REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCRA NO. 106 OF 2019

DKM.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of the Principal Magistrate Hon. C.A. Mayamba

dated 28/03/2019 in Kilungu SRMCR No. 12 of 2019.)

JUDGMENT

1. **DKM** the Appellant 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 were that the Appellant on the diverse dates between May and August 2018 in Mukaa sub-county within Makueni county being a father caused his genital organ to penetrate the genital organ of **CMK** a child aged sixteen (16) years and two (2) months who was to his knowledge his daughter.

2. He also faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006. The particulars were that the Appellant on the diverse dates between May and August 2018 in Mukaa sub-county within Makueni county intentionally and unlawfully touched the genital organ of **CMK** a child aged 16 years and two (2) months with his penis.

3. The Appellant denied the charges and the case proceeded to full hearing with the prosecution calling four (4) witnesses. The Appellant gave an unsworn defence without calling any witnesses.

4. He was finally convicted on the main count and sentenced to life imprisonment. Being aggrieved he filed this Appeal raising the following grounds: -

a) **That** the trial Magistrate erred in law and fact by failing to find that the elements of the offence *(identification)* were not conclusively proved to warrant a conviction.

b) **That** the learned trial Magistrate erred in law and fact in relying on the evidence of Pw1 whose integrity was questionable.

c) **That** the trial Magistrate erred in law and fact by failing to find that no *voire dire* was conducted in the present case in violation of the law.

d) **That** the trial Magistrate erred in law and fact by failing to find that essential witnesses necessary to prove basic facts did not testify.

e) **That** the trial Magistrate showed open biasness towards the Appellant.

f) **That** the sentence met upon the Appellant was harsh and excessive.

g) **That** the learned trial Magistrate erred in law and fact by failing to find that this was a fabricated case due to bad blood between the two families.

5. The prosecution case is that Pw1 CMK then aged 16 years when she testified on 19th February, 2019 is the Appellant's daughter. She was

staying with her grandmother but later came to stay with her sister at their home. This was in April 2018, and during her stay at home her father (*Appellant*) engaged her in forceful sex between May – August 2018 and she conceived.

6. He then organized for her to abort on 7th February, 2019. The matter became known to the administration and the assistant chief. Pw2 came for her and took her to the police station (*Kilome*) where a report was made. She was sent to the hospital and was treated and examined by Pw3, who confirmed she had been defiled. **Pw4 No. 107610 P.C Mollent Achieng** was the Investigating officer.

7. In his unsworn defence the Appellant denied the charge saying it was a fabrication as the boy responsible for the Pw1's pregnancy was **MK**. He however admits having organized for the abortion.

8. When the appeal came for hearing, the Appellant relied on his written submissions. He addresses the court on the ingredients of the offence of defilement. He submits that he was not identified as the culprit as he was never examined. That Pw1 who was not a credible witness had admitted having left her grandmother's home after her friendship with MK was discovered.

9. He claims to have only assisted with the abortion and nothing more. He raised issue with the prosecution for not calling Pw1's

sister as a witness and failure to do a DNA test to confirm the paternity of Pw1's child. On this he relied on the case of **Amos Kinyua Kugi – vs- R 2015 eKLR where Justice G.W. Ngenye** had said a DNA test would have assisted the prosecution since its evidence was weak.

10. He also submits that the court ought to have conducted a *voire dire* examination on Pw1. He cites section 125(1) of the Evidence Act and section 19(1) of the Oaths and Statutory Declarations Act and argues that Pw1 was a child. Referring to **Samuel Warui Karimi –vs- R (2016) eKLR** he contends that Pw1 ought to have been taken through a *voire dire* examination.

11. He further submits that failure to call Pw1's sister was fatal to the prosecution case. He cites the case of **Juma Ngodia –vs- R (1982 – 88) KAR 454** to support his argument.

12. He states that Pw1 had mentioned the sister severally and it would only have been fair for her to be called to testify unless the prosecution was hiding something. He refers to the case of **Julius Kalewa Mutunga –vs- Republic Criminal Appeal No. 31 of 2005(UR) and Paul Kanja Gitari –vs- Republic (2016) eKLR.**

13. The Appellant accuses the learned trial Magistrate of bias. On this, he refers to the remarks by the trial court just before the sentence. As a result, he was awarded the harshest sentence. He continues to plead his innocence. He has reminded the court of its duty to re-evaluate the evidence.

14. The Respondent represented by Mrs. Owenga relied on its written submissions which were briefly highlighted. It is counsel's submission that there was sufficient evidence adduced by the prosecution to sustain a conviction. She further admits that Article 50(2) of the constitution was breached by the prosecution since the Appellant was not supplied with witness statements.

15. She submits that in view of the evidence on record and the prosecution's failure to adhere to the right to disclosure the court may order for a retrial. This is her prayer since the Appellant has not served a substantial part of the sentence.

Analysis and determination

16. As a first appeal court I have had the chance of considering the evidence on record, the grounds of appeal, submissions and authorities cited. See **Okeno –vs- R 1972 E.A; Kiilu and Another –vs- R (2005) IKLR 174.**

17. The issue of Article 50 (2) the constitution was not raised by the Appellant but has been brought up by the Respondent, and I have to address it. Article 50(2) of the Constitution provides: -

Every accused person has the right to a fair trial, which includes the right –

(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.

The right to disclosure of the prosecution case to enable an accused prepare his defence is a fundamental right. That is the reason why the court must be satisfied that the defence has been supplied with witness statements, documents and reports that the prosecution intends to rely on before hearing commences.

18. A perusal of the record shows that the Appellant first appeared in court for plea on 12th February, 2019. The matter was listed for hearing on 19th February, 2019.

19. There is no indication that the Appellant was served with the witness statements or even informed about them by the court. He was unrepresented.

20. I have stated over and over again through my judgments especially as relates to Kilungu Principal Magistrate's Court about adherence to

this provision of the law. There is no need rushing up with cases in total violation of the law and they have to be reheard. In this one the matter was finalized on 28th March, 2019. i.e. In less than two months which is quite impressive, if Article 50(2) had been adhered to.

21. In the circumstances and in view of the violation of the Appellant's right to fair trial and in particular Article 50 (2) (c) and (j) of the constitution. I find the trial to have been vitiated and I set aside both conviction and sentence.

22. I order for a retrial at Kilungu Principal Magistrates' Court before any competent court besides Hon. C.A. Mayamba. The Appellant to be presented before the Kilungu court for plea and further directions on 12th May 2020.

23. The matter should be heard expeditiously, and in the event of a conviction the period served **MUST** be considered during sentencing.

Delivered, signed & dated this 8th day of May 2020, in open court at Makueni.

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H. I. Ong'udi

Judge