at the trial by PW5 it was ascertained that the complainant was sixteen (16) years at the date of the offence.

I find the evidence to be conclusive and the court had an opportunity to see the complainant and apply common sense to the scientific evidence of **Dr. Mwachai**.

As for the conduct of the appellant, it is observed from the totality of the evidence by (PW1), PW2 and PW3 that the appellant performed the unlawful act voluntarily and he created a situation that was under his control enough to have sexual intercourse with the complainant. The *actus reus* of the offence comprised of the appellant conduct of not taking the complainant to school and circumstances attendant to the commission of the offence were that he embraced the idea of living in the same house with the complainant both in Nairobi and Mbogolo. The so called sexual penetration would then become prevalent and continue to be committed against the complainant in an exclusive opportunity necessary to give rise to occurrence of the offence. Given, the evidence of PW1, PW2 and PW3, the appellant seized the opportunity to coin the defence that all he did to the complainant was to discipline her albeit wrongly from the habit of attending discos. With respect I find the defence to be of insufficient quality to safely dislodge the prosecution case.

Broadly, as can be deduced from the record, the appellant criminal intent to commit the offence involved a variety of culpable stages such as knowledge, recklessness, unlawful act done to have carnal knowledge of the complainant. The very credible evidence shows that the appellant acted purposely and knowingly that despite the complainant being his daughter, he cared less for being involved on each material of the offence. That the appellant acted recklessly the court in **Schroeder v State 123 S.W. 3D 398 (CR Appeal Dec 03 2003** made reference to the model Penal Code which formulated the definition of recklessness as follows:

> ***"A person acts recklessly with respect to a material element of an offence when he consciously disregards, a substantial and unjustifiable risk that the material elements exist or will result from his conduct. The risk must be of such a nature and degree that considering, the nature and purpose of the actors' conduct, and the circumstances known to him, its disregard involves a gross deviation. From the standard of conduct that a Law – abiding person would observe in the actor's situation."***

The trial court dealt in detail and accurately and carefully with the question of a raft of issues that demonstrated the culpability of the appellant thereby displacing the contention by the appellant that the prosecution wrongly placed reliance on the evidence of **(PW2), (PW3) and (PW5)** on the issue of corroboration. What amounts to corroboration in a case was well stated in the case of **Uganda v George Wilson Simbwa (SC) Criminal Appeal No. 37 of 1995** wherein it was held that:

> ***"Corroboration affects the accused by connecting or tending to connect him with the crime. In other words it must be evidence which implicates him, which confirms in some material particular not only the evidence that the crime has been committed but also that the defendant committed it. The test applicable to determine the nature and extent of corroboration is the same whether it falls within the rule of practice at common law or within the class of offences for which corroboration is required."***

Having reviewed the evidence, I am of the view that the appellant perpetrated the commission of the incest crime when he physically fulfilled the requisite elements of the definition of the substantive offence. I dare emphasize that the appellant on the ingredients of the offence was convicted on weighty and uncontroverted primafacie evidence. The appeal on this ground lacks merit.

The next unsatisfactory matter raised in this appeal was an infringement of Article 50 of the Constitution on right to a fair trial. The most substantial criticism by the appellant was against the trial court inaction not to ensure the charge sheet and witness statements were supplied immediately after taking plea in court under Sub-section (b) (c) (j) (k):

> ***"(b). to be informed of the charge, with sufficient detail to answer it;***

(c). to have adequate time and facilities to prepare a defence;

> ***(j). to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence.***
>
> ***(k). to adduce and challenge evidence;"***

On the interpretation of Article 50 of the Constitution encompasses fair trial rights guaranteed to an accused person. In summary an accused person has a right to pretrial discovery, to be supplied with depositions, copies of witness statements and exhibits unless there is a valid reason to withhold such crucial information relevant to the prosecution of the case against the accused **(See Juma & Others v Attorney General {2003} KLR, Mbogholi and Kuloba JJ**):

> ***"It is an elementary principle in our system of the administration of justice, that a fair hearing within a reasonable time, is ordinarily a judicial investigation and listening to evidence and arguments conducted impartially in accordance with the fundamental principles of justice and due process of law and of which a party has had a reasonable notice as to the time, place and issues or charges, for which he has had a reasonable opportunity to prepare, at which he is permitted to have the assistance of a lawyer of his choice as he may afford and during which he has a right to present his witnesses and evidence in his favour, a right to cross-examine his adversary's witnesses, a right to be appraised of the evidence against him in the matter so that he would be fully aware of the basis of the adverse view of him for the judgment, a right to argue that a decision be made in accordance with the law and evidence."***

In the case of **Natasha Singh v CBI** the court held that:

> ***"Fair trial is the main object of criminal procedure, and it is the duty of the court to ensure that such fairness is not hampered or threatened in any manner. Fair trial entails the interest of the accused, the victim and of the society, and therefore, fair trial includes the grant of fair and prompt opportunities to the person concerned, and the same must be ensured as this is a constitutional as well as human right."***

With respect to the complaint raised by the appellant on the question as to time when disclosure of the witness statements was successfully issued by the prosecution, in most instances, the duty is as entailed and stated in **R v Mcllkenny {1992} 2 ALL ER 4517** thus:

> ***"The prosecution's duty at Common Law and to constitutionally to disclose to the defence all relevant material, i.e. evidence, which tended either to weaken, the prosecution case or to strengthen the defence case, required the police to disclose to the prosecution all witness statements and the prosecution to supply copies of such witness statements to the defence or to allow them to inspect the statements and make copies unless there are good reasons for not doing so. Furthermore, the prosecution were under a duty, which contributed during the pretrial period and throughout the trial, to disclose to the defence all relevant material, or scientific, whether it strengthened or weakened the prosecution case or assisted the defence case and whether or not the defence made a specific request for disclosure……."***

In **R v Ward {1993} 2 ALL ER 577 at 601 J** the court further held:

> ***"All relevant evidence of help to an accused, is not limited to evidence which will obviously advance, the accused's case. It is of help to the accused to have opportunity of considering all material evidence which the prosecution have gathered and from which the prosecution have made their own selection of evidence to be led."***

In the instant appeal, I have reviewed the record and the evidence it clearly, shows the prosecutors brief, on witness statements and documentary docket was supplied to the appellant in advance of the state witness taking oath to testify in support of the charge.

As the issue is concerned there was no limitation that the prosecution or the court's duty of fairness to the appellant was infringed or violated as claimed in the Memorandum of Appeal.

The circumstances of this case simply do not justify the exercise of discretion to impugn the Judgment of the trial court, on this ground under Article 50 of the Constitution. The power is exercisable where the appellate demonstrates that there was non-disclosure which when considered in the interest of justice the situation occurring prejudiced or caused a failure of justice in the criminal trial. The real danger, as it seems to me is the failure by the prosecutor and the trial record to show the time and date when the case docket relied upon by the prosecution was furnished to the accused in compliance with Article 50 (2) (f) of the Constitution. Even, more disturbing is the casual nature trial courts handle applications for disclosure and witness statements by self-represented offenders as a precedent for the trial. It follows that, in my view and with due respect to the independence of the trial court constituted under Article 50 (1) of the Constitution to satisfy the record evidential onus that the prosecution has disclosed all materials on the charge against an accused person.

I am therefore satisfied that there are no issues of Law or facts raised by the appellant to warrant interference with his conviction as a whole.

As far as sentence is concerned, it is a matter which this court hesitates to interfere with the discretion of the trial court unless in the circumstances of the verdict on sentence is manifestly excessive, ignored material factors, took into account irrelevant matters and misapprehended the Law **(See Bernard Kimani Gacheru v R CR Appeal No. 188 of 2000**).

The decision and others concedes that interference with sentence by appellate court can only be done on any of the specific grounds provided above. I now end this Judgment by saying that being of the view and for the reasons that I have given, the Learned trial Magistrate was right in convicting and passing the lawful sentence against the appellant.

Therefore, this appeal must be dismissed.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 14TH DAY OF APRIL 2020

R. NYAKUNDI

JUDGE